

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CROCS, INC,

Appellant,

v.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

APR - 3 2009

JAN HOPBALY
CLERK

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.

Appeal from the United States International Trade Commission
in Investigation No. 337-TA-624.

BRIEF OF INTERVENOR DOUBLE DIAMOND DISTRIBUTION, LTD.

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United States Court of Appeals
For The Federal Circuit

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STATEMENT OF RELATED CASES

Intervenor Double Diamond Distribution, Ltd. agrees with Appellant Crocs, Inc.'s Statement of Related Cases.

STATEMENT OF ISSUES

1. Having accurately described all of the features giving rise to the overall visual appearance of the design protected by U.S. Design Patent No. D517,789 (“the ‘789 Patent”), did the Commission correctly construe the patent’s claim?

2. Given both the claimed design’s similarity to the prior art and the many differences between the design and the accused shoe models, did the Commission correctly determine that none of the accused shoe models infringe the ‘789 Patent?

3. Given that there were also many differences between the claimed design and Crocs’ shoes, did the Commission correctly determine that no protectable domestic industry exists under 19 U.S.C. § 1337(a)(3)?

4. Because a person of ordinary skill would have found it obvious to combine a common pivoting strap with an existing shoe, did the Commission correctly hold U.S. Patent No. 6,993,858 (“the ‘858 Patent”) invalid under 35 U.S.C. § 103?

COUNTERSTATEMENT OF THE CASE

Double Diamond incorporates by reference the Statement of the Case contained in the briefs of Appellee International Trade Commission, and Intervenor Collective Licensing International, LLC, Holey Soles Holdings, Ltd.,

and Effervescent, Inc. Moreover, Double Diamond specifically disagrees with certain one-sided characterizations contained in Crocs' Statement of the Case, described below.

First, contrary to Crocs' self-serving assertion, the ALJ did not "use his detailed claim construction as a checklist to focus on a few discrete differences between the accused shoes and his construction." Crocs' Brief at 3. The ALJ provided an extensive recitation of the law with respect to the ordinary observer/substantial similarity test (A00105-107), applied that legal standard to address the parties' respective contentions (A00109-115), and made his analysis "based on all of the drawings presented in the '789 patent," as required by governing Federal Circuit precedent. A00114. For each of the accused models, the ALJ looked at the overall appearance that an ordinary observer would perceive, and made individualized decisions based on comparison of the accused designs to each and every view claimed in the patent, as dictated by this Court's precedent. The ALJ found that, when comparing the respective shoe designs to the *entirety* of the '789 Patent, "there are differences that an ordinary observer would discern and therefore not be confused into purchasing each model of the accused footwear, supposing it to be a shoe reflecting the '789 patent design." *See, e.g.* A00134, 136, 137. While the ALJ presents specific examples with respect to each model to

facilitate his discussion of the respective models, his analysis did not involve a “checklist.”

Second, Crocs unnecessarily editorializes that the ALJ “disregarded” Crocs’ expert testimony by saying it was “not necessary” for design patents. Crocs Brief at 4, *citing* A00114. The ALJ’s statement concerning Crocs’ expert did not indicate he was “disregarding” such testimony; rather, that statement referenced (and refuted with case law) Crocs’ insistence that Respondents’ failure to proffer any expert testimony on infringement was fatal to their arguments. A00114. Any “disregard” of Mr. Whatley’s testimony by the ALJ was due to its dubious substance, not because it was “not necessary.” *See, e.g.* A00111-113.

Finally, Crocs misleadingly quotes the ALJ’s statement that Crocs “improperly ignored *key elements* in the [ALJ’s] claim construction,” and “[o]n that basis the ALJ concluded that none of the accused shoes infringed the ‘789 patent.” Crocs’ Brief at 4-5. Contrary to Crocs’ suggestion, the ALJ’s opinion makes clear that he “makes an infringement analysis based on all of the drawings presented in the ‘789 patent,” which is the standard dictated by this Court.

Arminak and Associates, Inc. v. Saint-Gobain Calmar, Inc., 501 F.3d 1314, 1320 (Fed. Cir. 2007), *citing Contessa Food Prods., Inc. v. Conagra, Inc.*, 282 F.3d 1370, 1379 (Fed. Cir. 2002).

STATEMENT OF FACTS

Double Diamond incorporates by reference the Statement of Facts contained in the briefs of Appellee International Trade Commission, and Intervenor Collective Licensing International, LLC, Holey Soles Holdings, Ltd., and Effervescent, Inc.

SUMMARY OF ARGUMENT

Intervenor Double Diamond Distribution, Ltd. is one of five Respondents-Intervenors in this case, in addition to Appellee International Trade Commission, who ask the Court to affirm the Final Determination of the ITC finding no violation of Section 337. For ease of the Court and to reduce the redundancy in the briefing of the four issues presented, Double Diamond will limit its brief solely to Issues 1 and 2 pertaining to the '789 Patent, including the ALJ's claim construction and non-infringement of the '789 Patent by each of Double Diamond's accused shoe models. Double Diamond expressly incorporates by reference the arguments of Appellee ITC and the other Respondents-Intervenors on all common issues, including the absence of a domestic industry and the invalidity of U.S. Patent No. 6,993,858.

While the Commission issued a detailed claim construction, it did not abuse its discretion in doing so. Crocs has not identified any prejudice it suffered as a consequence of the Commission's detailed verbalization of the design claimed in

the '789 Patent, which the Commission properly applied to each and every accused shoe model.

The Commission also correctly found that none of Double Diamond's four accused shoe models infringe the '789 Patent. The Commission applied the proper legal standard to the substantial evidence that supported this conclusion, and Crocs has not identified any error that merits reversal. Indeed, it is Crocs, not the Commission, that improperly focuses only on one discreet feature of the claimed design, rather than the design as a whole as dictated by this Court's precedent.

Crocs disregards the substantial documentary and physical evidence that supports the Commission's determination, instead focusing solely on the conclusory, cookie-cutter testimony of its expert witness, which was the same for each and every shoe model, and wholly disregarded six of the seven figures of the '789 Patent. Comparison of each of Double Diamond's accused shoe models to each of the seven figures of the design claimed in the '789 Patent highlights the striking dissimilarity between these models and the '789 design. Crocs failed to carry its burden to demonstrate infringement, and has identified no error that merits reversal.

ARGUMENT

I. COUNTERSTATEMENT OF STANDARD OF REVIEW

Crocs correctly identifies the substantial evidence standard as the proper standard under which this Court reviews factual determinations of the Commission, and the *de novo* standard for legal determinations. 19 U.S.C. § 1337(c); 5 U.S.C. §§ 706(2)(A), (E); *Finnigan Corp. v. ITC*, 180 F.3d 1354, 1361-1362 (Fed. Cir. 1999). Crocs neglects to acknowledge, however, that the Commission's issuance of a relatively detailed claim construction in determining infringement of the '789 Patent is reviewed for abuse of discretion. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679-80 (Fed. Cir. 2008); 5 U.S.C. §706(2)(A). Under this standard, an error in claim construction is not reversible error absent a showing of prejudice. *Egyptian Goddess*, 543 F.3d at 680.

II. THE COMMISSION DID NOT ERR BY ISSUING AND APPLYING A DETAILED CLAIM CONSTRUCTION OF THE '789 DESIGN PATENT

Crocs incorrectly contends the Commission committed reversible error in construing the '789 Patent claim when it provided a "detailed claim construction." Crocs Brief at 13. Crocs claims the Commission erroneously emphasized certain details in its claim construction, and then erroneously used these features as a checklist in its infringement analysis. Crocs baldly asserts, without elaboration, that it was prejudiced by this error, thereby warranting reversal. Crocs contentions, however, ignore the substance of this Court's recent holding concerning design

patent claim construction in *Egyptian Goddess*, as well as the Commission's actual analysis of Double Diamond's accused shoe designs. Crocs points to no abuse of discretion on the part of the Commission, nor does Crocs articulate any prejudice sufficient to sustain its assignment of error.

(A) The Commission's Detailed Claim Construction Is Not Reversible Error Under *Egyptian Goddess*

While Crocs correctly notes a detailed claim construction of a design patent is not required, Crocs disregards this Court's explicit holding in *Egyptian Goddess* that, in the absence of prejudice, issuance of such a detailed construction is not reversible error:

[The Commission's] decision regarding the level of detail to be used in describing the claimed design is a matter within the Court's discretion, and absent a showing of prejudice, the court's decision to issue a relatively detailed claim construction will not be reversible error.

Egyptian Goddess, 543 F.3d at 679. This holding echoes another recent Federal Circuit case – conveniently ignored by Crocs – that also confirmed a detailed claim construction is proper:

The district court's meticulous and accurate description of [all figures] of each of [the] patents-in-suit did not constitute error. The district court's analysis demonstrated the proper consideration of the claimed design as a whole.

Arminak, 501 F.3d at 1321.

Here, as in *Egyptian Goddess* and *Arminak*, the Commission chose to verbalize a relatively detailed claim construction, describing the various features of the claimed design and the accused designs. *Compare Egyptian Goddess*, 543 F.3d at 668 *with* A00108. As in *Arminak*, the Commission meticulously and accurately described all features of the '789 Patent, not just a limited subset of features as Crocs advocates. In so doing, the Commission did not abuse its discretion.

(B) The Commission Did Not Place Undue Emphasis On Certain Features of the '789 Design

Crocs accuses the Commission of “unduly emphasizing certain features of the patented design,” resulting in an improper ‘focus on each individual described feature in the verbal description rather than on the design as a whole.’” Crocs Brief at 15. Crocs’ dispute however, is not that the Commission focused only on “certain features,” but rather that it correctly highlighted several features that were undeniably different from the claimed design instead of focusing only on one feature: the strap assembly. In so doing, it is Crocs, not the Commission, that places “undue emphasis on certain features,” while ignoring the entirety of the design claimed in the '789 Patent.

In making this argument, Crocs relies solely on the testimony of its expert, Ian Whatley, which testimony Crocs repeatedly characterizes as “undisputed.” Crocs Brief at 16; 17. This characterization is wrong. Whatley’s testimony was

“disputed” by other documentary and physical evidence in the case: the seven figures of the patent itself, compared to the accused shoe models.¹

As in *OddzOn*, Whatley’s testimony was “wholly conclusory and devoid of any analysis,” and in some cases, contradicted by the patent itself. For example, Whatley’s testimony concerning the “subtle bulge” of the strap evident in Figure 1 of the patent is contradicted by other figures of the ‘789 Patent, which directly support the Commission’s construction of the patent as claiming a strap of uniform width:

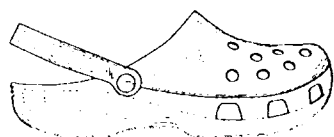


FIGURE 2

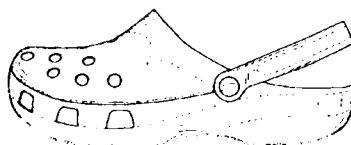


FIGURE 3

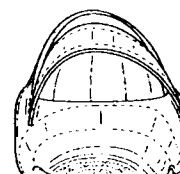


FIGURE 5

A10395-6. Certainly, this visual evidence, and the Commission’s observation thereof, satisfies the substantial evidence standard. Crocs has not identified any error in the Commission’s decision to “verbalize” its claim construction, particularly in light of the actual illustrations of the patent.

¹ While none of the respondents proffered expert witness testimony on infringement, this Court has held it is unnecessary. *OddzOn Prods., Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1401, 1405 (Fed. Cir. 1997) (no error in affording minimal credence to expert opinion on design patent that “was wholly conclusory and devoid of any analysis”); *Avia Group Int’l, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1564 (Fed. Cir. 1988) (expert’s conclusion in a design patent case was “neither necessary nor controlling”).

(C) **Crocs Has Not Identified Any Prejudice**

Finally, Crocs identifies no prejudice that it suffered in light of the Commission's detailed claim construction, particularly with respect to Double Diamond's accused shoe models. *See infra* at Section III.D. Even if, as Crocs suggests, no claim construction is necessary (Crocs Brief at 17, FN2), a proper comparison of all seven figures of the patent with corresponding views of Double Diamond's accused models, as dictated by this Court's precedent, demonstrates the Commission's non-infringement analysis and holding are legally sound and supported by substantial evidence. *Contessa*, 282 F.3d at 1379 (Commission "is not limited to the ornamental features of a subset of the drawings, but instead must encompass the claimed ornamental features of *all figures* of a design patent") (emphasis added). Crocs' bald declaration of prejudice, without more, is insufficient to rise to the level of reversible error. *Egyptian Goddess*, 543 F.3d at 680.

III. THE COMMISSION PROPERLY FOUND THAT NONE OF DOUBLE DIAMOND'S ACCUSED SHOE MODELS INFRINGE THE '789 PATENT

Crocs identifies several purported errors that provide grounds for reversal of the Commission's non-infringement holding. First, Crocs accuses the Commission of disregarding its "undisputed expert testimony." Crocs Brief at 17. As explained

herein, however, Crocs' expert testimony was not "undisputed," and all of the Commission's factual determinations were supported by substantial evidence.

Second, Crocs accuses the commission of focusing on a "few discrete design details" that "would require an ordinary observer to use a ruler and a magnifying glass to discern." Crocs Brief at 18. This hyperbole is not supported by the evidence, particularly for Double Diamond's accused models. A proper comparison of Double Diamond's shoe models with all seven figures of the patent, as dictated by this Court's precedent, demonstrate fundamental differences between the claimed design that would be obvious to one even with much less capacity than the "ordinary observer."

Finally, Crocs accuses the Commission of failing to consider the differences between the patented design and the prior art, as instructed by *Egyptian Goddess*. This argument, however, relies on the erroneous premise that the Aqua Clog is the only prior art. To the contrary, the strap assembly that Crocs touts as the "dominant design feature" also is in the prior art. *See infra* at §III.E. As in *Whitman Saddle*, the relevant prior art is a combination of at least two different references, which creates a narrow protected design that is not infringed by Double Diamond's models. *Smith v. Whitman Saddle Co.*, 148 U.S. 674 (1893).

(A) Legal Standard

As Crocs correctly notes, the “ordinary observer” test is the sole test for determining design patent infringement, under which:

[I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

Gorham v. White, 81 U.S. 511, 528 (1871).

When conducting the “ordinary observer” test for infringement, all of the ornamental features illustrated in all of the figures must be considered – infringement cannot be found based on just one drawing or one specific feature. *See, e.g. Contessa*, 282 F.3d at 1379 (“the ‘ordinary observer’ analysis is not limited to the ornamental features of a subset of the drawings, but instead must encompass the claimed ornamental features of all figures of a design patent”); *Keystone Retaining Wall Sys., Inc. v. Westrock, Inc.*, 997 F.2d 1444, 1450 (Fed. Cir. 1993) (“patented design is defined by the drawings in the patent, not just by one feature of the claimed design”); *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1125 (Fed. Cir. 1993) (“[i]n conducting [the *Gorham* test] the patented design is viewed in its entirety, as it is claimed”).

The ordinary observer is defined, as a matter of law, as a hypothetical purchaser of the accused product. *Goodyear Tire & Rubber Co v. The Hercules*

Tire & Rubber Co., 162 F.3d 1113, 1116 (Fed. Cir. 1998). The ordinary observer is not just any observer, but rather is one who, with less than the trained faculties of the expert, is a purchaser of things of similar design or one interested in the subject. *Arminak*, 501 F.3d at 1323. The ordinary observer is thus not a mere impulse purchaser who has never seen the type of item the patent describes. Rather, the ordinary observer is one who, though not an expert, has reasonable familiarity with such objects and is capable of forming a reasonable judgment when confronted with the accused design as to whether it is distinctive or substantially similar. *Egyptian Goddess*, 543 F.3d at 675 (citation omitted). The ordinary observer test should be applied from the viewpoint of “the eyes of men generally, of observers of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give.” *Contessa*, 282 F.3d at 1381-82 (citing *Gorham*, 81 U.S. at 528).

The design of the ‘789 Patent belongs to a crowded field, as established by the ‘789 Patent’s close similarity to the prior art. This renders the ‘789 Patent narrower in scope than patented designs in less crowded fields. *See, e.g. Goodyear*, 162 F.3d at 1121 (court recognized that the art was crowded, and held the design to a narrow scope): *Litton Sys., Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444 (Fed. Cir. 1984) (“Where, as here, a field is crowded with many references

relating to the design of the same type of [product], we must construe the range of equivalents very narrowly.”). The knowledge possessed by the ordinary observer includes an awareness of this crowded field.

While Crocs is correct in noting *Egyptian Goddess* dictates that, in certain circumstances, application of the ordinary observer test in comparison to the prior art may be helpful in assessing infringement, this Court did not adopt that as the definitive test. Indeed, the court observed, “[i]n some instances, the claimed design and the accused design will be sufficiently distinct that it will be clear without more that the patentee has not met its burden of proving the two designs would appear ‘substantially the same’ to the ordinary observer as required by *Gorham*.” 543 F.3d at 678. That is the case here, particularly with respect to Double Diamond’s models.

(B) The Commission’s Definition of “Ordinary Observer” And Its Application Of The Test Is Legally and Factually Supported

Contrary to Crocs’ dispute of the Commission’s definition of the “ordinary observer” (*see* Crocs Brief at 28, FN 6), the Commission’s description of the ordinary observer is supported by both the law and the facts. Common experience of a lay fact finder with a reasonable familiarity with the accused object includes recognition that a shoe purchaser will normally select a style and color, determine the appropriate shoe size, try on the shoe to determine whether the shoe fits and feels comfortable, and observe how the shoe looks when it is worn. The evidence

in this case, specifically, Crocs' expert witness, Ian Whatley, confirmed this, as he testified at length as to the time and consideration that goes into the purchase of a pair of shoes such as the ones at issue, during which the consumer invests substantial effort in evaluating the primary factors identified by Mr. Whatley that impact such a consumer's decision: fit, comfort and appearance. *See, e.g.*

A03103-A03104; A03112-A03115 (Whatley TR 280:12-284:5; 321:1-329:10).

Such testimony completely undercuts Crocs' contention that an ordinary observer, whether or not they fall within the category of "impulse buy purchaser," would abandon all reason and judgment in assessing the similarity of the design of the accused products and the patented design. As Mr. Whatley confirms, these are considerations which take time and require some reflection by the purchaser.

A district judge and an administrative law judge are ordinary observers and may therefore conduct the ordinary observer test without referring to some hypothetical ordinary observer. *Goodyear Tire & Rubber Co.*, 162 F.3d at 1118 (affirming district court's determination based on its own visual comparison); *see also Torspo Hockey Int'l, Inc. v. Kor Hockey Ltd.*, 491 F. Supp. 2d 871, 877 (D. Minn. 2007). Thus, under established precedent, the Administrative Law Judge, who has undoubtedly actually engaged in the activity of purchasing casual shoes, is capable of applying the ordinary observer test as the fact finder through his own

visual comparison. Crocs has not identified any legal or factual error in this regard that would merit reversal.

(C) Crocs' Emphasis on Purported "Dominant" Design Features Is Improper

(1) This Court Rejected Crocs' Approach When Eliminating The "Point of Novelty" Test

While Crocs places significant emphasis on what it coins the "dominant" design features of the claimed design, this concept of "dominant" design features has no grounding in the precedent of this Court. Indeed, Crocs' self-serving identification of what it believes to be the "dominant" design features invites the Court to engage in the same error that led to the abandonment of the point of novelty test in the first place. *Egyptian Goddess*, 543 F.3d at 677 (noting problem with point of novelty test is "[t]he attention of the court may therefore be focused on whether the accused design has appropriated a single specified design 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").

In urging this Court to focus only on what it views as the "dominant" design feature – the cleverly shaded strap assembly – Crocs simply repackages its arguments before the Commission with respect to the now-defunct point of novelty test, and disregards the fundamental application of the ordinary observer test under *Gorham* and its progeny. While *Egyptian Goddess* instructs that novelty should be

considered in connection with the ordinary observer test, *Egyptian Goddess* does not otherwise alter this Court's authority on application of that test.²

Crocs' repetitive arguments concerning the purported similarity of these so-called "dominant design features" and "dominant synergistic design features" also ignores this Court's recent admonition that a focus on only a self-serving subset of design features is improper. *Arminak*, 501 F.3d at 1324 ("the ordinary observer test requires...the comparing of the accused and patented designs from all views included in the design patent, not simply those views a retail customer seeking to buy would likely see when viewing the product at point of sale"). Substantial evidence supports the Commission's application of this proper legal standard.

(2) Crocs Misrepresents The Evidence Upon Which The Commission's Final Determination Is Based

Compounding its erroneous focus on so-called "dominant design features," Crocs also misrepresents the substantial evidence upon which the Commission based its ruling. Crocs repeatedly refers to its evidence, i.e., Ian Whatley's testimony, as "undisputed," which Crocs claims shows that all of the accused designs satisfy the ordinary observer test. *See, e.g.* Crocs Brief at 20, 22, 25, 28, 30. To the contrary, Ian Whatley's testimony was not "undisputed." His conclusory, cookie-cutter narrative testimony was disputed – and refuted – by

² Although the Commission's Final Determination pre-dates *Egyptian Goddess*, application of the standard and analysis articulated therein would yield the same result.

substantial evidence, both on cross examination, and by a comparison of the seven figures of the '789 Patent to each of the accused design.

Despite this Court's unambiguous instructions for applying the ordinary observer test, Crocs steadfastly disregards Figures 2-7 of the '789 Patent, while at the same time continuing to press a cookie-cutter analysis for all of the accused designs. *See, e.g.* Crocs Brief at 20-24. Crocs wholly disregards a visual comparison between the claimed design and the multitude of shoe models, which vary considerably from both the claimed design and each other. Instead, Crocs argues in conclusory fashion that all of accused shoes incorporate Crocs' self-serving "dominant synergistic design features." Crocs Brief at 20-25.

The testimony Crocs cites, in the form of a string cite to its expert's testimony for each and every accused model, suffers from the same flaw. *See, e.g. id.* at 22, 25. The referenced testimony includes a virtually identical recitation for all of the accused designs, using the exact same language with respect to every model despite obvious differences between them. None of this purportedly "undisputed" testimony actually shows the seven figures of the '789 Patent in comparison to the corresponding views of the accused design, or any other analysis of the claimed design vis-à-vis the accused designs per the Federal Circuit's instructions in *Arminak and Egyptian Goddess*.

Crocs' claim that its expert testimony was "undisputed" also disregards the substantial amount of testimonial, documentary and physical evidence submitted by both Crocs and the Respondents that fully supports the Commission's finding of no infringement under the ordinary observer test. *See* A00124-A00142.

Importantly, this evidence includes physical exhibits of each of the accused shoe models, which the Commission properly compared to all figures of the '789 Patent. *Id.*

Crocs' contention that its proffered expert testimony is "undisputed" wholly ignores that the Commission properly served in its role as fact finder, under which it was entitled to afford Mr. Whatley's testimony, unnecessary under this Court's precedent, the weight and credence it deserved. It also ignores the other substantial evidence upon which the Commission's holding was based. As such, Crocs has not identified any error that merits reversal.

(D) Substantial Evidence Supports The Commission's Determination That None of Double Diamond's Accused Models Infringe the '789 Patent

This Court has repeatedly confirmed that application of the ordinary observer test *requires* comparison of the accused and patented designs from all views included in the design patent. *Arminak*, 501 F.3d at 1320. There is simply no better way to ensure that a fact finder considers ALL of the design features claimed in all figures of the patent, and the overall similarity between two designs,

than addressing the particular elements that are claimed in the patent, as construed by the judge, which then must be considered by the fact finder *as a whole*.

Crocs' evidence concerning Double Diamond's accused shoe models suffers from a fatal flaw: despite this Court's unambiguous instruction that *each and every* figure of a design patent must be considered when assessing infringement under the ordinary observer test, the purported "undisputed testimony" upon which Crocs relies only includes a comparison with one of the seven figures of the '789 design. *See, e.g.* A16510-A16984. The absence of any reference to Figures 2-7 of the '789 patent when assessing Respondents' respective shoe models, coupled with Crocs' repetitive, cookie-cutter treatment of each and every shoe discussed in Whatley's testimony, only underscores Crocs' failure to carry its burden to prove infringement of the '789 patent.

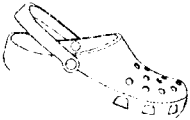

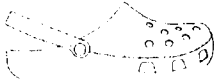

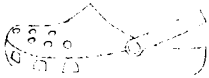

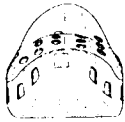





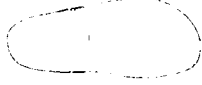

Crocs' failure to thoroughly and adequately assess each of the accused models under the ordinary observer test is not surprising, given the overall substantial *dissimilarity* between the wide range of various shoe design that Crocs accuse of infringing the '789 patent. Crocs made the conscious strategic choice to disregard a proper analysis of each model to enable it to cast its net unnecessarily broadly and attempt to protect a design "concept" rather than the actual patented design. A03376-A03435 (Whatley TR 1552:13-1555:25). Consequently, Crocs

has not satisfied its burden to prove infringement by Double Diamond or any other Respondent.

Although Crocs advocates that the details of the Commission's claim construction be ignored in favor of its conclusory statement that none of the myriad of differences, either individually or in the aggregate, diminish the overall substantial similarity, such an approach is squarely at odds with the Federal Circuit's most recent pronouncements on this subject. Accordingly, while the Commission may have organized its discussion of the numerous dissimilarities between the claimed design, as construed, and each accused model, the following analyses, considered in their entirety in conjunction with the comparisons below, highlight the substantial evidentiary proof of the *overall substantial dissimilarity* between the designs, in accordance with the Federal Circuit's guidance in *Egyptian Goddess* and *Arminak*.

(1) The Revised Beach DAWGS™ Do Not Satisfy the Ordinary Observer Test

Substantial evidence demonstrates that the overall visual appearance of Double Diamond's Revised Beach DAWGS™ model is substantially different than the overall visual impression of that depicted in the '789 Patent. Indeed, when the Revised Beach DAWGS™ is properly compared to each and every corresponding figure and view from the '789 Patent, as this Court requires, the overall dissimilarity is striking:

FIGURES FROM '789 PATENT (A10392-397)	CORRESPONDING VIEW OF REVISED BEACH DAWGS™ (A21183-90; A21441)
	
	
	
	
	
	
	

Contributing to this overall lack of substantial similarity is a myriad of obvious differences. When considered in the aggregate under the ordinary

observer test, a few specific examples of these differences further underscore the overall lack of substantial similarity.

Unlike the design claimed in the '789 Patent, the Revised Beach DAWGS™ does not contain round holes. Instead, the Revised Beach DAWGS™ hole pattern resembles an off-centered web, consisting of one D-shaped hole located approximately $\frac{1}{4}$ of the distance of the top surface from the inner edge, and $\frac{1}{4}$ of the distance of the top surface from the edge closest in proximity to the foot opening. *Compare* A10387, Figure 6 *with* A21141, A21187; A21441. From that D-shaped hole extend three rows of five rectangular-shaped holes, each row of holes increasing in size, in an off-center pattern resembling a web. This pattern is distinctly dissimilar to the claimed design. *Compare* A10395; A10397 *with* A21185; 21198; A21441. Crocs' expert witness even admitted that the holes in the top portion of the Revised Beach DAWGS™ are a different shape. A03376-A03435 (Whatley TR 1537:23-1538:4). Likewise, while the claimed design includes trapezoid-shaped holes evenly spaced around the sidewall of the upper, the sidewall hole pattern on the Double Diamond Revised Beach DAWGS™ consists of narrow rectangles, not trapezoids, which further contributes to the substantially different overall visual impression created by the Revised Beach DAWGS. *Compare* A03952-A03957 *with* A21441 and A21183-90.

Crocs' expert Whatley essentially concedes these differences are located on views of the shoes that would be noticed by a consumer. Mr. Whatley admitted that when an "ordinary observer" shopping for casual shoes such as these evaluated the three factors he deemed to be the most important – fit, comfort, and appearance – the views the consumer is most likely to assess when evaluating appearances include the top view and the side view where these hole patterns are located. A03089-A03151 (Whatley TR 321:1-330:23). Given the vast difference between what is claimed in the patent with respect to the hole patterns in the upper portion of the claimed shoe design and the hole pattern on the revised Beach DAWGS™, features Crocs' witness concedes would be noticed by the consumer, the Revised Beach DAWGS™ design creates an entirely different visual impression than that claimed in the '789 Patent.

The visual appearance of the sole on the Revised Beach DAWGS™ also gives a substantially dissimilar overall visual impression than that claimed in the '789 Patent. Unlike Figure 7 of the '789 Patent, the Revised Beach DAWGS™ tread pattern contains a distinctive footprint DAWGS™ logo that covers the entire sole. *Compare* A10392-397, Fig. 7 *with* A21141, A21190 p. 7. Mr. Whatley incredulously ignores the actual visual appearance of Double Diamond's soles, which only serves to further undermine his credibility. *See, e.g.* A16012-A17037 (CX-657-C at A. 1270; 1299).

Finally, the Revised Beach DAWGS™ strap and connectors also are not the same shape as, and as a result gives a substantially different visual impression than, the strap and connectors represented in the '789 Patent. The '789 Patent shows a strap that is of uniform width between the two round connectors, has a wrench-head like shape at the point of attachment, and extends to the heel of the shoe. Double Diamond's Revised Beach DAWGS™ is dissimilar to the claimed strap design in several respects. The strap on the Revised Beach DAWGS™ is not of uniform width" between the two connectors; it is wider at the heel portion of the strap where the DAWGS™ pawprint logo is located, and does not extend to the heel of the shoe. *Compare* A10392-397, Figs. 2-3, 5 *with* A21141; A21183-21190. Further, unlike the claimed design, the strap and connectors on Double Diamond's Revised Beach DAWGS™ model contains distinctive patterning, including the DAWGS™ trademark and pawprint logos carved into both items. *Compare* A10392-397, Figures 1-3 *with* A21141; A21183-21190.

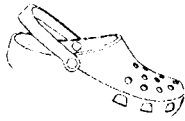








Cross admittedly disregarded these additional elements, such as the numerous logos and carved rivets, because they do not correspond to items claimed in the '789 patent. *See* A17113-17192 (CX-667-C at Q/A. 141). Such disregard is squarely at odds with this Court's precedent: both additions to and subtractions from what is claimed in a patent are relevant to the determination of overall similarity. *See, e.g. FMC Corp. v. Hennessy Industries, Inc.*, 836 F.2d 521, 527-29

(Fed. Cir. 1987) (quoting *Gorham*) (“difference between patented and accused designs are not irrelevant. Courts should take into account similarities and differences in determining ‘if in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same....’”). Indeed, the recent *Arminak* decision confirmed that differences in the accused product that are not present in the claimed design are relevant and must be considered when assessing infringement. *Arminak*, 501 F.3d at 1326 (raised surface and intersecting slanted line below the horizontal line of the claimed design “results in a different overall design appearance...”). Thus, these differences are important to, and must be considered in determining, the overall dissimilarity of the respective designs. Mr. Whatley’s and Crocs’ admitted disregard of such elements is yet another of the many flaws in his analysis and in Crocs’ infringement case. A17113-A17192 (CX-667-C at A. 141); A03376-A03435 (Whatley TR 1555:17-25).

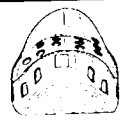











All of these significant differences between the Revised Beach DAWGS™ and each of the seven figures of the claimed design, when considered in the aggregate, lead to the inescapable conclusion that there is no overall similarity between the two. The Commission’s ruling is supported by substantial evidence; Crocs failed to carry its burden of proving infringement with respect to the Revised Beach DAWGS™.

(2) The Groovy/Big DAWGS™ Do Not Satisfy The Ordinary Observer Test

Similarly, the overall visual appearance of Double Diamond’s Groovy/Big DAWGS™ models also is substantially different than the overall visual impression of that depicted in the ‘789 Patent.³ An overall comparison of all seven figures of the design claimed to these two models clearly underscores the evidentiary support for the Commission’s holding that, when the claimed design, *as a whole*, is compared to the Groovy/Big DAWGS™ *as a whole*, these models do not infringe the ‘789 Patent:

FIGURES FROM ‘789 PATENT (A10392-397)	CORRESPONDING VIEW OF GROOVY DAWGS™ (A21191- 21191; 24442)	CORRESPONDING VIEW OF BIG DAWGS™ (A21199- 21205; A21443)
		
		
		

³ The Groovy DAWGS™ and Big DAWGS™ are analyzed together because these two respective models are identical in all respects, with the exception that the Groovy DAWGS™ contains an additional design feature of printed flower patterns that are not present on either the Big DAWGS or the ‘789 Patent.

FIGURES FROM '789 PATENT (A10392-397)	CORRESPONDING VIEW OF GROOVY DAWGS™ (A21191- 21191; 24442)	CORRESPONDING VIEW OF BIG DAWGS™ (A21199- 21205; A21443)
		
		
		
		

Like the Beach DAWGS™, the hole pattern on the top surface of the Groovy/Big DAWGS™ in no way resembles, and creates a different overall visual impression than, the systematic pattern of round holes claimed in the '789 Patent. Rather, the Groovy/Big DAWGS™ hole pattern consist of four alternating rows of pentagonal-shaped and hexagonal-shaped openings that are much larger in size than those depicted in the '789 Patent. *Compare A10392-397, Fig. 6 with A21191-21205, 21142-43.*

The sidewall holes on the Double Diamond Groovy/Big DAWGS™ are also not substantially similar to and do not create the same visual impression as the trapezoid-shaped holes claimed in the '789 Patent. The sidewall pattern on the Double Diamond Groovy DAWGS™ and Big DAWGS™ includes a series of alternating oval and triangular openings, all of which are substantially smaller in size than the sidewall holes depicted in the '789 Patent, which create a distinctive “zig-zag” design effect that gives a wholly dissimilar visual appearance to the claimed design. *Compare* A10392-397, Figs. 1-3 *with* A21191-21205, 21142-43.

Additionally, whereas Figure 4 of the '789 Patent claims a design wherein the toe curves upward, enabling a partial view of the shoe's tread, the Groovy/Big DAWGS™ models do not display such an “upward curvature,” but rather are relatively flat and provide minimal, if any, visibility of the underlying tread. Mr. Whatley even acknowledged this difference. A03376-A03435 (Whatley TR 1546:11-18).

Finally, the connectors and the shape of the strap on the Groovy/Big DAWGS™ similarly give an overall visual impression that is distinct from that of the '789 Patent. As with the Beach DAWGS™, the strap on the Groovy/Big DAWGS™ is wider at the back portion of the strap where the DAWGS™ pawprint logo is located and does not extend to the heel, which is unlike the strap claimed in the '789 patent. In addition to the DAWGS™ pawprint logo, the strap on the

Groovy/Big DAWGS™ also includes a series of raised hexagons that compliment the shapes of the holes on the upper. *Compare* A10392-397, Fig. 5 with A21191-21205, 21142-43. These additional design elements must be considered when assessing the overall similarity. *FMC Corp.*, 836 F.2d at 527-29; *Arminak*, 501 F.3d at 1326.

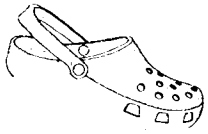



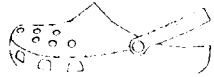

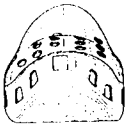

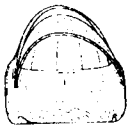

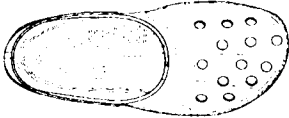


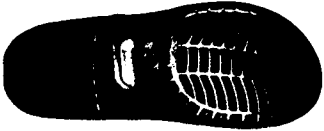
As with Double Diamond's Revised Beach DAWGS™ the substantial evidence supports the Commission's finding that no ordinary observer would mistake Double Diamond's Groovy/Big DAWGS™ for the design claimed in the '789 Patent. Crocs has identified no error in this ruling.

(3) The Original Beach DAWGS™ Do Not Satisfy The Ordinary Observer Test

Although Double Diamond has revised the Original Beach DAWGS™ model in many respects, that design had several features similar to the Revised Beach DAWGS™ that made it substantially dissimilar to the overall design shown in the '789 Patent as well. This lack of overall substantial similarity is evidenced by a comparison of all seven figures of the claimed design to the corresponding views of the Original Beach DAWGS™:

**FIGURES FROM '789
PATENT (A10392-397)**

**CORRESPONDING
VIEW OF REVISED
BEACH DAWGS™
(A21206-21213; A21444)**

Most notably, the Original Beach DAWGS™ model contains substantially the same web-shaped hole pattern that is included in the Revised Beach

DAWGST[™], which differs significantly from the systematic pattern of round holes claimed in the '789 Patent. *Compare* A10392-397, Fig. 6 *with* A21206-21213; A21444; A03376-A03435 (Whatley TR 1537:12-16). Further, the size, shape, location and visual appearance of the strap and the metal connectors imprinted with the DAWGST[™] logo give a very different overall visual impression than that claimed in the '789 Patent. *Compare* A10392-397, Figs. 1-3 *with* A21206-21213; A21444. These significant differences, shown by substantial evidence, all contribute to an overall lack of substantial similarity between the claimed design and the Original Beach DAWGST[™].

(4) Conclusion

In view of this evidence, there is no way that, “in the eye of an ordinary observer, giving such attention as a purchaser usually gives, [the] two designs are substantially the same, [and] the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other.” *Gorham*, 81 U.S. (14 Wall.) at 528. When viewed from above, below, or any side, the overall visual impression created by each of Double Diamond’s accused models simply looks nothing like the overall design shown and claimed in the '789 Patent. To the contrary, the substantial evidence supports the Commission’s findings that an ordinary observer seeing the accused Double Diamond models and the design claimed in the '789 Patent would readily discern that these respective products

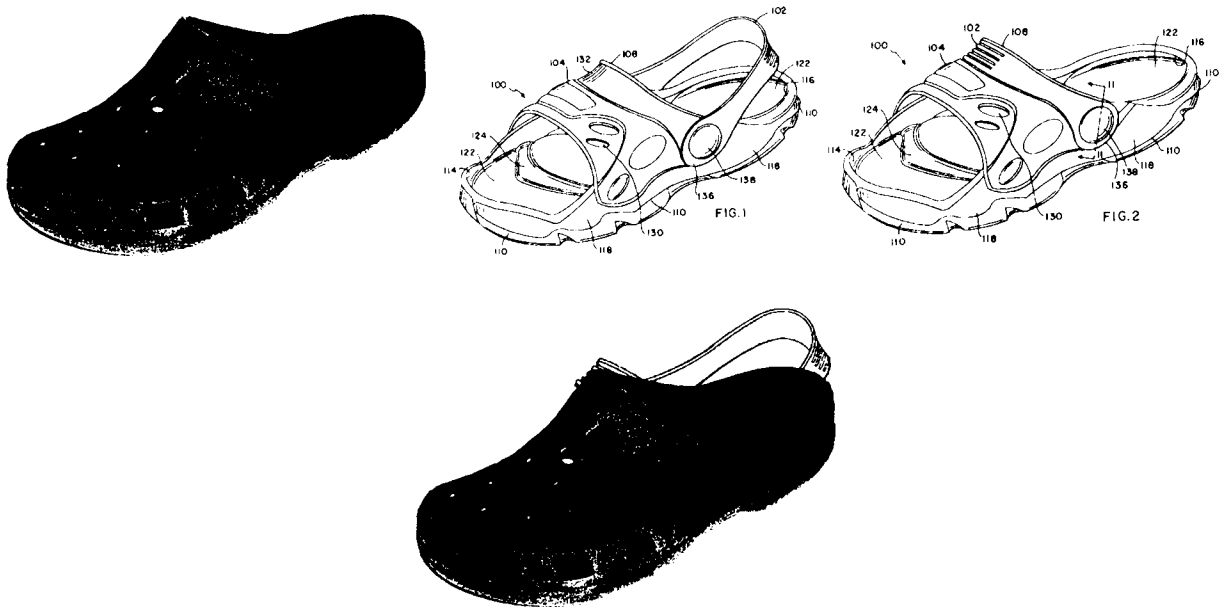
have a substantially *different* overall appearance. Accordingly, Crocs did not satisfy its burden to prove infringement of the '789 Patent under the "ordinary observer" test.

(E) Consideration of Prior Art Under *Egyptian Goddess* Results In The Same Conclusion As Reached by the Commission

As noted in *Egyptian Goddess*, the claimed design and Double Diamond's accused models are "sufficiently distinct that it will be clear without more that the patentee has not met its burden of proving the two designs would appear 'substantially the same' to the ordinary observer, as required by *Gorham*." *Egyptian Goddess*, 543 F.3d at 678. Hence, there is no need to resort to review of the prior art when assessing infringement. Yet, even when assessed in view of the prior art, the Commission's finding of non-infringement by Double Diamond shoe models still has substantial evidentiary support.

Crocs suggests the Aqua Clog is the only relevant prior art reference, and since the strap assembly was not present on the Aqua Clog, it therefore must be a "dominant feature" not in the prior art, proving infringement under the ordinary observer test. Consideration of the prior art in this case, however, is not limited solely to the Aqua Clog. Other prior art disclosed a substantially similar strap assembly claimed by Crocs in the '789 Patent, notably, U.S. Patent No. D422,780 (the "Aguerre Patent").

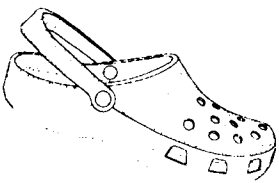



Hence, this case is more akin to *Whitman Saddle*, wherein two elements from the prior art were combined to create the claimed design. *Smith v. Whitman Saddle Co.*, 148 U.S. 674 (1893). In *Whitman Saddle*, the Supreme Court characterized the claimed saddle design as a combination of elements from two saddle designs that were well known in the art. *Id.* at 680. As in *Whitman Saddle*, “[n]othing more was done in this instance...than to put the [preexisting Aqua Cog and strap from the Aguerre Patent] together in the exercise of the ordinary skill of workmen of the trade, and in the way and manner ordinarily done.” *Id.* at 681. A visual comparison of such a combination demonstrates this:

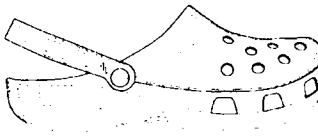



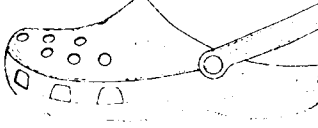



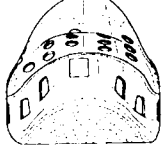



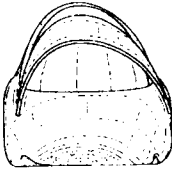













See A21447; A18981-18984.

Here, as in *Whitman Saddle*, the claimed design is made up of a mere combination of elements of the prior art. Under these circumstances, the scope of protection to be afforded to the claimed design is to be construed very narrowly as a matter of law.

Further, if the Court wishes to make a linear comparison as suggested by *Egyptian Goddess*, another shoe model that Crocs has admitted does not infringe the '789 Patent can be a useful data point for that comparison. Former Intervenor-Respondent Old Dominion Footwear, Inc.'s QUACKS™ shoe design, which Crocs has conceded does not infringe the '789 Patent, is much closer in overall visual appearance to the claimed design than any of Double Diamond's models. Placing such non-infringing model on a spectrum, as suggested by *Egyptian Goddess*, further shows that each of Double Diamond's accused models also is less similar in overall visual appearance to the claimed design than another footwear model that Crocs has conceded does not infringe the '789 Patent:

FIGURES FROM '789 PATENT (A10392-397)	NON- INFRINGING MODEL (A21445; A21479-86)	REVISED BEACH DAWGS™ (A21183-90; A21441)	GROOVY/ MEN'S DAWGS™ (A21191-21205, 21142-43)
			

FIGURES FROM '789 PATENT (A10392-397)	NON- INFRINGEMENT MODEL (A21445; A21479-86)	REVISED BEACH DAWGS™ (A21183-90; A21441)	GROOVY/ MEN'S DAWGS™ (A21191-21205, 21142-43)
			
			
			
			
			
			

1. AFFIRM the International Trade Commission's determination that the '789 Patent was not infringed by any of Double Diamond Distribution, Ltd.'s accused shoe models;

2. AFFIRM the International Trade Commission's determination that Crocs did not satisfy the technical prong of the domestic industry requirement of Section 337 relating to the '789 Patent;

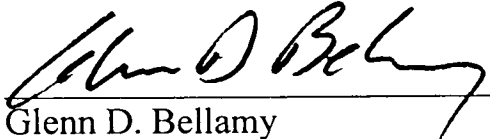
3. AFFIRM the International Trade Commission's determination that the '858 Patent is invalid as obvious; and

4. AFFIRM the International Trade Commission's finding of no violation of Section 337.

Respectfully submitted,

Double Diamond Distribution, Ltd.

Dated: April 3, 2009


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