The thing! the thing itself is the abuse!

In defense of the ITC's jurisdiction over digital imports

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The short version:
Read the slides at http://laweconcenter.org/images/articles/gam_clearcorrect_slides.pdf

Data sets are things, not "transmissions"

- ClearCorrect scanned teeth in the US and sent digital files of the scans to a related company in Pakistan. The Pakistani company first sent back custom physical devices until it was adjudicated to be an infringer and then tried to circumvent that order by creating digital data sets — digital models of the physical devices — and sending them into the US where a 3D printer output them as the same physical devices.
    - **Majority opinion**: "Here, the accused '**articles**' are **the transmission of** the 'digital models, digital data and treatment plans, expressed as digital data sets, which are virtual three-dimensional models of the desired positions of the patients' teeth at various stages of orthodontic treatment' ('digital models'), from Pakistan to the United States."
    - **ITC opinion**: "There is a threshold issue… whether Respondents' **electronic transmissions of digital data sets** constitute '**importation of… articles**' within the meaning of Section 337."

The crux of the matter

- The Federal Circuit panel majority in *ClearCorrect* would make the absence of a physical embodiment the feature that makes "articles" ineligible for protection under the Tariff Act.
- This is an inference; Congress never said any such thing.
- "Importation of articles" in the statute isn't meant operatively; it's meant to narrow the field of the ITC's unfair competition authority to *imports*.
- It's well accepted that ordinary IP laws would allow a District Court to impose a host of ordinary remedies against the infringer's use of the infringing data sets in this case.
- It's well accepted that trade remedy statutes are generally designed to have *broader reach* than ordinary District Courts and IP laws (that's why the trade remedies were added!)
- It's well accepted that the District Courts' practice of protecting mere intermediaries from liability through known safe harbors and defenses han't shut down the Internet; which is why the ITC's remedy in this case would cause no such harm either.
- Yet, the court's panel majority lambastes the ITC for treating an intangible data set that was well-defined with a precise signature and precise boundaries that actually caused significant concrete economic harm to US industry, as within the meaning of the statute's word, "articles."
- Instead, it asserts that Congress intended to write a statute prohibiting unfair competition *except* if caused by something having a feature *utterly irrelevant* to its ability cause harm (and that was a meaningless distinction in 1929).

I. This isn't the *Chevron* you're looking for

How not to interpret a statute

1. "Articles" *is* ambiguous, and no amount of dictionary mining will make it otherwise.
2. "[W]e must turn to the broader structure of the Act to determine the meaning [of statutory language]." — *King v. Burwell*
3. "unfair methods of competition and unfair acts in ***the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either***, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States…." — 1922 Tariff Act
4. **"Articles" is just a marker used to differentiate the ITC's unfair competition power in *trade* from a more general unfair competition power** like the FTC has over business arrangements themselves, including mergers etc.; all the action is in the surrounding language.

How not to interpret a statute

5. By the time the court (and Sapna) are done dissecting the text, they've excluded from the set of words that congress could have used to define the scope of ITC's power to include "digital data sets": *merchandise, products, goods, inanimate objects, property rights, patents, copyrights, wares, commodities, chattels, personal property, real property* — What's left?
6. (And if you say that congress could have said "tangible or intangible articles," then the more general "articles" must logically include both).

How not to interpret a statute

The real question should be the one suggested by Judge Newman's dissent: **Whatever the *static*, 1929 definition of the word "article," did Congress intend for it to evolve with technology and a changing economy?**

> Congress cannot, and need not, draft a statute which anticipates and provides for all possible circumstances in which a general policy must be applied to a specific set of facts. It properly leaves this task to the authorized agency." **To the extent that new technologies are involved in these infringing importations, deference is appropriate to the agency's reasonable application of the statute it is charged to administer.** *See NCTA v. Gulf Power* (upholding agency interpretive authority where the statute involved "technical, complex, and dynamic" subject matter that "might be expected to evolve in directions Congress knew it could not anticipate.").
>
> — *ClearCorrect v ITC* (Newman, *Circuit Judge*, dissenting)

II. You keep using that word. I do not think it means what you think it means

(*or*, hyper-textualism doesn't serve congressional intent)

Hyper-textualism vs. congressional intent

No one disputes that there was a unique grouping of 1s and 0s that defined these data sets. They had a particular function and unique and easy to determine content (a signature, with a clear start and end point). **They were delimited, defined, identifiable data models of particular sets of teeth straighteners — not abstract "data" or "information," and not vague or accidental.**

And they had economic value, were traded in commerce, and were actually causing the very harm the statute was intended to avoid.

It is far less reasonable (and inconsistent with Supreme Court precedent) to infer that Congress meant for the *tangibleness* of the import at issue to trump the overall aim of the statute, than it is to allow the statute to operate as intended in our modern, evolved environment.

Hyper-textualism vs. congressional intent

> The provision relating to unfair methods of competition in the importation of goods is **broad enough to prevent every type and form of unfair practice**.
>
> — Senate Report of the 1922 Tariff Act

The ITC's statutory term "articles" is used only to differentiate the ITC's unfair competition power in *trade* from a more general unfair competition power like the FTC has over business arrangements themselves, including mergers etc.; all the action is in the surrounding language.

http://laweconcenter.org/images/articles/gam_clearcorrect_slides.pdf

Hyper-textualism vs. congressional intent

The supreme irony is that the majority asserts that it is maintaining fealty to the objective definition of the statute at issue.

It dons, in other words, a mantel of Burkean conservatism that would make even Justice Scalia blush.

All the while, it is searching for some narrow, objective, static, linguistic definition, *not* congressional intent about what actually matters: how much weight to put on the static definition of “articles” in the unknown and unknowable future.

Hyper-textualism vs. congressional intent

Textualism [transforms] statutory interpretation into a kind of exercise in judicial ingenuity. The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer. The task is to assemble the various pieces of linguistic data, dictionary definitions, and canons into the best… account of the meaning of the statute… This exercise places a great premium on cleverness…

This active, creative approach to interpretation is subtly incompatible with an attitude of deference toward other institutions — whether the other institution is Congress or an administrative agency. In effect, the textualist interpreter does not *find* the meaning of the statute so much as *construct* the meaning. Such a person will very likely experience some difficulty in deferring to the meanings that other institutions have developed…

[T]his attitude is out of sync with the *Chevron* doctrine, based as it is on a generalized model of the courts as faithful agents of the politically accountable branches of government.

— Tom Merrill, *Textualism and the Future of the Chevron Doctrine*

III. If the law supposes that, the law is a ass

Hyper-textualism revisited

The majority opinion, in a nutshell:

- “Articles” were physical things when the Tariff Act was written, according to our reading of lots of dictionaries; we reject the ITC’s reading of lots of other dictionaries that say otherwise
- If Congress had meant to include intangible things, it would have said so [using what words?]
- It’s unreasonable to conclude that congress didn’t really care about the tangibleness of the transmission medium, and meant for “articles” to include intangible, electronic transmissions, based on our subjective reading of a single word, “articles.”

Compact discs didn't exist in 1929, either

> Here, the only purported 'article' found to have been imported was **digital data that was transferred electronically**, i.e., **not digital data on a physical medium such as a compact disk or thumb drive.**
>
> — *ClearCorrect v. ITC* (majority opinion)

Congress may not have contemplated electronic transmissions in the 1920s, but it also didn't contemplate compact discs, thumb drives, or smartphones; "digital data" as such didn't exist at all.

Then again, it actually might have contemplated electronic transmissions…

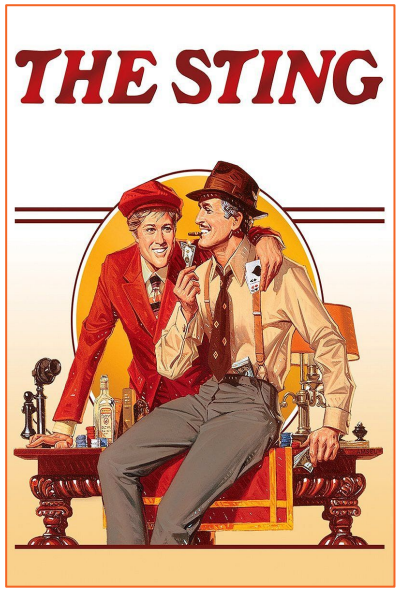
Misappropriated electronic transmissions in the 1920s

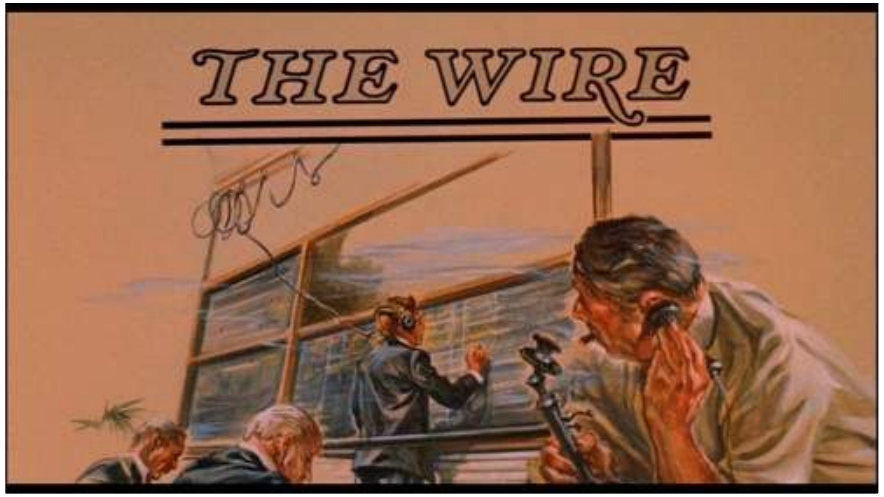
The *ClearCorrect* majority and Sapna dismiss them, but the ITC refers to several contemporaneous cases in which the courts found intangible content giving rise to unfair competition claims, e.g.:

- (1918) *INS v. AP*: Holding that pre-publication news reports were property and that you could sue for misappropriation when there was an electronic transmission of such property by wire.
- (1902) *Nat'l Tel. News Co. v. W. Union Tel. Co.*: Holding that you can sue for misappropriation via electronic signals sent to a ticker-tape machine. "The enterprise[s] [that depended upon] the great telegraph and cable lines [should not be denied legal recourse] against the inroads of the parasite."

Thus, for at least two decades before the Tariff Act, it was well established that unfair competition did not require "tangible" goods as a predicate for enforcement actions.

Misappropriated electronic transmissions in the 1920s (ok, 1930s)





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A distinction without a difference — except it's "long been discarded"

> Section 337 does not distinguish between digital goods imported electronically and digital goods imported as embedded in a physical medium. **My colleagues hold that importation of infringing digital data can be excluded when the data are carried on discs or other storage media, but cannot be excluded when carried in packets or waves by wired or wireless transmission. This distinction has long been discarded as unjustifiable**, and in the context of Section 337 and other Trade statutes and rulings, precedent is universally contrary.
>
> — *ClearCorrect v. ITC* (Newman, *Circuit Judge*, dissenting)

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The majority's opinion elevates form over substance…

> However, the Tariff Act did not lock Section 337 into the technology in existence in 1922 or 1930. **It cannot have been the legislative intent to stop the statute with the forms of 'article' then known**….
>
> **Section 337 was written in broad terms, whereby no field of invention, past, present, or future, was excluded.** It is not reasonable to impute the legislative intent to exclude new fields of technology, and inventions not yet made, from a statute whose purpose is to support invention.
>
> — *ClearCorrect v. ITC* (Newman, *Circuit Judge*, dissenting)

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… And reads a kind of "technological sunsetting" provision into the statute

This is the other great irony of the *ClearCorrect* majority's approach: It actually erodes the ITC's power over time, in precisely those areas that grow in economic significance and thus have the greatest power to do precisely the damage that the statute was intended to stop.

It is *possible* this is what Congress intended — **a kind of technological sunsetting provision.** But the court offers no evidence to support this interpretation.

IV. The Internet is *not* falling

"In *ClearCorrect* the ITC claims authority over the Internet" is a red herring

"Although the Commission's jurisdiction over imported physical goods is undeniable, it is very unlikely that Congress would have delegated the regulation of the Internet to the Commission, which has no expertise in developing nuanced rules to ensure the Internet remains an open platform for all."

— *ClearCorrect v. ITC* (O'Malley, *Circuit Judge*, concurring)

The ITC's interpretation doesn't expand its authority beyond what congress intended

At *worst*, the ITC's interpretation is an effort to **"Red Queen"** the statute:

> Now, here, you see, it takes all the running you can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!
>
> — Lewis Carroll, *Alice Through the Looking Glass*

An infringing digital file for 3D printing a set of braces is *not* "the Internet"

- Federal courts have long had the power to rule on unfair competition and IP cases involving intangible things, and, to date, the Internet hasn't been shut down.
- All of the usual defenses, safe harbors, and public interest protections under the law will continue to apply.
- The ITC is simply asserting its well-established and long-standing authority to police imports that amount to "unfair competition" with US industries.
- The fact that the ITC is now confronted with a case requiring it to exercise its authority in the *digital* realm isn't an untenable "power grab"; it's a logical evolution of existing authority to match the realities of the modern economy.
- And Congress did intend the ITC to be far more independent from political influence and capture than other so-called independent commissions like the FCC, which is why the ITC is structured with 6 commissioners and a rotating chair rather than 5 with a majority in the President's party and a chair able to sit for the President's term and removably by the President.
- The free flow of *legal* information isn't at issue in this case. None of the data transmissions at issue was legal, and any ITC decisions directed at future conduct would similarly depend on the illegality of the underlying conduct.
- The ITC didn't decide that just *any* type of digital data can constitute an "article," and it didn't assert jurisdiction over all electronically transmitted information, or over the Internet in general.

This isn't the FCC's Open Internet Order

FCC	ITC
Explicit language from congress that, when it comes to the Internet, the FCC is to *de*regulate	No explicit language that "article" is not intangible
Statutory definitions really do turn on physical, technological and/or business model characteristics of the thing being regulated	Physical and technological characteristics are irrelevant to the statute
FCC decided to take one such section of the Act, ignore the admonition to deregulate, and apply it to something utterly, technologically distinct.	Nope
Puts an enormous swath of the US economy, which was never intended to be under executive branch control, under executive branch control.	N/A

V. A house divided: *ClearCorrect* v. *Suprema*

ClearCorrect v. *Suprema*

There is a clear difference of opinion between the *en banc* majority in *Suprema* and the two judges on the panel majority in *ClearCorrect*.

Suprema focused on *congress'* intended meaning of "infringement" and did *not* look at the literal dictionary definition. Infringement is understood in the context of the patent laws and the general approach to infringement in IP enforcement.

ClearCorrect focused on discovering a literal dictionary definition of a term of art from 1920s and 1930s sources.

Suprema = WWCD? *ClearCorrect* = WWNPT?

Short Shrift

> This court recently reaffirmed that 'the legislative history consistently evidences Congressional intent to vest the Commission with broad enforcement authority to remedy unfair trade acts.' (citing *Suprema v. ITC*)
>
> — *ClearCorrect v. ITC* (Newman, *Circuit Judge*, dissenting)

The majority disposes of *Suprema* in one footnote, claiming that the case was about physical goods, so no further consideration of it was needed. It thus ignores the far more important, generalizable questions of interpretation in *Suprema*.

The *ClearCorrect* decision is *ultra vires*

Judge O'Malley, joined by Judge Prost (collectively, the panel majority in *ClearCorrect*) *dissented* from the *en banc* court in *Suprema*, and *authored* the panel opinion that the *en banc* court reversed:

> The key language is "articles that—infringe." Because the majority finds this language to be ambiguous, it concludes that we must defer to the Commission's interpretation. The majority fails, however, to identify an actual ambiguity in the statute. The word "articles" is not ambiguous—it has a well-defined legal definition. ***See* Black's Law Dictionary (defining "article" as "[g]enerally, a particular item or thing")… The word connotes a physical object.** And, Congress itself has defined "infringe."
>
> — *Suprema v. ITC* (rehearing *en banc*) (O'Malley, *Circuit Judge*, dissenting)

There's no citation to any authority for replacing Black's use of the word "particular" with O' Malley's use of the word "physical."

The *ClearCorrect* decision is *ultra vires*

Suprema happened to be about a physical thing, but it was also about induced infringement of a method patent — about a *process*, in other words, not about a *product*.

> **Suprema has not shown that the phrase "articles that infringe" has a clearly established usage limited to product claims** or to direct or contributory infringement, much less a usage that excludes induced infringement of a method claim.
>
> — *Suprema v. ITC* (rehearing *en banc*)

The *Suprema* majority a) never looked at dictionary definitions; b) rejected the dissent's interpretation of the statute; c) reinforced the breadth of the statute; and d) refused to let technicalities undermine congressional intent:

> When Congress used the words "unfair methods of competition 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 acts.**"
>
> — *Suprema v. ITC* (rehearing *en banc*) (citing *In re Von Clemm*)(emphasis added by *Suprema* court)

Prognostication: A house divided… cannot stand

Just this summer the *en banc* court showed us the views of its majority (against the same two-judge minority here)

- It Applied the same two basic lines of legal reasoning that are in this case:
  - **How to think about *Chevron* deference; and**
  - **How to think about the breadth of a trade remedy statute.**
- It upheld the ITC's authority, despite the same fears of unbounded power to block commerce:
  - By taking appropriate comfort in one of the oldest tools for protecting innocent middle-layer or platform or third-party or accidental infringers:
  - **The time-tested and easy-to-ascertain markers of bad faith: unclean hands and actual intent** (intent by specific parties to induce infringement or circumvent particular pending and legitimate orders against them).

Perhaps *ClearCorrect* gives the same *en banc* majority a clear path to make the same correction as before.