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Volume 66

Issue 3 *Volume 66, Issue 3 Spring 2017: Twenty-Sixth*  
*Annual DePaul Law Review Symposium*

Article 4

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# Disconnecting the ITC's Jurisdiction: Why Section 337 Does Not Grant the International Trade Commission the Power to Police the Internet For Unfair Importation

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## Recommended Citation

Patrick O. Doyle, *Disconnecting the ITC's Jurisdiction: Why Section 337 Does Not Grant the International Trade Commission the Power to Police the Internet For Unfair Importation*, 66 DePaul L. Rev. (2017)  
Available at: <http://via.library.depaul.edu/law-review/vol66/iss3/4>

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# DISCONNECTING THE ITC'S JURISDICTION: WHY SECTION 337 DOES NOT GRANT THE INTERNATIONAL TRADE COMMISSION THE POWER TO POLICE THE INTERNET FOR UNFAIR IMPORTATION

## INTRODUCTION

First, there was Napster—the notorious internet music service allowing unregulated access and downloading of copyright-protected music was shut down in 2001 after two years of high profile litigation.<sup>1</sup> Then came Grokster, fighting its way up to the U.S. Supreme Court and setting the precedent that makers of peer-to-peer software could be held liable for inducing copyright infringement.<sup>2</sup> After Grokster came Lime Wire, which was shut down in 2010 after several record companies sued the software developer for copyright infringement.<sup>3</sup> These three companies show the power of the internet to easily allow infringement of intellectual property rights; however, each of these defendants have one common denominator: They were all located within the United States. The rise of digital technology has created headaches for intellectual property rights holders requiring costly litigation to stamp out new avenues of unfair importation. However, websites outside the United States have sprouted, making content available for download outside the jurisdiction of U.S. courts. The United States government does have an agency for fighting unfair importation of goods which damage domestic industry. Sometimes “unfair importation” can be referred to as “internet piracy” or “illegal downloading.” This Comment uses the term “unfair importation.”

The United States International Trade Commission (ITC) was created in 1930 as a remedy to counter unfair importation.<sup>4</sup> The law vesting the ITC with its powers limited the agency to only enjoin importation of physical goods<sup>5</sup> because the technology had not yet been created to enable digital importation. As technology progressed

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1. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011, 1029 (9th Cir. 2001).

2. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005).

3. See *Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 398 (S.D.N.Y. 2011).

4. Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590, *amended by* Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (renaming the United States Tariff Commission to the United States International Trade Commission).

5. 19 U.S.C. § 1337 (2012).

and computers became more widespread, the ability for information to move across international borders became trivially easy. This presents the ITC with a dilemma: How does it fight unfair importation on the internet? Recent cases wrestled with the issue of whether the ITC has the power to regulate online importation and the internet.<sup>6</sup> The ITC believes that it possesses the jurisdiction to regulate infringement occurring on the internet.<sup>7</sup> This Comment argues that section 337 of the Tariff Act of 1930,<sup>8</sup> the statute governing the ITC's authority, does not grant the ITC the power to enforce exclusion orders enjoining unfair importation over the internet<sup>9</sup> because the U.S. Supreme Court distinguishes between digital data (not referred to in the statute) and tangible goods (expressly addressed by the statute).<sup>10</sup> The use of the word "articles" in section 337 limits the scope of the ITC's authority to physical goods. The ITC cannot rely on its improper interpretation of "articles" under section 337 because no ambiguity exists in the statute which the agency can interpret.<sup>11</sup> Allowing the ITC to read "articles" to encompass digital data raises substantial First Amendment questions.<sup>12</sup> Finally, the dissenting opinion arguments do not stand up to scrutiny.<sup>13</sup>

Part II presents an extensive background of relevant information for this Comment.<sup>14</sup> This Part provides (1) a brief history and background of the architecture of the Internet and how the Internet enables importation into the United States; (2) a foundation of administrative law relevant to this issue, as well as a brief history of the ITC; and (3) a description of the ITC's jurisdiction and authority to regulate importation into the United States. Part III analyzes and applies background information, arguing that the ITC should not have the authority to regulate unfair importation on the internet.<sup>15</sup> Part III also analyzes U.S. Supreme Court precedent distinguishing between digital data and tangible goods. Further, Part III argues that no ambiguity exists when analyzing the word "articles" in context with section 337 and then considers the First Amendment implications of a broad

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6. See, e.g., *ClearCorrect Operating, LLC v. ITC*, 810 F.3d 1283, 1290, 1299 (Fed. Cir. 2015).

7. See *id.* at 1299.

8. 19 U.S.C. § 1337.

9. The ITC issues exclusion orders, excluding a particular good from being imported or entering into the United States. OFFICE OF RESPONSE & RESTORATION, EXCLUSION ORDERS (1999), <https://www.cbp.gov/sites/default/files/documents/2310-006a.pdf>.

10. See *infra* notes 159–70 and accompanying text.

11. See *infra* notes 171–85 and accompanying text.

12. See *infra* notes 186–214 and accompanying text.

13. See *infra* notes 215–39 and accompanying text.

14. See *infra* notes 18–154 and accompanying text.

15. See *infra* notes 155–239 and accompanying text.

reading section 337. Finally, Part III offers counterarguments to Judge Newman's dissent, arguing that the dissent mischaracterizes the statute, and its comparisons to copyright are distinguishable. Part IV discusses the impact and ramifications of this interpretation of section 337 and offers a Congressional solution.<sup>16</sup> Part V concludes and reiterates the Federal Circuit's holding that the ITC does not possess the power to police unfair importation over the internet.

## II. BACKGROUND

This Part gives a brief description of the internet, the current state of administrative agency law, and its application in the ITC. It then describes the ITC, as well as cases questioning the ITC's jurisdiction to fight unfair importation.<sup>17</sup>

### A. *The Internet*

The internet needs no introduction. Its growth and use has facilitated the exchange of information and several of the world's most valuable brands.<sup>18</sup> This section discusses (1) the origins of the internet; (2) the basic underlying architecture of the network; and, (3) how computers communicate using that architecture and how those communications may lead to unfair importation.

Several computers connected together create a "network."<sup>19</sup> These computers can then share resources, such as processing power or data stored on a hard drive, while working to accomplish a task requested by the user.<sup>20</sup> The computers send electrical signals between each other, each requesting the other to perform a specific function or asking for data.<sup>21</sup> As an idea, the "internet" is a "network of networks," connected and exchanging electrical signals and sharing resources to accomplish tasks requested by the users.<sup>22</sup> Computers send these signals, known as "bits," to each other, all across the internet.<sup>23</sup> Each

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16. See *infra* notes 240–49 and accompanying text.

17. See *infra* notes 65–154 and accompanying text.

18. See *The World's Most Valuable Brands—2016 Ranking*, FORBES, <http://www.forbes.com/powerful-brands/list/> (last visited Jan. 1, 2017).

19. See SIMON HAYKIN & MICHAEL MOHER, *INTRODUCTION TO ANALOG AND DIGITAL COMMUNICATION* 6–12 (2d ed. 2007).

20. *Id.* at 6–8.

21. *Id.* at 7–8.

22. *Internet Interconnections*, EUROPEAN UNION AGENCY FOR NETWORK & INFO. SEC., <https://www.enisa.europa.eu/topics/critical-information-infrastructures-and-services/internet-infrastructure/inter-x> (last visited Feb. 8, 2017).

23. See HAYKIN & MOHER, *supra* note 19, at 9. A bit is a single electrical signal at one moment in time. See CHARLES E. MACKENZIE, *CODED CHARACTER SETS, HISTORY AND DEVELOPMENT* 12 (1980). The communication channels referenced can be a wired Ethernet connection,

individual network is connected to a “router” that acts as an intermediary by directing bits to the proper path in order to reach their destination.<sup>24</sup>

A group of multiple bits is called a bit “string.”<sup>25</sup> A bit string often becomes so long and complex that humans cannot efficiently interpret these instructions.<sup>26</sup> However, computers can be programmed to repeatedly and efficiently interpret strings of bits, translating them into something that humans can understand.<sup>27</sup> These bit strings translate into instructions for the computer to carry out, or some data for the computer to use.<sup>28</sup>

To send bits across the internet, a computer sends signals from its network to a router.<sup>29</sup> The router determines the best path for the bits to take and directs the signal to follow that route.<sup>30</sup> The bits travel along that route to their destination at another computer or server,<sup>31</sup> and the data may be a request for the other computer or server to send more data (e.g., a web page or file), or it may be uploading a file for other computers to access and download.<sup>32</sup>

Computers determine the destination of information using the Internet Protocol address (IP address).<sup>33</sup> Every computer, smartphone, tablet, server, and other devices connected to the internet has a unique IP address,<sup>34</sup> a small part of which contains a code that identifies the geographic location.<sup>35</sup> IP addresses do not contain any En-

Wi-Fi, cellular, or over any other suitable network for transmitting bits. See JAMES GRIMMELMANN, *INTERNET LAW: CASES & PROBLEMS* 28 (2016) (describing several types of “network links” for communications between computers).

24. Rus Shuler, *How Does the Internet Work?*, STANFORD U. (2002), <https://web.stanford.edu/class/msande91si/www-spr04/readings/week1/InternetWhitepaper.htm>.

25. GRIMMELMANN, *supra* note 23, at 25. A simple “string” refers to a group of arbitrary character used by the computer. A “bit string” is a string of bits.

26. See *id.* at 18 (“Using ASCII, it’s possible to convert arbitrary text into bits and vice versa.”). ASCII is the American Standard Code of Information Interchange; a system computers use for encoding letters as binary numbers. *Id.* When translated from bits, computers carry out the instructions and the computer performs some function. *Id.* at 19. Some examples include playing a sound or displaying an image. *Id.* at 19–21.

27. *Id.*

28. *Id.* at 24. However, software engineers do not write code using 1’s and 0’s. Engineers write code in a language developed to allow for translation by a computer into bits. See *id.*

29. *Id.* at 29.

30. Shuler, *supra* note 24.

31. *Id.* Servers are large computers that act only to respond to requests from users. Servers can be public (e.g., website, email, or file server) or private.

32. TIM BERNERS-LEE, *WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB* 222–28 (2000).

33. ICANN, *BEGINNER’S GUIDE TO INTERNET PROTOCOL (IP) ADDRESSES* 4 (2011), <https://www.icann.org/en/system/files/files/ip-addresses-beginners-guide-04mar11-en.pdf>.

34. *Id.*

35. *Id.* at 6.

glish text, making them difficult for humans to immediately identify. To help users navigate the internet, engineers created the Domain Name System (DNS) to create English “translations” of IP addresses.<sup>36</sup> A domain name is simply the website typed into the URL bar in any browser.<sup>37</sup> Internet browsers are programmed to translate that domain name into the IP address before sending that request.<sup>38</sup>

The internet is filled with content, providing news, sports, videos, music, and so much more;<sup>39</sup> however, many websites offer content for download or use that infringes on U.S. intellectual property.<sup>40</sup> That content is often hosted by web servers outside of the United States, thus U.S. courts are unable to help IP owners because it does not have jurisdiction over those foreign web servers.<sup>41</sup> The entertainment industry frequently supports legislation simplifying the process of seizing or shutting down websites that enable piracy by distributing copyrighted content.<sup>42</sup> Because these computers often sit outside the jurisdiction of U.S. courts, they are difficult to shut down.<sup>43</sup>

In 2014, Columbia Pictures authorized the release of the feature film *The Interview*, a comedy film about two comedians attempting to assassinate Kim Jong-Un.<sup>44</sup> One month before the scheduled release of the film, Sony, Columbia Picture’s parent company, found that hackers had gained administrator-level access to its private computer network and stole millions of confidential files, emails, employment

36. *Glossary*, ICANN, <https://www.icann.org/resources/pages/glossary-2014-02-03-en#d> (last visited Jan. 1, 2017).

37. *Id.*

38. *Id.*

39. *See, e.g.*, ESPN, [www.espn.com](http://www.espn.com) (last visited Jan. 17, 2017) (delivers sports); NPR, [www.npr.org/sections/news](http://www.npr.org/sections/news) (last visited Jan. 17, 2017) (delivers news); PANDORA INTERNET RADIO, [www.pandora.com](http://www.pandora.com) (last visited Jan. 17, 2017) (delivers music); YOUTUBE, [www.youtube.com](http://www.youtube.com) (last visited Jan. 17, 2017) (delivers videos).

40. *See* Gregory Babcock & Jason Duaine Hahn, *A Beginner's Guide to the Pirate Bay Controversy*, COMPLEX (Jan. 31, 2015), <http://www.complex.com/pop-culture/2015/01/the-pirate-bay-down-and-up-again/>.

41. *Id.*

42. *SOPA/PIPA: Internet Blacklist Legislation*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/coica-internet-censorship-and-copyright-bill> (last visited Jan. 14, 2017).

43. For example, ‘The Pirate Bay’ was a notorious website in Sweden that allowed users to illegally download millions of movies, television shows, music, and software files. Swedish law enforcement eventually shut down the website by physically disconnecting the servers and criminally charging the site’s owners for promotion of copyright infringement. *See* Timothy J. Sepala, *The Pirate Bay Shutdown: The Whole Story (So Far)*, ENGADGET (Dec. 16, 2014), <http://www.engadget.com/2014/12/16/pirate-bay-shutdown-explainer/>.

44. *THE INTERVIEW* (Columbia Pictures 2014). The comedy film chronicled Dave Skylark, a talk show host (Franco), and his producer Aaron Rapoport (Rogen), as they journeyed to North Korea to interview Supreme Leader Kim Jong-Un. In the film, the Central Intelligence Agency approaches the two friends and orders them to assassinate Kim Jong-Un and overthrow the communist dictatorship.

records, and internal memoranda.<sup>45</sup> The FBI quickly determined that the Guardians of Peace, hackers with computers located in North Korea, most likely hacked Sony following Kim Jong-Un's orders, in retaliation for the upcoming release of *The Interview*.<sup>46</sup>

Among the leaked files from the Sony hack was an internal memo about the ITC.<sup>47</sup> Sony and the Motion Picture Association of America (MPAA) had requested legal memoranda from major law firms about using the ITC's exclusion orders to stop importation of copyrighted materials into the United States via the internet.<sup>48</sup> Sony and the MPAA wanted to use the ITC's power to issue exclusion orders to stop importation of their intellectual property.<sup>49</sup> The memo detailed a hypothetical "site-blocking order" that the ITC could use to block internet website domains that delivered infringing content.<sup>50</sup> Such an action, however, would require an improper reinterpretation of the ITC's agency powers.

## B. *Administrative Agency Law*

This Section provides a brief summary of the current state of United States administrative law. In addition, this Section also shows the history of the ITC, the scope of the ITC's jurisdiction, and two cases that help better define the scope of that jurisdiction.

### 1. *A Brief Overview of Administrative Law*

An administrative agency derives its powers and authority from the organic statute that creates it.<sup>51</sup> Congress delegates some power (legislative, executive, or judicial) to the agency to make rules, adjudicate disputes, investigate, fact-find, or some combination of these responsi-

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45. Brooks Barnes & Nicole Perlroth, *Sony Films Are Pirated, and Hackers Leak Studio Salaries*, N.Y. TIMES (Dec. 2, 2014), <http://www.nytimes.com/2014/12/03/business/media/sony-is-again-target-of-hackers.html>. Administrative level access to a computer network allows access to almost all files and records within a computer system.

46. *Id.*

47. Russell Brandom, *The MPAA Has a New Plan to Stop Copyright Violations at the Border*, VERGE (Jan. 2, 2015, 12:53 PM), <http://www.theverge.com/2015/1/2/7481409/the-mpaa-has-a-new-plan-to-stop-copyright-violations-at-the-border>.

48. *Id.*

49. *Id.*

50. Memorandum from Jenner & Block LLP & Adduci, Mastriani & Schaumberg, LLP to MPAA 1 (Aug. 15, 2014), <http://www.scribd.com/doc/250191712/Use-of-the-ITC-to-Block-For-eign-Pirate-Websites>. This is the actual memorandum submitted to the MPAA.

51. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 5 (7th ed. 2013).

bilities.<sup>52</sup> Final agency decisions or interpretations of an organic statute generally receive deference from the judiciary.<sup>53</sup>

The seminal case for agency deference is *Chevron, U.S.A. v. Natural Resources Defense Council*.<sup>54</sup> The test articulated in *Chevron* looks at: (1) whether there is an ambiguity within the agency's organic statute which needs interpretation; and (2) whether the agency's interpretation is a permissible construction of the agency's organic statute.<sup>55</sup> If a court finds no ambiguity under step one of the *Chevron* test, it cannot defer to the administrative agency's interpretation because the intent of Congress is clear.<sup>56</sup> However, if a reviewing court finds an ambiguity in the statute, it treats this ambiguity as an implied delegation of power from Congress for the agency to interpret its own organic statute.<sup>57</sup> Once the court finds an ambiguity, a reviewing court then determines whether the agency's interpretation is reasonable.<sup>58</sup> If an agency's interpretation does not go against its organic statute, it will be held as reasonable. While there is some unpredictability to the *Chevron* test, it has allowed for administrative agencies to make decisions faster than Congress by giving agency actions reasonable deference.<sup>59</sup>

An administrative agency may interpret the scope of its own jurisdiction. The U.S. Supreme Court held in *City of Arlington v. FCC*<sup>60</sup> that “[n]o matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*.”<sup>61</sup> The Court went on to reason that interpretations of an agency’s “jurisdiction” do not preclude a court from applying *Chevron* deference simply because they concern procedural aspects of a statute.<sup>62</sup> The Court reasoned that under normal judicial circumstances, a “meaningful line” exists between jurisdiction and substantive questions, but for cases involving *Chevron* deference, no difference exists.<sup>63</sup> The ITC operates as an administrative agency

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52. See *id.*; see also *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (holding that Congress may delegate limited authority to administrative agencies).

53. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

54. *Id.* at 842–43.

55. *Id.*

56. *Id.*

57. *Id.* at 842–43.

58. *Id.* at 843.

59. *Chevron*, 467 U.S. at 843.

60. 133 S. Ct. 1863 (2013).

61. *Id.* at 1868.

62. *Id.*

63. *Id.* at 1868–69.



under the executive branch. Therefore, the Administrative Procedures Act section 551 governs its procedures.<sup>64</sup>

## 2. *The History of the ITC*

The ITC was formed in 1916 and was originally named the United States Tariff Commission.<sup>65</sup> Congress created the Tariff Commission to investigate economic transaction costs of tariffs and customs for various industries importing into the United States.<sup>66</sup> After making investigatory findings, the Tariff Commission would advise the President to help draft trade proposals between the United States and foreign nations.<sup>67</sup>

In 1922, Congress amended the ITC's organic statute, granting it greater investigatory powers in a response to the threat of European manufactures undermining U.S. industries after World War I.<sup>68</sup> The agency's mission became "to insulate United States manufacturers from the post-World War I revitalization of European industry."<sup>69</sup> However, the agency lacked any adjudicatory powers and still acted to advise the Executive Branch.<sup>70</sup>

In response to declining economic conditions at the end of the 1920s, Congress passed the Tariff Act of 1930.<sup>71</sup> Section 337 of the Tariff Act of 1930 authorized the ITC to conduct investigations into unfair importation and provided remedies to help American industries and labor.<sup>72</sup> The new law codified the procedures and powers of the ITC.<sup>73</sup> The new law also defined methods of unfair importation and subsequently declared them illegal.<sup>74</sup>

64. See 5 U.S.C. § 551 (2012); see also *FAQS—Intellectual Property*, U.S. INT'L TRADE COMMISSION, [https://usitc.gov/faqs/intellectual\\_property\\_faqs.htm](https://usitc.gov/faqs/intellectual_property_faqs.htm) (last visited Jan. 14, 2017).

65. Revenue Act of 1916, Pub. L. No. 64-271, § 700, 39 Stat. 756, 795. The Trade Act of 1974 renamed the Tariff Commission to the International Trade Commission. See Pub. L. No. 93-618, § 171, 88 Stat. 1978, 2009 (1975). The agency retained all its old powers and received more clear instructions of its duties to investigate unfair trade practices. See 19 U.S.C. § 2101 (1976).

66. See 19 U.S.C. § 2252 (2012).

67. See Abraham Berglund, *The Tariff Act of 1922*, 13 AM. ECON. REV. 14, 17 (1923) (explaining how the Tariff Commission obtained the right and duty to propose recommendations for changes in rates of duty to the President).

68. See Tariff Act of 1922, Pub. L. No. 67-318, 42 Stat. 858; see also J. Stephen Simms, Comment, *Scope of Action Against Unfair Import Trade Practices Under Section 337 of the Tariff Act of 1930*, 4 NW. J. INT'L L. & BUS. 234, 240 (1982).

69. Simms, *supra* note 68, at 240.

70. *Id.* at 241.

71. Pub. L. No. 71-361, 46 Stat. 590 (1930) (codified at 19 U.S.C. §§ 1202–1683g (2012)).

72. 19 U.S.C. § 1337.

73. *Id.*

74. *Id.* § 1337(a)(1)(A).

Section 337 granted the ITC the authority to investigate allegations of unfair importation and issue exclusion orders to remedy any illegal activity,<sup>75</sup> under which the ITC could now enjoin goods from entering the United States.<sup>76</sup> Since 1930, the ITC has routinely investigated alleged unfair trade practices and issued many exclusion orders.<sup>77</sup> Although the President of the United States has the final authority to approve these orders, they are rarely reversed.<sup>78</sup>

### 3. Section 337 Investigations

A section 337 investigation begins with a complaint from a party alleging unfair trade practices.<sup>79</sup> After the party files a complaint, the ITC Commissioners examine the complaint to determine whether it sufficiently alleges an unfair importation pursuant to the statute.<sup>80</sup> If the Commissioners vote to open an investigation, the offending parties receive notice through the Federal Register.<sup>81</sup> Once an investigation commences, the Administrative Procedures Act governs the adjudicatory proceeding.<sup>82</sup> An ITC investigation is similar to a civil trial.<sup>83</sup> The investigation involves separate stages of pleadings, motions, discovery, a *Markman* hearing (for patent infringement actions), an evidentiary hearing, and post-hearing briefs.<sup>84</sup>

The Office of Unfair Import Investigations appoints its own attorney during ITC investigations to represent the public interest at large, not the two parties in dispute.<sup>85</sup> If the general public stands to suffer harm from unfair importation, the ITC will take note when consider-

75. *Id.* § 1337(d).

76. *Id.* An exclusion order enjoins goods from importation into United States. This Comment will use the term “exclusion order” for simplicity.

77. See *Section 337 Statistics*, U.S. INT’L TRADE COMMISSION, [http://www.usitc.gov/press\\_room/337\\_stats.htm](http://www.usitc.gov/press_room/337_stats.htm) (last visited Jan. 16, 2017).

78. President Barack Obama vetoed an exclusion order that would have banned the importation of some GSM models of the Apple iPhone 4 for infringing on Samsung Electronic Co.’s patents. See Brent Kendall & Ian Sherr, *Obama Administration Vetoes Ban on Sale of Some of Apple iPhones, iPads*, WALL ST. J. (Aug. 4, 2013, 12:09 PM), <http://www.wsj.com/articles/SB10001424127887324136204578646192008412934>.

79. 19 C.F.R. § 210.9(b) (2016).

80. *Id.* § 210.9(a).

81. See *id.* § 210.10(b).

82. U.S. INT’L TRADE COMM’N, SECTION 337 INVESTIGATIONS—ANSWERS TO FREQUENTLY ASKED QUESTIONS 17 (2009), [https://usitc.gov/intellectual\\_property/documents/337\\_faqs.pdf](https://usitc.gov/intellectual_property/documents/337_faqs.pdf).

83. *Id.* at 2.

84. *Id.* at 2, 17. A *Markman* hearing, named after *Markman v. Westview Instruments Inc.*, 517 U.S. 370, 372 (1996), held that patent claim construction is for the judge to decide.

85. ANSWERS TO FREQUENTLY ASKED QUESTIONS, *supra* note 82, at 2.

ing its decision of whether to issue an exclusion order.<sup>86</sup> The attorney for the public has the right to cross examine witnesses and submit a post-hearing brief advocating its position for whether the commission should issue an exclusion order.<sup>87</sup> Although the ITC has had jurisdiction to investigate unfair importation since the passage of the Tariff Act of 1930, the ITC's use of section 337 investigations began to significantly increase during the 1980s.<sup>88</sup>

### C. *The ITC's Jurisdiction*

The ITC's jurisdiction to police unfair importation has only recently been questioned.<sup>89</sup> Since 2010, several parties have appealed ITC decisions and exclusion orders, claiming that interpretations of the language in section 337 do not actually vest the agency with powers it presumed to have since its inception.<sup>90</sup> Specifically, respondents have argued that the definition of "infringement" in section 337 only covers direct infringement.<sup>91</sup> Additionally, respondents have argued that the word "articles" only covers tangible objects and does not encompass digital files.<sup>92</sup>

United States patent law describes several theories of infringement.<sup>93</sup> Direct patent infringement occurs when an unauthorized party "makes, uses, . . . or sells" the patented invention.<sup>94</sup> Induced infringement occurs when an unauthorized party encourages the production or use of the patented invention.<sup>95</sup> Contributory infringement requires an unauthorized party to "offer[ ] to sell" a component of the patented invention.<sup>96</sup> The text of section 337 only states "infringe-

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86. Louis S. Mastriani, *U.S. Administrative Proceeds for Protection from Unfair Import Competition: The Revitalization of Section 337*, ADDUCI MASTRIANI & SCHAUMBERG LLP, <http://www.aduci.com/node/112> (last visited Feb. 11, 2017).

87. *Id.*

88. *See Section 337 Statistics*, *supra* note 77.

89. *See* *Suprema, Inc. v. ITC*, 742 F.3d 1350, 1353 (Fed. Cir. 2013).

90. *See infra* notes 98–154 and accompanying text.

91. *See infra* notes 98–123 and accompanying text.

92. *See infra* notes 124–54 and accompanying text.

93. *See* 35 U.S.C. § 271 (2012).

94. *See id.* § 271(a) ("[W]hoever without authority makes, uses, offers to sell, or sells any patented invention . . . infringes the patent.").

95. *See id.* § 271(b) ("Whoever actively induces infringement of a patent shall be liable as an infringer.").

96. *See id.* § 271(c) ("Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine . . . constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.").

ment” and does not specify the type of infringement it declares illegal and prohibits.<sup>97</sup> The Federal Circuit addressed this question in 2013.

### 1. *The Suprema Case and Defining “Infringement”*

In *Suprema, Inc. v. ITC*,<sup>98</sup> Suprema, Inc., a Korean company, was investigated and subsequently barred from importing its goods into the United States. The company designs and manufactures several products for access control and authentication of employees, including biometric fingerprint scanners,<sup>99</sup> and imports its products into the United States for customers to purchase and use.<sup>100</sup> The biometric scanner could be programmed to recognize fingerprints and grant or deny access.<sup>101</sup> Crossmatch Technologies (Crossmatch) is a Florida corporation and the owner of several U.S. patents relating to biometric scanning devices.<sup>102</sup> Crossmatch designs and manufactures similar authentication security devices and directly competes with Suprema.<sup>103</sup>

In 2010, Crossmatch filed a complaint with the ITC against Suprema and Mentalix, Inc., a software company that programmed biometric security devices.<sup>104</sup> Crossmatch alleged that Suprema infringed its patents for biometric security devices when Suprema imported its products into the United States and programmed them with software created by Mentalix.<sup>105</sup> The ITC voted to open an investigation and held a hearing that ultimately resulted in an exclusion order barring Suprema from importing biometric scanners into the United States.<sup>106</sup>

Suprema appealed the ITC’s decision to the Federal Circuit.<sup>107</sup> Suprema argued that its fingerprint sensors were imported into the United States as part of a computer waiting to be programmed and

97. See 19 U.S.C. § 1337 (2012).

98. *Suprema, Inc. v. ITC*, 742 F.3d 1350 (Fed. Cir. 2013); see *About Suprema*, SUPREMA, [https://www.supremainc.com/en/About\\_Suprema](https://www.supremainc.com/en/About_Suprema) (last visited Jan. 3, 2017).

99. Controlled Access Technology uses some sort of authentication (ID card, fingerprint, eye scan, voice scan, etc.) to grant or deny access to certain facilities. See *BioEntry Plus: Feature*, SUPREMA, <https://www.supremainc.com/en/AccessControl-TimeandAttendance/Biometric/BioEntry-Plus> (last visited Jan. 3, 2017).

100. *Id.*

101. *Id.*

102. See *In re Certain Biometric Scanning Devices, Components Thereof, Assoc. Software & Products Containing the Same*, Inv. No. 337-TA-720, USITC Pub. No. 4366, at 1 (Oct. 24, 2011) (Final).

103. See *Suprema*, 742 F.3d at 1355.

104. See *Suprema, Inc. v. ITC*, 796 F.3d 1338, 1341 (Fed. Cir. 2015) (en banc).

105. *Id.*

106. *Id.* at 1343–44.

107. *Id.* at 1344.

that no actual infringement had occurred until the software was loaded onto the device.<sup>108</sup> *Suprema* also contended that the statute only allowed direct infringement and the ITC did not have the authority to police induced infringement.<sup>109</sup> A fractured Federal Circuit panel agreed, holding, over a dissent, to vacate the ITC's exclusion order.<sup>110</sup> The panel reasoned that "an exclusion order based on a violation of section 1337(a)(1)(B)(i) may not be predicated on a theory of induced infringement."<sup>111</sup> The majority reasoned that according to the statute, an ITC exclusion order only applies to direct infringement at the time of importation, and any indirect infringement falls outside of the Commission's authority.<sup>112</sup> Judge Reyna dissented in part, arguing that this new reading of section 337 significantly narrowed the authority of the Commission and "enable[s] circumvention of the legitimate legislative objective of [the statute] to stop, at the border, articles involved in unfair trade."<sup>113</sup>

The ITC petitioned for a rehearing en banc to allow the entire Federal Circuit to hear the issue.<sup>114</sup> Many major technology companies filed amicus briefs for the hearing, some urging the reversal of the panel's holding to allow the ITC to continue operating as it had for many years prior to *Suprema*.<sup>115</sup>

The en banc Federal Circuit agreed and reversed the panel's ruling.<sup>116</sup> The en banc court held that the ITC possessed the authority under section 337 to enforce induced infringement.<sup>117</sup> The ITC found that the definition of "infringement" is ambiguous because it has more than one possible meaning.<sup>118</sup> The Federal Circuit agreed that an ambiguity existed, so the court then looked to step two of the *Chevron* test. The court found that the ITC's interpretation of "infringement" to include induced infringement was a reasonable construction of section 337.<sup>119</sup> "When Congress used the words 'unfair methods of com-

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108. *Id.* at 1347.

109. *Id.* at 1357.

110. *Suprema*, 742 F.3d at 1353.

111. *Id.*

112. *Id.* at 1360.

113. *Id.* at 1375 (Reyna, J., dissenting).

114. See *Suprema, Inc. v. ITC*, No. 2012-1170, 2014 WL 3036241, at \*1 (Fed. Cir. May 13, 2014).

115. See Aebra Coe, *Fed. Circ. Reverses Ruling Narrowing ITC's Patent Authority*, LAW360 (Aug. 10, 2015, 3:49 PM), <http://www.law360.com/articles/689173/fed-circ-reverses-ruling-narrowing-itc-s-patent-authority>.

116. See *Suprema, Inc. v. ITC*, 796 F.3d 1338 (Fed. Cir. 2015) (en banc).

117. *Id.* at 1352 ("The Commission reasonably determined that its interpretation would further the purpose of the statute.")

118. *Id.*

119. *Id.*

petition and unfair acts in the importation of articles,' that language is 'broad and inclusive and should not be limited to, or by, *technical definitions* of those types of act.'"<sup>120</sup> The ITC took steps to interpret the definition of "infringement," and the court gave deference to that interpretation.<sup>121</sup> Since the legislative intent of the ITC was to fight unfair importation, giving "infringement" a wide interpretation allows the agency to effectively carry out its intended purpose.<sup>122</sup> Therefore, the en banc Federal Circuit allowed the ITC to invoke *Chevron* deference when reading "infringement" because it would allow the ITC to effectively carry out its intended purpose of fighting unfair importation.<sup>123</sup> However, as electronic goods continue to become more mainstream, the ITC has attempted to fight unfair importation on the internet.

## 2. *The ClearCorrect Appeal and Defining "Articles"*

In 2006, Align Tech, Inc. sued OrthoClear, Inc. and several other subsidiaries for unfair importation in the ITC.<sup>124</sup> Align Tech alleged that the "incremental positioning adjustment appliances" for orthodontics infringed on its patented "Invisalign System."<sup>125</sup> Rather than go through costly litigation, the parties settled and the ITC issued an exclusion order, barring the infringing devices from importation into the United States without a license.<sup>126</sup>

In its second case in front of the ITC, Align Tech alleged that ClearCorrect Operating Systems, LLC, the successor to OrthoClear, unfairly imported internet files that infringed its patents.<sup>127</sup> After a full investigation, the ITC held that ClearCorrect infringed on Align Tech's patents and violated section 337 by importing them into the United States.<sup>128</sup> The ITC issued an exclusion order, barring ClearCorrect from "importing (including through electronic transmission)" products that infringed Align Tech's several patents.<sup>129</sup> The re-

120. *Id.* at 1350 (citing *In re W. C. Von Clemm*, 229 F.2d 441, 443, (C.C.P.A. 1955)).

121. *Id.*

122. *Suprema*, 796 F.3d at 1350.

123. *Id.* at 1352.

124. *In re Certain Incremental Dental Positioning Adjustment Appliances & Methods of Producing Same*, USITC Inv. No. 337-TA-562, 2011 WL 8883648 (Nov. 13, 2006) (Order).

125. *See Align Tech., Inc. v. ITC*, 771 F.3d 1317, 1319 (Fed. Cir. 2014).

126. *Id.*

127. *See ClearCorrect Operating, LLC v. ITC*, 810 F.3d 1283, 1287 (Fed. Cir. 2015).

128. *Certain Digital Models, Digital Data & Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, the Appliances Made Therefrom & Methods of Making the Same*, Inv. No. 337-TA-833, USITC Pub. 2013-18437 (Apr. 3, 2014) (Final) [hereinafter *Certain Digital Models*].

129. *See id.* at \*6.

spondent, ClearCorrect, appealed the exclusion order to the Federal Circuit.<sup>130</sup>

ClearCorrect's appeal presented a monumental issue for the ITC, namely whether the Commission has the statutory authority to issue exclusion orders blocking unfair importation on the internet.<sup>131</sup> The ITC declared that it has the authority to police online unfair importation.<sup>132</sup> Many internet companies worried that the ITC's newly created power to regulate the internet may lead to a legalized form of censorship.<sup>133</sup>

The Federal Circuit held, over a dissenting opinion, that the ITC receives no deference to its interpretation of the definition of "articles."<sup>134</sup> The panel wrote that *Suprema* was distinguishable because it involved a single instance of induced patent infringement, while this case concerned the definition of the word "articles."<sup>135</sup> The Tariff Act of 1930 did not define "infringement" or specify whether the ITC may police direct, indirect, or induced infringement.<sup>136</sup> In contrast to the issue in *Suprema*, the Tariff Act of 1930 interprets the word "articles" as a tangible, material thing.<sup>137</sup> The statute makes reference to many other provisions that are only permissible if "articles" is a material object.<sup>138</sup>

The majority also wrote that it is "difficult to see how one could physically stop electronic transmissions at the borders under the current statutory scheme."<sup>139</sup> The Federal Circuit also noted that digital data could not be "forfeited" or "seized" at any border.<sup>140</sup> None of the uses of the word "article" in the text of the statute could be read as ambiguous.<sup>141</sup> The Federal Circuit wrote that under the *Chevron* framework, the definition of "articles" is unambiguous and, therefore,

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130. See *ClearCorrect Operating*, 810 F.3d at 1289.

131. *Id.* at 1288.

132. See Certain Digital Models, *supra* note 128.

133. Rebecca McCray, *ITC Tells Google Invisalign Case Won't Cripple the Web*, LAW360 (Feb. 20, 2015, 4:42 PM), <http://www.law360.com/articles/623541/itc-tells-google-invisalign-case-won-t-cripple-the-web>.

134. *ClearCorrect Operating*, 810 F.3d at 1300.

135. *Id.* at 1286 n.1.

136. See *Suprema, Inc. v. ITC*, 796 F.3d 1338, 1351 (Fed. Cir. 2015) (en banc) ("There is no indication that Congress, in 1988, meant to contract the Commission's authority regarding patent infringement. To the contrary, Congress said it was expanding Commission authority.").

137. *ClearCorrect Operating*, 810 F.3d at 1290.

138. *Id.*; see also 19 U.S.C. § 1337(i) (2012) (referencing "ports of entry" into the United States).

139. *ClearCorrect Operating*, 810 F.3d at 1295.

140. *Id.*

141. *Id.* at 1302.

the analysis should stop there.<sup>142</sup> The Federal Circuit, however, continued to apply step two of the *Chevron* test and concluded that the ITC's interpretation of "articles" was not reasonable.<sup>143</sup>

Under step two of the *Chevron* test, the "question for the court is whether the agency's answer is based on a permissible construction of the statute."<sup>144</sup> The Federal Circuit panel held that the ITC's construction of the statute was not permissible because it adopted a definition of "articles" from a 1924 dictionary and "generate[d] its own definition, unrelated to the definition provided by the dictionary."<sup>145</sup> The ITC cited several other dictionaries in an attempt to support its construction that digital files fall within the scope of "articles."<sup>146</sup> However, the Federal Circuit read the opinion and rejected it, stating that the ITC opinion did not provide any evidence supporting why these other dictionaries ought to be included.<sup>147</sup> The Federal Circuit also wrote that the ITC cites to several other dictionaries' definitions, yet failed to state "why they should not control."<sup>148</sup>

The ITC appealed the panel decision for a rehearing by the en banc Federal Circuit in late January 2016.<sup>149</sup> The ITC asked for a reversal, characterizing the issue as one of "exceptional importance."<sup>150</sup> Align Tech also filed a petition.<sup>151</sup>

The Align Tech litigation presents a growing problem plaguing the digital industries, which is the illegal downloading and pirating of intellectual property.<sup>152</sup> If these files sit on servers outside of the United States, U.S. courts have no jurisdiction.<sup>153</sup> Rights holders have

142. *Id.* at 1299–1300.

143. *Id.* at 1300.

144. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

145. *ClearCorrect Operating*, 810 F.3d at 1300.

146. *Id.*

147. *Id.*

148. *Id.*

149. Aarti Shah et al., *ClearCorrect: ITC and Patentee Align Submit Petitions for Rehearing En Banc, Asking Federal Circuit to Reconsider Whether the ITC Has Jurisdiction over Digital Imports*, GLOBAL IP MATTERS, (Jan. 29, 2016), <https://www.globalipmatters.com/2016/01/29/clearcorrect-itc-and-patentee-align-submit-petitions-for-rehearing-en-banc-asking-federal-circuit-to-reconsider-whether-the-itc-has-jurisdiction-over-digital-imports#/page=1>.

150. See Jack Newsham, *ITC Seeks Full Fed. Circ. Review of Data-Blocking Authority*, LAW360, (Jan. 27, 2016, 11:19 PM), [www.law360.com/articles/751618/itc-seeks-full-fed-circ-review-of-data-blocking-authority](http://www.law360.com/articles/751618/itc-seeks-full-fed-circ-review-of-data-blocking-authority).

151. *Id.*

152. See generally Anthony G. Gorry, *Many People Do Not View Music Sharing as Wrong*, in INTERNET PRIVACY 22 (James D. Torr ed., 2005).

153. See *Asahi Metal Indus. Co. v. Sup. Ct. of Cal.*, 480 U.S. 102, 116 (1987) (holding that courts cannot exercise jurisdiction over foreign corporations without an intentional targeting of the jurisdiction in question). Copyright holders can petition search engines to remove links to infringing content from search results under the Digital Millennium Copyright Act (DMCA).



little recourse when this occurs and often incur heavy revenue losses.<sup>154</sup> While the ITC acted to address the growing problem of unfair importation, its actions went beyond the statutory text of section 337 and the Federal Circuit correctly reversed its holding.

### III. ANALYSIS

This Part analyzes relevant case law and argues that the ITC does not have the power under its organic statute to remedy unfair importation over the internet.<sup>155</sup> The U.S. Supreme Court makes a distinction between digital data and tangible objects and the ITC cannot usurp that distinction.<sup>156</sup> No ambiguity exists for the word “articles” in the text of section 337, and, in addition, the statute does not grant the ITC the power to implement an exclusion order from using third-party companies.<sup>157</sup> Finally, this Part opines that major First Amendment concerns would arise if the ITC received the authority to police unfair importation on the internet.<sup>158</sup>

#### A. *Physical Articles vs. Digital Data*

In its brief, the ITC argued that digital data is congruent to physical articles.<sup>159</sup> The U.S. Supreme Court addressed this issue of digital data and physical objects in *Riley v. California*.<sup>160</sup> In *Riley*, police arrested the petitioner for possession of a firearm and searched his pockets for dangerous objects.<sup>161</sup> Riley possessed a smartphone, and the police seized it, subsequently searching it for evidence without obtaining a warrant.<sup>162</sup> Riley attempted to have the digital evidence obtained from his phone suppressed at trial, arguing that the phone search without a warrant was unreasonable and violated his Fourth Amendment rights.<sup>163</sup> The U.S. Supreme Court heard arguments

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See 17 U.S.C. § 512(c)(3) (2012). However, this does not remove the copyrighted material from access by users; it only removes the search engine result from appearing. Additionally, complainants in *ClearCorrect* could not use the DMCA provision because its claim concerned a patent, not a copyright.

154. See *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 492 (1st Cir. 2011) (“Between 1999 and 2008, the recording industry as a whole suffered a fifty percent drop in both sales and revenues, a figure plaintiffs attribute to the rise of illegal downloading.”).

155. See *infra* notes 159–239 and accompanying text.

156. See *infra* notes 159–70 and accompanying text.

157. See *infra* notes 171–85 and accompanying text.

158. See *infra* notes 186–214 and accompanying text.

159. See *Petition of Appellee Int'l Trade Comm'n for Rehearing En Banc at 13–14, ClearCorrect Operating, LLC v. ITC*, 810 F.3d 1283 (Fed. Cir. 2015) (No. 2014-1527).

160. 134 S. Ct. 2473 (2014).

161. *Id.* at 2480.

162. *Id.* at 2480–81.

163. *Id.* at 2481.

about this issue and held that the seizure of Riley's phone was unreasonable and that the evidence obtained from it was not admissible because the police did not have a warrant to search the device.<sup>164</sup> The Court distinguished between physical objects on a person (e.g., keys, a wallet, or a notepad) from the digital data on a smartphone.<sup>165</sup>

The U.S. Supreme Court holding in *Riley* shows that digital data must be treated differently than physical articles.<sup>166</sup> The two concepts are not synonymous, as digital data stored on a smartphone receives greater protections under the Constitution.<sup>167</sup> The ITC's organic statute only states "articles" and does not reference digital data.<sup>168</sup> Because the Supreme Court made this distinction, the ITC cannot declare the two concepts equal to fulfill its legislative purpose. This would contradict the Supreme Court's holding in *Riley*. In *ClearCorrect*, the Federal Circuit's panel holding maintained the distinction between digital data and physical articles set forth in *Riley*.<sup>169</sup> The ITC erred in its holding when it did not maintain the U.S. Supreme Court's distinction between digital data and physical articles.<sup>170</sup> Therefore, the Federal Circuit was correct in holding that the ITC does not possess the power to police unfair importation over the internet. The distinction between physical articles and digital data, however, is not the only reason that the Federal Circuit holding was correct; section 337's reference to "articles" is unambiguous and only applies to physical articles.

### B. *No Ambiguity in the Interpretation of "Article"*

Administrative agencies have often acted to interpret their own organic statutes,<sup>171</sup> but when interpreting the law, statutory provisions may not be read in isolation.<sup>172</sup> The Supreme Court has held, "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"<sup>173</sup>

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164. *Id.* at 2495.

165. *Id.* 2484.

166. *Riley*, 134 S. Ct. at 2489.

167. *Id.* at 2478.

168. *See* 19 U.S.C. § 1337 (2012).

169. *See ClearCorrect Operating, LLC v. ITC*, 810 F.3d 1283, 1298 (Fed. Cir. 2015).

170. *Id.*

171. *See, e.g., City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

172. *See, e.g., King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (affirming that the language of a statute must be read in context with the statute as a whole).

173. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see also Davis v. Mich. Dep't of Treasury*, 489 U.S. 803 (1989).

Section 337 does not define “articles,” but a contextual reading shows that its scope is only limited to tangible objects.<sup>174</sup> The statute was written in 1930 when digital data did not exist.<sup>175</sup> Additionally, the statute makes reference to several enforcement mechanisms that only apply if the definition of “articles” is limited to physical objects and does not include digital data.<sup>176</sup> Section 337 states that the ITC will notify the Secretary of the Treasury if it issues an exclusion order,<sup>177</sup> and the Treasury Department will, “upon receipt of such notice, . . . through the proper officers, refuse such entry.”<sup>178</sup> Digital data cannot be easily inspected or “refused entry” by the government. This is because of the massive volume of digital data entering the country and the encrypted nature of some of that data rendering it impossible to interpret. In addition, data does not enter the United States through any dedicated port. This makes its inspection difficult and time-consuming. Assuming U.S. Customs Officers could inspect digital data entering the United States, the sheer volume of data would overwhelm the office.<sup>179</sup>

If the ITC could issue exclusion orders barring unfair importation over the internet, it would need to use a digital filter programed to stop access to a specific website.<sup>180</sup> Private companies, or “internet service providers” (ISPs), build and maintain the infrastructure for computers to connect to the internet.<sup>181</sup> By enforcing an exclusion order, the ITC would force a third party to implement the filters, rather than directing government officers to turn away goods at the

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174. Tariff Act of 1930 § 337, 19 U.S.C. § 1337 (2012).

175. See Pub. L. No. 71-361, 46 Stat. 590 (1930).

176. See 19 U.S.C. § 1337(d)(1). For example, the ITC has listed exclusion orders for electric pianos and smartphones which were found to infringe U.S. companies’ intellectual property. Kevin Penton, *ITC to Probe Samsung, LC, Others in Smartphone Patent Row*, LAW 360 (May 6, 2016, 5:25 PM), <https://www.law360.com.ezproxy.depaul.edu/articles/793500>.

177. 19 U.S.C. § 1337(d)(1).

178. *Id.*

179. See generally CISCO SYS., *THE ZETABYTE ERA—TRENDS AND ANALYSIS* (2016), <http://www.cisco.com/c/en/us/solutions/collateral/service-provider/visual-networking-index-vni/vni-hyperconnectivity-wp.pdf>. As a means of comparison, the modern consumer computers hold between 100 gigabytes, (1 billion bytes) to 3 terabytes (3 trillion bytes), depending on the model purchased. According to Cisco Systems’ White Paper, traffic moving around the internet will exceed 1 billion gigabytes by the end of 2016. *Id.* at 1. This is 10<sup>21</sup> or 1,000,000,000,000,000,000,000 bytes of data.

180. See *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 628 (E.D. Pa. 2004).

181. See *id.* at 613. An ISP is the “internet service provider” that allows you to connect to the internet using some physical connection (usually through a cable or phone line). There are many ISPs in the United States. Some examples include: Comcast, Time Warner Cable, AT&T, Verizon, RCN, Cox, and Google Fiber. See Raymond Blockman, *What Is an Internet Service Provider (ISP)?—Definition & Examples*, STUDY.COM, <http://study.com/academy/lesson/what-is-an-internet-service-provider-isp-definition-examples-quiz.html> (last visited Mar. 15, 2017).

border. Section 337 does not vest in the ITC the power to enforce exclusion orders through third parties.<sup>182</sup> Section 337(d) only vests the power to enforce exclusion orders through the Secretary of the Treasury.<sup>183</sup> The statute makes no reference to the ITC possessing the power to exercise its authority to require third parties to enforce exclusion orders.<sup>184</sup>

If the ITC receives the power to issue exclusion orders barring unfair importation over the internet, the method of implementation presents technical challenges. To enforce an exclusion order over the internet, ISPs across the country must uniformly implement software to filter specific content and remove it from the internet traffic entering the United States. Some of these filters may block access to foreign websites in the United States.<sup>185</sup> Denying access to internet websites raises serious free speech questions and whether the government violates the First Amendment by issuing exclusion orders.

### C. *First Amendment Considerations*

A broad reading of “articles” would encompass digital data on the internet and would allow the ITC to take steps to block access to internet websites. Internet content is protected by the First Amendment, and blocking access to websites raises large questions about freedom of speech.<sup>186</sup> This Section explores attempts by the legislature to enact laws regulating access to content on the internet and these attempts are a minefield of First Amendment violations.<sup>187</sup>

In 2002, the Pennsylvania legislature passed a law giving the state Attorney General the power to direct ISPs to block websites that displayed child pornography.<sup>188</sup> In order to comply with the law, ISPs implemented a system of filters to block users in the state of Pennsylvania from accessing websites displaying child pornography.<sup>189</sup> The law imposed criminal liability on ISPs that failed to comply with these orders.<sup>190</sup> The ISPs operated outside of Pennsylvania and routinely

182. 19 U.S.C. § 1337 (2012).

183. *Id.* § 1337(i)(2) (“The Commission shall notify the Secretary of the Treasury of any order issued under this subsection and, upon receipt of such notice, the Secretary of the Treasury shall enforce such order in accordance with the provisions of this section.”).

184. *Id.*

185. *See Pappert*, 337 F. Supp. 2d at 635.

186. *Reno v. ACLU*, 521 U.S. 844, 863 (1997) (“[T]he First Amendment denies Congress the power to regulate the content of protected speech on the Internet.”).

187. *See infra* notes 188–214 and accompanying text.

188. 18 PA. CONS. STAT. §§ 7621–7630 (2003); *see Pappert*, 337 F. Supp. 2d at 610 (holding the Internet Child Pornography Act unconstitutional).

189. *Pappert*, 337 F. Supp. 2d at 628.

190. *Id.* at 610.

sent information into the state—even if not destined for any user within the state.<sup>191</sup> The Pennsylvania Attorney General moved to direct ISPs to block many websites using several different methods of filtering.<sup>192</sup>

The ISPs implemented three methods of compliance used to filter the internet traffic: (1) DNS filtering; (2) IP filtering; or (3) URL filtering.<sup>193</sup> DNS filtering occurs when an ISP denies a request from a user to access a specific domain.<sup>194</sup> To implement DNS filtering, an ISP programs its routers not to recognize a specific website when requested by a user.<sup>195</sup> For example, if an ISP removed its routers' recognition of "google.com," a user requesting data from "google.com" would receive nothing or an error code. IP filtering works by programming routers not to send or receive data from a specific IP address.<sup>196</sup> Using IP filtering, if a user wished to navigate to "google.com," the computer would send data destined for the "google.com" IP address. The ISP's router would stop data from being forwarded to "google.com" and stop data being sent from "google.com" from reaching the user. URL filtering requires more than IP or DNS filtering. URL filtering requires an ISP to place special equipment to analyze internet traffic.<sup>197</sup> If the filter finds a blocked URL, it discards the request and does not allow the data to complete its journey to the user.<sup>198</sup> When used, each of these filters removes access to internet web sites.<sup>199</sup> If the blocked websites contain protected speech, this process violates the First Amendment.

A local ISP, several website owners, and the American Civil Liberties Union, filed a lawsuit alleging that this law violated multiple provisions of the U.S. Constitution.<sup>200</sup> The plaintiffs argued that the web filter violated the First Amendment by "burdening a substantial amount of lawful speech, establishing a system of secret censorship, and failing to provide adequate procedural protections."<sup>201</sup> To sup-

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191. *Id.* Even temporary presence in a state, regardless of the final destination, is sufficient to establish in personam jurisdiction. *See generally* *Burnham v. Sup. Ct. of Cal.*, 495 U.S. 604 (1990).

192. *Pappert*, 337 F. Supp. 2d at 636.

193. *Id.* at 628.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Pappert*, 337 F. Supp. 2d at 628.

199. *Id.*

200. *See id.* at 611.

201. *Id.*

port their case, the ISPs relied on *United States v. Playboy Entertainment Group*.<sup>202</sup>

Television programs are a form of protected free speech.<sup>203</sup> The *Playboy* case analyzed a law requiring that cable providers take steps to block sexually oriented television programming or to schedule it between the hours of 10:00 PM and 6:00 AM.<sup>204</sup> Laws regulating speech must be the “least restrictive means to further the articulated interest.”<sup>205</sup> The Court found the law at issue in *Playboy* was not the “least restrictive” means for censoring speech.<sup>206</sup> Therefore, the Supreme Court struck down the law as unconstitutional as applied because it violated the First Amendment.<sup>207</sup>

The *Pappert* court looked to *Playboy* for guidance on First Amendment doctrine.<sup>208</sup> The court found that the orders from the Pennsylvania Attorney General effectively blocked “in excess of 1,190,000 websites.”<sup>209</sup> Of these blocked websites, only a handful contained documented instances of child pornography.<sup>210</sup> The court wrote, “Although the inference could be drawn that making it more difficult to access child pornography reduces the incentive to produce and distribute child pornography, this burden on the child pornography business is not sufficient to overcome the significant suppression of expression . . . .”<sup>211</sup> The law was invalidated under the First Amendment for being overly inclusive due to the large volume of websites blocked that contained protected speech.<sup>212</sup>

The ITC interpreted its authority to issue exclusion orders for content imported over the internet.<sup>213</sup> Using similar filtering techniques as the ISPs in *Pappert*, an ITC exclusion order could potentially block websites containing protected speech. If the ITC issues an exclusion order for a specific website, internet users in the United States would not be able to access that entire website. As demonstrated in *Pappert*,

202. *Id.* at 650 (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 804 (2000)).

203. *See Playboy Entm't*, 529 U.S. at 804.

204. *Id.* at 806.

205. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

206. *Playboy Entm't*, 529 U.S. at 827.

207. *Id.*

208. *Ctr. for Democracy & Tech. v. Pappert*, 337 F. Supp. 2d 606, 650 (E.D. Pa. 2004)

209. *Id.*

210. *Id.* at 655 (“More than 1,190,000 innocent web sites were blocked in an effort to block less than 400 child pornography web sites, and there is no evidence that the government made an effort to avoid this impact on protected expression.”).

211. *Id.*

212. *Id.* at 611.

213. *Certain Digital Models*, *supra* note 128.

these methods often lead to blocking websites containing protected speech.<sup>214</sup>

Because of the potential for serious First Amendment violations stemming from exclusion orders, “articles” as used in section 337 should not be interpreted broadly. Limiting the definition of “articles” to only include physical goods and exclude digital data quashes these First Amendment questions before they arise.

#### D. Addressing the *ClearCorrect* Dissent

The *ClearCorrect* court held, over a dissenting opinion, that the ITC’s interpretation of “articles” was incorrect and that it does not encompass digital data.<sup>215</sup> The dissent argued that (1) the court should look at the legislative intent of section 337 when interpreting “articles”; (2) precedent cases in the Federal Circuit have held that software and other digital data is material; and (3) laws can adapt and be applied to advances in technology.<sup>216</sup> However, when scrutinized, these arguments do not retain their merit.

Judge Newman’s dissent in *ClearCorrect* focused on the legislative intent of section 337 and argued that it showed how “articles” could encompass digital goods.<sup>217</sup> Citing *Suprema*, she reasoned that the case reaffirmed the ITC’s “broad enforcement authority to remedy unfair trade acts,” and that authority should govern here.<sup>218</sup> According to Judge Newman, the ITC correctly held section 337 applies to importing digital goods.<sup>219</sup> She cited legislative history and reasoned that “[t]he statute was designed to reach every type and form of unfair competition arising from importation.”<sup>220</sup>

This argument incorrectly applied the *Suprema* holding to the issue here. The *Suprema* court analyzed the ITC’s definition when applied to “infringe.”<sup>221</sup> Looking at the legislative intent for guidance in *Suprema*, the en banc Federal Circuit held that the ITC possessed the authority to enforce exclusion orders for all types of infringement.<sup>222</sup> However, the issue in *ClearCorrect* does not concern infringement; it concerns the *article that causes the infringement*. Both the statutory text and the legislative history of section 337 define “articles” as noth-

214. *Pappert*, 337 F. Supp. 2d at 650.

215. *See ClearCorrect Operating, LLC v. ITC*, 810 F.3d 1283, 1301 (Fed. Cir. 2015).

216. *Id.* at 1304–06.

217. *Id.* at 1304–05 (Newman, J., dissenting).

218. *Id.* at 1306 (Newman, J., dissenting).

219. *Id.* (Newman, J., dissenting).

220. *Id.* at 1305 (Newman, J., dissenting).

221. *Suprema, Inc. v. ITC*, 796 F.3d 1338, 1340 (Fed. Cir. 2015) (en banc).

222. *Id.*

ing more than a physical good. The ITC cannot extend the scope of “article” to encompass digital data because the text of Section 337 does not allow it. The context of section 337 points to the definition of “article” being only a physical good. Therefore, the argument that legislative intent shows digital data was understood to be included in the word “article” does not pass muster.

Judge Newman’s dissent also references several U.S. Supreme Court and previous Federal Circuit opinions that contradict the holding that digital data is not considered an “article.”<sup>223</sup> In 2009, the Federal Circuit addressed whether patented software was a “material or apparatus” for patent infringement.<sup>224</sup> The Federal Circuit held that a patented software method was “material” for purposes of patent infringement.<sup>225</sup> Judge Newman’s argument rests on the assumption that the term “material” equals “article.”

The dissent looked to the use of the word “material” in 35 U.S.C. § 271(c).<sup>226</sup> Notably, however, the dissent omits the important words that come after “material.”

Whoever offers to sell or sells within the United States . . . a *material* or apparatus for use in practicing a patented process, constituting a *material* part of the invention, knowing the same to be especially made or especially *adapted for use in an infringement* of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.<sup>227</sup>

When used in this context, “material” describes some object that is designed for the sole purpose of infringement and has no other noninfringing use.<sup>228</sup> The dissent incorrectly assumes that the internet is a “material” used to enable infringement that has no other noninfringing use. This assumption is fundamentally flawed because the internet has thousands of noninfringing uses and enables significant commercial activity.<sup>229</sup> A court cannot equate “material” with “articles” because the internet has so many noninfringing uses—35 U.S.C. § 271(c) requires the “material” to be only suited for purpose of infringe-

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223. *ClearCorrect Operating*, 810 F.3d at 1307 (Newman, J., dissenting).

224. *See* *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1321 (Fed. Cir. 2009).

225. *Id.*

226. *ClearCorrect Operating*, 810 F.3d at 1307 (Newman, J., dissenting).

227. 35 U.S.C. § 271(c) (2012) (emphasis added).

228. *Id.*

229. *See What Is Ecommerce?*, NETWORK SOLUTIONS, <http://www.networksolutions.com/education/what-is-ecommerce/> (last visited Jan. 14, 2017). The internet enables significant commerce through websites allowing visitors to buy, sell, trade, and advertise goods and services from all over the world. Some examples of internet commerce websites are: Amazon, eBay, Alibaba, Craigslist, and Netflix.



ment.<sup>230</sup> In addition, if a court follows this logic and equates “article” with “material” in the context of section 271(c), all users of the internet may be liable for infringement because they would use the “material or apparatus” that enables unfair importation. However, all users of the internet are not infringers because the internet has many noninfringing uses.

Judge Newman also emphasized that interpretations of statutes often change with evolving technologies.<sup>231</sup> Judge Newman gave the example of how the Copyright Act, despite being written in 1909, easily adapted to the widespread use of radio, television, and film.<sup>232</sup> In 1975, Twentieth Century Music Corporation sued a restaurant owner for playing copyrighted music over his speakers at his business.<sup>233</sup> The music was broadcast from a radio station, which held licenses allowing the performance and dissemination of the music on the radio.<sup>234</sup> The U.S. Supreme Court noted that while the law (at the time) did not expressly state that music deserves copyright protection, the intention of the law was to “stimulate artistic creativity,” and that “[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.”<sup>235</sup>

Laws often adapt to advances in technology;<sup>236</sup> however, the authors of the Copyright Act wrote the law broadly, allowing almost all forms of artistic expression, fixed in a tangible medium, to receive protection.<sup>237</sup> As technology progressed, musical recordings proliferated, and the U.S. Supreme Court found that extending copyright protection falls within the legislative intent of the statute.<sup>238</sup> However, the drafters of Section 337 only wrote certain provisions of the statute broadly, explicitly crafting the ITC’s powers, scope of review, and remedies. The words in section 337 cannot be extended because other provisions in the statute limit the definitions. “Articles” cannot be

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230. See 35 U.S.C. § 271(c).

231. *ClearCorrect*, 810 F.3d at 1307 (Newman, J., dissenting).

232. *Id.* at 1306–07 (Newman, J., dissenting).

233. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 153 (1975). Coincidentally, Congress passed a new Copyright Act one year after this decision: The Copyright Act of 1976, expressly grants music copyright protection. See Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101–122 (2012)).

234. *Aiken*, 422 U.S. at 153.

235. *Id.* at 156.

236. See *id.*; see also *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982) (holding that a video game can receive copyright protection). Video games are not expressly mentioned in the Copyright Act; however, it receives protection because they may be defined as “audiovisual works.”

237. See 17 U.S.C. § 101. While the Copyright Act expressly lists eligible forms of expression, copyright protection has been extended to other forms expression.

238. *Aiken*, 422 U.S. at 163–64.

extended to encompass digital data because the statutory provisions limit its definition to physical objects.<sup>239</sup>

The drafters of section 337 wrote the law in narrow terms, so it cannot be compared to the Copyright Act. Section 337 granted limited power and enforcement mechanisms to the ITC, while the Copyright Act did not contain any limits on what expression receives protection. With the narrow scope of the ITC's powers, the dissent's argument of section 337 adapting to advances in technology does not have merit. The statutory text shows that Congress did not grant the ITC any open-ended powers that may be extended to encompass other channels of importation.

#### IV. IMPACT

Silicon Valley technology companies have consistently raised concerns about any party's ability, government or otherwise, to regulate access to internet websites, often framing the issue as one of possible infringement of the fundamental right to freedom of speech under the Constitution.<sup>240</sup> As *ClearCorrect* was pending in front of the Federal Circuit, several major technology companies filed amicus briefs urging the court to vacate the decision of the ITC and to hold the definition of "articles" in section 337 is limited to physical goods.<sup>241</sup> The ITC has assured technology companies that if it receives the authority to police the internet for unfair importation, there will not be a chilling of free speech online.<sup>242</sup>

This Part explores the impact of the Federal Circuit's decision to limit the definition of "articles" to physical goods in both the short term and long term. In addition, this Part describes a possible congressional solution to clarify whether the ITC receives the power to regulate unfair importation over the internet.

##### A. Short Term Impact and Unintended Consequences

The immediate effect of the Federal Circuit limiting the definition of "articles" to physical goods will be maintaining the status quo

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239. See, e.g., 19 U.S.C. § 1337(e)(1) (2012).

240. See U.S. CONST. amend. I. AirBNB, Amazon, AOL, Auction.com, eBay, Expedia, Facebook, Gilt, Google, Groupon, IAC, Linked, Lyft, Monster Worldwide, Netflix, Practice Fusion, Rackspace, reddit, Salesforce.com, Sidecar, SurveyMonkey, TripAdvisor, Twitter, Uber Technologies, Inc., Yelp, Yahoo!, and Zynga all signed onto a brief against the ITC's expanded authority. See Brief of the Internet Ass'n as Amicus Curiae in Support of Appellants and Urging Reversal, *ClearCorrect Operating, LLC v. ITC*, 810 F.3d 1283 (Fed. Cir. 2015) (No. 2014-1527), 2014 WL 5427858.

241. See, e.g., Brief of the Internet Ass'n, *supra* note 240, at 6.

242. McCray, *supra* note 133.

within the ITC. The Federal Circuit's holding did not invalidate or change section 337; it only struck down an interpretation of the word "article" and reinstated the older definition.<sup>243</sup> The ITC will continue to exclude physical articles being imported into the United States.

However, The Federal Circuit's holding will have some unintended consequences. By construing "articles" narrowly, the Federal Circuit has effectively created a loophole for illegally downloading copyrighted content from foreign websites. The Federal Circuit removed the ability for injured parties to take steps to remove access to the content damaging an American industry.<sup>244</sup> Rights holders, however, are not without remedy. Rights holders still retain standing to sue in any U.S. district court for monetary and statutory damages.<sup>245</sup> In addition, rights holders may also sue in foreign jurisdictions to shut down servers and remove the content from the internet.<sup>246</sup>

Holding "articles" to a narrow definition also avoids the potential for a sudden and massive increase in litigation in front of the ITC. If the Federal Circuit held that "articles" included digital data imported over the internet, the massive increase in litigation in front of the ITC would render the legal process very inefficient and slow.

### *B. Major Drawbacks to the Broad Interpretation*

A broad interpretation of "articles" creates many problems that courts will need to adjudicate in the future. This interpretation would create more problems for the ITC while only delivering negligible gains for the rights holders. The ITC would run into imminent First Amendment problems which it cannot adjudicate because its jurisdiction is limited to unfair importation, and it is not an Article III court.<sup>247</sup> The ITC would also be overwhelmed with litigation if it attempted to block a wide swath of internet content potentially protected by the First Amendment. Additionally, circumventing blocking mechanisms on the internet is trivially easy and will result in a metaphorical game of "whack-a-mole" by rights holders; when one website

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243. *ClearCorrect*, 810 F.3d at 1291.

244. *Id.*

245. See 17 U.S.C. §§ 101–122 (2012); 35 U.S.C. § 271 (2012).

246. See, e.g., Copyright, Designs, and Patents Act of 1988, c. 48 (Eng.), <http://www.legislation.gov.uk/ukpga/1988/48/data.pdf>.

247. Article III of the U.S. Constitution vests the judicial power in the courts to adjudicate disputes arising under the "Constitution, or the laws of the United States." See U.S. CONST. art. III, § 2. The ITC can adjudicate disputes regarding unfair importation. However, it cannot adjudicate any other issues, otherwise it would be infringing on Article III court's jurisdiction.

is shut down or blocked, another offering the same protected content will quickly pop up.<sup>248</sup>

Interpreting the definition of “articles” to exclude digital data quashes the inevitable First Amendment questions about whether ITC exclusion orders blocking access to websites infringe on constitutionally protected speech. Courts will not be subject to extensive litigation regarding this issue if the Federal Circuit interprets the definition of “articles” narrowly. Simultaneously, courts will be able to operate more efficiently.

### C. *Amending Section 337*

Congress can tackle this problem by amending section 337. However, the statute would require several amendments to clarify the ITC’s jurisdiction, how internet traffic will be monitored for the future, and how internet service providers implement an exclusion order.

Where the word “article” appears in 19 U.S.C. § 1337(a), Congress should change the law to read “physical article.” This would functionally eliminate litigation by parties attempting to expand the definition to include digital data and allow the ITC to continue operating as it has since the inception of section 337.

If Congress feels that the ITC should regulate the internet for unfair importation, Congress should craft the language of the statute carefully to avoid any First Amendment issues. Inserting a provision that allows the ITC to issue exclusion orders barring internet importation would require amending the statute to give the ITC jurisdiction over internet service providers. The statute would also need to clarify which government agency implements the exclusion orders. While this statutory amendment remains a daunting task riddled with constitutional traps, it is not impossible.

## V. CONCLUSION

Internet and technology companies have created some of the most valuable corporate brands in the world.<sup>249</sup> The internet has become

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248. The infamous internet drug marketplace *The Silk Road* is routinely seized by the Federal Bureau of Investigation, only to have copies of the website pop up on different URLs a few hours later. However, the Silk Road eventually folded as its users fled because of a fear of being caught by the authorities. See Andy Greenburg, *The Silk Road's Dark-Web Dream Is Dead*, WIRE, (Jan. 14, 2016, 7:00 AM), <https://www.wired.com/2016/01/the-silk-roads-dark-web-dream-is-dead/>.

249. See, e.g., *The World's Most Valuable Brands*, FORBES, <http://www.forbes.com/powerful-brands/list/> (last visited Jan. 14, 2017).

ubiquitous and access has exploded, allowing information to propagate quickly and at the touch of a button. But alongside the rise of its virtues, a dark network of websites promoting illicit activity has flourished, which threatens to undermine the intellectual property rights of artists and inventors.<sup>250</sup>

U.S. companies have no remedy within the structure of the ITC to fight unfair importation on the internet.<sup>251</sup> The Federal Circuit correctly held that the ITC does not possess the authority to police unfair importation on the internet. The ITC cannot usurp the distinction created by the Supreme Court to further its legislative intent. In addition, the text of section 337 only functions effectively when “articles” is limited to physical goods. The ITC has no power to enforce an exclusion order over the internet because section 337 does not vest the ITC with the authority to demand third-party ISPs implement blocking mechanisms. In addition, the ITC possessing the authority to issue exclusion orders over the internet raises significant potential First Amendment problems. As a matter of public policy, the ITC should not receive that power. Finally, the dissenting arguments do not hold up when scrutinized. If Congress feels that section 337 should be amended, it must do so carefully to avoid any constitutional violations and clearly delineate the powers the ITC possesses and can execute. However, under the current section 337, the ITC does not possess the power to police the internet for unfair importation. Therefore, the Federal Circuit correctly held that “articles” does not include digital files. This holding effectively pulled the plug on the ITC’s jurisdiction over the internet.

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250. See, e.g., Knibbs, *supra* note 248; Seppala, *supra* note 43.

251. ClearCorrect Operating, LLC v. ITC, 810 F.3d 1283, 1289–90 (Fed. Cir. 2015).

\* B.S. in Electrical Engineering, Marquette University, 2014. Juris Doctor, DePaul University College of Law, 2017. Thank you to my parents and my brother for their never-ending support through my law school career. I want to give special thanks to my editor Joe Gregorio and my fellow Volume 66 editors for their feedback to help me complete this Comment. Finally, I want to give thanks to my friends for their support and encouragement. Special thanks to my close friends from McCormick Hall 7 East for their support, encouragement, and comradery while I journeyed through law school. It’s Game Night.