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ITC: Data Transmissions from Abroad Are Importations Subject to Section 337

Ruling Caused Film, Publishing, and Internet Giants to Take Note of this Powerful Weapon against Unfair Importations

Unfair acts connected to imported "articles" are unlawful under **Section 337**. The U.S. International Trade Commission – the agency tasked with administering Section 337 – recently ruled that data transmissions from abroad are imported articles and subject to the statute. At issue was data used to domestically produce 3D-printed dental devices, which were found by the ITC to infringe the asserted patents. But more broadly, **the Digital Models investigation** signals that the ITC can be a powerful weapon against many other unfair acts involving cross-border electronic transmissions, such as copyright infringement and trade secret misappropriation.

Section 337's Remedies against Unfair Imports. Two remedies are available to complainants bringing Section 337 actions: exclusion orders, and cease and desist orders (CDOs). Exclusion orders block importation at the ports, and are administered by U.S. Customs and Border Protection. CDOs, on the other hand, are administered by the ITC and prohibit domestic dissemination of goods found to violate Section 337. Remedies are in force typically within about 18 months after filing the complaint.

Parties circumventing cease and desist orders risk incurring massive fines of up to \$100,000 per day of violation or twice the value of the goods, whichever is higher. And the financial risk is not theoretical – past enforcement actions for CDO violations have totaled in the millions of dollars each. Enforcement of the CDO can be accomplished by the ITC informally through correspondence with the violator. More commonly, the complainant monitors the respondent's activities and brings a formal enforcement action if it has reason to believe a CDO violation occurred, after which the ITC may bring a civil action to collect assessed penalties.

The ITC Issues CDOs to Halt Infringing Data "Imports." A 3D printer uses data representing a three dimensional object to automatically build that object, layer by layer. For certain applications, domestic 3-D printing is becoming recognized as a fast, cost-effective alternative to off-shore manufacturing.

Align Technology, Inc. is a company known for its Invisalign® system for straightening teeth using custom-made "aligners" derived from 3-D modeling of a patient's teeth. Align brought an ITC action alleging that a pair of related competitors violated Section 337 by sending 3-D modeling data from Pakistan to Texas, where they used the data to produce their customers' aligners. Align alleged (and the ITC found) that the 3-D data contributorily infringed Align's patents when used to manufacture the accused aligners. Last week, the ITC issued CDOs prohibiting the respondents from "importing" the unlawful data and using it to manufacture the accused aligners.

The ITC Tailors Its Remedies to the Modern World. In nearly every other ITC action, the complainant primarily sought an exclusion order to block unlawful physical items at the ports. The CDO in such cases was typically intended to halt domestic distribution of residual inventory.

The *Digital Models* investigation was unusual because Align alleged wrongful importation of data from Pakistan – *but data is imported through computer networks and not through Customs*. Recognizing that, in *Digital Models* the ITC used a CDO – not an exclusion order – to stop the unlawfully imported data. While this specific use of the CDO was likely not specifically contemplated when added by Congress in the early 1970's, *Digital Models* shows that the ITC can adapt to new market realities when carrying out Section 337's intended purpose: protecting U.S. industries from unfair imports.

Numerous Industries Weighed In. The issue of whether data transmitted from abroad is an imported "article" subject to Section 337 caught the attention of a number of large companies having very different

relationships to data. During the "public comment" period, the Motion Picture Association of America and Association of American Publishers each submitted briefs favoring an interpretation covering electronic transmissions. Google, on the other hand, opposed. That they all chose to weigh in on this issue likely reflects their recognition that the ITC can be a powerful tool for IP holders battling unauthorized distribution, and a potential problem for those entities (perhaps unwittingly) handling the electronic transmissions.

What This May Mean for Industries. The ruling spotlights a way to combat unfair acts that may appear, at first blush, to be purely domestic. Note that Section 337 jurisdiction requires at least one importation, and normally that importation enters through the ports. In *Dental Devices*, the manufacturing activity appeared entirely domestic since the accused aligners were fabricated in Texas, but the complainant tied the contributorily infringing data importation to domestic manufacturing to cut off an essential item. While the *Dental Devices* respondent may be able to sidestep the CDO by establishing a purely domestic operation, that move would likely cannibalize the cost savings obtained through using Pakistan-based technical support, causing margins to shrink and pushing prices higher.

Companies facing unfair competition through or aided by electronic imports should examine whether the ITC can provide meaningful relief against what is otherwise difficult behavior to curtail. Companies who may find themselves targets of an ITC action alleging participation in unfair data imports should begin considering what steps could be taken if a CDO were to prohibit them from using such data.