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Federal Circuit Rules that ITC Lacks Regulatory Power Over Digital Imports

By Whitney Florian, J.D. Candidate 2017 | November 20, 2015

On November 10, 2015, the Federal Circuit ruled in *ClearCorrect Operating, LLC v. ITC* ("*ClearCorrect*") that the U.S. International Trade Commission ("ITC") does not have jurisdiction to regulate digital data imports. The court held that the ITC's regulatory power is limited to "material things," and electronically transmitted digital data is not a "tangible good."

The decision overturned the ITC's April 2014 finding that ClearCorrect was barred from importing data sets converted from scanned models of patients' teeth. The ITC had found that ClearCorrect infringed seven of Align Technology's patents by using the data sets to create dental aligners, a method to reposition teeth, via 3D printing.

The appeals court explained that Section 337 of the Tariff Act of 1930 was enacted to stop the importation of articles involved in unfair trade practices. "Articles" was defined by the court as tangible, "material things," which do not include non-physical articles such as electronic transmissions of data sets.

ClearCorrect has important implications for the software, publishing, and entertainment industries in addition to the breadth of the ITC's jurisdiction. While the *ClearCorrect* holding is supported by high-tech and internet-related companies, the entertainment industry saw the ITC's April 2014 finding as an effective anti-piracy tool. Music, film, e-book, and software piracy mostly occurs by means of digital download and streaming rather than importation of physical articles. Absent regulation or case law to the contrary, *ClearCorrect* may provide infringers with an avenue to bypass anti-piracy laws and ITC jurisdiction by electronically transmitting digital data and using 3D printing to create products across international borders. This leaves patent and copyright holders with the cumbersome task of enforcing their rights in U.S. District Courts.

In her dissent, Federal Circuit Judge Pauline Newman argued that Congress intended Section 337 to "reach 'every type and form' of unfair competition arising from importation." According to Judge Newman, excluding electronic transmissions and downloads from the ITC's jurisdiction would "lock the [ITC] into technological antiquity" and render "Section 337 incapable of performing its statutory purpose." Judge Newman asserted that the law should be expanded "to encompass today's forms of infringing technology."

Given the weight of Judge Newman's dissent in the 2-1 split Federal Circuit decision and its implications for key industries, there may be a petition for rehearing *en banc*.