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Federal Circuit Limits International Trade Commission's Reach Over Digital Transmissions

On Nov. 10, 2015, the Federal Circuit issued a fractured opinion holding that the ITC does not have jurisdiction over digital transmissions since they are not “articles” within the meaning of 19 U.S.C. § 1337.

Case Background and Commission Decision

This appeal arose from an ITC complaint filed by Align Technology, Inc. (“Align”) alleging that ClearCorrect Operating, LLC and other related companies (collectively, “Clear Correct”) were infringing patents relating to orthodontic appliances, also known as aligners. ClearCorrect makes aligners by scanning physical models of a patient’s teeth and creating a digital recreation of the patient’s initial tooth arrangement. The digital recreation is electronically transmitted to ClearCorrect Pakistan, where the position of each tooth is manipulated to create a final tooth position. ClearCorrect Pakistan then creates digital models of intermediate tooth positions. ClearCorrect Pakistan then transmits these digital models electronically to ClearCorrect US, which 3D prints them into physical models used to create aligners. Align asserted that the transmission of “digital models, digital data and treatment plans” were infringing “articles” subject to an exclusion order under Section 337.

The Commission ruled that ClearCorrect Pakistan was a contributory infringer for importing the data models. The Commission also found that ClearCorrect Pakistan practiced certain asserted method claims overseas, and that the resulting importation of the digital models resulted in a violation of Section 337. In so doing, the Commission held that it had jurisdictional authority over imported data under Section 337.

Federal Circuit's Decision

The Federal Circuit reversed and remanded, concluding that the Commission does not have jurisdiction over the case because the accused digital transmissions are not “articles” within the meaning of Section 337.

The Federal Circuit reviewed the Commission’s interpretation of “articles” in the statute under the two-step *Chevron* framework: (1) has Congress directly spoken to the precise question at issue; and (2) if the answer to the first question is “no,” then is the Commission’s answer based on a permissible construction of the statute?

The court’s analysis was complete after step one of *Chevron*; it ruled that the term “articles” is unambiguously limited to material things and does not extend to electronic transmission of digital data. Although “articles” is not defined in Section 337, the Federal Circuit found that dictionaries and other sources published contemporaneously with the Tarriff Act of 1922 (which preceded Section 337, but also used the same term) defined “articles” to mean “material things.” The court also noted the impracticalities of a Section 337 remedy against digital transmissions, which cannot be forfeited, seized or stopped at the border. If the Commission’s interpretation were correct, it “would

mean that Congress included an entire set of commodities in the statute without providing a method to curtail their importation. The impossibility of this result supports confining ‘articles’ to ‘material things.’”

Judge O’Malley concurred, but reasoned that application of *Chevron* was unnecessary in this case to affirm the Commission’s decision. Judge O’Malley noted that the *Chevron* framework is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. Here, however, Congress’s last major amendment to Section 337 was in 1988, one year before the invention of the World Wide Web. Judge O’Malley reasoned that Congress had, therefore, not delegated authority to the Commission to fill in the gaps regarding its own jurisdiction, particularly given the importance of the Internet to modern day life.

Judge Newman dissented, reasoning that the majority ignored the realities of modern technology and improperly assumed that Congress intended to omit later-developed technologies. Judge Newman also highlighted the Supreme Court’s adaptation of the copyright statute to new technologies that Congress could not have envisioned at the time of enactment.

Takeaways

This decision may have far-reaching implications. It effectively immunizes all downloadable software and internet-based products from Section 337 remedies, and creates an incentive to import products without pre-installed software. However, given the fractured nature of the opinion, it may not be the last word on the issue.

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