

Program for Small Business Concerns Owned and Controlled by Service Disabled Veterans (SDVOSBC), which permits a contracting officer to award contracts on the basis of competition restricted to "small business concerns owned and controlled by service-disabled veterans." See 15 U.S.C. § 657f. While the SDVOSBC enabling legislation and associated administrative regulations repeatedly refer to contract preferences for small businesses owned by disabled veterans, they do not confer any rights directly on the veterans themselves. See 15 U.S.C. § 657f; 13 C.F.R. § 125.8(g); 13 C.F.R. § 125.14; 48 C.F.R. § 6.206; 48 C.F.R. § 18.116. The Companies therefore could have advanced Griswold's claims in the prior litigation, making them subject to claim preclusion.

C. *Manifest Injustice Exception*

[8] Griswold further argues the district court erred by failing to apply a manifest injustice exception. The Supreme Court, however, has cautioned against departing from accepted principles of res judicata. In *Federated Department Stores, Inc. v. Moitie*, the Court explained that "[t]he doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata.'" 452 U.S. 394, 401, 101 S.Ct. 2424, 2429, 69 L.Ed.2d 103 (1981) (quoting *Heiser v. Woodruff*, 327 U.S. 726, 733, 66 S.Ct. 853, 856, 90 L.Ed. 970 (1946)). Even if a manifest injustice exception were to exist, the application of res judicata would not be unjust in this case. Griswold could have advanced claims under the Veterans Act during his control of the prior litigation and thus has already had his day in court.

IV. CONCLUSION

The district court did not err by holding that Griswold was in privity with the Companies in the prior litigation and that both suits involved the same cause of action. We therefore affirm the district court's order granting Appellees' motion to dismiss on the grounds of res judicata.

AFFIRMED.



CROCS, INC., Appellant,

v.

INTERNATIONAL TRADE  
COMMISSION,

Appellee,

and

Double Diamond Distribution,  
Ltd., Intervenor,

and

Holey Soles Holdings, Ltd.,  
and Effervescent, Inc.,  
Intervenors.

No. 2008-1596.

United States Court of Appeals,  
Federal Circuit.

Feb. 24, 2010.

Rehearing and Rehearing En Banc  
Denied May 20, 2010.

**Background:** Assignee of a patent relating to foam footwear and a patent for an ornamental footwear design appealed final decision of the United States International Trade Commission, in its unfair competition action against competitors, finding no infringement and no domestic industry for the design patent, and obviousness for the other patent.

Target Corp.

**Holdings:** The Court of Appeals, Rader, Circuit Judge, held that:

- (1) accused shoes infringed the design patent;
- (2) articles protected by design patent satisfied technical prong of domestic industry requirement of unfair competition statute; and
- (3) patent relating to foam footwear was non-obvious.

Reversed and remanded.

### 1. Customs Duties ⇌85(3)

Court of Appeals for the Federal Circuit reviews the International Trade Commission's legal determinations without deference and its factual findings for substantial evidence; "substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

See publication Words and Phrases for other judicial constructions and definitions.

### 2. Patents ⇌252

In many cases, the considerable effort in fashioning a detailed verbal description for a design patent does not contribute enough to the infringement analysis to justify the endeavor; depictions of the claimed design in words can easily distract from the proper infringement analysis of the ornamental patterns and drawings.

### 3. Patents ⇌180

Design patents are typically claimed as shown in drawings, and claim construction must be adapted to a pictorial setting; thus an illustration depicts a design better than it could be by any description and a description would probably not be intelligible without the illustration.

### 4. Patents ⇌100

As a rule, the illustration in drawing views is its own best description of a design patent.

### 5. Patents ⇌252

In determining whether an accused product infringes a patented design, the Court of Appeals for the Federal Circuit applies the "ordinary observer" test, without any "point of novelty" perspective; to show infringement under the proper test, an ordinary observer, familiar with the prior art designs, would be deceived into believing that the accused product is the same as the patented design.

### 6. Patents ⇌252

Under the "ordinary observer" test for determining whether an accused product infringes a patented design, when the differences between claimed and accused designs are viewed in light of the prior art, the attention of the hypothetical ordinary observer may be drawn to those aspects of the claimed design that differ from the prior art, and if the claimed design is close to the prior art designs, small differences between the accused design and the claimed design assume more importance to the eye of the hypothetical ordinary observer; the ordinary observer, however, will likely attach importance to those differences depending on the overall effect of those differences on the design, and even if the claimed design simply combines old features in the prior art, it may still create an overall appearance deceptively similar to the accused design, so as to warrant upholding a finding of infringement.

### 7. Patents ⇌252

The "ordinary observer" test for determining whether an accused product infringes a patented design applies to the patented design in its entirety, as it is claimed; minor differences between a patented design and an accused article's design cannot, and shall not, prevent a finding of infringement.

**8. Patents** ⇨252

Accused shoes embodied the overall effect of patented design for ornamental footwear in sufficient detail and clarity to cause market confusion, and, thus, the accused shoes infringed the design patent, in light of side-by-side comparisons of the accused shoes and the patented design.

**9. Customs Duties** ⇨22

The test for the technical prong of the domestic industry requirement of a patent-based unfair competition statute, whether the industry produces articles covered by the asserted claims, is essentially the same as that for infringement, i.e., a comparison of domestic products to the asserted claims; in other words, the technical prong requires proof that the patent claims cover the articles of manufacture that establish the domestic industry, or, put simply, the complainant must practice its own patent. Tariff Act of 1930, § 337(a)(2), 19 U.S.C.A. § 1337(a)(2).

**10. Customs Duties** ⇨22

Articles protected by patent for an ornamental footwear design satisfied technical prong of domestic industry requirement of unfair competition statute, by producing articles covered by the asserted claims, where, an ordinary observer, familiar with the prior art designs, would have considered the protected shoes the same as the patented design. Tariff Act of 1930, § 337(a)(2), 19 U.S.C.A. § 1337(a)(2).

**11. Patents** ⇨16(2, 3), 16.13, 36.1(1)

Obviousness of a patent is a question of law based on underlying factual inquiries including: (1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the prior art and the claimed invention; and (4) the extent of any objective indicia of non-obviousness.

**12. Patents** ⇨16.26

In finding patent relating to foam footwear obvious, the International Trade

Commission (ITC) unreasonably determined that foam straps were known in the art without acknowledging that prior art references rendered the material out of place for use as a strap, and, thus, the ITC could not have properly concluded that a person of ordinary skill would have used foam to attach a foam base portion to a wearer.

**13. Patents** ⇨16.26

“Passive restraint system” employed by the patent relating to foam footwear facilitated a loose anatomical fit that made the claimed invention more comfortable than prior art products, when the prior art taught away from the passive restraint system, and, thus, the patent yielded more than predictable results, rendering it non-obvious.

**14. Patents** ⇨16(4), 36.1(1)

Secondary considerations can be the most probative evidence of non-obviousness of a patent in the record, and enables a court to avert the trap of hindsight.

**15. Patents** ⇨36.1(1)

Secondary considerations of non-obviousness may often establish that a patented invention appearing to have been obvious in light of the prior art was not.

**16. Patents** ⇨36.1(1)

Evidence of secondary considerations of non-obviousness is not just a cumulative or confirmatory part of the obviousness calculus under patent law but constitutes independent evidence of nonobviousness.

**17. Patents** ⇨36.2(7)

On secondary considerations of non-obviousness, a prima facie case of nexus is made between commercial success and a patented invention when the patentee shows both that there is commercial success, and that the product that is commercially successful is the invention disclosed

and claimed in the patent; once the patentee demonstrates a prima facie nexus, the burden of coming forward with evidence in rebuttal shifts to the challenger.

**18. Patents** ⇨36.1(2)

On secondary considerations of non-obviousness of a patent, copying may indeed be another form of flattering praise for inventive features.

**Patents** ⇨328(1)

517,789. Infringed.

**Patents** ⇨328(2)

6,237,249. Cited as Prior Art.

**Patents** ⇨328(2)

6,993,858. Valid.

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James C. Otteson, Wilson Sonsini Goodrich & Rosati, of Palo Alto, California, argued for appellant. With him on the brief were Thomas T. Carmack, of Palo Alto, California, and Michael A. Berta, Ariana M. Chung-Han, and Tung-On Kong, of San Francisco, California. Of counsel was Michael A. Ladra.

Clint A. Gerdine, Attorney, Office of the General Counsel, United States International Trade Commission, of Washington, DC, argued for appellee. With him on the brief were James M. Lyons, General Counsel, and Andrea C. Casson, Assistant General Counsel for Litigation.

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Before LOURIE, RADER, and PROST, Circuit Judges.

RADER, Circuit Judge.

The United States International Trade Commission (“ITC” or “Commission”) found no violation of 19 U.S.C. § 1337. Specifically the Commission determined that U.S. Patent No. 6,993,858 (the “’858 patent”) would have been obvious at the time of invention and that none of the intervenors infringed U.S. Patent No. D517,789 (the “’789 patent”). The Commission also determined that Crocs, Inc. (“Crocs”) had not satisfied the technical prong of the industry requirement under section 1337 for the ’789 patent. Because the Commission erred in finding that the prior art taught all of the claimed elements of the ’858 patent and incorrectly weighed the secondary considerations, this court reverses the Commission’s finding that the ’858 patent would have been obvious. Because the Commission also erred in claim construction for the ’789 patent, in applying the ordinary observer test for infringement, and in applying the technical prong of the section 1337 domestic industry requirement, this court reverses the Commission’s determination on the ’789 patent.

I.

Crocs is the assignee of the ’858 and ’789 patents. Crocs’s ’858 patent, entitled “Breathable Footwear Pieces,” issued on February 7, 2006, based on a filing in 2003. The asserted claims of the ’858 patent, independent claims 1 and 2, cover foam footwear having a foam base section—an upper portion (“upper”) and a sole—and a foam strap. A pair of connectors ties the foam strap to the base section. This con-

nection creates frictional forces that keep the strap in an ideal position at the rear of the base section.

Claim 1 of the '858 patent reads as follows (emphasis added):

A footwear piece comprising:

[a] a base section including an upper and a sole formed as a single part manufactured from a moldable foam material; and

[b] *a strap section formed of a moldable material that is attached at opposite ends thereof to the upper of the base section with plastic connectors such that the moldable foam material of the strap section is in direct contact with the moldable material of the base section and pivots relative to the base section at the connectors;*

[c] wherein the upper includes an open rear region defined by an upper opening perimeter, and *wherein frictional forces developed by the contact between the strap section and the base section at the plastic connectors are sufficient to maintain the strap section in place in an intermediary position after pivoting, whereby the strap section lends support to the Achilles portion of the human foot inserted in the open rear region;* and

[d] wherein the upper includes a substantially horizontal portion and a substantially vertical portion forming a toe region that generally follows the contour of a human foot, wherein the toe region tapers from an inner area of the base section where the larger toes exist to an outer area of the base section where the smaller toes exist; and

[e] wherein the sole includes a bottom surface having front and rear tread patterns longitudinally connected by a flat section.

Claim 2 of the '858 patent reads as follows (emphasis added):

A footwear piece comprising:

[a] a base section including an upper and a sole formed as a single part manufactured from a moldable foam material; and

[b] *a strap section formed of a molded foam material attached at opposite ends thereof to the base section such that the strap section is in direct contact with the base section and pivots relative to the base section;* and

[c] wherein the upper includes an open rear region defined by an upper opening perimeter; and wherein the sole includes a rear perimeter; and *wherein the strap section pivots between a first contact point on the upper opening perimeter and a second contact point on the rear perimeter, and wherein frictional forces developed by the contact between the strap section and the base section at the points of attachment are sufficient to maintain the strap section in place in an intermediary position after pivoting whereby the strap section lends support to the Achilles portion of a human foot inserted in the open rear region;* and

[d] wherein the upper includes a substantially horizontal portion and a substantially vertical portion forming a toe region that generally follows the contour of a human foot, wherein the toe region tapers from the inner area of the base section where the larger toes exist to the outer area of the base section where the smaller toes exist; and

[e] wherein a decorative pattern of raised bumps is molded or otherwise created in the upper near to and extending the length of the upper opening perimeter; and

[f] wherein a plurality of ventilators are formed in both the substantially vertical portion and the substantially horizontal portion, and wherein the ventila-



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