



THINK FORWARD

The Federal Circuit Denies En Banc Review Of Split Panel Decision Which Prohibits ITC Jurisdiction Over The Electronic Transmission of Digital Data Into the United States

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On March 31, 2016, the Federal Circuit issued an Order denying Petitions for Rehearing *En Banc* filed by the U.S. International Trade Commission and intervenor Align Technology, Inc. The Court's denial of the petitions leaves intact the split panel's decision in *ClearCorrect Operating, LLC v. ITC*, 810 F.3d 1283 (Fed. Cir. 2015), holding that Section 337 of the Tariff Act of 1930 gives the Commission jurisdiction over infringing material articles being imported into the United States, but not jurisdiction over electronic transmissions being sent from a foreign country and received in the U.S.

This case involves the electronic transmission of digital data sets from Pakistan into the United States. Once the electronic transmissions are received in the U.S., a 3D printer is used to transform the digital data into an infringing product. In *Certain Digital Models*, Inv. No. 337-TA-833 (2014), the ITC found contributory infringement that violated Section 337 and issued a Cease and Desist Order prohibiting the electronic transmission into the United States of the digital data. The Commission stayed its order pending appeal to the Federal Circuit.

In the *ClearCorrect* case, Chief Judge Prost and Judge O'Malley, with J. Newman dissenting, reversed the Commission. The panel majority held that the literal text of Section 337 provides that "'Articles' is defined as 'material things,' and thus does not extend to electronic transmission of digital data." 810 F.3d at 1290.

Because of the importance of this case to the jurisdictional reach of Section 337, and because of the view of a not insubstantial number of the ITC bar that the *ClearCorrect* majority panel's holding may be inconsistent with the recent *en banc* Federal Circuit holding in *Suprema v. ITC*, 796 F.3d 1338 (2015) (*en banc*), the Court's denial of the petitions for rehearing *en banc* is a surprising development to say the least.

How large a digital loophole the Federal Circuit's *ClearCorrect* decision has created in Section 337's enforcement ability remains to be seen. It is likely that such a question will be answered sooner than later.

Contact Us

If you have any questions or wish to discuss how this decision impacts your business, please contact one of our [Brinks Attorneys](#).