

November 11, 2015

## Split Federal Circuit Panel Curtails ITC's Ability to Regulate Electronic Transmission of Data

On November 10, 2015, a split panel of the Federal Circuit issued a decision in *ClearCorrect Operating, LLC v. Int'l Trade Comm'n* (No. 2014-1527), curtailing the jurisdiction of the U.S. International Trade Commission ("ITC") in investigations under Section 1337 of the Tariff Act of 1930, as amended, ("Section 337"). In an opinion authored by Chief Judge Prost, the court held that Section 337 does not vest the ITC with authority to investigate unfair acts or unfair methods of competition in situations involving only electronic transmissions of data, as opposed to those involving the importation of "material things." This ruling is likely to be well received by many companies who heavily rely on cross-border electronic transmissions in today's information-age economy; however, because a petition for en banc review is expected, caution is still warranted.

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In the underlying ITC investigation that was at issue on appeal, the ITC found that respondent ClearCorrect violated Section 337 through the electronic transmission of certain digital models of teeth sent from servers in Pakistan into the United States, where the digital models were subsequently used in the United States to create physical models of teeth and to form dental appliances. The ITC found that ClearCorrect's U.S. subsidiary infringed certain claims of complainant Align Technology's patents relating to methods of forming dental appliances, but that this activity was not a violation of Section 337 because it occurred only within the United States. The ITC also found that ClearCorrect's Pakistan subsidiary violated Section 337 because it contributed to the infringement of the patents relating to methods of forming dental appliances, as well as directly infringing patents covering methods of producing digital data sets. But because an exclusion order would be ineffective in prohibiting the electronic transmission of digital models, the Commission instead imposed a cease-and-desist order prohibiting ClearCorrect from certain activities relating to the importation of digital models. Recognizing the uncertain state of the law concerning the ITC's jurisdictional authority over electronically imported data, however, the ITC took the rare step of staying the enforcement of the cease-and-desist order until the issue was resolved on appeal.

The principal issue before the Federal Circuit on appeal was whether the term "articles" in the context of Section 337 must mean "material things," or whether—as the ITC concluded—"articles" could also include electronically transmitted data. Chief Judge Prost's majority opinion held that articles must in fact be material things, and reversed the ITC's finding of a violation of Section 337 and its imposition of a cease-and-desist order. Echoing the Federal Circuit's recent evaluation of the term "articles . . . that infringe" in *Suprema v. Int'l Trade Comm'n*, the majority opinion first applied the two-step framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to determine whether the ITC's interpretation of articles was owed deference. But contrary to its conclusion in *Suprema* that "articles . . . that infringe" was ambiguous, the court here concluded that the term "articles" is *not* ambiguous in the context of Section 337—because neither the statutes at the time of the Tariff Act's passing nor contemporary dictionaries defined "articles" as anything other than "material things." Therefore, the court held that Congress had unambiguously intended that the ITC's jurisdiction relates to only material things, and that the ITC's interpretation that electronic transmissions should also be included within the definition of articles was owed no deference. Judge Prost also in the alternative applied Chevron step two and determined that the ITC's interpretation was unreasonable.

Judge O'Malley (who argued in dissent in *Suprema* for more jurisdictional restrictions on the ITC) concurred with the conclusion that the ITC lacked jurisdiction over the case, but authored a separate opinion expressing her view

that applying the two-step *Chevron* test was unnecessary. Judge O'Malley opined that the Internet is "arguably the most important innovation in communications in a generation" and that there is no indication whatsoever that Congress has or would have delegated regulation of the Internet to the ITC, noting that (1) the last major amendment to Section 337 came one year before the advent of the World Wide Web and (2) none of the recent debates over Internet-related legislation have raised the issue that the ITC may already be regulating the Internet.

Judge Newman, writing in dissent, vehemently disagreed with the conclusion that the ITC lacks jurisdiction over electronic transmissions of data. Judge Newman argued that the term article should mean "articles of commerce," including electronic data, and that, given its broad terms, the Tariff Act "did not lock Section 337 into the technology in existence in 1922 or 1930." Judge Newman also recounted the various ways in which other entities, such as the Bureau of Customs and Border Protection, the Court of International Trade, and the Department of Labor, viewed the cross-border transfers of data as the importation of articles, regardless of whether that data was transmitted electronically or in a tangible medium. Finally, Judge Newman argued that the mere difficulty in enforcing exclusionary remedies against electronic transmissions of data is not grounds for discarding the ITC's jurisdiction over those transmissions.

The case is now reversed and remanded to the ITC for dismissal for lack of jurisdiction, although a petition for *en banc* review or *certiorari* is likely to be filed. The Federal Circuit's decision may also have an impact on pending patent reform discussions, as stakeholders may seek to overturn the decision through an amendment of Section 337.

For more information on the potential impact of this decision, please contact your usual Ropes & Gray attorney or one of the attorneys listed above.