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INTELLECTUAL PROPERTY LAW

Intellectual Property Alert:

The Import of Electronic Data: Federal Circuit Appears Unlikely to Affirm Commission's Jurisdiction over Digital "Articles"

By Aaron Bowling

August 13, 2015 — The United States International Trade Commission (ITC or Commission) possesses unique powers under 19 U.S.C. § 1337 (Section 337). Upon finding that a party engaged in "unfair acts," e.g., patent or trademark infringement, the ITC issues "exclusion orders" that prevent the importation of certain products into the United States. ITC exclusion orders are enforced by United States Customs, and depending on the nature and pattern of infringement, may be either "limited" (extend only to certain named parties) or "general" (extend to *all persons*, i.e., "good against the world").

These powerful, low-maintenance remedies, along with the Commission's reputation as a rocket docket, have recently piqued interest in the ITC as a preferable forum for intellectual property enforcement. A wave of new cases have presented a number of issues of first impression, including several related to the Commission's Section 337 jurisdiction in the context of digital goods and electronic data. The digital world presents interesting considerations for the ITC, because the Commission's jurisdiction is limited to unfair acts that involve the "importation of articles": only once an act of "importation" has occurred, and only where that importation involves an "article," does the Commission obtain jurisdiction.

On Tuesday, August 11, the Federal Circuit heard oral arguments in *ClearConnect v. ITC and Align Technology*, to determine whether electronic data — which an alleged infringer in Texas downloaded from a server in Pakistan — constituted an "article" that was "imported" under 19.U.S.C. § 1337.

In 2012, Align Technology, Inc. (Align) filed a complaint in the ITC alleging that ClearCorrect Operating LLC and its foreign associates (ClearCorrect) infringed seven patents related to Align's *Invisalign* teeth-straightening system. Specifically, Align claimed that ClearCorrect had imported "digital models, digital data, and [digital] treatment plans" used to make teeth aligners. In May 2013, the administrative law judge held, in a lengthy 815-page opinion, that the digital data at issue was an "article" under Section 337 and that ClearCorrect infringed six Align patents. In April 2014, the Commission agreed, holding that the digital models imported as part of ClearCorrect's process of manufacturing orthodontic appliances constituted "articles" over which the ITC properly had jurisdiction.

In briefing to the Federal Circuit, appellant ClearCorrect vigorously opposed the Commission's finding on a number of grounds, arguing that intangible information and digital data cannot, and

should not, constitute an "article." ClearCorrect pointed to the plain language, structure, and legislative history of Section 337, identifying a number of provisions and Senate hearing discussions that are allegedly rendered nonsensical under the Commission's interpretation. ClearCorrect described the practical difficulties involved in the ITC's proposed enforcement of electronic data, and further argued that the ITC was unilaterally, and impermissibly, expanding its own power. ClearCorrect received support from a number of amici submitted by computing giants Apple and Google, who similarly warned of the widespread and unanticipated impact that could result from the Commission's decision.

Appellee briefs filed by Align and the Commission focused on the asserted misconduct of ClearCorrect, who "hoped to skirt U.S. patent law through 3D printing in the United States of the digital models it imported." Amicus briefs from the Motion Picture Association of America and the Recording Industry Association of America struck similar tones, speaking to the benefits of utilizing ITC remedies to enforce against pirated digital content. The appellees argued that the digital models in-question were "articles" because the electronic data represented tooth alignment in precisely the same manner as a physical mold. The appellees relied on the Supreme Court's decision in *International News Service v. Associated Press*, 248 U.S. 215 (1918) (the well-known "hot news" case), and attempted to interpret "articles" in light of the Driver's Privacy Protection Act—but neither analysis was directly on-point.

At Tuesday's oral arguments, a Federal Circuit panel comprised of Chief Judge Prost, Judge Newman, and Judge O'Malley appeared hesitant to affirm the Commission's ruling. The panel voiced concern over the ITC's ability to enforce against digital data, along with the Commission's inability to delineate the types of digital data that would or would not fall within its jurisdiction. In general, Tuesday's panel appeared to believe that the Commission's ruling could significantly expand the Commission's jurisdiction, and that such an expansion is best-suited for Congress.

Note: The parties briefed and argued the Commission's § 271(b) contributory infringement finding, but in light of the Federal Circuit's *en banc* opinion in *Suprema v. ITC* , which issued the day before oral argument, the panel ordered additional briefing.