



337 Reporter Monthly Round-Up

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SEPTEMBER–OCTOBER AT THE COMMISSION:

New Investigations or Ancillaries:
2 (Sep.) / 4 (Oct.)

Cases Terminated:
0 (Sep.) / 0 (Oct.)

Motions to Terminate ruled on:
17 (Sep.) / 9 (Oct.)

Complaints Pending Institution:
0 (Sep.) / 4 (Oct.)

Initial Determinations:
1 (Sep.) / 1 (Oct.)

Commission Opinions:
1 (Sep.) / 1 (Oct.)

OUII Complaint Activity: Moderate

Total New Investigations for 2023: 28



p2 Commission Affirms ALJ Moore’s Finding of No Violation in Crocs’ Trademark Dispute

The Commission affirms no Section 337 violation because Crocs failed to prove likelihood of confusion, infringement, false designation of origin, or dilution of its Asserted Trademarks.

(Prepared by Lauren Peterson, Shareholder, Polsinelli PC)

p3 The Commission Finds that Complainant Satisfied the Economic Prong of Domestic Industry based on a “Major Fraction” of its Worldwide Investment being US-based

Affirming CALJ Cheney, the Commission determined that Complainant OPEX Corp. satisfied the economic prong of domestic industry requirement, established that a cease-and-desist order was appropriate, and set a bond at 100%.

(Prepared by Nicholas H. Jackson, Partner, Dentons)

p4 Commission Vacates Claim Construction and Finds Claims Indefinite and Invalid for Lack of Enablement and Written Description

The Commission determined on review to vacate the ID’s findings on definiteness and reverse the ID’s findings on written description and enablement, such that the ID’s finding of a violation of section 337 also was reversed.

(Prepared by Tommy Martin, Partner, Baker Botts LLP)

p5 ALJ Hines Recommends Issuance of 12-Month Limited Exclusion Orders Based on Misappropriation of Trade Secrets

In her second Final Initial Determination since becoming an Administrative Law Judge, ALJ Hines recommended the issuance of 12-month Limited Exclusion Orders based on misappropriation of trade secrets relating to raised metal garden bed products, and the issuance of a Limited Exclusion Order based on false advertising associated with the same products.

(Prepared by Adam R. Hess, Partner, Squire Patton Boggs)

p6 The Commission Reaffirms Its Authority to Correct Minor Errors in Patent Claims and Holds Doctrine of Assignor Estoppel Does Not Bar OUII’s Indefiniteness Challenge

The ALJ determined that a patent claim was indefinite because it contained a major error, which the Commission lacked authority to correct. The Commission reversed and remanded, finding that the error was a minor error, which the Commission could correct, because the correct construction would not have been subject to reasonable debate based on the claim language and specification and because the prosecution history did not suggest a different interpretation. The Commission also reviewed and affirmed the ALJ’s ruling that the doctrine of assignor estoppel does not bar OUII from raising indefiniteness challenges.

(Prepared by Benjamin Levi; Levi Snoterly & Schaumberg, PLLC)



Commission Affirms ALJ Moore's Finding of No Violation in Crocs' Trademark Dispute

In the Matter of CERTAIN CASUAL FOOTWEAR & PACKAGING THEREOF, Inv. No. 337-TA-1270, Commission Opinion (October 4, 2023)

Before the Commission

Summary: On October 4, 2023, the Commission affirmed, with modification, ALJ Moore's Initial Determination ("ID") finding no violation of Section 337 with respect to three trademarks (two 3D marks and one word mark) asserted by Crocs.

Crocs' complaint, as amended, alleged 34 Respondents infringed its registered trademarks. After many settlements, consent orders, and defaults, three Respondents (Hobby Lobby, Orly, and Amoji) participated in the evidentiary hearing. The ID found no violation due to Crocs' failure to prove infringement of the 3D marks by any Respondent, failure to prove infringement of the word mark by Hobby Lobby or Orly, failure to prove false designation of source or unfair competition, failure to prove dilution via blurring or tarnishment, invalidity of the 3D marks due to lack of secondary meaning, and waiver of infringement contentions as to the Defaulting Respondents.

The Commission reviewed the ID in part and affirmed the ID's finding that Crocs failed to prove that Orly, Hobby Lobby, or Amoji infringed the 3D marks or the word mark. For the 3D marks, on *DuPont* factor 1, the Commission determined that Orly and Hobby Lobby's original designs caused a likelihood of confusion, but the redesigns, and Amoji's product, were at most weak on this factor. As for *DuPont* factor 2 (similarity and nature of goods), the Commission adopted the ID's determination that it favored a finding of likelihood of confusion but assigned little weight to

this factor. On *DuPont* factor 4 (conditions of sale), the Commission again affirmed the ID's finding that the different tags and price points weighed against likelihood of confusion. For *DuPont* factor 5 (fame of the mark), the Commission modified the ID's finding from "weak" to "neutral." Finally, on confusion (factors 7, 8, 12), the Commission adopted the ID's finding that the alleged evidence of actual confusion was ambiguous and weak. The Commission also affirmed the ID's finding that Crocs' expert consumer surveys were not reliable or persuasive, due to, *inter alia*, use of an improper control shoe. Conversely, the Commission adopted the ID's finding that Respondents' surveys *were* reliable and weighed against a finding of a likelihood of confusion.

Commissioner Kearns wrote a lengthy dissent, finding that both Orly (Gator) and Amoji (Garden Clog) infringed the 3D marks. Specifically, he agreed with the ID's findings as to *DuPont* factors 1 and 2 but argued that the clear and strong similarities between Crocs' products and the Accused Products negated the need for survey evidence. Kearns also found that the 3D marks made the Crocs product distinctive and famous (*DuPont* factor 5), not the overall shape, which further supported a finding of infringement.

(Prepared by Lauren Peterson, Shareholder, Polsinelli PC)



The Commission Finds that Complainant Satisfied the Economic Prong of Domestic Industry based on a “Major Fraction” of its Worldwide Investment being US-based

In the Matter of Certain Automated Put Walls and Automated Storage and Retrieval Systems, Associated Vehicles, Associated Control Software, and Component Parts Thereof, Inv. No. 337-TA-1293, Commission Opinion (August 17, 2023)

Summary: Affirming CALJ Cheney, the Commission determined that Complainant OPEX Corp. satisfied the economic prong of domestic industry requirement, established that a cease-and-desist order was appropriate, and set a bond at 100%.

OPEX filed a complaint requesting an investigation of alleged patent infringement by Respondents HC Robotics and Invata LLC of four of OPEX’s patents through the importation of automated material-handling systems used in, for example, e-commerce fulfillment centers, to receive, sort, and store items. After an evidentiary hearing, Respondents were found in violation of Section 337 by the infringement of two of OPEX’s patents. Respondents petitioned for review of the ID on multiple grounds; however, the Commission only granted review on findings related to whether OPEX satisfied the economic prong of domestic industry requirement.

Domestic Industry. To satisfy the economic prong, OPEX presented evidence that it operates four US facilities at which it researches, designs, develops, manufactures, and supports the domestic industry products. It cited records for 2020 and 2021, the most recent data being three months before the filing date of the complaint, relating to its expenditures relating to the rent, utilities, and equipment for those four facilities. It also presented evidence relating to the number of employees and financial expenditures of labor and capital expenses relating to the employees who worked at those facilities, including labor investments tied to engineering, manufacturing, production, installation, service and repair, as well as capital investments. While the precise figures are redacted, CALJ Cheney found that the amounts spent were “*per se*” quantitatively significant, as well as being significant compared to its foreign operations and due to the year-over-year increase in its expenditures. Judge Cheney also found the investments to be qualitatively significant due to the increased adoption of the products, the fact that domestic employees work at every stage in the life cycle of the products, and that the DI products reflect ongoing innovation and new product development, which are important to OPEX and its competitive position.

The Commission agreed that OPEX established a domestic industry, finding that “a major fraction” of OPEX’s worldwide employees were located in the US

and citing the percentage of facility space that is likewise in the US. Further, the year-over-year increase in OPEX’s expenditures also supported a finding that the domestic industry expenditures were significant. The Commission also took no issue with the lack of evidence after the end of September 2021 before the filing of the complaint on December 22, 2021. The Commission found that the compilation of evidence in November and December 2021, as well as an updated declaration in August 2022 supported the finding that a domestic industry existed as of the filing of the complaint.

While affirming the CALJ, the Commission vacated several elements of the ID. First, the Commission took no position on the CALJ’s finding that sales, human resources, and travel expenditures should be included as part of the relevant domestic industry. The Commission also vacated the CALJ’s determination that the expenditures were “*per se*” significant, finding that this violated Federal Circuit precedent holding that the domestic industry requirement is intended to be flexible and context-dependent.

Remedy. The Commission issued limited exclusion orders, cease-and-desist orders, and a bond at 100%. In granting an exemption for warranty repairs and service, the Commission found that the Respondents’ sole customer, Fanatics, would be harmed without such an exemption. The Commission found that the infringing systems cost several hundred thousand dollars and include extensive terms for warranty and repair in the sales contract. Accordingly, the Commission permitted importation to prevent harm to Respondents’ customer. The Commission also found a commercially significant inventory, supporting a cease-and-desist order, even though only one system was in inventory in the US. Due to the extremely high price and customization of the system, the Commission found that one system is commercially significant, especially given that the one system represents 33% of the imported units and 50% of the units sold. Finally, the Commission set the bond at 100% because it found calculating a price differential as impractical because “pricing varies from unit to unit depending on the size and complexity of the installation” which is customer-specific, and the ‘benchmark’ pricing of the DI products themselves are considerably different.”

(Prepared by Nicholas H. Jackson, Partner, Dentons)



Commission Vacates Claim Construction and Finds Claims Indefinite and Invalid for Lack of Enablement and Written Description

In the Matter of CERTAIN HIGH-PERFORMANCE GRAVITY-FED WATER FILTERS AND PRODUCTS CONTAINING THE SAME, Inv. No. 337-TA-1294, Commission Opinion (Sept. 22, 2023)

Before the Commission

Summary: On September 22, 2023, the Commission issued an opinion in this investigation between Brita LP (“Complainant”) and five respondents: Kaz USA, Inc.; Helen of Troy Limited; Zero Technologies, LLC; Culligan International Co.; and Vestergaard Frandsen Inc. The Commission determined on review to vacate the ID’s construction of the claim term “filter usage lifetime claimed by a manufacturer or seller of the filter,” and find that claim limitation indefinite. The Commission also reversed the ID’s finding that the asserted claims are enabled and not invalid for lack of written description. The Commission vacated the ID’s finding of a violation of section 337 on these grounds and took no position on the ID’s other analyses and findings, including a finding that the asserted claims were not invalid under 101.

The Commission’s indefiniteness finding focused on the differences between the phrase “claimed by a manufacturer or seller” in the term “filter usage lifetime claimed by a manufacturer or seller of the filter” and the phrase “that a manufacturer or seller validated” in the ID’s construction of that term: “[t]he total number of gallons of water that a manufacturer or seller has validated can be filtered before the filter is replaced.” The Commission found that “claimed by” was permissive, and that there was nothing in the intrinsic record to correlate that term with a mandatory “validat[ion],” leaving the scope of the claims unclear. For example, the specification of the asserted patent disclosed a testing protocol, but failed to establish which version

should be used. And the version Complainant attempted to rely upon would have read a disclosed embodiment out of the claims. The Commission therefore determined that what could be “claimed by a manufacturer or seller,” and how that might be “validated,” was purely subjective and not could not be determined with reasonable certainty. As a result, the Commission reversed the ID’s definiteness findings in view of this term.

The Commission’s enablement and written description findings, on the other hand, focused on the claims’ recitation of a combination of activated carbon, a lead scavenger, and a filter media that, together, achieved a specific Flow Rate and Performance, or FRAP. The Commission found that the specification failed to disclose how to achieve the claimed FRAP with that specific combination of elements—namely, a combination that included a lead scavenger. The Commission also found, under the *Wands* factors, that undue experimentation would be required to achieve the claimed FRAP with a combination that included a lead scavenger. The Commission therefore reversed the ID’s findings on written description and enablement, and the ID’s finding of a violation of section 337 was ultimately reversed.

(Prepared by Tommy Martin, Partner, Baker Botts LLP)



ALJ Hines Recommends Issuance of 12-Month Limited Exclusion Orders Based on Misappropriation of Trade Secrets

In the Matter of CERTAIN RAISED GARDEN BEDS AND COMPONENTS THEREOF, Inv. No. 337-TA-1334, Initial Determination and Recommended Determination

Before ALJ Hines

Summary: The investigation was instituted on October 13, 2022, based on a complaint filed by Vego Garden, Inc. against five Respondents, asserting misappropriation of three trade secrets and unfair competition based on false advertising. By the time of the hearing, only Respondents Huizhou Green Giant Technology Co., Ltd. and Utopban Limited remained in the investigation.

Relying on *TianRui Grp. Co. Ltd. v. Int'l Trade Comm'n*, 661 F.3d 1322 (Fed. Cir. 2011) and *Certain Bone Cements, Components Thereof, and Products Containing the Same*, Inv. 337-TA-1153, Comm'n Op. (Jan. 25, 2021), ALJ Hines first found that two of three asserted trade secrets were entitled to protection and were misappropriated by Green Giant, with the third asserted trade secret being neither entitled to protection nor proven to have been used by Respondents. ALJ Hines then found that Utopban engaged in false advertising by using the Complainant's photographs as false representations of its own products.

ALJ Hines also found that the Complainant demonstrated a domestic industry that has suffered an actual substantial injury pursuant to 19 U.S.C. § 1337(a)(1)(A)(i), thus establishing a violation of Section 337.

When fashioning remedies for violations of Section 337 based on trade secret misappropriation, the Commission often sets

the duration of a Limited Exclusion Order as the time it would have taken the respondent to independently develop the trade secret. In making this determination, the Commission may consider the length of time that it took the complainant to develop the trade secret and the resources of the respondent. Using this analysis, ALJ Hines recommended 12-month LEOs for each trade secret violation, to run concurrently. Regarding the violation based on false advertising, ALJ Hines recommended an LEO with a certification provision. Lastly, ALJ Hines recommended the issuance of a Cease and Desist Order regarding Utopban's inventory currently in the United States, and a 100% bond during the Presidential review period.

(Prepared by Adam R. Hess, Partner, Squire Patton Boggs)



The Commission Reaffirms Its Authority to Correct Minor Errors in Patent Claims and Holds Doctrine of Assignor Estoppel Does Not Bar OUII's Indefiniteness Challenge

In the Matter of CERTAIN BIO-LAYER INTERFEROMETERS AND COMPONENTS THEREOF, Inv. No. 337-TA-1344, Commission Opinion

Before the Commission

Summary: The ALJ found that the claim term “the layer of enzyme binding molecules” lacked antecedent basis, thus rendering the claim invalid as indefinite because that limitation could not be corrected to refer to the previously claimed limitation “a layer of *analyte* binding molecules.” The ALJ found that the dueling proposed corrections of Complainant (the layer of analyte binding molecules) and Respondent (*a* layer of enzyme binding molecules) demonstrate that the correct construction of the claim is subject to reasonable debate by one of ordinary skill in the art and is thus an error that the Commission could not correct. The ALJ granted Complainant’s unopposed motion for summary determination of invalidity and terminated the investigation with a finding of no violation. On review, the Commission reversed and remanded. The Commission found that the Complainant’s proposed correction is not subject to reasonable debate based on consideration of the claim language and the specification. The Commission also found that the prosecution history did not suggest a different interpretation of the claims. Thus, the Commission found that the claim term “the layer of enzyme binding molecules” can be properly corrected as “the layer of analyte binding molecules.” Notably, Chairman Johanson dissented and would have declined to review and reverse.

On review of the ALJ’s holding that the Commission possesses authority to correct

minor errors in claims, the Commission affirmed with supplemental explanation. Although the Commission found that Respondent waived its argument that the Commission lacked authority to correct even minor errors in claims, the Commission nevertheless explained that its authority to construe claims gives it the inherent ability also to correct obvious and minor errors in patent claims.

The ALJ also held that the doctrine of assignor estoppel does not bar the indefiniteness challenge raised by OUII. On review, the Commission affirmed with supplemental explanation. Specifically, when applicable, the doctrine still operates to prevent respondents from raising certain defenses before the Commission. But OUII is an independent party in section 337 investigations, whose role includes advocating independent positions before the Commission. Thus, the Commission reasoned that assignor estoppel does not prevent OUII from making challenges based on indefiniteness.

(Prepared by Benjamin Levi; Levi Snotherly & Schaumberg, PLLC)



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