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Federal Circuit panel decision 2-1 reverses U.S. International Trade Commission determination that it has authority to regulate the importation of digital data

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In *ClearCorrect v. ITC*, issued on November 10, 2015, the Federal Circuit interpreted the term "articles" as used in Section 337 to be tangible, physical items. Accordingly, electronic transmissions were held to be outside the scope of litigable subject matter—reversing the Commission's earlier opinion in *In re Certain Digital Models*, Inv. No. 337-TA-833 (Apr. 3, 2014).

Background

The dispute was based on a complaint filed by Align Technology who makes Invisalign® clear dental aligners. The respondents, ClearCorrect US and ClearCorrect Pakistan, were accused of gathering dental information from patients in the U.S., exporting that information to Pakistan for processing, and importing that information back into the U.S. to create competing dental aligners. The Commission ultimately found in its final determination that the imported data was an "article" within the meaning of Section 337 that contributed to the infringement of the claimed methods, and issued a cease-and-desist order against ClearCorrect. Both parties appealed this finding to the Federal Circuit.[1]

The Majority Reverses the Commission's Decision

The majority opinion, written by Chief Judge Prost, adopted the position that the Commission lacked jurisdiction to hear this dispute. Using *Chevron* deference, the majority concluded that the term "article" did not include everything that "may be traded in commerce or used by consumers" and instead limited the term to a "material thing," which did not include digital data. Based upon this conclusion there was no need to visit the second *Chevron* step. However, even under the *Chevron* second step, the Court found that the Commission's construction of the statute did not warrant deference because it was inconsistent with the dictionary definitions, statutory context, and legislative history.

The Impact of *ClearCorrect* on the Industry

The Commission is no longer in a position to regulate unfair acts of competition that involve importation of pure digital data transmissions over the internet or over other networks, as was hoped by the film, music, and publishing industries. This now places the burden on domestic intellectual property holders to enforce their rights in U.S. District Courts, which can often be cumbersome given the extraterritoriality implications associated with data importation by foreign entities. More fundamentally, if the accused technology in a Section 337 investigation involves software, this Decision leaves open the possibility for companies to circumvent the Commission's jurisdiction by "splitting" digital data from any associated physical medium or material good, and transferring it into the U.S. electronically.

[1]Although stays of remedial orders are rare, the Commission set aside the cease-and-desist order here pending guidance by the Federal Circuit on its statutory interpretation of what qualifies as an "article."