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Charles Duan

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## INTERNET FREEDOM WITH TEETH

*Charles Duan* \*

### INTRODUCTION

“You make the very salient statement that we shouldn’t lose sight of the fact that this is a case about teeth. Well, *Markman* was a case about dry cleaning. But nobody thinks of *Markman* as standing for anything about dry cleaning.”<sup>1</sup>

So went what was Chief Judge Prost’s perhaps most striking question to the attorney for the International Trade Commission at oral argument in *ClearCorrect Operating, LLC v. International Trade Commission*,<sup>2</sup> which is the focus of Professor Sapna Kumar’s recent article *Regulating Digital Trade*.<sup>3</sup> Yet this is what remains so fascinating about *ClearCorrect*: an administrative agency decision about idiosyncratic facts and perhaps the driest issue of statutory construction that one could imagine could have captivated both the legal community and the public press to have spawned, beyond Professor Kumar’s article, pages upon pages of legal briefing, high-visibility news reports, and even a comparison by the chief judge of the U.S. Court of Appeals for the Federal Circuit to one of the most important decisions of patent law.

*ClearCorrect* concerned a decision by the International Trade Commission that the Commission had the ability to regulate data transmissions under its statutory powers granted by Section 337 of the Tariff Act of 1930.<sup>4</sup> The ITC reached that conclusion . . . based on a statutory construction of the phrase “importation . . . of articles,” specifically concluding that the word “articles” included electronic data transmitted over the Internet.<sup>5</sup>

Professor Kumar’s article identifies, at bottom, two types of errors with the Commission’s reasoning, and the important distinction between these two types of errors. First, she identifies *textual* or *legal* errors with

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\* Director, Patent Reform Project, Public Knowledge.

1. Oral Argument at 15:14, *ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, 810 F.3d 1283 (Fed. Cir. 2015) (No. 14-1527), [http://www.cafc.uscourts.gov/oral-argument-recordings?title=clearcorrect&field\\_case\\_number\\_value=&field\\_date\\_value2%5Bvalue%5D%5Bdate%5D=](http://www.cafc.uscourts.gov/oral-argument-recordings?title=clearcorrect&field_case_number_value=&field_date_value2%5Bvalue%5D%5Bdate%5D=).

2. 810 F.3d 1283 (Fed. Cir. 2015).

3. Sapna Kumar, *Regulating Digital Trade*, 67 FLA. L. REV. 1909 (2015).

4. Tariff Act of 1930 § 337, 19 U.S.C. § 1337 (2012); *see also In re 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, at 34 (Apr. 9, 2014) (Final), [hereinafter *Certain Digital Models*], <http://www.itcblog.com/images/Digital-Models-Commission-Opinion-lowres-10Apr14.pdf>.

5. 19 U.S.C. § 1337 (a)(1)(B); *see also Certain Digital Models, supra* note 4, at 55.

the ITC's analysis. With regard to these types of errors, she focuses on the Supreme Court's guidance in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>6</sup> for how courts are to analyze the correctness of agencies' statutory interpretations.<sup>7</sup> To assess the ITC's errors in this category, the article focuses on relevant dictionary definitions of the term "articles" and the legislative history and statutory context of Section 337.<sup>8</sup>

But in stark contrast, the second category of errors is *policy* based. The article discusses at length the normative propriety of regulation of Internet data, traditionally conceived as borderless, by an administrative agency borne out of populist calls for national protectionist borders.<sup>9</sup> The article considers the ITC's institutional capacity for regulating electronic data transmissions, concluding that the Commission would lack both the right incentives and the right remedies to deal with the expansive problem of policing Internet data.<sup>10</sup>

More brightly than the run-of-the-mill case, *ClearCorrect*, as elucidated by Professor Kumar's article, illustrates this divide in judicial decision-making between the legal modes of analyses and underlying policy considerations. This is particularly so for this case, because the relevant considerations for these respective elements of decision-making are so different as to be practically orthogonal: 1930s dictionary definitions of the word "articles" have very little to do with modern concerns over Internet data regulation. *ClearCorrect* thus offers a fascinating opportunity to consider the relative influence of these two elements of judicial thinking.

Full appreciation of the relevance of policy considerations to the *ClearCorrect* case requires an understanding of the history of the case outside the four corners of the Federal Circuit's opinion. While Professor Kumar's article touches upon many aspects of that history, there are numerous additional details and events that shed further light upon the case, details that the present author had the privilege to observe and participate in at times. This Article, then, seeks to offer that broader context of the case and the surrounding debate.

### I. AN UNEXPECTED INTERSECTION OF QUESTIONS

In her article, Professor Kumar lays out effectively three arguments as to why the ITC should not have jurisdiction over digital data transmissions. First, the article analyzes the Commission's statutory grant of authority under Section 337, which permits the Commission to

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6. 467 U.S. 837 (1984).

7. See Kumar, *supra* note 3, at 1937.

8. See *id.* at 1940–49.

9. See *id.* at 1952–54.

10. See *id.* at 1954–58.

deal with “importation into the United States . . . of articles” that infringe various intellectual property rights.<sup>11</sup> Applying the *Chevron* framework, the article reviews the plain meaning of the text,<sup>12</sup> the legislative history of Section 337,<sup>13</sup> and canons of statutory construction.<sup>14</sup> Based on this analysis, Professor Kumar concludes that “it is clear that Congress intended ‘article’ to be no broader than personal property,” as opposed to “pure digital information.”<sup>15</sup> Furthermore, she finds that to the extent there is any ambiguity in the statute, the ITC’s choice of interpretation is not reasonable and thus should not warrant deference under *Chevron*.<sup>16</sup> Accordingly, the article concludes that the ITC lacks jurisdiction over digital data because the statutory text does not permit it.

The second concern is instrumental. Professor Kumar reviews the ITC’s statutory abilities and notes that they would be ineffective at actually policing digital data transmissions. Because the ITC relies on Customs Enforcement to actually carry out its exclusion orders, and because Customs has no mechanism for blocking data transmissions, the ITC cannot use its primary enforcement power with respect to digital data and must instead rely on its secondary cease-and-desist power.<sup>17</sup> Furthermore, the ITC lacks substantive rulemaking authority, a fact that Professor Kumar argues would hamper the ITC in carrying out efforts to block data transmissions.<sup>18</sup> These considerations could be seen as wholly unrelated reasons for why the ITC should not have jurisdiction over data transmissions, but they also play into the statutory interpretation question—after all, if the statute does not provide the ITC with the tools to deal with data transmissions, that would seem to suggest that the statute never intended to deal with data transmissions in the first place.

The third concern, however, seems to come out of far left field. Professor Kumar notes that “[i]ndustry groups are attempting to further expand the ITC’s jurisdiction” in this case as they have in the past.<sup>19</sup> In particular, she argues that those industry groups hoped to use the *Certain Digital Models* decision as a starting point to seek orders “to implement widespread blocking of content on the Internet.”<sup>20</sup> The article then notes that this effort “raises major concerns regarding

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11. 19 U.S.C. § 1337(a)(1)(B).

12. See Kumar, *supra* note 3, at 1940–41.

13. See *id.* at 1941–46.

14. See *id.* at 1946–48.

15. See *id.* at 1949.

16. See *id.*

17. See *id.* at 1918–19.

18. See *id.* at 1957–58.

19. *Id.* at 1950.

20. *Id.*

“censorship” and contends that it would raise difficult questions of Internet policies and boundary-drawing problems.<sup>21</sup>

In its *ClearCorrect* opinion issued almost simultaneously with Professor Kumar’s article, the Federal Circuit judges followed almost the same pattern. Chief Judge Prost’s lengthy majority opinion focused entirely on the *Chevron* framework and issues of statutory construction, considering dictionary definitions of the term “articles,”<sup>22</sup> the statutory context of the term,<sup>23</sup> the practical ability of the ITC to block data,<sup>24</sup> and the legislative history<sup>25</sup> to conclude that “the unambiguously expressed intent of Congress is that ‘articles’ means ‘material things’ and does not extend to electronically transmitted digital data.”<sup>26</sup> It further considered *arguendo* whether the Commission’s interpretation of “articles” was reasonable under *Chevron* step two; the court concluded the interpretation was unreasonable.<sup>27</sup> Thus, Judge Prost’s analysis focused on doctrinal analysis, mirroring Professor Kumar’s first two arguments as discussed above.

Judge O’Malley’s concurrence, though, reflects many of the Internet policy concerns seen in Professor Kumar’s third argument. She begins with the premise that “[t]he Internet is ‘arguably the most important innovation in communications in a generation.’”<sup>28</sup> Given that importance, she found it “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 that the Internet remains an open platform for all.”<sup>29</sup> While Judge Newman in dissent obviously disagreed with this analysis, her opinion again relied heavily on Internet policy matters, finding that ITC jurisdiction over digital data was necessary “to encompass today’s forms of infringing technology.”<sup>30</sup>

There is nothing necessarily improper with incorporating these sorts of policy concerns; indeed they may inform the statutory interpretation by suggesting the intent of legislators,<sup>31</sup> or they may affect the

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21. *See id.* at 1953–54.

22. *See ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, 810 F.3d 1283, 1291–94 (Fed. Cir. 2015).

23. *See id.* at 1294–98.

24. *See id.* at 1295.

25. *See id.* at 1298–99.

26. *Id.* at 1299.

27. *See id.* at 1299–302.

28. *Id.* at 1302 (O’Malley, J., concurring) (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010)).

29. *Id.* at 1303 (citing *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015)).

30. *Id.* at 1304 (Newman, J., dissenting).

31. *See, e.g., United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1850) (“In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”).

application of the legal framework.<sup>32</sup> But the question arises: how exactly did a patent case about the meaning of a word in a statute end up becoming a conversation over online content blocking? As one journalist put it, how is it that “an undead SOPA,” the controversial 2011 bill widely criticized as opening the door to Internet censorship, was “hiding inside an extremely boring case about invisible braces”?<sup>33</sup>

## II. HISTORY OF THE CASE

The answer to how matters of Internet policy became intertwined with a question of statutory interpretation is seen by tracing the history of the *ClearCorrect* litigation. This section reviews that litigation and the surrounding public discussion of the case, from the agency proceedings up to the Federal Circuit appeal.

### A. PROCEEDINGS BEFORE THE ITC

In originally posing the question of whether electronic transmissions were “articles,” the ITC viewed the issue as strictly a legal matter of statutory construction. The Commission submitted the question for comment in a January 2014 Federal Register notice, formulated as follows: “Are electronic transmissions “articles” within the meaning of Section 337? Please answer with respect to the text, structure, and legislative history of Section 337. Also address any potentially relevant judicial precedent [including several listed thereafter].”<sup>34</sup>

Despite this request specifically directed just to the “text, structure, and legislative history,” the commenters responding to the notice demonstrated an interest in the policy implications of the question being asked. Four commenters provided submissions to the ITC. Three supported the view that electronic transmissions were “articles”; they were the Motion Picture Association of America, the Association of American Publishers, and Nokia.<sup>35</sup> While much of their comments

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32. See, e.g., *ClearCorrect Operating*, 810 F.3d at 1302 (O’Malley, J., concurring) (noting that such considerations in “extraordinary cases” can affect the application of the *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* framework (citing *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015))).

33. Sarah Jeong, *An Undead SOPA Is Hiding Inside an Extremely Boring Case About Invisible Braces*, VICE (Aug. 5, 2015), <http://motherboard.vice.com/read/an-undead-sopa-is-hiding-inside-an-extremely-boring-case-about-invisible-braces>.

34. *In re 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, 2014 WL 253681, at 4174 (Jan. 17, 2014) (Final) (Notice of Commission Determination to Extend the Target Date for Completion of the Investigation; Schedule for Filing of Additional Written Submissions from the Parties and the Public), [https://www.usitc.gov/secretary/fed\\_reg\\_notices/337/337\\_833\\_notice01172014sgl.pdf](https://www.usitc.gov/secretary/fed_reg_notices/337/337_833_notice01172014sgl.pdf).

35. Nokia Corp., Comment Letter on *Certain Digital Models*, Inv. No. 337-TA-833 (Feb. 10, 2014); Letter from Allan Adler, Gen. Counsel and Vice President for Gov’t Affairs, Ass’n of

offered legal analysis on the interpretation of the term “articles,” both the MPAA and AAP pointed to the perceived policy effects of the ITC’s jurisdiction over digital goods. The MPAA, for example, discussed the shift from physical to digital distribution of films, concluding that “it is important that Section 337 remains a viable tool to protect against infringement occurring in the cross-border context,” including infringement that “occurs through electronic transmissions entering the United States over the internet.”<sup>36</sup>

One party, Google, submitted comments opposing the interpretation of electronic transmissions as “articles” under Section 337. It primarily focused on statutory construction, but did also point out one policy concern: that the ITC’s effectiveness in enforcement of its orders was already being questioned, and those concerns would be “exacerbated by any attempt to craft a remedy for electronic transmissions.”<sup>37</sup> A second commenter, an attorney apparently filing comments of his own accord, also opposed the construction of “articles” as including electronic transmissions; his comments focused entirely on evidence of textual interpretation.<sup>38</sup>

The Commission, in view of these comments and the parties’ arguments, held that data transmissions were articles of importation. Thirty-five pages of opinion were dedicated to analyzing the issue, including five pages of discussion of how the “[c]omments of third party submitters present practical considerations” of the effects of the competing interpretations of Section 337.<sup>39</sup> Briefly, the Commission opinion focused primarily on the comments of the MPAA, AAP, and Nokia (those supporting treatment of digital transmissions as “articles”), agreeing with the concerns about “the problems of infringement by illegal downloading and streaming”<sup>40</sup> and about the possibility that “an infringer could shift from importing its infringing software on a disk to importing the very same software by electronic transmission,” thereby avoiding liability.<sup>41</sup> It further rejected Google’s contention that the ITC

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Am. Publishers, to the Honorable Lisa R. Barton, Acting Sec’y, U.S. Int’l Trade Comm’n (Feb. 10, 2014) [hereinafter Letter from Allan Adler]; Letter from Dan Robbins, Senior Vice President and Associate Gen. Counsel, Motion Picture Ass’n of Am., Inc., to the Honorable Lisa R. Barton, Acting Sec’y, U.S. Int’l Trade Comm’n (Feb. 3, 2014) [hereinafter Letter from Dan Robbins].

36. Letter from Dan Robbins, *supra* note 35, at 3–4; *see also* Letter from Allan Adler, *supra* note 35, at 4–5.

37. Google Inc., Comment Letter on *Certain Digital Models*, Inv. No. 337-TA-833, at 14 (Feb. 3, 2014).

38. *See* Andrew B. Katz., Comment Letter on *Certain Digital Models*, Inv. No. 337-TA-833 (Feb. 3, 2014).

39. *Certain Digital Models*, *supra* note 4, at 50–54.

40. *Id.* at 50.

41. *Id.* at 53.

would be ineffective at enforcement, arguing that “[t]he Commission vigorously enforces violations of cease and desist orders.”<sup>42</sup>

The proceedings before the ITC, then, do demonstrate that policy considerations were of concern at that stage, at least to some degree. But of note, the major concerns that drove the debate over this case, namely the effect of ITC jurisdiction over digital data on Internet openness, did not make an appearance at the agency decision-making level. Those concerns would only be raised at the appellate stage.

## B. APPEAL TO THE FEDERAL CIRCUIT

ClearCorrect appealed to the Federal Circuit on several issues, including the question of whether the ITC had erred in construing “articles” to include data transmissions. The appeal attracted a fair number of amicus curiae briefs, perhaps a surprising occurrence for a case before just an ordinary three-judge panel of the court.

In support of the ITC, the same three groups (MPAA, AAP, and Nokia) filed briefs making much the same arguments that they presented before the Commission. But substantially more was written in opposition. Two major trade associations representing software companies filed briefs contending that the ITC did not have statutory authority over digital transmissions. The Internet Association<sup>43</sup> filed a brief primarily focusing on a number of statutory interpretation arguments, but tellingly the introductory section of its brief discussed the background of international cloud computing.<sup>44</sup> “Efficient operation of a global network requires that particular types of data be stored, processed, and served in identical ways throughout the world, without regard for country borders,” the Internet Association explained, and an ITC order that would effectively require different treatment of data by country would thus potentially disrupt these cloud computing practices.<sup>45</sup> The Business Software Alliance<sup>46</sup> also filed a brief; although that brief focused entirely on statutory construction, the mere presence of an argument from a representative of “among the world’s most innovative companies” certainly suggested that the case would have implications for that industry.<sup>47</sup>

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42. *Id.* at 52.

43. Google is a member of the Internet Association. *See* Brief of the Internet Association as Amicus Curiae Supporting Appellants at 1, *ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, 810 F.3d 1283 (Fed. Cir. 2015) (No. 14-1527).

44. *See id.* at 3.

45. *Id.* at 4–5.

46. Google is not a member of the Business Software Alliance. *See* Brief for Business Software Alliance as Amicus Curiae Supporting Appellants at 1, *ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, 810 F.3d 1283 (Fed. Cir. 2015) (No. 14-1527).

47. *Id.*



But in addition to those, two organizations representing “the public interest for a balanced patent system” submitted an amicus brief.<sup>48</sup> That brief pointed to two fairly different policy considerations, relating to the implications for the broader Internet community of the ITC’s purported jurisdiction. The brief theorized that ITC jurisdiction over digital data transmissions could ultimately lead to an ITC action being taken against an Internet service provider, seeking to have the ITC direct the service provider to block certain data being transmitted to Internet users.<sup>49</sup> This possibility conflicted with at least two established policies underlying contemporary Internet law, the brief proceeded to argue. First, any requirement that an Internet service provider inspect data in transmission would be contrary to laws specifically relieving such service providers of inspection obligations.<sup>50</sup> Second, the brief argued that openness of the Internet was a valuable norm that supported several important principles such as free speech and innovation, and “ITC authority to police Internet data transmissions, particularly at the level of service providers, would be a step in the wrong direction in view of these policies.”<sup>51</sup>

Thus, the amicus briefs opposing the ITC’s position introduced several new policy concerns into the debate over ITC jurisdiction over digital data: concerns about cloud computing, software company innovation, and Internet openness and free expression.

### C. THE SONY HACK OPENS A NATIONAL DISCUSSION

The application of the ITC’s interpretation of “articles” to concerns of Internet freedom and content blocking were hypothetical as an initial matter, insofar as *Certain Digital Models* was the ITC’s first decision regarding pure digital data transmissions. But it would soon be revealed that these hypothetical possibilities were under serious legal consideration, through the documents uncovered in the Sony hack.

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48. Brief for Public Knowledge and the Electronic Frontier Foundation as Amicus Curiae Supporting Appellants at 1, *ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, 810 F.3d 1283 (Fed. Cir. 2015) (No. 14-1527) [hereinafter PK Brief]. The author of the present Article was the author of that brief.

49. *See id.* at 13.

50. *See id.* at 13–15. Specifically, the Electronic Communications Privacy Act prohibits intentional interception of “any wire, oral or electronic communication.” Electronic Communications Privacy Act, 18 U.S.C. § 2511(1)(a) (2012). Section 512 of the Digital Millennium Copyright Act grants Internet service providers a safe harbor from copyright liability and specifically does not condition that safe harbor upon “a service provider monitoring its service or affirmatively seeking facts indicating infringing activity.” Digital Millennium Copyright Act, 17 U.S.C. § 512(m)(1) (2012). Both statutes thus reflect “a policy that Internet service providers not be required to monitor data transmissions for infringing content.” PK Brief, *supra* note 48, at 15.

51. PK Brief, *supra* note 48, at 17.

Professor Kumar's article discusses the circumstances of this event, in which hackers obtained internal documents from Sony including a memorandum positing a legal theory for seeking ITC orders directing Internet service providers to block websites.<sup>52</sup> But an additional and important component of the story is how this event, and the reaction that followed, turned the *ClearCorrect* appeal into a matter of national interest.

While the memorandum, prepared for the MPAA by its law firm, was in the initial batch of documents released in December 2014, initial reports paid little attention to the memorandum in view of other, more splashy topics.<sup>53</sup> News outlets characterized the ITC site-blocking theory as "too risky to try out in court"; none appeared to connect it to the ongoing *ClearCorrect* litigation.<sup>54</sup> One of those outlets was *The Verge*, which had begun a line of stories on the various MPAA efforts revealed in those Sony Hack documents. A journalist there connected the dots between the MPAA memorandum and the *ClearCorrect* case, and a month after the initial release of the hacked documents published an article on the MPAA's so-called "new plan to stop copyright violations at the border."<sup>55</sup>

The story on *The Verge* sparked a small wave of interest in the subject,<sup>56</sup> but the primary effect of the connection between the ITC's *Certain Digital Models* decision and the MPAA's site-blocking strategies was to invite interest from a large body of civil society

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52. See Kumar, *supra* note 3, at 1951–52.

53. See, e.g., Rachel Emma Silverman & Ben Fritz, *Data Breach Sets Off Upheaval at Sony Pictures*, WALL ST. J. (Dec. 4, 2014), <http://www.wsj.com/articles/data-breach-sets-off-upheaval-at-sony-pictures-1417657799>.

54. Russell Brandom, *Hollywood Still Obsessed with Breaking the Internet*, THE VERGE (Dec. 15, 2014), <http://www.theverge.com/2014/12/15/7396639/hollywood-is-still-obsessed-with-breaking-the-internet>; see also Mike Masnick, *MPAA Knows It Doesn't Understand SOPA-Style Site Blocking, But Has Decided It's The Answer*, TECHDIRT (Dec. 16, 2014), <https://www.techdirt.com/articles/20141215/13574629446/mpaa-admits-it-doesnt-understand-sopa-style-site-blocking-has-decided-its-answer.shtml> (calling MPAA's ITC theory "really risky and unlikely to work"); Andy Maxwell, *MPAA Prepares to Bring Pirate Site Blocking to the U.S.*, TORRENTFREAK (Dec. 11, 2014), <https://torrentfreak.com/mpaa-prepares-to-bring-pirate-site-blocking-to-the-u-s-141211/>.

55. Russell Brandom, *The MPAA Has a New Plan to Stop Copyright Violations at the Border*, THE VERGE (Jan. 2, 2015), <http://www.theverge.com/2015/1/2/7481409/the-mpaa-has-a-new-plan-to-stop-copyright-violations-at-the-border>. As is evident from the *Verge* story, the journalist consulted with the author of this law review article in researching the story.

56. See, e.g., Eli Dourado, *Is the MPAA Even Pro-Hollywood Any More?*, PLAIN TEXT (Jan. 13, 2015), <https://readplaintext.com/is-the-mpaa-even-pro-hollywood-any-more-9fef31467c36>; Eriq Gardner, *With the MPAA Watching, ITC Says Case About Teeth Won't Bring Down the Internet*, HOLLYWOOD REP. (Feb. 19, 2015), <http://www.hollywoodreporter.com/thr-esq/mpaa-watching-itc-says-case-775397>; Timothy B. Lee, *How Hollywood Could Use Trade Law to Create an Internet Blacklist*, VOX (Jan. 6, 2015), <http://www.vox.com/2015/1/6/7503315/hollywood-internet-blacklist-trade-law>.

activists and trade organizations. Three years prior to the decision, a major debate had erupted over two copyright bills, Stop Online Piracy Act and PROTECT IP Act.<sup>57</sup> Those two bills featured, among other things, provisions that would have given copyright holders certain powers to demand Internet service providers to block access to certain foreign websites. Those provisions caused substantial consternation among Internet companies and public policy organizations, leading to a public outcry that demonstrated, as one reporter put it, “the potential power of . . . young Americans who live and breathe the Internet.”<sup>58</sup> Thus, the MPAA memorandum suggested that the MPAA, having ultimately lost its efforts to advance SOPA and PIPA through Congress, was now seeking to use the ITC as a “backdoor internet blacklist” to achieve similar results.<sup>59</sup>

Such a possibility naturally sparked the interest of the organizations originally active in the SOPA/PIPA debate. So on April 10, 2015, four months after the Sony hack documents were released and three months after that initial article breaking the story, a coalition of “28 organizations, associations, and scholars of law, policy and economics” sent an open letter to the commissioners of the ITC, which would “urge the Commission to reconsider, for future investigations, its decision that pure data transmissions are within the ambit of the Commission’s powers.”<sup>60</sup> The letter identified “the economic benefits of free information flow” on the Internet, benefits that stood to be sharply diminished by the effect of the ITC’s decision, namely “erecting new trade barriers for data flows.”<sup>61</sup> A second letter on behalf of “free-market organizations” similarly criticized the ITC’s decision as one that “would open a Pandora’s Box of new complaints and investigations that

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57. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011); PROTECT IP Act, S. 968, 112th Cong. (2011).

58. Somini Sengupta, *Big Victory on Internet Buoy Lobby*, N.Y. TIMES (Jan. 26, 2012), <http://www.nytimes.com/2012/01/27/technology/victory-on-antipiracy-issue-buoys-internet-lobby.html>; see also Yochai Benkler et al., *Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate*, 32 POL. COMM. 594 (2015) (performing a study to map the controversial debate regarding these two provisions).

59. Lee, *supra* note 56; see also Maira Sutton, *Transparency is Necessary to Ensure the Copyright Industry Won’t Sneak Policies Through the Back Door*, ELEC. FRONTIER FOUND. (Jan. 22, 2015), <https://www.eff.org/deeplinks/2015/01/transparency-necessary-ensure-copyright-industry-wont-sneak-policies-through-back>.

60. Letter from Twenty-Eight Orgs. & Professors, to Honorable Meredith M. Broadbent, Chairwoman, U.S. Int’l Trade Comm’n, at 1 (Apr. 10, 2015), <https://www.publicknowledge.org/documents/letter-to-the-international-trade-commission>. In the interest of disclosure, the author of this Article was the author of that letter.

61. *Id.* at 2.

concern a wide range of business activities.”<sup>62</sup>

Not all advocates were on the same side of the issue, of course; several organizations supported the ITC’s position on the grounds that it offered a new avenue for combating copyright piracy. One organization called *ClearCorrect* “the most important case that nobody is talking about” (a strange hook for an article in view of the degree of interest in the case so far discussed here) and called ITC authority over digital data “a powerful tool for creators and innovators against a threat that has only gotten worse.”<sup>63</sup> Another contended that the ITC’s ruling was actually very narrow, one with “only a few teeth, and they bite only cheaters.”<sup>64</sup> The MPAA, unsurprisingly, agreed on the grounds that ITC jurisdiction over digital data was needed to stop “illegal distribution that undermines our industry’s growth is now largely occurring in the same way.”<sup>65</sup>

Such interest in the *ClearCorrect* case led to a level of national coverage of the oral argument uncommon for a circuit court panel hearing. A week before the hearing, *The Wall Street Journal* ran a preview article describing the case as “closely watched by tech companies and the movie, music and publishing industries.”<sup>66</sup> And two days before the oral argument, *The New York Times* published an editorial opposing the ITC’s position, calling it “bound to hamper the exchange of ideas and information on the Internet.”<sup>67</sup>

The totality of these voices shows that, by late 2015, the case about teeth had become a policy debate among national think tanks, civil society organizations, businesses, and academics. The concerns by then had shifted far from mere statutory construction of the term “articles” in Section 337 to a discussion about the role of a generally obscure government agency with respect to large questions of Internet policy.

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62. Letter from Niskanen Ctr., R St. Inst. and FreedomWorks, to Honorable Meredith M. Broadbent, Chairwoman, U.S. Int’l Trade Comm’n, at 1 (Aug. 3, 2015), <http://www.rstreet.org/wp-content/uploads/2015/08/ITCLetter.pdf>.

63. Devlin Hartline & Matthew Barblan, *Digital Goods and the ITC: The Most Important Case That Nobody is Talking About*, CTR. FOR PROTECTION INTELL. PROP. (July 29, 2015), <http://cpip.gmu.edu/2015/07/29/digital-goods-and-the-itc-the-most-important-case-that-nobody-is-talking-about-2/>.

64. Geoffrey Manne, *False Teeth: Why an ITC Case Won’t Chew Up The Internet*, FORBES (Aug. 25, 2015), <http://www.forbes.com/sites/danielfisher/2015/08/25/false-teeth-why-an-itc-case-wont-chew-up-the-internet/>.

65. Dan Robbins, *Supporting the International Trade Commission’s Authority to Protect Creators and U.S. Industry*, MOTION PICTURE ASS’N AM. (Aug. 10, 2015), <http://www.mpaa.org/itc/>.

66. Brent Kendall, *Imports of Digital Goods Face Test*, WALL ST. J. (Aug. 2, 2015), <http://www.wsj.com/articles/imports-of-digital-goods-face-test-1438554684>.

67. Editorial Bd., *Keep the Internet Free of Borders*, N.Y. TIMES (Aug. 10, 2015), <http://www.nytimes.com/2015/08/10/opinion/keep-the-internet-free-of-borders.html>.

### III. EFFECT ON THE ARGUMENT

The question is, though, did this large-scale discussion of the policy implications actually have effect on the *ClearCorrect* case itself, or was that case decided simply as a matter of statutory interpretation of the term “articles”? A review of the oral argument before the Federal Circuit suggests that, while matters of statutory interpretation obviously drove the court’s reasoning, concerns for the policy implications undoubtedly entered the minds of both the panel judges and arguing counsel.<sup>68</sup>

As an initial matter, the weight of the case and the breadth of its implications were made clear by Chief Judge Prost’s opening question to the ITC attorney, when she compared the case to the seminal Supreme Court decision on patent claim construction, as discussed at the beginning of this Article. She immediately proceeded to ask about the effect of the ITC’s decision on Internet service providers: “It does seem to me that if we were to affirm the Commission here, we would be saying that the ITC has jurisdiction over electronic transmissions. I don’t see very many limiting principles there that may apply to future cases.”<sup>69</sup>

Similarly, when questioning the attorney for the patent owner who argued in support of the ITC, Judge O’Malley asked why jurisdiction over data transmissions should be in the hands of the ITC rather than Congress:

Isn’t it telling, though, that Congress has been grappling for several years about how best to deal with any kind of governing of this trading of information on the Internet and especially as it relates to copyrighted material, and has yet been able to really come up with the proper solution because there are so many issues to balance? Doesn’t that tell you that Congress believes that it’s its role, not the ITC’s role, to draw those balances?<sup>70</sup>

Questions like these compelled the attorneys to address not merely statutory construction tools but also policy effects of the case. Most

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68. This section is based in part on Foster Dobry, *A Piece of Internet Freedom, in the Hands of an Appeals Court*, PUB. KNOWLEDGE (Aug. 11, 2015), <https://www.publicknowledge.org/news-blog/blogs/clearcorrect-itc-oral-argument>, which contains a more comprehensive review of the oral argument. This Article includes a smaller selection of relevant quotes.

69. Oral Argument at 15:57, *ClearCorrect Operating, LLC v. Int’l Trade Comm’n*, 810 F.3d 1283 (Fed. Cir. Nov. 8, 2015) (No. 14-1527), [http://www.cafc.uscourts.gov/oral-argument-recordings?title=clearcorrect&field\\_case\\_number\\_value=&field\\_date\\_value2%5Bvalue%5D%5Bdate%5D=](http://www.cafc.uscourts.gov/oral-argument-recordings?title=clearcorrect&field_case_number_value=&field_date_value2%5Bvalue%5D%5Bdate%5D=)

70. *Id.* at 29:54.

strikingly, the ITC attorney volunteered—not in direct response to any question—the Commission’s view on applicability of ISP copyright liability:

[W]e also have all the limitations of substantive law here, with regard to the ISPs, if the ISPs are what you’re concerned about. In a future case—the Commission applies all of the defenses, legal and equitable—the Commission would apply the DMCA safe harbors to the extent that ISPs are immune from liability in the district courts, they would be immune from liability in the Commission.<sup>71</sup>

The applicability of the DMCA safe harbors, of course, has nothing to do with the interpretation of the word “articles” or the disposition of *ClearCorrect*. The only reason for the Commission’s attorney to volunteer this unsolicited promise was to address a policy concern that was clearly on the minds of the judges and now intertwined with the case itself.

#### CONCLUSION

The path by which this case about teeth became a matter of national discussion was neither straightforward nor certain, as the above discussion suggests. *ClearCorrect* could easily have gone unnoticed—indeed, that is what the ITC apparently hoped would happen. Instead, it would go on to be named a “milestone case” by an international journal on intellectual property,<sup>72</sup> and at least one attorney would name it one of “the most important Federal Circuit decisions from 2015.”<sup>73</sup>

More broadly, *ClearCorrect* seems to demonstrate an increasing awareness of how patent law intersects with public policy questions of general concern. From its origins, patent law has always involved matters of the public interest: the Constitution authorizes Congress to establish a patent system but only to the extent that it serves “[t]o promote the Progress of Science and useful Arts,”<sup>74</sup> and the Supreme Court has said on several occasions that “the exercise of the patent power may not overreach the restraints imposed by the stated

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71. *Id.* at 18:45.

72. See Michael Loney, *Managing IP North America Awards 2016: The Winners*, MANAGING INTELL. PROP. (Mar. 18, 2016), <http://www.managingip.com/Article/3538824/Managing-IP-North-America-Awards-2016-The-winners.html>.

73. Esther H. Lim, *Suprema Inc. v. ITC and ClearCorrect Operating v. ITC Top the List of the Most Important Federal Circuit Decisions from 2015*, LEXOLOGYLIM (Jan. 6, 2016), <http://www.lexology.com/library/detail.aspx?g=c4d5d5ca-bdc9-4c77-9453-4a282678cfbc>.

74. U.S. Const. art. I, § 8, cl. 8; Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771, 1772 n.1 (2006).

constitutional purpose.”<sup>75</sup> The patent system has been described as a bargain in which patents are granted ultimately for the benefit of the public’s access to new inventions; “the benefit to the public or community at large,” the Supreme Court has said, is “doubtless the primary object in granting and securing that monopoly” of patents.<sup>76</sup>

But in some situations, patent law has strayed from that basic premise of advancing the public interest. Most notably, in the context of the four-factor test for injunctions under *eBay Inc. v. MercExchange, LLC*,<sup>77</sup> the Federal Circuit has found that “the public interest nearly always weighs in favor of protecting” patentees<sup>78</sup>—a proposition that makes little sense in a system where patentees and the public sit on opposite sides of the bargaining table.<sup>79</sup> Various scholars have criticized current patent law as “an isolated and sterile jurisprudence that is increasingly disconnected from the technological communities affected by patent law.”<sup>80</sup> Others have described the Federal Circuit as “particularly resistant to considering patent policy in making its decisions.”<sup>81</sup>

How and to what extent courts should incorporate policy into their decisions is a complex matter beyond the scope of this Article.<sup>82</sup> But the degree of attention to the implications of the *ClearCorrect* case, reflected both in Professor Kumar’s article and in the case’s argument and decision, do seem to show a renewed interest of the wider public in what could otherwise have been of interest only to the “somewhat

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75. *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966); *see, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989).

76. *Kendall v. Winsor*, 62 U.S. 322, 328 (1859); *see also Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 63 (1998) (“[T]he patent system represents a carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances in technology, in return for an exclusive monopoly for a limited period of time.”).

77. 547 U.S. 388, 391 (2006) (holding that injunction in patent law requires plaintiff to show “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction”).

78. *Apple Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 647 (Fed. Cir. 2015).

79. *See, e.g., id.* at 662–63 (Prost, J., dissenting); *see also* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 3 (2011) (describing how courts have shifted views of intellectual property “from social utility to fundamental rights”). Merges ultimately argues for disposing with the utilitarian justification for patents, but that view is unquestionably contradictory to the Constitution and Supreme Court law previously discussed.

80. Craig Allen Nard & John F. Duffy, *Rethinking Patent Law’s Uniformity Principle*, 101 Nw. U. L. Rev. 1619, 1620–21 (2007).

81. Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1671 (2003).

82. *See, e.g., Colleen V. Chien, Patent Amicus Briefs: What the Courts’ Friends Can Teach Us About the Patent System*, 1 U.C. IRVINE L. REV. 395, 397, 398 (2011) (discussing various viewpoints).

insular community” of the patent bar.<sup>83</sup> In that sense, *ClearCorrect* does seem to show that in patent law, the public interest has teeth.

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83. Nard & Duffy, *supra* note 80, at 1645.