



THINK FORWARD

Rehearing En Banc Sought in Clear Correct Case

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In a case of major significance, on January 27, 2016, both the U.S. International Trade Commission (ITC) and Align Technology, Inc. (Align) have filed a petition for rehearing en banc seeking the full Federal Circuit's review of the panel's decision in *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, No. 2014-1527, slip op. (Fed. Cir. Nov. 10, 2015). There, a divided panel ruled against the ITC and held that the ITC lacks jurisdiction over the importation of electronic transmissions.

The technology at issue in this case relates to the production of orthodontic appliances, also known as aligners. ClearCorrect U.S. scans physical models of the patient's teeth and electronically transmits to ClearCorrect Pakistan a digital recreation of the initial tooth arrangement. ClearCorrect Pakistan then creates digital data models of the patient's tooth positions and electronically transmits this digital dataset back to ClearCorrect U.S. Upon receipt of the electronic transmissions, ClearCorrect US 3D prints the models for its aligners from the datasets.

The ITC held that its authority over "articles" in Section 337(a)(1)(B) of the Tariff Act of 1930 encompasses datasets imported for 3D printing, here the electronic transmissions from ClearCorrect Pakistan to ClearCorrect US. (*In re Certain Digital Models*, No. 337-TA-833). A Federal Circuit panel reversed. Writing for the panel majority, Chief Judge Prost stated, "[t]he Commission's decision to expand the scope of its jurisdiction to include electronic transmissions of digital data runs counter to the 'unambiguously expressed intent of Congress.'" Citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

In its petition for rehearing en banc, the ITC cut to the heart of this case in framing the question before the Federal Circuit. "Must the term 'articles' in section 337 of the Tariff Act of 1930 ... be limited to physical products, such that section 337 can be evaded by a respondent that 3D prints products in the United States using imported datasets representing those products?"

It is expected that the petitions for rehearing en banc will be granted. The stakes for the ITC cannot get any higher than they are in this case. Stay tuned.