

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)**

ERIK B. CHERDAK
149 Thurgood Street
Gaithersburg, Maryland 20878

Plaintiff,

v.

CROCS, INC.
6328 Monarch Park Place
Niwot, Colorado 80503

Defendant.

Case No. 1:11-cv-480 LOG/tcb

**COMPLAINT FOR
PATENT INFRINGEMENT**

JURY TRIAL DEMANDED

FIRST AMENDED COMPLAINT

Plaintiff Erik B. Cherdak (hereinafter “Plaintiff” or “CHERDAK”), *by and through Counsel*, and in and for his Complaint against CROCS, INC. (hereinafter “CROCS”), and states as follows:

THE PARTIES

1. Plaintiff CHERDAK is an individual who resides in Gaithersburg, Maryland at the address listed in the caption of this Complaint.
2. Defendant CROCS, is a Delaware, USA Corporation having a principal place of business as specified in the caption of this Complaint.

JURISDICTION AND VENUE

3. This is an action for Patent Infringement under the Laws of the United States of America and, in particular, under Title 35 United States Code (Patents – 35 USC § 1, *et seq.*). Accordingly, Jurisdiction and Venue are

properly based under Sections 1338(a), 1391(b) and (c), and/or 1400(b) of Title 28 of the United States Code.

4. Defendant sells infringing lighted shoes in this judicial district and is therefore subject to this court's jurisdiction. For example, Defendant CROCS regularly sells footwear and related products including, but not limited to, light-up JIBBITZ™ branded products to retail stores like and/or similar to NORDSTROM, INC. located at the Tysons II Mall in Tysons, Virginia, USA. Defendant CROCS also operates a retail website at www.crocs.com which Defendant has made accessible to citizens of Virginia, USA, 24 hours per day, 7 days per week and 365 days per year.

FACTS

5. On July 6, 1993, Plaintiff filed a patent application entitled "Athletic Shoe with Timing Device" that resulted in the issuance of U.S. Patent No. 5,343,445 (hereinafter, the "'445 patent'") on August 30, 1994. The '445 patent is directed, *inter alia*, to footwear products like those sold by the Defendant. The '445 patents has successfully gone through additional expert review before the USPTO during reexamination proceedings related to the same (USPTO Reexamination Proceeding Control No. 90/008,269). Those reexamination proceedings resulted, *inter alia*, in the confirmation of many patent claims without amendment; many of said claims form the basis of the instant lawsuit. U.S. Patent No. 5,343,445 and its corresponding reexamination certificate have been attached hereto at EXHIBITS 1 and 2, respectively.

6. The Defendant has in the past used, imported, distributed, sold and offered for sale, and continues to use, import, distribute, sell and offer for sale, infringing products such as those products bearing the CROCS® and JIBBITZ® trademarks. *EXEMPLARY* infringing footwear products sold by Defendant throughout its vast distribution network as late as May 1, 2011, include, but are not limited to, CROCS® branded shoes and JIBBITZ® light-up products which bear the “ELECTRO” name, the “CROCBAND” name, the “KEELEY” name, etc.
7. According to Defendant the holes present on their popular CROCS® branded shoes are for insertion of JIBBITZ® products so as to allow people to personalize their shoes and to express their individuality. In particular, Defendant has informed the U.S. Securities and Exchange Commission that:

“In addition to our footwear brands, we own the Jibbitz brand, a unique accessory product-line with colorful snap-on charms specifically suited for Crocs shoes.”

See, CROCS, INC. 10K Annual Report Filed with the U.S. Securities and Exchange Commission on or about February 25, 2011 at page 3. Defendant further stated in that 10K Annual Report that:

“Jibbitz designs allow Crocs consumers to personalize their footwear to creatively express their individuality.”

Id.

8. In its concerted efforts to seek greater profits by inducing ultimate consumers *inter alia* “to personalize their footwear to creatively express their individuality”, Defendant has and continues to sell a vast line of

light-up JIBBITZ™ brand products. In fact, Defendant advertises on its own website 26 different styles of light-up JIBBITZ™ products specifically suited for Defendant's own footwear products. See EXHIBIT 3 – A printout from the CROCS® website at <http://www.crocs.com/Light-Up/jibbitz-led,default,sc.html?sz=26>. Also shown in EXHIBIT 3 are exemplary CROCS® branded shoes (upper right) having a plurality of JIBBITZ™ brand products like and/or similar in construction to the 26 different light-up JIBBITZ™ shown in EXHIBIT 3. EXHIBIT 3 clearly shows, suggests, induces and recommends that consumers install a plurality of JIBBITZ™ onto each shoe of a pair of their CROCS™ branded shoes.

9. Defendant's JIBBITZ™ branded LED-based light-up products are specifically sold for the sole purpose of installation into CROCS® branded shoes. And, the JIBBITZ™ light up products are packaged with the specific notice to consumers that reads ***“So, that’s what the holes are for!”*** referring to the holes found on CROCS® branded shoes. See EXHIBIT 4 – Packaging from a JIBBITZ™ branded light up JIBBITZ™ product.
10. On March 16, 2011, Plaintiff's agent purchased a pair of “ELECTRO” CROCS® shoes and was further induced by Defendant's Retailer (in that case, NORDSTROM) to further purchase JIBBITZ™ branded light-up products at the point of sale. See EXHIBIT 5 – A Retail Point of Sale Receipt for goods purchased at a NORDSTROM store – 2 Pairs of CROCS® branded shoes and four lighted JIBBITZ™ products (2 light-up

products for each shoe of a pair). The “up sells” of light-up JIBBITZ™ products by a retailer like or similar to NORDSTROM has allowed Defendant to reap significant profits in terms of millions of dollars of “add-on” sales. NORDSTROM is not alone and Defendant CROCS sells both its light-up JIBBITZ™ products and its correspondingly configured CROCS® branded shoes with holes configured specifically for such JIBBITZ™ light-up products in a variety of retail channels including, but not limited to, HALLMARK stores, etc.

11. *The infringing footwear products mentioned in this COMPLAINT are merely **Exemplary** products sold in this judicial district of Virginia (USA) and/or throughout the United States.* Accordingly, the particular shoe model(s) and light-up JIBBITZ™ identified in paragraph numbers 6-10, *supra*, are merely exemplary and do not constitute a full and complete identification of all infringing shoes which are contemplated by this Complaint for Patent Infringement and the instant lawsuit commenced hereby – *Due discovery in this case will reveal all infringing shoes used, made, imported, offered for sale, and/or sold by the Defendant individually and/or collectively with other parties.*
12. **DEFENDANT CROCS IS HEREBY ADVISED THAT THE PLAINTIFF, THE INSTANT LAWSUIT AND THIS COMPLAINT DO NOT SEEK REMEDIES IN CONNECTION WITH ANY ACTS OF PATENT INFRINGEMENT BY DEFENDANT RELATED TO LIGHTED SHOE PRODUCTS WHICH ARE MANUFACTURED**

**BY AND/OR WHICH ARE SOURCED TO (SUPPLIED TO)
DEFENDANT FROM ANY OF THE FOLLOWING PARTIES:**

COLLECTIVE BRANDS, INC. (/dba/ PAYLESS, INC.)
BBC INTERNATIONAL, INC.
STRIDE-RITE CORPORATION
ESO ORIGINALS, INC.
VIDA SHOES INTERNATIONAL, INC.
CHAMELEON, INC.
SKECHERS USA INC.
THE WALT DISNEY COMPANY
ELAN-POLO, INC.
PUMA NORTH AMERICA, INC.
GEOX S.p.A.

COUNT I – PATENT INFRINGEMENT

Paragraphs 1 through 12 are hereby incorporated by reference as though completely set forth herein.

13. Given the validity and corresponding enforceability of the ‘445 patent against past, present, and future infringing acts and other activities prohibited under the U.S. Patent Act (35 USC § 1, *et seq.*), Plaintiff Cherdak, *inter alia*, possesses the right to pursue claims in connection with the Defendant’s past, present, and future design, use, manufacture, importation, sale, offer for sale, and distribution of infringing shoes under 35 USC § 271(a), (b), and (c).
14. On information and belief Defendant has infringed, contributed to the infringement of, and/or induced the infringement of the ‘445 patent in violation of 35 USC § 271(a), (b), and (c) by its design, use, manufacture, importation, distribution, sale, and offer for sale of shoes including, **but not limited to**, the shoes identified in paragraphs 6-10 *supra*.

15. On information and belief, Defendant has infringed the '445 patent in violation of 35 USC § 271(b) by actively inducing distributors, customers, and/or other retailers to infringe the Cherdak patents.

16. Such infringing acts on the part of Defendant have and continue to injure and damage Plaintiff. Accordingly, without the grant of adequate remedies at law and in equity, Defendant will be permitted to willfully infringe the Cherdak patents to Plaintiff's further detriment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Cherdak prays for judgment and relief against the Defendant as follows:

- A. That permanent injunctions be issued against continued infringement of the '445 patent by Defendant and its parents, subsidiaries, officers, directors, employees, affiliates, representatives and agents, and all those acting in concert with or through Defendant, directly or indirectly, including, but not limited to, distributors, customers, and other retailers;
- B. That an accounting be had for damages caused to Plaintiff Cherdak by Defendant's acts in violation of the U.S. Patent Act (35 USC § 1, *et seq.*) together and damages including, but not limited to, pre-judgment and post-judgment interest be awarded in accordance with said accounting;
- C. That any damages awarded in accordance with any prayer for relief be enhanced and, in particular, ***trebled*** in accordance with the U.S. Patent Act (35 USC § 1, *et seq.*) for Defendant's acts which are found to be willful acts of patent infringement; and
- D. Such other and further relief as this Court shall deem just and proper.

DEMAND FOR TRIAL BY JURY

The Plaintiff hereby demands a TRIAL BY JURY on all issues so triable.

Respectfully submitted,

/s/ Daniel S. Ward

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ERIK B. CHERDAK

May 5, 2011