

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN FOAM FOOTWEAR

Investigation No. 337-TA-567
(Advisory Opinion Proceeding)

**NOTICE OF A COMMISSION DETERMINATION TO ADOPT A REPORT ISSUED BY
THE OFFICE OF UNFAIR IMPORT INVESTIGATIONS AS ITS ADVISORY OPINION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to adopt the report prepared by the Office of Unfair Import Investigations (“OUII”) as the Commission’s advisory opinion in the above-captioned proceeding.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, D.C. 20436, telephone (202) 708-2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 11, 2006, based on a complaint, as amended, filed by Crocs, Inc. (“Crocs”) of Niwot, Colorado. 71 FR 27514-15 (May 11, 2006). The complaint alleged, *inter alia*, violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain foam footwear, by reason of infringement of claims 1-2 of U.S. Patent No. 6,993,858 (“the ’858 patent”) and U.S. Patent No. D517,789 (“the ’789 patent”). The notice of investigation named several respondents including Double Diamond Distribution Ltd. (“Double Diamond”) of Saskatoon, Canada.

On July 25, 2008, the Commission issued its final determination finding no violation of section 337 based on non-infringement and non-satisfaction of the technical prong of the domestic industry requirement with respect to the ’789 patent, and invalidity of the ’858 patent as obvious

under 35 U.S.C. 103. 73 FR 45073-74 (Aug. 1, 2008). On July 15, 2011, after an appeal to the U.S. Court of Appeals for the Federal Circuit and subsequent remand vacating the Commission's previous finding of no violation, the Commission found a violation of section 337 based on infringement of the asserted claims of the patents and issued a general exclusion order and, *inter alia*, a cease and desist order directed against Double Diamond. 76 FR 43723-24 (July 21, 2011).

On July 12, 2016, Double Diamond and U.S.A. Dawgs, Inc. ("USA Dawgs") of Las Vegas, Nevada (collectively, the "requesters") petitioned for institution of an advisory opinion proceeding as to whether their Fleece Dawgs footwear is covered by the general exclusion order or cease and desist order directed against Double Diamond. No responses were filed.

On August 11, 2016, the Commission determined that requesters' petition complied with the requirements for institution of an advisory opinion proceeding under Commission Rule 210.79. The Commission therefore determined to institute an advisory opinion proceeding and assigned the proceeding to OUII. 81 FR 54820 (Aug. 17, 2016). The Commission assigned OUII the task of investigating and preparing a report concerning requesters' Fleece Dawgs footwear, and it named Crocs, Double Diamond, and USA Dawgs as parties to the proceeding.

On November 7, 2016, OUII issued a report concluding that requesters' Mossy Oak Women's Fleece Dawgs footwear ("the Subject Articles") is not covered by the general exclusion order and cease and desist order directed against Double Diamond issued in the underlying investigation. In so doing, OUII concluded, *inter alia*, that (1) requesters met their burden of showing non-infringement by the Subject Articles with respect to the claim term "strap section" for claims 1-2 of the '858 patent; and (2) the Subject Articles do not meet the "ordinary observer" test for infringement of the '789 patent. *See Crocs, Inc. v. ITC*, 598 F.3d 1294, 1302 (Fed. Cir. 2010). No party filed comments on the OUII report.

After reviewing the report, the Commission has determined to adopt the report issued by OUII as its advisory opinion in this proceeding.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: December 20, 2016