

FEDERAL CIRCUIT TO THE ITC: NOW YOU'VE GONE TOO FAR!

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In recent years, the types of intellectual property disputes investigated by the International Trade Commission under Section 337 of the Tariff Act of 1930 have expanded. On November 10, the U.S. Court of Appeals for the Federal Circuit pulled back on that expansion in *Clearcorrect Operating, LLC, Clearcorrect Pakistan (Private Ltd. v. International Trade Commission*, Dkt. No. 2014-1527. There, the court held in a 2-1 decision that digital files transmitted from another country into the United States are not “articles” that properly may be the subject of a Section 337 Investigation. The Federal Circuit panel, which itself has sometimes been criticized for expanding the scope of its jurisdiction, chastised the ITC for unilaterally deciding “to expand the scope of its jurisdiction to include electronic transmissions of digital data” in contravention of the “unambiguously expressed intent of Congress.”

The data in question were digital models of tooth positions transmitted from Pakistan to the United States. The digital models then were used to create physical models using 3-D printing, after which those models were used to fabricate allegedly infringing orthodontic devices. The Federal Circuit noted that the data were transmitted in “intangible” form and not, for instance, via CDs or thumb drives, and thus clearly were not “articles” for purposes of Section 337. As a result, the court reversed the ITC’s finding of infringement and issuance of a cease and desist order.

The case is fascinating for its discussion, especially in Judge Newman's dissent, of how to apply decades-old statutory language to new technologies that are rapidly evolving. With increasing globalization, companies face increased risk that their import practices may come under scrutiny in a fast-paced, typically very expensive Section 337 investigation. If the Federal Circuit’s opinion stands, companies that limit “imports” to intangibles such as digital data should be able to avoid being named as a respondent in a Section 337 investigation – although they still may be liable for patent infringement in the more common setting of District Court litigation.

ADDITIONAL INFORMATION

For more information, please contact:

- [BRIAN BROOKEY](#) | 213.430.3377 | brian.brookey@tuckerellis.com

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