



LLM, Postgraduate Diploma or Postgraduate Certificate in
Computer and Communications Law
by Distance Learning
Course start date: 11 January 2016

Click
here for
more info

US Perspectives: US Agency Stripped Of Power To Regulate Internet [🔒]

16/12/2015 BY [STEVEN SEIDENBERG](#) FOR INTELLECTUAL PROPERTY WATCH — [LEAVE A COMMENT](#)



America's International Trade Commission is a tempting venue for US intellectual property owners. The agency acts quickly, has a history of supporting IP owners, and offers a powerful means to stop infringing products from entering the US. So when the ITC expanded its jurisdiction last year, claiming the power to stop online infringements, many IP owners cheered. And many internet companies fretted. Until last month, when the Federal Circuit had its say.

The case centered on how to interpret [Section 1337](#) of the Tariff Act. This provision empowers the ITC to remedy the import and subsequent sale in the US of infringing "articles."

The term "articles" includes the electronic transmission of digital data, the ITC [concluded](#)



[pdf] in a 2014 investigation. This was a broader interpretation than the agency had previously given the term, but times had changed. If the agency was to protect US companies against 21st century forms of unfair competition, it would need to address online infringements.

“Because software and digital data are increasingly important parts of the economy, excluding that from ITC jurisdiction would be a big deal,” said Daniel P. Muino, a partner in the Washington, DC office of law firm Morrison & Foerster.

The Federal Circuit, however, recently rejected the ITC’s broad interpretation. By 2-1, the judges on the panel held in *ClearCorrect Operating LLC v. International Trade Commission* [pdf] that “articles” means “material things,” not electronically transmitted digital data.

The majority in the 10 November ruling did not consider the policy reasons for ITC enforcement. Instead, the majority examined the contemporaneous meaning of the statute, the statute’s legislative history, and the repeated judicial interpretations of “articles” in related legislation – all of which clearly indicated that the term “articles” covered only material objects.

The ITC apparently had trouble defending its interpretation. “The [Federal Circuit] majority criticized the ITC for relying on only one ambiguous dictionary definition, when there were a host of contemporary definitions that supported the opposing view. And the ITC misquoted some [relevant] legislative history – failing to indicate that a clause had been deleted, when that clause supported the opposing view,” said Prof. Tyler T. Ochoa of Santa Clara Law School. All this, he added, “was indicative of the lengths the ITC had to go through in order to reach its initial ruling.”

Square Peg, Round Hole

The Federal Circuit majority sidestepped questions about how to stop infringing online imports, indicating that it was not the appropriate body to consider such policy issues. “Congress,” the majority wrote, “is in a far better position to draw the lines that must be drawn if the product of intellectual processes rather than manufacturing processes are to be included within the [ITC]

statute.”

There are, however, some good policy reasons to keep the ITC from enforcing IP online. First, the ITC is not well equipped to handle online issues; it has no experience or expertise in the area.

“The ITC was created to deal with specific trade problems such as dumping and the importation of infringing items. Are online infringements really a trade problem? Is stopping infringing digital transmissions really similar to seizing infringing goods from a ship in the harbor?” said Prof. Dan L. Burk of University of California at Irvine’s School of Law. He added, “It is better for everyone if this issue [of online infringement] is not adjudicated in a place where it was never intended to be adjudicated.”

Second, there is no significant need for the ITC to act against online infringements. Aggrieved IP owners can obtain any necessary remedies from the courts.

“IP owners like going to the ITC because it is typically faster and cheaper than full blown litigation in court, but there are no orders that could be obtained from the ITC that could not also be obtained from a court,” said Ochoa.

Friendly Forum

IP owners certainly would like the option of going to the ITC to stop online infringements. “The ITC moves fast and it is very friendly to IP owners, whereas courts look at things more carefully and move more slowly,” said Burk. Many movie and music companies, which have been battling online infringement for years, were particularly unhappy about the Federal Circuit’s *ClearCorrect* decision.

Many internet firms, by contrast, were relieved by *ClearCorrect*. “Big internet companies like Google don’t want the ITC regulating their internet traffic. They already have enough difficulty complying with the rules in various countries,” said Ochoa.

ITC proceedings against online infringement could create huge new burdens for internet firms, since they, not the Customs Service, would have to enforce any ITC remedies against online infringers.

“Having a body with no expertise in the internet issuing broad orders in proceedings to which

internet companies aren't parties poses a significant problem for them. They don't have an opportunity to explain how easy or hard it is to block certain transmissions," said Ochoa.

The dispute over the ITC's power may not be over. Some legal experts expect the *ClearCorrect* decision to be reviewed by the en banc Federal Circuit. And it may not end there.

"Must an 'article' be a material thing or can it be purely electronic data? It is an interesting issue that may go up to the Supreme Court," said Rudolph A. Telscher, a principal in law firm Harness Dickey.

Related Articles:

- [US Supreme Court Questions America's Power To Carry Out Treaties](#)
- [Veto Power For Governments Against Any Internet Domain Name?](#)
- [UKIPO: Copyright Owners And Internet Providers, Please Regulate Yourselves!](#)

Steven Seidenberg is a freelance reporter and attorney who has been covering intellectual property developments in the US for more than 15 years. He is based in the greater New York City area and may be reached at info@ip-watch.ch.



"US Agency Stripped Of Power To Regulate Internet" by [Intellectual Property Watch](#) is licensed under a [Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License](#).

FILED UNDER: [ENGLISH](#), [THEMES](#), [HUMAN RIGHTS](#), [IP POLICIES](#), [PATENTS/DESIGNS/TRADE SECRETS](#), [COPYRIGHT POLICY](#), [VENUES](#), [NORTH AMERICA](#), [FEATURES](#), [ENFORCEMENT](#), [SUBSCRIBERS](#), [LANGUAGE](#), [IP LAW](#), [PERSPECTIVES ON THE US](#), [REGIONAL POLICY](#)

Leave a Reply