

IP

Crocs Aims to Flip ITC Ruling, Widen IP Reach at Federal Circuit

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Crocs Inc. will press the Federal Circuit Thursday to bless its use of trade dress to fortify the diminished intellectual property protection around its iconic foam clogs, years after its design patents expired.

The company is appealing a split International Trade Commission ruling it says wrongly found shoes imported by competitors including Orly Shoe Corp. and Hobby Lobby Stores Inc. didn't infringe its footwear trade dress registrations.

The case, set for oral argument Thursday, raises questions about the reach of trade dress protection—which can be perpetual—compared with design patents that inherently expire. It also illustrates the strategic decisions brand owners face to protect their intellectual property, as Crocs chose to assert specific registered elements of trade dress at the ITC rather than the entire design as a whole.

Crocs argues the strength of its trade dress and actual confusion demonstrated in consumer surveys swing a likelihood of confusion analysis in its favor. But the ITC noted the shoemaker relied on those narrower trade dress registrations, saying Crocs didn't establish the independent fame of the distinct elements in particular, or that consumers were confused by replication of them.

Crocs appears to be trying to use trade dress to block any competition in the foam clog space, IP attorney Alan Behr of Phillips Nizer said.

"It's a very limited right because you don't want companies to do what they appear to want to do: find a way to make perpetual something that the law meant to be for a limited term," Behr said. "I don't think that, long term, it's a good strategy to fight like this."

'Picked Their Poison'

The Federal Circuit upheld the validity of Crocs' core design patent—which protects novel design but doesn't hinge on consumer confusion—in 2010 and 2021. In 2011, Crocs used that design patent to secure a broad import ban on any shoes that resemble their "Classic Clogs" before the ITC.

Crocs filed its 2021 ITC complaint against 25 respondents over imports of footwear it said infringed two registered trademarks on the shape of its clogs. The registrations collectively cover 13 evenly spaced circular holes on top, seven trapezoid holes in a textured vertical part of the shoe at the base, a textured strip on the heel of the shoe, and a decorative band along the length of the heel strap.

The ITC found the three imported clog designs at issue varied significantly from the protected elements, noting they also had their own branding that should dispel any remaining confusion. Crocs' failure to show the fame of the particular design elements—independent of its clog as a whole—sank its dilution claims.

"Trying to prove those registered elements are famous, removed from the product, is a very difficult proposition," IP professor Susan Scafidi of Fordham School of Law said.

Enforcing registered elements, rather than the clog as a whole, widens the range of competitor products Crocs can target and limits what has to match to find infringement, IP attorney Michelle Mancino Marsh of ArentFox Schiff said. But it also forces Crocs to demonstrate the distinctiveness and consumer recognition of the specific claimed trade dress elements. In this case, Marsh said, the evidence of consumer recognition spoke to the whole shoe, not the parts at issue.

"They picked their poison, and it killed them," Marsh said.

'Leave a Scar'

Scafidi said she's skeptical Crocs can convince the appeals court to reverse the ITC findings.

"They're just playing with a not-great hand," she said.

The ITC found that the similarity of the marks alone weighed in favor of Crocs regarding the three imported shoes, albeit weakly so for two of them. But while the product and channels of trade factors were also on Crocs' side, the ITC found the other factors outweighed them all.

The agency found that generic, unprotectable aspects of the clogs could have been the source of consumers' confusion in surveys conducted by both parties. But that's "illogical," the company said in its appellate brief, as as those features, "by definition, are not source identifying." It also said the ITC wrongly put decisive weight on survey evidence provided by Orly and discounted the substantial confusion that both its and Orly's surveys uncovered.

Even if it loses on appeal, Scafidi said, Crocs likely still has significant protection for its omnipresent clogs. But it would provide a case for other competitors to point to in the future.

"It's going to leave a scar," she said. "It's going to be harder for them to be aggressive in the future."

Crocs is represented by Arnold & Porter. The ITC is represented by the Department of Justice.

The case is Crocs Inc. v. ITC, Fed. Cir., No. 24-01300.

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