

No.

In the Supreme Court of the United States

CROCS, INC.,
PETITIONER,

v.

DOUBLE DIAMOND DISTRIBUTION, LTD. ET AL
RESPONDENTS.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 43(a)(1)(B) of the Lanham Act creates a civil action for any person damaged by a statement in commercial advertising or promotion that “misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.” 15 U.S.C. § 1125(a).

The question presented is:

Whether the Lanham Act’s prohibition on “misrepresent[ations]” as to “nature, characteristics, [or] qualities” extends to misrepresentations about the product’s intangible properties, like its patent status.

II

PARTIES TO THE PROCEEDING

Petitioner Crocs, Inc. was appellee in the court of appeals and plaintiff and counterclaim-defendant in the district court. Ronald J. Snyder, Lyndon Hanson, Donald Lococo, Michael Margolis, and John P. McCarvel were appellees in the court of appeals and defendants in the district court.

Respondents Double Diamond Distribution, Ltd. and U.S.A. Dawgs, Inc. were appellants in the court of appeals and defendants and counterclaim-plaintiffs in the district court. Respondent Mojave Desert Holdings, LLC was an appellant in the court of appeals and counterclaim-plaintiff in the district court. Effervescent, Inc. and Holey Soles Holdings, Ltd. were also defendants in the district court.

III

CORPORATE DISCLOSURE STATEMENT

Petitioner Crocs, Inc., a Delaware corporation, has no parent entity. FMR LLC, a limited liability company, owns more than 10% of Crocs' stock.

IV

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Crocs, Inc. v. Effervescent, Inc.*, No. 22-2160 (Fed. Cir. Oct. 3, 2024) (reversing judgment for counterclaim-defendants)
- *Crocs, Inc. v. Effervescent, Inc.*, No. 1:06-cv-00605 (D. Colo. Sept. 14, 2021) (entering summary judgment for counterclaim-defendants)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Crocs, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion is reported at 119 F.4th 1. Pet.App.1a-12a. The district court's opinion denying reconsideration is unreported but available at 2022 WL 22882917. Pet.App.40a-55a. The district court's opinion granting summary judgment to counterclaim-defendants is unreported but available at 2021 WL 4170997. Pet.App.13a-35a.

JURISDICTION

The court of appeals entered an order denying a timely filed petition for rehearing *en banc* on February 18, 2025. On April 22, 2025, Chief Justice Roberts extended the time to file a petition until July 18, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 43(a) of the Lanham Act (codified at 15 U.S.C. § 1125(a)) provides in relevant part:

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

STATEMENT

Section 43(a) of the Lanham Act makes parties liable for statements in commercial advertising or promotion that “misrepresent[] the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.” 15 U.S.C. § 1125(a)(1)(B). In the decision below, the Federal Circuit held that claims that a product is “patented,” “proprietary,” or “exclusive” are actionable on the theory that plaintiffs can sue for false or misleading statements about a product’s intangible properties, so long as the claim could indirectly cause consumers to be misled. Pet.App.11a-12a.

In so doing, the court entrenched a significant circuit split over the breadth of the Lanham Act’s false advertising cause of action. As the Federal Circuit acknowledged, Pet.App.7a n.3, 10a, the Sixth and Ninth Circuits hold that “[a]bsent a false statement about geographic origin, a misrepresentation is actionable under § 1125(a)(1)(B) only if it misrepresents the ‘characteristics of the good itself’—such as its properties or capabilities”; “[t]he statute does not encompass misrepresentation about the source of the ideas embodied in the object.” *Kehoe Component Sales Inc. v. Best Lighting Prods., Inc.*, 796 F.3d 576, 590 (6th Cir. 2015) (quoting *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008)).

Whether the Lanham Act’s prohibition on “misrepresent[ations]” as to “nature, characteristics, [or] qualities” extends to intangible properties like its patent status is critically important, as many commentators have recognized. Section 43(a)(1)(B) is frequently litigated and permits liability without requiring a plaintiff to show willful-

ness. Permitting false marking claims to be artfully repackaged under the Lanham Act will allow plaintiffs to make an end run around Congress’s careful limitations on suits for false marking in the Patent and Copyright Acts. By using the Lanham Act, plaintiffs are able to circumvent the limitations Congress imposed under the Patent Act for false marking—thus expanding the pool of plaintiffs who can sue, the range of conduct that can give rise to liability, and the range of remedies that can be imposed far beyond what the Patent Act allows. The scenario is even worse for false copyright marking: under the Federal Circuit’s rule, the Lanham Act provides a civil cause of action for false copyright marking when Congress declined to do so.

This case cleanly tees up the split. As the Federal Circuit observed, the lone, purely legal question this case presents is whether “commercial misrepresentations that a product is ‘patented,’ ‘proprietary,’ and ‘exclusive’ . . . are actionable under Section 43(a)(1)(B) of the Lanham Act.” Pet.App.7a. And had respondents sued in the Second, Sixth, or Ninth Circuit—where statements about a product’s intangible attributes are not actionable—there is no question that their Lanham Act claim would have been dismissed. Instead, petitioner faces a potential federal trial under the Lanham Act. This Court should intervene to put an end to the disparate application of one of the central provisions of federal intellectual property law.

The Federal Circuit’s holding is also wrong. Other than its prohibition on falsehoods about a product’s geographic origin, Section 43(a)(1)(B)’s prohibition textually excludes a product’s intangible traits. The Federal Circuit’s far more expansive reading moreover subverts Con-

gress’s careful limitations on the scope of patent and copyright law and improperly “project[s] the Lanham Act into the province of the Copyright and Patent Acts.” *Ke-hoe*, 796 F.3d at 590. And by extending Section 43(a)(1) to misrepresentations about intangibles the Federal Circuit transforms the provision from one constrained by “its inherently limited wording” that applies “only to certain unfair trade practices prohibited by its text” into the kind of “boundless . . . remedy,” that this Court said that it is *not* in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29 (2003) (citation modified).

This Court should grant certiorari to restore uniformity on this critical and frequently litigated provision of the Lanham Act.

A. Statutory Background

1. The Lanham Act

In 1946, Congress enacted the Lanham Act as a comprehensive federal trademark law to replace a patchwork of weaker laws. *See* S. Rep. No. 100-515, 100th Cong., 2d Sess. at 2 (Sept. 15, 1988); Ethan Horwitz & Benjamin Levi, *Fifty Years of the Lanham Act: A Retrospective of Section 43(a)*, 7 Fordham Intell. Prop. Media & Ent. L.J. 59, 59-63 (1996). Before the Lanham Act, trademark rights were largely governed by state common law and a few narrow federal statutes (the Acts of 1881, 1905, and 1920). Horwitz & Levi, *supra*, at 61-63. The Lanham Act unified and modernized U.S. trademark law: It established a national registration system, allowed enforcement against unregistered marks, and outlawed counterfeit and misleading uses of marks.

Section 43(a) of the Lanham Act created a companion federal cause of action against “passing off” and false advertising. Horwitz & Levi, *supra* at 63-64. As originally enacted, Section 43(a) provided a single cause of action for, as relevant here, making “any false description or representation” in commerce. Pub. L. No. 79-489, § 43(a), 60 Stat. 427, 441 (July 5, 1946). In 1988, Congress—through the Trademark Law Revision Act—overhauled Section 43(a)’s language to codify decades of judicial interpretation and to sharpen its focus on false or deceptive advertising. *See ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 963 n.6 (D.C. Cir. 1990). The statute replaced Section 43(a) in its entirety, swapping the single long paragraph with a two-pronged structure covering both false designation of origin and false advertising. Pub. L. 100-667, § 132, 102 Stat. 3935, 3946 (Nov. 16, 1988).

False designation is addressed by Section 43(a)(1)(A), which makes actionable a false statement which “is likely to cause” among other things, deception as to the “connection” between persons and goods. False advertising is addressed by Section 43(a)(1)(B), which, as relevant here, makes actionable only a false statement which “misrepresents the nature, characteristics, qualities, or geographic origin of . . . [a] person’s goods.” These changes were both material and deliberate, reflecting Congress’s effort to adapt the statute to evolving commercial realities while preserving its core protective purpose. *See* S. Rep. No. 100-515, 100th Cong., 2d Sess. at 1 (Sept. 15, 1988).

Section 43(a) has several unique features. It has been held to impose liability for confusing or deceptive uses without requiring proof of the defendant’s state of mind. *See* 4 J. McCarthy, *Trademarks and Unfair Competition* § 27:51 (5th ed. 2025). It empowers courts to grant both

equitable and legal relief (including injunctive relief, disgorgement of profits, and attorney fees). *See* 15 U.S.C. § 1117(a). And on its face it grants standing broadly to “any person who believes that he or she is likely to be damaged,” which this Court has limited only modestly. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (quoting 15 U.S.C. § 1125(a)(1)).

Nonetheless, this Court has emphasized that Section 43(a) is not “boundless.” *Dastar*, 539 U.S. at 29. The statute is “inherently limited” by its text. *Id.* For instance, in *Dastar*, the Court held that the text of Section 43(a)(1)(A) cannot be “stretched” to reach false claims of authorship. *Id.* at 31-32. Extending the phrase “origin of goods” to reach falsehoods about the “the person or entity that originated the ideas or communications” the goods embody or contain would “not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.” *Id.* The Court thought it especially important not to construe the Lanham Act to create liability for copying ideas, because copyright law “addresses that subject specifically.” *Id.* at 33-35.

2. The Patent Act’s Prohibition on False Marking

U.S. patent law has long forbidden falsely claiming patent rights on products. Congress first outlawed false patent marking in the Patent Act of 1842. Patent Act of 1842, Pub. L. No. 27-288, § 5, 5 Stat. 543, 544. The false marking law was adopted to prevent companies from falsely claiming patent protection to gain an unfair market advantage or mislead consumers. *See id.*

Today the false marking statute is codified at 35 U.S.C. § 292. Section 292(a) makes it a crime to knowingly mislead the public by affixing or using any patent-related

designation—such as a patent number, the word “patented,” “patent pending,” or a patentee’s name—on a product, its packaging, or in its advertising. 35 U.S.C. § 292(a). Section 292(a) is not limited to stamping the word “patented” on a product’s surface. It prohibits anyone from “us[ing] in advertising in connection with any unpatented article”—including on the article itself, its container or packaging, or other advertisement of the patented article—a false or misleading patent notice, with “the purpose of deceiving the public.” 35 U.S.C. § 292(a). Thus, a written claim in product literature, catalogues, or other marketing materials that an item is “patented” when it is not falls squarely within the statute’s ambit—even if the item itself bears no patent marking.

Before 2011, private parties could sue under the Patent Act for statutory penalties of up to \$500 for each offense, 35 U.S.C. § 292 (2006), but the 2011 America Invents Act eliminated private “qui tam” actions to curb abusive lawsuits. Pub. L. No. 112-29, § 16, 125 Stat. 284, 328-29 (2011). Today, the United States may pursue criminal penalties under the Patent Act, and violations are punishable by a fine of up to \$500 per offense. 35 U.S.C. § 292(a), (c). Separately, §292(b) (added in 2011) provides a civil remedy to businesses or competitors who have suffered a competitive injury from another’s false marking. 35 U.S.C. § 292(b) (2011). However, their recovery is limited to actual damages. *Id.*

3. The Copyright Act’s Prohibition on False Marking

Copyright law likewise forbids falsely asserting that a work is protected. 17 U.S.C. § 506(c). This false-notice ban has deep roots. Congress first imposed penalties for false copyright notices in 1802. Act of Apr. 29, 1802, ch.

36, § 4, 2 Stat. 171. The false notice statute provides that “[a]ny person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false” (or who distributes or imports such falsely marked articles) shall be fined up to \$2,500. 17 U.S.C. § 506(c). In other words, affixing a false “©” notice or any words suggesting copyright protection to a work one knows is not copyrighted (for example, a public-domain work or unregistered creation) is a criminal offense under Section 506(c). Unlike the patent false-marking law, the copyright false-notice law has no private cause of action; it is purely a criminal statute.

B. Factual and Procedural Background

1. Crocs is one of the most recognizable shoe brands in the world.



Crocs Clogs. D. Ct. Dkt. 45-3.

Shortly after the brand’s launch in the early 2000s, a wave of knock offs of Crocs’ designs began pouring into

the United States. One such imitator was Dawgs, a brand launched by Respondent Double Diamond, a Canadian corporation. In 2006, Crocs sued Double Diamond for patent infringement. That litigation was stayed three times while other parallel litigation unfolded nationwide.

In 2016, after an unsuccessful attempt to challenge the validity of Crocs' patents in parallel litigation, respondents asserted a Lanham Act counterclaim against Crocs, arguing that Crocs violated Section 43(a) of the Lanham Act by falsely describing the foam material that Crocs shoes are made from as "patented," "proprietary," and "exclusive." (The foam material is not patented; Crocs maintains that the material is proprietary and exclusive. Pet.App.14a-15a.) In 2017, Dawgs sought leave to assert a false marking claim under the Patent Act for the very same conduct, but withdrew the request after the case was stayed for several years during U.S.A. Dawgs' bankruptcy proceedings.¹

2. In 2021, the district court entered summary judgment for Crocs on respondents' Lanham Act counterclaim. The district court noted that this Court has warned against reading the Lanham Act as "as co-extensive with patent or copyright laws" and has directed that the law must be "limited to its text and common law foundations."

¹ See Dawgs' Motion for Leave to File Third Amended Answer and Counterclaims, *Crocs, Inc. v. Effervescent, Inc.*, No. 1:06-cv-00605 (D. Colo. Sept. 27, 2017), ECF No. 677 (seeking leave to assert false patent marking); Motion For Leave To File Third Amended Answer And Counterclaims Against Crocs And First Amended Complaint Against The Individual Defendants at 3, *Crocs, Inc. v. Effervescent, Inc.*, No. 1:06-cv-00605 (D. Colo. Aug. 28, 2020), ECF No. 849 (seeking leave to assert CCPA deceptive trade practices claim; abandoning false patent marking claim).

Pet.App.26a. The district court concluded that Dawgs’ allegation that Crocs falsely stated that its shoes were made of “patented,” “proprietary,” and “exclusive,” material was “nothing more than a false designation of authorship” not actionable under the Lanham Act. Pet.App.27a. “[E]ven assuming that Crocs misrepresented” Croslite “as a proprietary and exclusive foam . . .[,] that is not enough for a Lanham Act false advertising claim under [Section 43](a)(1)(B).” Pet.App.27a.

3. The Federal Circuit reversed. Merely misrepresenting a product’s inventorship, the Federal Circuit held, can violate Section 43(a)(1)(B)’s prohibition on misrepresentations as to “the nature, characteristics, qualities, or geographic origin” of a product. Pet.App.11a-12a. The court acknowledged that it was splitting with other circuits, explaining that other “courts have taken the approach that ‘nature, characteristics, [or] qualities’ in Section 43(a)(1)(B) relate to ‘the characteristic of the good itself,’ *not intangibles involving the source of ideas embodied in a product*, like product authorship.” Pet.App.7a n.3 (emphasis added) (citing *Kehoe*, 796 F.3d at 590 and *Sybersound*, 517 F.3d at 1144).

The Federal Circuit recounted Dawgs’ allegations: (1) that Crocs used the falsehood that Croslite is patented, proprietary, or exclusive “to ascribe characteristics that go to the nature and qualities of Croslite,” Pet.App.11a; (2) that “Crocs’ statements referring to the closed-cell resin that [it] call[s] ‘Croslite’ as ‘exclusive,’ ‘proprietary,’ and/or ‘patented’ causes customers to believe that ‘Crocs’ molded footwear is made of a material that is different than any other footwear,” Pet.App.11a; and (3) that Crocs’ promotional materials “deceive[d] consumers and poten-

tial consumers into believing that all other molded footwear . . . is made of inferior material compared to Crocs’ molded footwear.” Pet.App.11a-12a. The Federal Circuit “agree[d] with Dawgs that these allegations about Crocs’ advertisement statements [were] directed to the nature, characteristics, or qualities of Crocs’ shoes.” Pet.App.12a.

The Court summarized its holding succinctly: “We hold that . . . where a party falsely claims that it possesses a patent on a product feature and advertises that product feature in a manner that causes consumers to be misled about the nature, characteristics, or qualities of its product” that party violates Section 43(a)(1)(B). Pet.App.12a. Despite the acknowledged circuit conflict, the Federal Circuit denied rehearing en banc.

REASONS FOR GRANTING THE PETITION

This case is the perfect vehicle to resolve a critically important, 3-2 circuit split over whether the Lanham Act’s Section 43(a)(1)(B) cause of action covers misrepresentations about a good’s intangible properties. Three circuits squarely hold that the Lanham Act’s prohibition on “misrepresent[ations]” as to “nature, characteristics, [or] qualities” does not extend to a good’s intangible traits, like patent status. But the Fourth Circuit and now the Federal Circuit hold that the Lanham Act reaches beyond misrepresentations about a good’s physical and functional characteristics to encompass intangible properties. These circuits thus let plaintiffs impose liability for false patent marking—and myriad other misrepresentations—that have nothing to do with a good’s actual nature, characteristics, or qualities. The Federal Circuit below acknowledged this split, yet denied a petition for rehearing en banc to correct it. Only this Court can restore uniformity.

The question presented is substantial, recurring, and cleanly presented. The Federal Circuit reinstated respondents’ Section 43(a)(1)(B) claim based on its holding that Section 43(a)(1)(B) can reach misrepresentations about intangibles. The Federal Circuit—the central forum for intellectual property litigation—now applies an expansive and erroneous view of the Lanham Act’s reach that threatens to destroy the careful balances Congress struck in regulating false marking under the Patent and Copyright Acts. This Court should grant certiorari to eliminate this divide over the correct interpretation of this constantly litigated federal statute.

I. The Circuits Are Divided 3-2 Over The Lanham Act’s Application to Misrepresentations About Intangibles

Three circuits hold that the Lanham Act does not extend to misrepresentations about intangible features of a product, like its intellectual property status. Two circuits, including the Federal Circuit below, have held the opposite. If this Court does not intercede, the circuit split will persist, resulting in starkly inconsistent outcomes based solely on the circuit with jurisdiction over the suit.

1. The Second, Sixth, and Ninth Circuits hold that the Lanham Act’s false advertising cause of action does not reach statements that concern a product’s intangibles, like its intellectual property status.

The Ninth Circuit held that misrepresentations about the “copyright licensing status” of karaoke recordings are not misrepresentations about their “nature, characteristics, and qualities.” *Sybersound*, 517 F.3d at 1144. “[T]he nature, characteristics, and qualities of karaoke recordings under the Lanham Act are more properly construed to mean characteristics of the good itself, such as the original song and artist of the karaoke recording, and the

quality of its audio and visual effects.” *Id.* A contrary rule, the Ninth Circuit explained, would allow competitors to litigate the validity of copyrights even though they are “third party strangers under copyright law.” *Id.*

The Ninth Circuit thus dismissed Lanham Act claims alleging that certain producers and sellers of karaoke recordings misrepresented to their customers “that their karaoke records [were] 100% licensed and that all applicable royalties [had] been paid.” *Id.* at 1141. Even if the statements were “misrepresentations” they did not go to the “nature, characteristics, or qualities of the karaoke products.” *Id.* at 1144.

Courts applying *Sybersound* have recognized that it leaves no ambiguity that intangible properties are beyond the reach of Section 43(a)(1)(B). *Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1307 (Fed. Cir. 2009); *Micro/sys, Inc. v. DRS Techs., Inc.*, No. CV 14-3441 DMG (CWx), 2015 WL 12748631, at *2-3 (C.D. Cal. Feb. 18, 2015). In *Baden Sports, Inc. v. Molten U.S.A., Inc.*, the defendant manufactured basketballs that it advertised as “innovative,” even though it had in effect copied the plaintiff’s patented design. 556 F.3d at 1303-04. The Federal Circuit rejected plaintiff’s claim, applying *Sybersound* to a case originating from the Ninth Circuit, and reasoning that “Section 43(a)(1)(B) must refer to the ‘the characteristics of the good itself.’” *Id.* at 1307 (quoting *Sybersound*, 517 F.3d at 1144). The court reasoned that the word “innovative” “indicates, at most, that its manufacturer created something new.” *Id.* Such a misrepresentation “is not a nature, characteristic, or quality, as those terms are used in Section 43(a)(1)(B) of the Lanham Act.” *Id.*

The Sixth Circuit follows the same rule: “Absent a false statement about geographic origin, a misrepresentation is actionable under [Section 43(a)(1)(B)] only if it misrepresents the ‘characteristics of the good itself’—such as its properties or capabilities.” *Kehoe*, 796 F.3d at 590 (quoting *Sybersound*, 517 F.3d at 1144). “The statute does not encompass misrepresentations about the source of the ideas embodied in the object (such as a false designation of authorship); to hold otherwise would be to project the Lanham Act into the province of the Copyright and Patent Acts.” *Id.*

Applying that rule, the Sixth Circuit rejected a false advertising claim that alleged that a lighting manufacturer had copied another manufacturer’s products and falsely claimed the cloned products as its own. *Kehoe*, 796 F.3d at 580, 584. Though the plaintiff claimed that misrepresenting the manufacturer of a product is a misrepresentation about “the nature, characteristics, qualities, or geographic origin” of the product, the Sixth Circuit disagreed. *Id.* at 589-90. “[A] misrepresentation about the source of the ideas embodied in a tangible object (such as a misrepresentation about the author of a book or the designer of a widget) is not a misrepresentation about the nature, characteristics, or qualities of the object.” *Id.* at 590. The claims were not actionable because Section 43(a)(1)(B) “does not impose liability for misrepresenting the intellectual progenitor of a tangible product.” *Id.*

The Second Circuit follows a similar approach. In *Forschner Grp., Inc. v. Arrow Trading Co. Inc.*, the Second Circuit rejected a claim brought by an importer of pocket knives from Switzerland, designated “Swiss Army knives,” against a distributor of knives manufactured in

China, also designated “Swiss Army,” alleging a Section 43(a)(1)(B) violation because the phrase “Swiss Army” can be misleading as to a product’s nature, characteristics, and qualities. 30 F.3d 348, 350, 353 (2d Cir. 1994). The Court held that even if consumers associate the phrase “Swiss Army” with goods of a superior quality, that cannot be enough to give rise to liability under Section 43(a)(1)(B). *See id.* at 357. No “system of grade, standard, or regulation” is “employed as a touchstone for the quality” of Swiss Army knives. *Id.* And the “absence of any general and definite standards of [Swiss Army knife] quality” means it cannot form the basis for a Section 43(a)(1)(B) claim. *Id.* (quoting *California Apparel Creators v. Wieder of Cal.*, 162 F.2d 893, 901 (2d Cir. 1947)).

2. In direct conflict, the Federal Circuit below applied Tenth Circuit law to hold that Lanham Act false advertising claims may be premised on misrepresentations about intangibles—here, patent status. The Federal Circuit cited nothing distinctive about Tenth Circuit law to support its conclusion, suggesting that its reading would apply to all future Lanham Act cases arising from district courts in circuits that likewise lack contrary precedent. The Federal Circuit acknowledged that the Sixth and Ninth circuits confine Section 43(a)(1)(B) to “characteristics of the good itself” and not to legal or conceptual attributes like inventorship or patent-coverage. Pet.App. 7a n.3 (citing *Kehoe*, 796 F.3d at 590; *Sybersound*, 517 F.3d at 1144). The panel nevertheless held that describing Croslite as “patented,” “proprietary,” or “exclusive,” could give consumers the false impression that Crocs “is made of a material that is different than any other footwear”— and therefore “misrepresents the nature, characteristics, or qualities” of a product. Pet.App. 11a-12a. By extending Section 43(a)(1)(B) to encompass patent-

status claims, the Federal Circuit not only misread the statute's text and common-law origins but, more importantly, it further fragmented Lanham Act jurisprudence nationwide.

In reaching its result, the Federal Circuit joined the Fourth Circuit, which has also held that intangible product attributes can give rise to a Section 43(a)(1)(B) claim. In *Belmora LLC v. Bayer Consumer Care AG*, the Fourth Circuit held that passing off can support a false advertising claim under Section 43(a)(1)(B). 819 F.3d 697, 712-13 (4th Cir. 2016). There, a foreign manufacturer of over-the-counter pain relief products with a valuable trademark in Mexico sued an American company that used a copycat mark to sell the same product in the United States. *Id.* at 701-03. The foreign manufacturer brought Lanham Act claims accusing the American company of attempting to deceive Mexican-American consumers into thinking they were purchasing its product. *Id.* at 701-02.

The Fourth Circuit easily concluded that the manufacturer had a good Section 43(a)(1)(A) claim for false association. *Belmora*, 819 F.3d at 711. But the Fourth Circuit *also* held that the manufacturer had a valid Section 43(a)(1)(B) claim as well. *Id.* at 712-13. The Fourth Circuit recognized that the manufacturer's false advertising claim was "perhaps not 'typical'" but nonetheless found that permitting it to proceed "advance[d] the Act's purpose of 'making actionable the deceptive and misleading use of marks.'" *Id.* at 712 (citing 15 U.S.C. § 1127). The court explained that because the American company's misleading mark could lead consumers to believe they were purchasing the foreign manufacturer's product, the deceptive mark constituted a misrepresentation as to the

“nature, characteristics, qualities, or geographic origin,” of its products. *Id.* at 712-13.

3. District courts across the country have taken sides in this split. Some have followed the Sixth and Ninth Circuits in rejecting Lanham Act false advertising claims premised on misrepresentations about intangibles instead of characteristics of the good itself—such as its properties or capabilities. Citing Sixth Circuit precedent, a Massachusetts district court dismissed a claim that a furniture company violated the Lanham Act by representing that its products were “exclusive”—*i.e.*, sold only by the defendant—because such statements “do not relate to the properties, capabilities, or characteristics of the goods.” *Williams-Sonoma, Inc. v. Wayfair Inc.*, 652 F.Supp.3d 216, 223-24 (D. Mass. 2023). The district court in this case similarly applied the Ninth Circuit’s rule to hold respondents claims not actionable. *Id.* at 224-25.

Others, like the decision below, have adopted the contrary position, holding that misrepresentations about intangible attributes are actionable under Section 43(a)(1)(B). For instance, in *Roof Maxx Technologies, LLC v. Holsinger*, one district court held—without citing *Kehoe*—that Section 43(a)(1)(B) provided a cause of action for a roofing company’s allegedly false statement that its product was patented, because that statement went “directly to the nature, characteristics, and qualities” of the product.” No. 2:20-cv-03154, 2021 WL 3617153, at *9 (S.D. Ohio Aug. 16, 2021). And in *Abarca Health, LLC v. PharmPix Corp.*, a district court concluded that *Dastar* did not preclude a Section 43(a)(1)(B) claim premised on the defendant’s allegedly false statements that its software application was “proprietary” and therefore “innovative.” 915 F.Supp.2d 210, 221-22 (D.P.R. 2012).

* * * * *

The courts of appeals are divided over whether Section 43(a)(1)(B) of the Lanham Act reaches misrepresentations about a product’s intangible attributes—like its intellectual property status, authorship, or inventorship. Three circuits—the Sixth, Ninth, and Second—have squarely held that Section 43(a)(1)(B) is limited to misstatements about tangible qualities of a product, such as its features, capabilities, or geographic origin. Two others—the Fourth Circuit and the Federal Circuit (applying Tenth Circuit law)—have concluded the opposite, holding that false claims about patent status or product heritage can constitute misrepresentations about a product’s “nature, characteristics, or qualities.”

This conflict reflects a fundamental disagreement about the statute’s scope—one that affects whether false advertising claims rise or fall based solely on where they are litigated. Only this Court can resolve this conflict over the correct interpretation of one of the most widely litigated federal statutes. Until it does, litigants will face dramatically different outcomes depending on the circuit in which they are sued—undermining the Lanham Act’s uniformity and predictability, and inviting exactly the kind of forum shopping the federal system is meant to prevent.

II. The Question Presented Is Important, Recurring, and Squarely Presented

1. The question presented is exceptionally important. The decision below subverts Congress’ careful statutory scheme and permits expansive and speech-stifling liability.

The dangers of the Federal Circuit’s expansive interpretation are particularly acute given that the Lanham Act is uniquely powerful and easy to invoke. Section 43(a)(1)(B) has been held to impose liability for false advertising without requiring any proof of the defendant’s state of mind. And it authorizes expansive remedies, including injunctions, disgorgement, damages, and attorneys’ fees. *See* 15 U.S.C. § 1117(a); 4 J. McCarthy, *supra*, § 27:51. It also permits suit by virtually any commercial plaintiff who claims to be “likely” to suffer harm—including direct competitors who may weaponize Lanham Act claims not to redress deception, but to gain litigation leverage or suppress competition. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129, 131-32 (2014). The Federal Circuit’s expansive reading exposes businesses to unpredictable and costly litigation over commonplace marketing language, incentivizes strategic lawsuits aimed at inflicting competitive harm, and distorts the careful balance Congress struck between robust enforcement and defined statutory limits.

These risks are not hypothetical. Each year, plaintiffs file approximately 4,500 cases under Section 43 of the Lanham Act. *Lex Machina Copyright and Trademark Litigation Report 2021*, Lex Machina at 6, 31 <https://perma.cc/M4KY-88HN>. Many of these suits involve commercial competitors and false advertising claims under § 43(a)(1)(B). If the decision below stands, it will give rise to an entirely new category of Lanham Act litigation based on alleged misrepresentations about legal status or intangible product features. Given the low threshold for pleading harm, the broad availability of remedies, and the high costs of discovery and defense, such suits are easily weaponized to burden rivals and deter competition, even when the underlying claim is meritless.

Courts and litigants need a clear, administrable rule: Section 43(a)(1)(B) reaches misstatements about a product’s characteristics or geographic origin—not legal entitlements, intellectual property status, or generalized marketing puffery.

The Federal Circuit’s rule also chills speech. Under the Federal Circuit’s rule, *any* statement that could potentially be construed as bearing on consumer perceptions of a product’s nature, characteristics, or qualities could give rise to Section 43(a)(1)(B) liability. This rule leaves advertisers to guess at which sorts of statements will open them up to Lanham Act liability. A company’s inadvertently false statement that it pays above the minimum wage could give rise to a Section 43(a)(1)(B) violation because consumers may believe that higher-paid workers produce better products. And for companies that make or license patented products, the Federal Circuit’s holding threatens to turn every expired patent, invalidated patent, and marking mistake into a potential weapon lying at hand for competitors and plaintiffs’ attorneys to wield against them.

Permitting false advertising claims based on misrepresentations about patent status would gut the critical limitations Congress imposed on false patent marking suits. In response to an explosion of abusive litigation following *Forest Grp., Inc. v. Bon Tool Co.*, 590 F.3d 1295 (Fed. Cir. 2009)—which authorized up to \$500 in penalties for every falsely marked item—Congress enacted the America Invents Act (AIA) to “put to an end” to such abuse. 157 Cong. Rec. H4426 (2011). The AIA eliminated qui tam suits, required plaintiffs to show competitive injury, and limited remedies to actual damages. Pub. L. No. 112-29, § 16. The result was a dramatic and intended drop

in filings. But the decision below allows plaintiffs to circumvent those reforms entirely by rebranding false marking claims as Lanham Act claims, reintroducing the very abusive suits Congress eliminated.

The risk of circumvention is not limited to patent law. The Copyright Act prohibits false copyright marking, but provides only for criminal enforcement, and only upon proof of fraudulent intent. 17 U.S.C. § 506(c). By contrast, the Lanham Act has been held not to require proof of fraudulent intent and authorizes broader remedies—including injunctions and disgorgement of profits. *See* 4 J. McCarthy, *supra*, § 27:51. Allowing plaintiffs to repackage false patent or copyright marking claims under the Lanham Act would erase these carefully crafted statutory limits and distort the balance Congress struck across intellectual property law.

Many commentators have recognized the Federal Circuit’s decision below as a watershed with serious consequences for patent law. One commentator warned that the ruling has effectively created “two different statutes” governing the same conduct—“with different elements of proof and different remedies”—by allowing the Lanham Act to reach claims already addressed by the Patent Act. Bryan P. Collins, *Is the Federal Circuit Breathing New Life Back Into False Patent Marking Claims?*, Pillsbury (Oct. 9, 2024), <https://perma.cc/W5N8-GV25>. Another noted that the decision “may be opening a window under the Lanham Act” to bring claims foreclosed by the Patent Act. Jordan Cordani, *False Patent Marking Claims Find New Home in Lanham Act*, Law360 (Oct. 30, 2024), <https://perma.cc/L78Q-G8QR>. Other commentators have reached the same conclusion.² It is difficult to imagine an

² Dennis Crouch, *Distinguishing Dastar: False Patent Marking*

issue that could be more consequential for companies that sell patented products.

2. This case is the ideal vehicle to resolve the circuit split. The issue was squarely presented and decided by both courts below. This case presents a single question of law, without record disputes or antecedent issues that might prevent its review. No dispute about the factual record would prevent this Court from deciding the question presented—indeed, both the district court and the Federal Circuit found their (conflicting) interpretations of the scope of the Lanham Act to be outcome determinative.

III. The Decision Below Is Incorrect

As this Court has recognized, the Lanham Act must be applied according to its statutory text, not as a sweeping “codification of the overall law of unfair competition,” that extends into patent or copyright domains. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29 (2003) (quoting 4 J. McCarthy, *Trademarks and Unfair Competition* § 27:7, p. 27-14 (4th ed. 2002)). The statute

Claims Get New Life Under the Lanham Act, Patently-O (Oct. 4, 2024), <https://perma.cc/XCE5-J4YA> (characterizing the decision as “breath[ing] new life into false patent marking claims”); Jeffrey Ratinoff, *The Federal Circuit Breathes New Life Into False Patent Marking Claims via Section 43(a) of the Lanham Act*, SpencerFane (Oct. 16, 2024), <https://perma.cc/H4PC-NC88> (characterizing the decision as “effectively reviv[ing] a private actor’s right to bring a cause of action for false marking”); Jeffrey Ratinoff, *Patent Marking Steps After Fed. Circ. Opens Lanham Act Door*, Law360 (Nov. 8, 2024), <https://perma.cc/4JX6-68XJ> (similar); Marissa C. Truskowski et al., *Crocs Versus Dawgs: The Federal Circuit Holds That Falsely Stating a Product is “Patented” Can Lead to A False Advertising Claim*, 37 Intellectual Property & Tech. L.J. 1, 1 (2025) (characterizing the decision as “provid[ing] a new avenue for false patent marking claims”).

“appl[ies] only to certain unfair trade practices prohibited by its text.” *Id.* Section 43(a)(1)(B)’s text, structure, history, and purpose establish that it does not reach misrepresentations about a product’s intangible attributes.

1. Text. Section 43(a)(1)(B) makes actionable only “false or misleading representation[s] of fact” which “misrepresent[] the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.” 15 U.S.C. § 1125. In ordinary English, the words “nature,” “characteristics,” and “qualities” refer to tangible attributes.³ They refer to an item’s properties—what it is made of, how it works, or what type of item it is. If someone asked, “What are that product’s characteristics?,” no one would think they were asking about its intellectual property status; they would think they were asking whether it is plastic or steel, a beverage or a chemical agent. The same would hold if someone asked about its “nature” or “qualities.” In everyday use, these terms denote observable, measurable traits—weight, texture, performance—not intangibles like origin or patent status.

The remainder of the sentence confirms that “nature,” “characteristics,” and “qualities” bear their everyday meaning by separately listing “geographic origin”—a purely intangible attribute—apart from those three

³ Dictionary definitions reflect this ordinary understanding. A product’s “nature” is “the inherent and inseparable combination of properties” that “giv[e] it its fundamental character.” *The Compact Oxford English Dictionary* 247 (2d ed. 1992). A product’s characteristics are the “propert[ies]” that “distinguish[] it.” *Webster’s New International Dictionary* 451 (2d ed. 1954). And a product’s qualities are its “special feature[s] or characteristic[s].” *The Compact Oxford English Dictionary*, *supra* at 974.

terms. Were “nature,” “characteristics,” and “qualities” already meant to encompass intangibles, Congress would have omitted “geographic origin” as redundant. “A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Hibbs v. Winn*, 542 U.S. 88, 101 (2004). The separate inclusion of “geographic origin” makes clear that “nature,” “characteristics,” and “qualities” refer only to a product’s tangible traits.

Had Congress intended to impose Lanham Act liability for *any* false or misleading statement about a product in commercial advertising—regardless of whether it concerned the product’s tangible attributes—it could have done so in far simpler terms. It could have prohibited all misrepresentations “about a product,” full stop. Instead, Congress used narrowly tailored language to confine liability to falsehoods that speak to a product’s properties or provenance. Reading Section 43(a)(1)(B) to sweep in any statement that might influence consumer perception untethers the statute from its text and transforms it into an open-ended unfair competition tort—precisely what this Court has warned against. *See Dastar*, 539 U.S. at 29.

Structure. Section 43(a) is divided into two distinct prongs, each addressing a different species of unfair competition. Subsection (A) targets confusion about certain intangibles such as a product’s source, sponsorship, or approval—claims that typically arise in trademark or false endorsement contexts. Subsection (B), by contrast (save “geographic origin”), addresses false advertising that misrepresents the tangible, intrinsic qualities of a product—what it is or how it works. That Congress’s decision to separate these causes of action reflects a deliberate structural choice to distinguish claims about origin,

branding, or affiliation from claims about the product itself. Courts and commentators alike recognize that these two prongs serve different functions: (A) protects against confusion as to who stands behind a product; (B) protects against misstatements about the product’s properties or performance. *See* 4 J. McCarthy, *supra*, § 27:9. The Federal Circuit’s interpretation creates significant redundancy and overlap between the two provisions: Every false sponsorship claim can now also be brought as a false advertising claim.

Extending Section 43(a)(1)(B) to cover misrepresentations about intangible attributes like patent or copyright status would displace the carefully calibrated remedies Congress enacted in the Patent Act’s false marking statute, 35 U.S.C. § 292, and in the false copyright notice statute, 17 U.S.C. § 506(c). This Court has repeatedly emphasized that the Lanham Act serves a role distinct from patent or copyright. *See TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 34 (2001) (“The Lanham Act does not exist to reward manufacturers for their innovation . . . that is the purpose of the patent law.”).

Further, as this Court held in *Dastar*, courts must not construe the Lanham Act to create “patent and copyright” protections beyond those Congress delineated in the patent and copyright acts. 539 U.S. at 37. There, the Court rejected the idea that Section 43(a)(1)(A)’s reference to the “origin” of goods could be stretched to mean the originator of ideas or expression—holding that such a reading would impermissibly overlap with copyright law and upset the balance struck in the Copyright Act. *Id.* at 33-34. The same principle applies here. Just as in *Dastar*, the Lanham Act must not be interpreted in a manner that duplicates or overrides the protections—and limits—that

Congress has embedded in the intellectual property laws. But that is just what Dawgs sought to do here: It filed a (meritless) Lanham Act claim while attempting to bring claims under the Patent Act for the very same conduct.

The practical consequences of reading Section 43(a)(1)(B) to reach intangibles demonstrate that reading cannot be right. If Section 43(a)(1)(B) is construed to reach statements about any intangible—such as patent status, copyright ownership, exclusivity, proprietary technology, or tradability—then virtually any product boast, marketing phrase, or legal claim becomes a potential Lanham Act violation. Claims that a product is “exclusive,” “innovative,” or “proprietary” are routine in modern advertising, and often reflect puffery, opinion, or legal conclusions, not statements about a product’s inherent traits. Allowing Lanham Act liability to attach to such representations would open the floodgates: Any claim related to a product’s intangibles could lead to a false advertising claim or counterclaim, and such claims would likely become routine, particularly in intellectual property litigation. Worse still, it would invite plaintiffs to relabel false marking or copyright notice claims as false advertising suits to obtain broader remedies under the Lanham Act. That outcome would chill legitimate commercial speech and collapse the statutory boundaries Congress carefully drew between trademark, patent, and copyright protections. *See supra* pp. 29-30.

History. The history of Section 43(a) reinforces this reading. The original text of the Lanham Act made “any false description or representation” actionable. Pub. L. No. 79-489, Title VIII, § 43(a) (July 5, 1946). In 1988, Congress narrowed Section 43(a) so that only those false

statements which “misrepresent[] the nature, characteristics, qualities, or geographic origin” of goods are actionable. By allowing a Section 43(a)(1)(B) claim to proceed on an allegedly false statement that is not itself about “the nature, characteristics, qualities, or geographic origin” of the product—in other words, that is not about the “characteristics of the good itself,” *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1143-44 (9th Cir. 2008)—the Federal Circuit effectively wrote the 1988 amendments out of existence.

2. The Federal Circuit’s contrary conclusion is unpersuasive. The Federal Circuit held “that a cause of action arises from Section 43(a)(1)(B) where a party falsely claims that it possesses a patent on a product feature and advertises that product feature in a manner that causes consumers to be misled about the nature, characteristics, or qualities of its product.” Pet.App.12a.

That indirect-effects interpretation of Section 43(a)(1)(B) is textually untenable. The statute provides that the “false or misleading description of fact, or false or misleading representation of fact” at issue must *itself* “misrepresent[] the nature, characteristics, qualities, or geographic origin” of the goods in question. 15 U.S.C. § 1125(a)(1). The statutory text provides absolutely no room to draw an attenuated causal chain from a false statement that is not about product characteristics within the ambit of Section 43(a)(1)(B).

The Federal Circuit’s indirect-effects reading of Section 43(a)(1)(B) also renders the statute effectively boundless. Under the Federal Circuit’s logic, *any* false or misleading statement—so long as it might indirectly cause a consumer to form a mistaken belief about a product’s nature, characteristics, or qualities—would fall within the

statute’s reach. That includes statements about patent or copyright status, company reputation, legal ownership, or business practices, so long as some consumer might *infer* something favorable about the product’s performance. It would be trivially easy for plaintiffs to allege that statements about such intangible properties affected their perception of the tangible qualities of the product, and thereby circumvent limitations on false copyright and patent marking actions. But the Lanham Act is not a general-purpose truth-in-marketing regime untethered from specific subject matter. Congress did not grant courts open-ended authority to police all misleading statements in commerce; it narrowly targeted misrepresentations *about a product’s actual tangible properties—its nature, characteristics, qualities—or its geographic origin*.

If downstream consumer inferences were enough to render misstatements about intangible properties actionable, then any legal, business, or reputational claim could trigger Lanham Act liability based on how consumers might interpret it. That would eviscerate the statute’s text, eliminate any limiting principle, and transform Section 43(a)(1)(B) into a catch-all that swallows not only the Patent and Copyright Acts, but also large swaths of commercial speech (including statements about a company’s values, sustainability goals, or financial strength). Nothing in the statutory text—or this Court’s precedent—permits such an outcome.

In sum, the Federal Circuit’s interpretation of Section 43(a)(1)(B) cannot be squared with the text, structure, or purpose of the Lanham Act. It disregards the statute’s plain language, blurs the careful distinctions Congress drew between different species of unfair competition, and permits expansive liability untethered to the

product-specific falsehoods the statute actually regulates. It creates intolerable overlap with intellectual property regimes that Congress crafted to operate with different rules, limits, and remedies. And it opens the door to unchecked litigation over generalized marketing language that has never been the Lanham Act's concern. This Court has consistently declined to read the Lanham Act as a catch-all for commercial misstatements divorced from trademark principles or product-specific deception. *E.g.*, *Dastar*, 529 U.S. at 28-29; *TrafFix*, 532 U.S. at 34-35. It should do so again here. Section 43(a)(1)(B) does not reach claims about patent status or other intangibles—and the decision below should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

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