

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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SKECHERS U.S.A., INC.,  
Petitioner,

v.

NIKE, INC.,  
Patent Owner.

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Case IPR2017-00608  
Patent D707,032 S

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Before KEN B. BARRETT, SCOTT A. DANIELS, and  
TRENTON A. WARD, *Administrative Patent Judges*.

BARRETT, *Administrative Patent Judge*.

DECISION  
Denying Institution of *Inter Partes* Review  
*37 C.F.R. § 42.108*

## I. INTRODUCTION

### A. *Background and Summary*

Skechers U.S.A., Inc. (“Petitioner”) filed a Petition requesting *inter partes* review of U.S. Patent No. D707,032 S (“the ’032 patent,” Ex. 1001). Paper 1 (“Pet.”). The Petition challenges the patentability of the sole claim of the ’032 patent on the grounds of obviousness under 35 U.S.C. § 103. Nike, Inc. (“Patent Owner”) filed a Preliminary Response to the Petition. Paper 12 (“Prelim. Resp.”).

An *inter partes* review may not be instituted “unless . . . the information presented in the petition . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” 35 U.S.C. § 314(a). Having considered the arguments and evidence presented by Petitioner and Patent Owner, we determine that Petitioner has not demonstrated a reasonable likelihood that it would prevail in establishing the unpatentability of the challenged claims of the ’032 patent.

### B. *Related Proceedings*

Both parties identify, as matters involving or related to the ’032 patent, *Nike, Inc. v. Skechers U.S.A., Inc.*, No. 3:16-cv-00007-PK (D. Or.) and IPR2016-01045 (an earlier *inter partes* review case involving the ’032 patent). Pet. 4; Paper 3, 2. Patent Owner additionally identifies as related matters *Nike, Inc. v. Fujian Bestwinn (China) Industry Co., Ltd.*, No. 2:16-cv-00311 (D. Nev.), and *Inter Partes Reviews* IPR2016-01043 (U.S. Patent No. D696,853), IPR2016-01044 (U.S. Patent No. D700,423), and IPR2017-00607 (U.S. Patent No. D696,853). Paper 3, 2.

*C. The '032 Patent and the Claim*

In an *inter partes* review, claim terms in an unexpired patent are given their broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b); *see also Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144–46 (2016). With regard to design patents, it is well-settled that a design is represented better by an illustration than a description. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (*en banc*) (citing *Dobson v. Dornan*, 118 U.S. 10, 14 (1886)). Although preferably a design patent claim is not construed by providing a detailed verbal description, it may be “helpful to point out . . . various features of the claimed design as they relate to the . . . prior art.” *Egyptian Goddess*, 543 F.3d at 679–80; *cf. High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1314–15 (Fed. Cir. 2013) (remanding to district court, in part, for a “verbal description of the claimed design to evoke a visual image consonant with that design”).

The '032 patent is titled “Shoe Upper,” and the claim recites “[t]he ornamental design for a shoe upper, as shown and described.” Ex. 1001 (54), (57). The '032 patent contains three figures. Figures 1 and 2 are reproduced below.

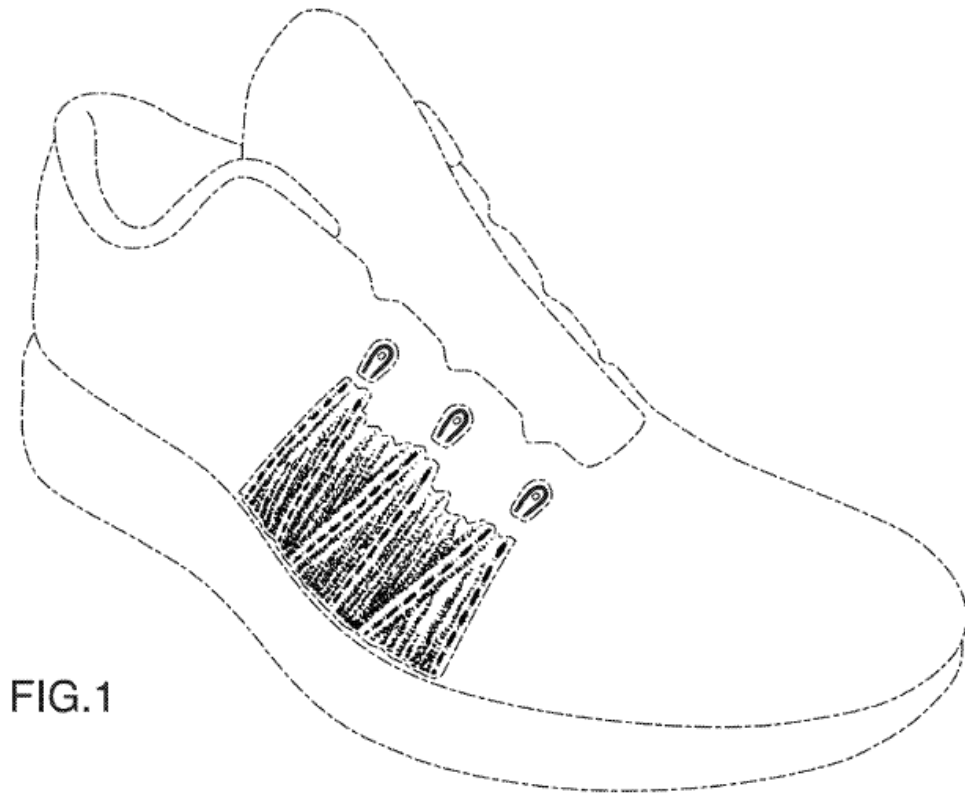


FIG. 1

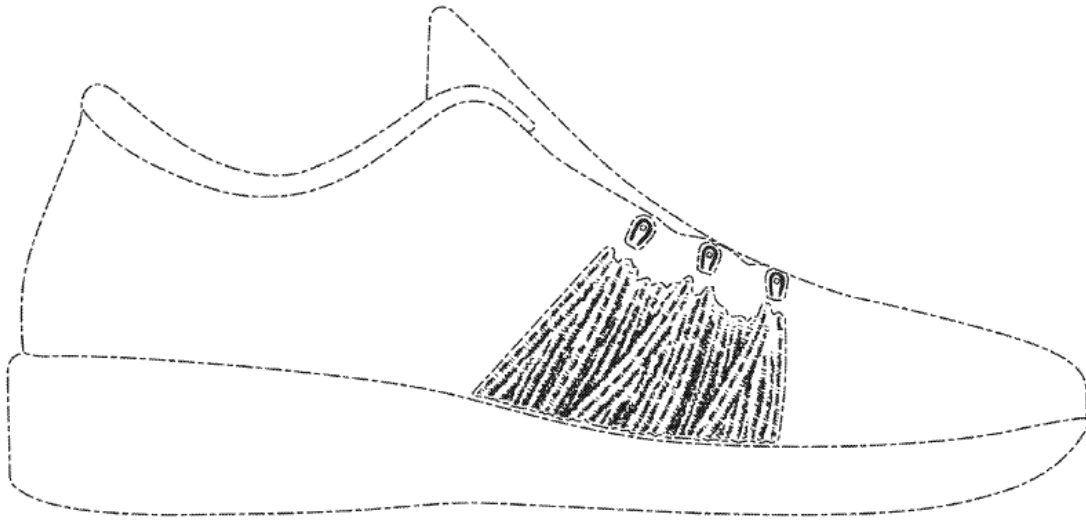


FIG. 2

Figure 1 is a front perspective view of the claimed shoe upper and Figure 2 is a side view thereof. *Id.* at 1. The description of the '032 patent states:

The broken lines immediately adjacent to the shaded areas represent unclaimed boundaries of the design. The broken lines

showing the remainder of the shoe are for environmental purposes only and form no part of the claimed design.

*Id.*

We determine that the following verbal descriptions will be helpful by pointing out “various features of the claimed design as they relate to the . . . prior art.” *Egyptian Goddess*, 543 F.3d at 679–80.

We begin by addressing Petitioner’s contentions as to “the various features comprising the overall appearance of the design claimed in the '032 patent as they relate to the prior art.” Pet. 25–26. Petitioner identifies the following as such features: “(a) solid striping with (b) inlaid strands forming thin dashed lines centered in the striping; (c) pairs of solid striping and dashed lines forming inverted-V configurations; (d) each inverted-V culminating in an exposed, open horseshoe-shaped shoelace loop; and (e) a pattern of fine lines of varying lengths between the striping of the inverted-Vs.” *Id.* at 26 (footnotes omitted). Thus, Petitioner’s characterizations of at least features (a), (b), (c), and (d), are based on the assertion that the claimed design contains solid striping and that the striping forms, in part, the inverted-Vs. Patent Owner argues that solid striping does not exist in the claimed design. Prelim. Resp. 27–28.

Petitioner, in its modified versions of the claimed design utilizes orange highlighting to depict the purported striping and orange lines to “highlight[]” the pattern of fine lines between the purported striping. Pet. 27, 31–32. These two demonstrative drawings are shown below.

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