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Cover Page Footnote

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TOOTHLESS TRADE? IMPLICATIONS OF THE FEDERAL CIRCUIT'S CLEARCORRECT DECISION FOR THE ENFORCEABILITY OF INTELLECTUAL PROPERTY PROTECTIONS IN DIGITAL TRADE UNDER USMCA

Alissa M. Chase[+]

Digital trade is growing faster than trade in goods and services and comprises a key area for innovation and intellectual property concerns. The United States-Mexico-Canada Agreement ("USMCA") acknowledged this development by including chapters devoted to both digital trade and intellectual property. In 2015, the Federal Circuit held that the International Trade Commission ("ITC") does not have jurisdiction over unfairly traded digital goods. Without exclusion orders issued by the ITC, the United States lacks a powerful tool to enforce the USMCA provisions protecting intellectual property in unfairly traded digital goods. This comment explores the implications of the Federal Circuit's 2015 *ClearCorrect* decision for the United States's enforcement obligations under USMCA and provides options to intellectual property rights holders and practitioners interested in protecting the domestic industry's digital goods from intellectual property rights infringement.

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I. Introduction

A major shift in the United States economy occurred after the negotiation of the North American Free Trade Agreement ("NAFTA"). The digital economy, which did not exist at the time of negotiation, by 2017 accounted for "nearly 6.9 percent of U.S. GDP, or $1.35 trillion."[1] The Senate Committee on Finance

1. S. Rep. No. 116–283, at 3 (2020). Cong. Res. Serv., Digital Trade and U.S. Trade Policy, R44565 Summary (Dec. 9, 2021), https://crsreports.congress.gov/product/pdf/R/R44565. Since 2010, "[n]early two-thirds of the 13 million new jobs created in the U.S. . . . required digital skills." John Engler et al., The Work Ahead: Machines, Skills, and U.S. Leadership in the Twenty-First Century 12 (2018). In addition to the growing impact of the digital economy on the labor market, Holbrook and Osborn explain the potential impact of new digital technologies on science, engineering, and manufacturing:

> New technologies now are adding a (literal) third dimension to the commingling of the physical and digital worlds, allowing people to create complex, tangible objects directly

cited this major shift in the United States economy, along with changes in environmental, labor, and other policies, as the reasons to update NAFTA in the United States-Mexico-Canada Agreement ("USMCA").[2] USMCA's digital trade chapter is considered the new gold standard for trade agreements,[3] demonstrating how essential a digital trade chapter will be for all future free trade agreements. Digital trade's contribution to the United States economy is "growing faster than traditional trade in goods and services."[4] But with this growth comes new challenges. Digital trade is the future, but unfortunately, the Federal Circuit's decision in *ClearCorrect, LLC v. ITC* ("ClearCorrect") may have the unintended consequence of exposing intellectual property ("IP") rights in digital trade to inadequate protection.[5]

The Federal Circuit's decision in the *ClearCorrect* case that the International Trade Commission's ("ITC") jurisdiction over unfairly traded digital goods is not a reasonable interpretation of its mandatearguably rendered certain provisions of the U.S. flagship trade agreement toothless.[6] In deciding that the ITC does not have jurisdiction over unfairly traded digital goods in importation,[7] the Federal Circuit ruled that the ITC does not have the power to issue exclusion orders or cease and desist orders on digital goods that infringe U.S. intellectual property rights.[8] USMCA chapters 19, 20, and 21—covering digital trade, IP protections, and competition policy, respectively—provide protections for intellectual property rights holders, including when infringement affects goods in international trade with the intent of protecting domestic parties from unfair

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> from digital files . . . [3D] printers, scanners, and computer-aided design ('CAD') programs allow people to translate physical objects into digital files and, more ominously for patent holders, to then translate the digital files back into physical objects. . . . [W]e can now move, almost seamlessly, between the physical and the digital worlds. Additionally, advances in chemistry and biology allow scientists to digitally design DNA and other chemicals and to feed digital files to a machine that will directly manufacture the molecules. Collectively, we term these technologies digital manufacturing technology ('DMT').

Timothy R. Holbrook & Lucas S. Osborn, *Digital Patent Infringement in an Era of 3D Printing*, 48 U.C. DAVIS L. REV. 1319, 1321–22 (2015).

2. S. REP. NO. 116–283, at 3–4 (2020).

3. Just before the House of Representatives vote on the United States-Canada-Mexico Agreement, U.S. Trade Representative Robert Lighthizer described the trade agreement to reporters: "We have what is really the absolute gold standard on digital trade and financial services . . .." Jonathan Garber, *USMCA Is 'Gold Standard for Digital Trade': Trade Chief Robert Lighthizer*, FOX BUS., (Dec. 17, 2019), https://www.foxbusiness.com/markets/usmca-gold-standard-digital-trade-robert-lighthizer.

4. CONG. RES. SERV., *see supra* note 1.

5. ClearCorrect Operating, LLC v. ITC, 810 F.3d 1283 (Fed. Cir. 2015).

6. *ClearCorrect*, 810 F.3d at 1301. Kathleen Claussen describes trade agreements as "hav[ing] the power to create new rules, to lock in domestic rules already on the books, and to be entirely powerless." Kathleen Claussen, *Regulating Foreign Commerce Through Multiple Pathways: A Case Study*, 130 YALE L.J.F. 266, 279 (2020).

7. *ClearCorrect*, 810 F.3d at 1302.

8. *Id.* at 1298.

competition.[9] Under USMCA, U.S. Customs and Border Protection ("Customs") enforces these rights, but without the ITC to issue cease and desist or exclusion orders, enforceability all but disappears with the remaining weak injunctive remedy.[10] The impact of the Federal Circuit's decision in *ClearCorrect* raises important questions regarding how much courts should consider the implications of their decisions, especially in cases involving inter-statutory interpretation.

Chapter 19 of the USMCA includes a state-of-the-art chapter on digital trade,[11] which prohibits the imposition of customs duties or other fees on digital products[12] transmitted electronically[13] and limits data localization.[14] The goals of Chapter 19 include promoting cross-border data flows and supporting "modern means of international trade, including digital trade and eCommerce."[15] The digital trade chapter, among others, is designed to "raise standards and allow Americans to compete and win both regionally and

9. *See generally* United States-Mexico-Canada Agreement, Can.-Mex.-U.S., July 1, 2020, chs. 19–21 [hereinafter USMCA].

10. *See, e.g.*, *id.* at ch. 20, art. 20.81, at 20-46. Article 20.81 provides that "[e]ach Party shall provide that its judicial authorities have the authority to order injunctive relief . . . including to prevent goods that involve the infringement of intellectual property right under the law of the Party providing that relief from entering into the channels of commerce." *Id.*

11. H.R. REP. NO. 116–358, at 11–12 (2019). *See* USMCA, *supra* note 9, ch. 19. Despite USMCA's substantial differences from NAFTA, Prof. Thomas Schoenbaum notes that "[t]he great majority of the text of the USMCA is identical or a paraphrase of the TPP [Trans-Pacific Partnership]." Thomas J. Schoenbaum, *The Art of the Deal and North American Free Trade: Advantage for the United States?*, 14 OHIO ST. BUS. L.J. 100, 111 (2020).

12. The USMCA defines digital product as "a computer program, text, video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically." USMCA, *supra* note 9, ch. 19, art. 19.1, at 19-1.

13. *Id.* at ch. 19, art. 19.3, at 19-3.

14. *Id.* at ch. 19, art. 19.12, at 19-6. Data localization is a particular point of concern for U.S. businesses worried about information security, data privacy, and trade secret theft. Less than one year after the USMCA entered into force, "Mexico's central bank (Banxico) and the National Banking and Securities Commission (CNBV) issued draft fintech regulations (Provisions Applicable to Electronic Payment Fund Institutions) that would force firms to only choose cloud providers based in Mexico. . . . [O]fficials justified [the draft regulation] on the basis of broad, vague, and highly unlikely national security grounds." Nigel Cory, *Bring USMCA to Life: The United States Should Ensure Mexico Abides by Commitments to Allow the Free Flow of Data*, INFO. TECH. & INNOVATION FOUND. (June 17, 2021), https://itif.org/publications/2021/06/17/bring-usmca-life-united-states-should-ensure-mexico-abides-commitments-allow.

15. S. REP. NO. 116–283, at 18. The report details the breadth and depth of the chapter's provisions regarding digital trade. *Id.* at 30–31.

globally."[16] Similarly, USMCA Chapter 20: Intellectual Property Rights,[17] seeks to provide robust protections for intellectual property rights holders and industrial designs while simultaneously facilitating innovation and cross-border trade.[18]

Together, these chapters incentivize innovation by protecting the competitive economic advantage gained by developers that offsets the human and capital resources required for innovation. However, for intellectual property rights holders to reap the economic benefits of their innovations, those intellectual property rights must be enforced against infringement. USMCA provides that "[e]ach Party shall provide that its judicial authorities have the authority to order injunctive relief . . . including to prevent goods that involve the infringement of an intellectual property right under the law of the Party providing that relief from entering into the channels of commerce."[19] Notably, USMCA Chapter 19 specifies that the definition of a digital product "should not be understood to reflect a Party's view that digital products are a good or are a service."[20]

Congress created the United States Tariff Commission in 1916,[21] granting the new Commission broad authority to investigate matters of international trade.[22] In 1974, Congress renamed the United States Tariff Commission the United States International Trade Commission,[23] recognizing that the Commission's investigative activities generally followed patterns of global economic development. Likewise, Section 337, originally enacted as part of the Tariff Act

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16. H.R. REP. NO. 116–358, at 56. Professor Elizabeth Winston notes that:

> [r]egulating and protecting American industry and trade has long been a critical factor in the United States economy. Domestic industry is protected through a variety of methods, including seizures of harmful items at the border and the use of tariffs and subsidies. . . . The harms of that intangible property on domestic industry can be quite extensive, yet, CBP is not reviewing personal data for its impact on domestic industry, and instead they are looking for signs of criminal behavior.

Elizabeth Winston, *Information Age Technology, Industrial Age Laws*, 87 TENN. L. REV. 483, 545, 545 n.393 (2020).

17. USMCA, ch. 20, art. 20.8(1) provides that "[i]n respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals of another Party treatment no less favorable than it accords to its own nationals with regard to the protection of intellectual property rights." USMCA, *supra* note 9, ch. 20, art. 20.8, at 20-5. Note 2 accompanying Article 20.8(1) further provides that "'protection' shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as matters affecting the use of intellectual property rights specifically covered by this Chapter . . . [and] also includes the prohibition on the circumvention of effective technological measures." *Id.* at 20-5 n.2.

18. *See* S. REP. NO. 116–283, at 31–32 (discussing the elements and goals of the USMCA chapter on intellectual property rights).

19. USMCA, *supra* note 9, at ch. 20, art. 20.81(2) at 20-46.

20. *Id.* at ch. 19 at 19-1 n.1.

21. *See* Revenue Act of 1916 § 700, 39 Stat. 795 (1916).

22. *Id.* at § 704.

23. *See* Trade Act of 1974, Pub. L. No. 93-618, § 171, 88 Stat. 2009 (1975).

of 1930, grew in importance after the enactment of the Trade Act of 1974,[24] as intellectual property-related acts of unfair trade assumed a growing proportion of the Commission's investigative activities.[25] Section 337 prohibits unfair trade through "[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States, or in the sale of such articles by the owner, importer, or consignee."[26] However, the statute does not provide a definition of "articles," leaving the interpretation of this term to the agency.[27]

Over the years, the ITC has been asked to exclude intangible articles and found that it has jurisdiction to adjudicate unfair trade acts involving intangible articles.[28] In 2015, however, the Federal Circuit held in *ClearCorrect* that the

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24. *See* Hon. William E. Leonard, Jr., Chairman, U.S. Int'l Trade Comm'n, Trade Act Time Limits and the APA: The U.S.I.T.C. Between a Rock and a Hard Place, Address at the Third Annual Judicial Conference of the United States Court of Customs and Patent Appeals (May 10, 1976), *in* 72 F.R.D. 239, 252–53. *Compare* A Centennial History of the United States International Trade Commission, USITC Pub. 4744 at 323 n.835 (Nov. 2017) [hereinafter USITC Pub. 4744] (citing United States Tariff Commission, 1974 Annual Report, at 13) ("Prior to the passage of the 1974 Act [i.e., from 1916–1974], the Commission instituted 72 preliminary investigations and 35 full investigations under Section 337."), *with* U.S. INT'L TRADE COMM'N, BUDGET JUSTIFICATION FISCAL YEAR 2022 at 32 (2021), https://www.usitc.gov/documents/fy_2022_congressional_budget_justification.pdf (showing that there were nearly 60 new ITC complaints filed in 2020 alone, notwithstanding the effects of the COVID-19 pandemic).

25. USITC Pub. 4744, *supra* note 24, at 310–11.

26. 19 U.S.C. § 1337(a)(1)(A) (2018).

27. The Court of Customs and Patent Appeals addressed the Commission's broad jurisdiction in the 1955 case *In re Von Clemm*:

> The statute here under consideration provides broadly for action by the Tariff Commission in cases involving 'unfair methods of competition and unfair acts in the importation of articles,' but does not define those terms nor set up a definite standard. . . . [T]he quoted language is broad and inclusive and should not be held to be limited to acts coming within the technical definition of unfair methods of competition as applied in some decisions. The importation of articles may involve questions which differ materially from any arising in purely domestic competition, and it is evident from the language used that Congress intended to allow wide discretion in determining what practices are to be regarded as unfair.

In re Von Clemm, 229 F.2d 441, 443–44 (C.C.P.A. 1955).

28. *See* Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond (May 6, 2013) at 14, Certain Digital Models, Digital Data, and Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, Inv. No. 337–TA–833, USITC Pub. 4555 (Nov. 2017) [hereinafter USITC Pub. 4555]:

> [T]he Commission has issued, on multiple occasions, remedial orders covering electronically transmitted data. (Citing Certain Systems for Detecting and Removing Computer Viruses or Worms, Components Thereof ("Computer Viruses"), Inv. No. 337–TA–510, Comm'n Determination at 16 (August 2007) (holding that a cease and desist order covering electronically transmitted data is appropriate where the failure to cover such would result in the circumvention of the cease and desist order); Certain Set Top Boxes and Components Thereof, Inv. No. 337–TA–454, Final Initial Determination at 304–314 (November 8, 2002) (noting that Section 337 is broad enough to prevent the electronic transmission of software and/or data that induces infringing use of an imported product) Certain Hardware Logic Emulation Systems and Components Thereof ("Hardware Logic"), Inv. No. 337–TA–383, Comm'n Opinion at 25–29 (March 1998)

ITC does *not* have jurisdiction over intangible articles in international trade.[29] This decision declined to grant deference to the ITC's interpretation of the ambiguous statutory language central to the agency's mandate.[30] As expressed by Professor Elizabeth Winston, "[t]he ITC's mission is to protect domestic industry, not to protect the complainant's intellectual property rights. To draw distinctions between the tangible elements and the intangible elements in an allegation of intellectual property infringement is to misunderstand the mission of the ITC."[31] Customs works in cooperation with the ITC by enforcing exclusion orders that seize subject goods at the border and prevent said goods from entering the channels of commerce.[32] Unfortunately for the future of U.S. innovation and domestic industry, the *ClearCorrect* decision may have more far-reaching effects than originally anticipated because only the ITC has the authority to issue exclusion orders.[33]

This comment discusses the Congressional mandate of the ITC through the lens of the ITC's and the Federal Circuit's interpretations of its authorizing statute. By examining how the ITC has responded to changes in international trade since its enactment one-hundred years ago, this comment will analyze the impact of the Federal Circuit's statutory interpretation in the *ClearCorrect* case

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(issuing permanent cease and desist order prohibiting importation of electronically transmitted software)).

Id.

29. ClearCorrect Operating, LLC v. ITC, 810 F.3d 1283 (Fed. Cir. 2015).

30. *Id.* at 1286. Under the principle of *Chevron* deference, when a court analyzes whether an agency action is legitimate, the court first looks to see whether Congressional intent is unambiguous. If Congressional intent is clear and unambiguous, the agency must act in accordance with the express intent of Congress. But, if Congressional intent is not express and the statute is silent on a matter or leaves a gap for the agency to fill, the court will defer to an agency's interpretation as long as that interpretation is not arbitrary, capricious, or manifestly contrary to the statute. *See* Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

31. Winston, *supra* note 16, at 546. Winston further notes that "'Congress has deemed it illegal to import articles that infringe patents and impact domestic industry. . . . When domestic industry is harmed by patent infringement, and a complaint is filed at the ITC,' then there should be no difference in the type of article being imported—tangible or intangible." *Id.* at 547 (quoting Elizabeth I. Winston, *Standard Essential Patents at the United States International Trade Commission*, *in* THE CAMBRIDGE HANDBOOK OF TECHNICAL STANDARDIZATION LAW: COMPETITION, ANTITRUST, AND PATENTS 449 (Jorge L. Conteras ed., 2017)).

32. *Intellectual Property Rights*, U.S. CUSTOMS AND BORDER PROTECTION, https://www.cbp.gov/trade/priority-issues/ipr (May 26, 2022).

33. 19 U.S.C. § 1337 (2018); 19 C.F.R. § 12.39 (2016). *See also* Gary M. Hnath, *General Exclusion Orders Under Section 337*, 25 NW. J. INT'L L. & BUS. 349, 353-54 (2005) (discussing the *in rem* jurisdiction of ITC general exclusion orders as a unique remedy available under section 337 that provides intellectual property rights holders an order barring infringing goods from entry at port even if the companies importing the infringing goods were not party to the section 337 investigation). For an explanation of U.S. Customs and Border Protection offices responsible for exclusion order enforcement, *see* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 15-78, REPORT TO THE COMMITTEE ON FINANCE, U.S. SENATE, INTELLECTUAL PROPERTY: U.S. CUSTOMS AND BORDER PROTECTION COULD BETTER MANAGE ITS PROCESS TO ENFORCE EXCLUSION ORDERS 36 (2014), https://www.gao.gov/assets/gao-15-78.pdf.

on the future of unfair trade enforcement in the digital age. In light of the recent Supreme Court decision in *Bostock v. Clayton County*,[34] courts should reconsider the impact of textualist statutory interpretations that favor extratextual sources over sources that shed light on the language used by those who drafted the statute.

Broad issues of administrative law and agency deference, while critical issues in the *ClearCorrect* case, are not the focus of this comment. Instead, this comment focuses on the intersection of the ITC's mission to promote international trade while protecting domestic industry and the Digital Trade,[35] Intellectual Property Protection,[36] and Competition Policy[37] chapters of the USMCA. Section I will discuss the language of section 337 of the Tariff Act of 1930, as interpreted by Congress, administrative agencies, and the judiciary. Section I also will examine the relevance of the digital trade and intellectual property chapters of the USMCA to the future of domestic intellectual property protection. Section II provides an analysis of the statutory interpretation issues introduced in Section I and explores the implications of the *ClearCorrect* decision for U.S. intellectual property rights enforcement obligations under USMCA. Finally, Section III seeks to provide options to intellectual property rights holders and practitioners who wish to protect domestic industry's digital goods from intellectual property rights infringement.

II. PRIOR LAW: HOW THE FEDERAL CIRCUIT'S STATUTORY INTERPRETATION LED TO TODAY'S PROBLEM

A. Section 337: Three perspectives on the statutory language

1. Congress's broad mandate to the ITC to protect the domestic industry

In 1974, Congress amended the Tariff Act of 1930 in response to pressure from industry to modernize the trade laws for the post-World War II global economic era.[38] Consistent with its mandate to promote trade and enforce U.S.

34. *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1749–54 (2020).

35. *See* USMCA, *supra* note 9, at ch. 19.

36. *Id.* at ch. 20.

37. *Id.* at ch. 21.

38. Trade Act of 1974, *supra* note 23, at §§ 171–75. Legislators in 1974–75 followed in the footsteps of legislators in 1930 and 1921 who recognized that the existing trade laws were insufficient to address contemporaneous international trade challenges. *See* USITC Pub. 4744, *supra* note 24, at 316–23. In a 1919 Tariff Commission report to the House Committee on Ways and Means, the report recommended legislative action: "If the act of 1916 is adhered to, attention should be devoted to careful revision and strengthening of its provisions." U.S. TARIFF COMM'N, DUMPING AND UNFAIR FOREIGN COMPETITION IN THE UNITED STATES 33 (1919). Members of Congress agreed and introduced H.R. 7456, noting in the floor debate that "[d]umping and other unfair methods of competition in importation have been recognized as a menace, particularly under postwar conditions, to American industries." 67 CONG. REC. 5879 (Apr. 24, 1922). Sen. Smoot declared:

trade laws, the 1974 Act clarified that the Commission "could consider patent validity and enforceability for purposes of determining violation of section 337," but "[f]indings of patent invalidity or unenforceability . . . were not *res judicata*."[39] Similarly, Congress directed the ITC to consider public interest factors when determining remedies:

> Should the Commission find that issuing an exclusion order would have a greater adverse impact on the public health and welfare; on competitive conditions in the United States economy; on production of like or directly competitive articles in the United States; or on the United States consumer, than would be gained by protecting the patent holder (within the context of the U.S. patent laws) then . . . such exclusion order should not be issued.[40]

Consequently, Congress granted the Commission broad authority to investigate allegations of unfair trade, but in doing so, required the Commission to consider the entire domestic industry it was tasked with protecting from unfair trade acts rather than focusing narrowly on the complaining party.[41] This holistic approach reinforced the Congressional view of the agency as independent, non-partisan, and expert[42]—and therefore trusted to exercise discretion within the bounds set by Congress.

In the 1980s, Congress again amended section 337.[43] In response to the growing importance of research and development in the innovation of new goods, Congress expanded section 337 to protect domestic industries that relied on such research and development against acts of unfair trade in importation.[44] Although Congress explicitly recognized the growth of technology in trade and expandedrather than narrowed the ITC's authority to better protect domestic

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> If any doubt whatever exists to the effectiveness of the tariff rates and the provisions of the elastic tariff . . . the addition of this effective unfair competition statute should remove it. We have in this measure an anti-dumping law with teeth in it—one which will reach all forms of unfair competition.

Id. Congress undertook the next major revision of the trade laws in 1930, redesignating section 316 as section 337 as the statutory provision related to unfair trade practices. USITC Pub. 4744, *supra* note 24, at 319. *See* H.R. REP. NO. 71–7, at 66 (1929).

39. USITC Pub. 4744, *supra* note 24, at 323 (citing S. REP. NO. 93–1298, at 196).

40. S. REP. NO. 93–1298, at 197 (1974).

41. *See* Winston, *supra* note 16, at 556–57 (2020) (discussing the mission of the International Trade Commission to protect the domestic industry, not individual intellectual property rights holders, from unfair trade).

42. *See* Robert Longley, *Independent Executive Agencies of US Government*, THOUGHTCO., https://www.thoughtco.com/independent-executive-agencies-of-us-government-4119935 (Aug. 2, 2021) (discussing the characteristics of independent agencies as comprised of experts in their field of expertise, often headed by a bipartisan commission, and exercising substantial independence from the President).

43. *See generally* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418 §§ 1341–42, 102 Stat. 1107, 1211–13 (1988).

44. *Id.*

industry,[45] Congress did not feel the need to amend section 337 with respect to its definition of "articles" or to explicitly grant—or bar—the ITC's jurisdiction over intangible goods in international trade.

2. The ITC's interpretation of the organic act in changing economic and technological environments

As Congress has amended section 337 and other trade laws to respond to changing economic and technological environments, the ITC and other agencies tasked with interpreting Congressional mandates have continually engaged in statutory analysis to ensure that they are carrying out their duties in accord with the intent of Congress.[46] For instance, shortly after Congress amended section 337 in the late 1980s to provide stronger intellectual property protections for domestic innovations,[47] domestic industry recognized this congressional enlargement of the ITC's authority. In 1996, Quickturn Design Systems Incorporated filed the first section 337 complaint dealing with intangible goods.[48] At that time, the ITC considered the applicability of section 337 to the electronic transmission of the goods deemed to infringe the complainant's intellectual property rights.[49] Because Customs enforces exclusion orders and Customs had declined to regulate electronic transmissions,[50] the Commission declined to apply the limited exclusion order to electronic transmissions, but did include electronic transmissions in the cease and desist order.[51] Importantly, the Commission stated in the cease and desist order that "[t]he terms 'import' and 'importation' . . . refer to the electronic transmission of software, in whatever form, into the United States."[52]

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45. *See, e.g.*, Sen. Lautenberg's comments during the floor debates of the 1988 Act:

> Mr. President, a recent International Trade Commission study found that America's most competitive industries are losing over $40 billion a year in sales as a result of inadequate protection of intellectual property. . . . America's economic edge is its technology and its innovation. But, if we are to enjoy the fruits of our labor—the jobs and growth that are to come from innovation—we need to stop the piracy of American intellectual property. . . . Mr. President, our trade deficit cannot be erased overnight. We need to remove unfair trade practices. We need to promote American competitiveness. American innovation is key to American competitiveness. That innovation is tied up in our patents, copyrights, trademarks, and semiconductor mask works. We need to protect those rights, and take action to gain respect for those rights abroad.

134 CONG. REC. at 20086–87 (1988) (statement of Sen. Lautenberg).

46. *See infra*, Section II.A.3.c (discussing how Customs and the Department of Labor responded to the impact of digital goods on their duties under the Tariff Act of 1930).

47. *See* Andrew S. Newman, *The Amendments to Section 337: Increased Protection for Intellectual Property Rights*, 20 LAW & POL'Y INT'L BUS. 571, 572 (1989).

48. *In re* Certain Hardware Logic Emulation Systems and Components Thereof, Inv. No. 337–TA–383, USITC Pub. 3089 (Mar. 1998) (Final).

49. *See id.* at 28–29.

50. *Id.* at 20.

51. *Id.* at 2.

52. *Id.* at 2.

3. The Federal Circuit's decision-making in ClearCorrect and changing Supreme Court approaches to statutory interpretation

In 2015, the old world of traditional manufacturing and the new world of digital files and additive manufacturing—commonly known as 3D printing—came together in a case that changed the legal landscape for domestic intellectual property rights holders when that intellectual property is infringed through a digital medium.[53] Orthodontic alignment is one industry where additive manufacturing has allowed companies to provide customized products faster and more conveniently than traditional manufacturing methods.[54] Align Technology, Inc. (Align) and ClearCorrect Operating, LLC (ClearCorrect) are two companies operating in the orthodontic alignment market.[55] In the early 2010s, ClearCorrect operated its business by scanning a patient's teeth in the United States, creating a digital model of the patient's current orthodontic alignment.[56]

ClearCorrect then sent that digital file to its offices in Pakistan, where the digital model would be reshaped to create the desired dental alignment.[57] The digital file with the reshaped model was then sent to the United States, where ClearCorrect would use a 3D printer to produce the aligner for the patient.[58] In 2012, Align Technology, Inc. filed a complaint at the ITC against ClearCorrect, alleging that ClearCorrect infringed Align's patents for making dental appliances using digital data sets in the digital files that ClearCorrect sent from Pakistan to the United States,[59] constituting an act of unfair trade.

ClearCorrect challenged the ITC's jurisdiction over digital files transmitted over the internet as infringing articles in international trade. In *ClearCorrect v. ITC*, the Federal Circuit considered whether the ITC has jurisdiction over digital data as part of its congressional mandate to conduct unfair import investigations.[60] The Federal Circuit held that "articles," as the term is used in Section 337, means "material things,"[61] even though no such intent is expressed in the statutory text[62] or legislative history.[63]

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

54. *See e.g.*, Charles Gemmi, *How 3D Printing Has Transformed Orthodontics*, ORTHODONTICS LIMITED, PC (Mar. 31, 2018), https://www.orthodonticslimited.com/orthodontics/how-3d-printing-has-transformed-orthodontics/.

55. *See* USITC Pub. 4555, *supra* note 28, Comm'n Op. at 8.

56. *Id.*, Comm'n Op. at 18.

57. *Id.* at 19–20.

58. *Id.* at 17.

59. *Id.* at 1–2.

60. ClearCorrect Operating, LLC v. ITC, 810 F.3d 1283, 1286 (Fed. Cir. 2015).

61. *Id.* at 1286.

62. *See generally* 19 U.S.C. § 1337 (2018).

63. *See ClearCorrect*, 810 F.3d at 1299. Although the court found that the legislative history indicated that Congress intended to *exclude* digital data from its definition of "goods," this

a. Textual Interpretation

Courts use a number of interpretive methodologies to analyze statutory language, including linguistic and substantive canons of construction, plain meaning, statutory context, legislative history, and contextual and intertextual analysis.[64] Different methodologies give different weight and priority to the sources used to interpret ambiguous text.[65] In *Bostock v. Clayton County*, a recent textualist Supreme Court decision,[66] the Court stated that:

> Those who adopted the [Act] might not have anticipated their work would led to this particular result. . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. . . . *If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process*.[67]

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conclusion did not come directly from the legislative history. The court relied on BLACK'S LAW DICTIONARY: the definition for "Merchandise, Goods" provided that "[s]ometimes the meaning of 'goods' is extended to include all tangible items, as in the phrase 'goods and services.'" *Id.*

64. *See* LARRY M. EIG, CONG. RES. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 3 (2014), https://sgp.fas.org/crs/misc/97-589.pdf; *see also* CONG. RES. SERV., R415153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 1 (2018), https://crsreports.congress.gov/product/pdf/R/R45153.

65. A report on statutory interpretation prepared for Members of Congress notes that traditional differences in statutory interpretive approaches are most acute "in instances where it is unlikely that Congress anticipated and legislated for the specific circumstances being disputed before the court. While purposivists argue that courts should prioritize interpretations that advance the statute's purpose, textualists maintain that a judge's focus should be confined primarily to the statute's text." CONG. RES. SERV., R415153, *supra* note 64, at Summary.

66. Professors Eskridge and Nourse refer to *Bostock* as the "statutory interpretation blockbuster of the 2019 Term." William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1768 (2021). Eskridge and Nourse note that:

> [I]n any difficult case, the textualist judge starts with two potentially outcome-determinative decisions: a *choice of text*—the scope of text the judge decides to focus on when interpreting a statute—and a *choice of context* surrounding this text. Though both choices involve text, the normative decisions which underlie these choices are not themselves grounded in the text. And the way judges make both of those decisions is changing. . . .

Id. at 1721 (emphasis added).

67. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737–38 (2020) (emphasis added). For a novel exploration of the canon of "ordinary meaning," favored by Justice Gorsuch, *see* Kevin Tobia et al., *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 213 (2022). *Bostock* demonstrates that, even among textualist jurists, methodological approach matters but may not result in a presupposed conclusion. Despite Justice Gorsuch's call for judges to avoid using their imaginations to interpret statutory terms, Justice Gorsuch ultimately relied on a selection of dictionary definitions and constructions of "ordinary language," to arrive at his chosen linguistic interpretations. Eskridge & Nourse, *supra* note 66, at 1769. In his dissent, Justice Kavanaugh favored a contextual approach, arguing that "[l]egislation cannot sensibly be interpreted by

Although Justice Gorsuch was writing about the Civil Rights Act in *Bostock*, all courts engaging in statutory interpretation, including the Federal Circuit in *ClearCorrect,* apply the same rule of statutory construction in beginning with the statutory text.[68]

In considering the plain language of the statute, because the pertinent sections of the Trade Act of 1974 were drafted as amendments to the Tariff Act of 1930, which itself was an adaptation of the Tariff Act of 1922, the court looked to dictionaries from the 1920s and 1930s to construe the plain meaning of the statutory language.[69] Unsurprisingly, definitions of the word "article" in 1920s and 1930s dictionaries generally considered items in terms of materiality.[70] However, not all contemporary dictionaries included an element of materiality in the definition of "article," indicating that materiality may have been a common assumption of the time but was not a necessary element of the term as used in the statute.[71]

In addition to examining contemporary plain text meanings of the term "articles," the court examined contemporaneous usage of the term "goods."[72] The court noted that the Commission's interpretation accorded with Congressional debates for the 1922 and 1930 Acts, wherein Members of Congress "refer[red] to articles as synonymous with goods."[73] However, the court then concluded that neither "goods" nor "articles" could include immaterial items.[74] The court came to this conclusion by determining that the

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stringing together dictionary synonyms of each word and proclaiming that, if the right example of the meaning is selected, the 'plain meaning' of the statute leads to a particular result." *Id.* at 1774–75 (citing *Bostock*, 140 S. Ct. at 1827 (Kavanaugh, J., dissenting)).

68. *See, e.g.*, EIG, *supra* note 64, at 3; *ClearCorrect*, 810 F.3d at 1286.

69. *See id.* at 1291–92. Interestingly, the court highlights the definition of "article" from THE CENTURY DICTIONARY AND CYCLOPEDIA from 1911, noting that dictionary was used exclusively by the Supreme Court for its definition of "manufacture" when the Supreme Court interpreted the Plant Patent Act of 1930 in Am. Fruit Growers v. Brogdex Co., 283 U.S. 1, 11 (1931). *See id.* at 1291. However, as cited by the court, that "dictionary defines 'article' as '[a] material thing as part of a class, or, absolutely, a particular substance or *commodity*.'" *Id.* (emphasis added). The court focused on the words "material thing" and neglected to consider that the definition also indicated that an article could be a commodity, which need not be a material thing. *Id.*

70. *See, e.g., id.* at 1291–92 (discussing a number of contemporaneous dictionaries that included materiality in the definition of the term "article").

71. *See, e.g., id.* at 1308 (Newman, J., dissenting) (discussing a number of contemporaneous dictionaries that did not include materiality in the definition of the term "article").

72. *See id.* at 1298–99.

73. *See id.* at 1298 n.17 (citing S. REP. NO. 67–595, at 3 (1922) ("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."); H.R. REP. NO. 71–7, at 3 (1929); 71 CONG. REC. S. 3872, 4640 (1929)). *See also id.* at 1307 (J. Newman, dissenting) (citing the definition of "article" as "unchanged from the 1922 and 1930 statutes . . . 'article' includes any commodity, whether grown, produced, fabricated, manipulated, or manufactured."). Notably, the Federal Circuit also used the term "goods" interchangeably with "articles" in its opinion in *Suprema, Inc. v. ITC*. *Id.* at 1298 n.18 (citing Suprema, Inc. v. ITC, 796 F.3d 1338 (Fed. Cir. 2015)).

74. *See id.* at 1298–99.

BLACK'S LAW DICTIONARY definition of chattels as "movables" meant that "movables" only included material things, then extending that interpretation of "movables" to "goods."[75] Similarly, the court looked to the BLACK'S LAW DICTIONARY definition of "merchandise, goods" and determined that "goods," under the broadest definition, was limited to tangible items.[76]

The Federal Circuit then engaged in a *Chevron*[77] analysis to review the ITC's jurisdiction in light of the organic act as a whole and recent Congressional attempts to pass legislation that included granting the ITC explicit jurisdiction over digital files:

Under step one of Chevron, "[w]e begin with the text" . . . Here, it is clear that "articles" means "material things" . . . We recognize, of course, that electronic transmissions have some physical properties . . . but commonsense dictates that there is a fundamental difference between electronic transmissions and "material things." Our analysis is therefore complete.[78]

Accordingly, the Federal Circuit determined that the statutory language was unambiguous and ended its *Chevron* analysis, concluding that the ITC only has jurisdiction over material goods.[79]

b. Contextual interpretation

In conducting its statutory analysis, the Federal Circuit looked at the term "articles" in the context of the Tariff Act as a whole, noting that the Supreme Court held that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[80] The court first noted that the statute defined the term "article" in one place in the 1922 Act, using a relatively broad definition, but also contrasted the word "article" with other terms, as in "fabrics with fast edges: and also for articles made therefrom."[81] The court determined that this use narrowed the meaning of the term "article," and thus applied the narrower meaning anywhere that the broader meaning was

75. *See id.* Note, however, that the BLACK'S LAW DICTIONARY cited by the court explicitly stated that "goods" "applies to inanimate objects." *Id.* at 1298 (citing *Goods*, BLACK'S LAW DICTIONARY, 2d ed. 1910).

76. *See id.* at 1298–99.

77. *See generally* Chevron USA v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). For a general discussion of *Chevron* analysis, *see supra* note 30.

78. *ClearCorrect*, 810 F.3d at 1286.

79. *Id.* Even if one accepts the court's argument that such a fundamental difference between electronic transmissions and "material things" exists, the court's error arguably occurs at the prior step, when the court determined that the language is unambiguous. In fact, the plain language of the statute is ambiguous, but Congressional intent to protect domestic industry is unambiguous. Consequently, Congressional intent to protect domestic industry would weigh in favor of the broader interpretation of "article" adopted by the agency because that definition best effectuates Congressional intent underlying the entire statutory scheme.

80. *Id.* at 1296 (quoting King v. Burwell, 576 U.S. 473, 486 (2015)).

81. *Id.* at 1293.

not explicitly delineated.[82] Additionally, because the court determined that Congress intended the cease and desist order to function as a "softer remedy" in the Commission's "arsenal" of remedial orders and Customs had declined to regulate the importation of electronic transmissions, the cease and desist order functioned as the exclusive remedy.[83] Consequently, the court determined that cease and desist orders covering digital data went against the statutory scheme of section 337 as a whole.[84]

Secondly, when looking to the legislative history for indications of Congressional intent with regard to the term "article," the court acknowledged that Members of Congress and outside witnesses used various terms interchangeably to refer to goods in trade, including "articles," "merchandise," "commodities," and "goods,"[85] but the court did not consider the adverse implications for Congressional intent of narrowly construing the terms "goods" and "articles" without clear Congressional indication that the terms should be construed narrowly. The Supreme Court in *Bostock* explained that:

> while legislative history can never defeat unambiguous statutory text, historical sources can be used for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally. To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence.[86]

Applying this methodology to the 1922 Act, rather than intending a narrow definition of the term "article," the legislative history demonstrates that Congress used the term broadly.[87] Moreover, the broad interpretation of the term

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82. *Id.* This interpretation exemplifies the reason that legislative drafters are admonished to use only one meaning for a given term throughout a piece of legislation. *See* LAWRENCE E. FILSON & SANDRA L. STROKOFF, THE LEGISLATIVE DRAFTER'S DESK REFERENCE 247 (2d ed. 2008).

83. *ClearCorrect*, 810 F.3d at 1296. However, the fact that Customs declined to regulate exclusion orders on digital data—thereby failing to enforce an ITC exclusion order—does not render the Commission's exclusion order invalid, merely ineffective through lack of enforcement.

84. *Id.*

85. *See, e.g.*, *id.* at 1298 n.17; *see also Intellectual Property and Trade: Hearings Before Subcomm. on Courts, Civ. Liberties & the Admin. of Just. of the H. Comm. on the Judiciary*, 99th Cong. (1986).

86. *Bostock*, 140 S. Ct. at 1750.

87. *See* USITC Pub. 4555, *supra* note 28, at 43 (discussing the use of the term "articles" synonymously with "goods" in the Congressional debates and reports of the 1922 and 1930 Tariff Acts).

accords with the full definition of the term "articles" in the 1911 dictionary cited by the court.[88]

Finally, the Federal Circuit stated that if legislators had intended the ITC to have jurisdiction over intangible articles, Congress would have expressly granted that jurisdiction in the ITC's organic act.[89] However, the Supreme Court held that "'the fact that [a statute] has been applied in situations not expressly anticipated by Congress' does not demonstrate ambiguity; instead, it simply 'demonstrates [the] breadth' of a legislative command."[90] Notwithstanding the court's consideration of the drafters' interchangeable and broad use of "goods" and "articles,"[91] the expansion on several occasions of section 337's reach,[92] and comments in the legislative history that the statute was "broad enough to prevent every type and form of unfair practice,"[93] the court held that the "literal text" of the statute was unambiguous,[94] concluding that "we think it is best to leave to Congress the task of expanding the statute if we are wrong in our interpretation."[95]

c. Interstatutory Interpretation

Both the Department of Labor (DOL) and Customs have interpreted the terms "articles," "goods," and "merchandise" to include digital transmissions. In a 1998 ruling, Customs held that "the transmission of software modules and products to the United States from a foreign country via the Internet is an importation of merchandise into the customs territory of the United States in that the software modules and products are brought in to the United States from a

88. *See supra* note 68.

89. *See ClearCorrect*, 810 F.3d at 1299. In her concurrence to the court's original opinion, Judge O'Malley wrote that "[t]he Commission has concluded that it has jurisdiction over all incoming international Internet data transmissions." *Id.* at 1302. The majority expands the Commission's position from unfair acts of trade in importation, regardless of medium, to all incoming data transmissions—similar to if the Commission were to claim jurisdiction over all goods in trade, foreign or domestic, or all intellectual property rights. Neither is the case. Just as the ITC only adjudicates alleged unfair acts in international trade, adjudicating unfair acts in digital trade does not constitute an assertion of general jurisdiction over all Internet transmissions. Moreover, of the several bills cited by Judge O'Malley as evidence that Congress did not intend to delegate authority over unfairly traded digital goods, only one of those bills, the Online Protection and Enforcement of Digital Trade Act, dealt explicitly with amending the Tariff Act of 1930 to confer jurisdiction over digital data in importation on the ITC. *See id.* at 1303. That bill, like countless others, died in committee. It was never presented for floor debate, much less a vote. The other bills cited dealt with regulation of the Internet generally.

90. *Bostock*, 140 S. Ct. at 1749 (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985)).

91. *ClearCorrect*, 810 F.3d at 1298 n.17.

92. *See id.* at 1296–99.

93. *Id.* at 1298 n.17 (citing S. REP. NO. 67–595, at 3(1992)).

94. *Id.* at 1299.

95. *Id.* at 1302.

foreign country."[96] The Federal Circuit noted in *ClearCorrect* that digital transmissions are not subject to duties under the Harmonized Tariff System of the United States (HTSUS),[97] but Customs deems "software [as] merchandise and a good, even if not covered by the HTSUS,"[98] demonstrating that articles not covered by the HTSUS may still be goods in trade.

Similarly, the Department of Labor administers programs to provide assistance to workers displaced in the labor market through global trade shifts.[99]

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96. Winston, *supra* note 16, at 549 (quoting Customs Ruling HQ 114459 (Sept. 17, 1998), http://www.faqs.org/rulings/rulings1998HQ114459.html).

97. *ClearCorrect*, 810 F.3d at 1297–98. The majority cited a Commission report that accompanied the 1963 revision of the Tariff Schedule:

> General headnote 5 sets forth *certain* intangibles which, under various established customs practices, are not regarded as articles subject to treatment under the tariff schedules. . . . This subsection includes items such as electricity, securities, and similar evidences of value. . . . while [the 1988] schedule included a heading for electrical energy, it specifically removed it from the purview of section 484 of the Tariff Act of 1930 and placed its regulation purely in the hands of the Secretary of the Treasury. . . . This succession of tariff schedules provides further evidence that the Act's scheme was not meant to include intangibles.

Id. at 1298 (emphasis added). Contrary to the court's assertion, the Commission's report proves only that *certain* intangibles were not deemed articles subject to the tariff code, not that all intangibles were discounted from such treatment. Furthermore, of the intangibles mentioned in the Commission's report, only electrical energy was cited by the court as having been removed to the regulatory authority of the Treasury. A selective re-assignment of a single intangible hardly excludes the entire category of intangible commodities from consideration under the HTSUS, much less as goods in trade generally. Judge Newman's dissent provides:

> Although the panel majority argues that the Tariff Schedule exempts telecommunications transmissions from import duties . . . it is established that telecommunications transmissions, including electronically imported software, are within the purview of the Customs service. . . . Exemption from import duty is not exemption from patent infringement. The court now discards established protocols and practices concerning electronic and digital technology, although it is beyond debate that digital articles are 'goods' or 'merchandise' and may be bought and sold and patented and imported. Today's ruling discards the Tariff Act's purpose of protecting domestic industry from unfair trade in the importation of this vast and powerful body of commercial articles that may infringe United States patents.

Id. at 1309 (Newman, J., dissenting).

98. Winston, *supra* note 16, at 549 (quoting Customs Ruling HQ 114459 (Sept. 17, 1998), http://www.faqs.org/rulings/rulings1998HQ114459.html). Although software code may be transmitted on a physical medium, the Court of International Trade in *Former Employees of Computer Sciences Corporation* found that software need not be on a physical medium to be considered an article under the law. Former Emps. of Comput. Scis. Corp. v. Sec'y of Labor, 414 F. Supp. 2d 1334, 1340 (Ct. Int'l Trade 2006).

99. *See generally* 19 U.S.C. §§ 2102, 2272 (2018). Qualification for the Trade Adjustment Assistance (TAA) program requires that workers have been affected by the shift of production overseas of articles/goods (not services). *Id.*; *see also* Joanne Guth and Jean Lee, *A Brief History of the U.S. Trade Adjustment Assistance Program for Workers*, USITC EXEC. BRIEFINGS ON TRADE (Jan.2017), https://www.usitc.gov/publications/332/executive_briefings/ebot_historyoftaaguthlee_corrected.pdf.

In a 2006 ruling, the Court of International Trade stated that "the Trade Act does not define the term 'articles' within the statutory language, and specifically absent is a tangibility requirement."[100] Accordingly, the CIT found that requiring code "be on a physical medium to be an article" would be inconsistent with recent technological developments.[101] The court concluded that "the plain language of the Trade Act does not require that an article must be tangible,"[102] noting that "[t]he Trade Act does not define the term 'articles' within the statutory language, and specifically absent is a tangibility requirement."[103] Following that case, the Department of Labor changed its policy to provide trade adjustment assistance to workers whose jobs were displaced through the offshoring of intangible articles.[104]

In its denial of the ITC's request for rehearing *en banc* after the Federal Circuit's 2015 *ClearCorrect* decision, the court addressed arguments raised in the dissent that the court should interpret the Trade Act of 1974 in interstatutory context and consider the ways that the term "article" had been interpreted in other trade legislation and related legislative history.[105] The Federal Circuit said that "[t]he Trade Act of 1974 was enacted to provide assistance to domestic producers of 'articles' whose jobs were being moved abroad," concluding that "[t]he meaning of the word 'article' in this worker-protection context is irrelevant to the question of the ITC's jurisdiction to regulate importation of articles that infringe U.S. patents."[106]

The concurrence to the Federal Circuit's original *ClearCorrect* decision also opined that Congressional failure to pass legislation that expressly granted the ITC authority over unfairly traded digital data indicated that Congress did not intend for the ITC to adjudicate such alleged unfair acts.[107] However, that interpretation is contrary to the Supreme Court's holding in *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*[108] In *Cent. Bank of Denver*, the Supreme Court cautioned that "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'"[109]

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100. *Former Emps. of Comput. Scis. Corp.*, 414 F. Supp. 2d at 1340.

101. *Id.*

102. *Id.* at 1343.

103. *Id.* at 1340.

104. Fred K. Foulkes et al., *Global Sourcing of Talent: Implications for the US Workforce*, *in* AMERICA AT WORK: CHOICES AND CHALLENGES 257, 272 (Edward E. Lawler III & James J. O'Toole eds., 2006).

105. ClearCorrect Operating, LLC v. ITC, 819 F.3d 1334, 1336–37 (Fed. Cir. 2016).

106. *Id.* at 1336 n.1.

107. ClearCorrect Operating, LLC v. ITC, 810 F.3d 1283, 1303 (Fed. Cir. 2015) (O'Malley, J., concurring).

108. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994).

109. *Id.* at 187 (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990). The intense debates surrounding section 230 of the Communications Decency Act in recent years demonstrate that intense lobbying by industry leaders in the technological arena makes legislating

B. Updated digital trade and intellectual property protections in USMCA to protect U.S. innovators and businesses

Although the Office of the United States Trade Representative ("USTR") largely negotiated the United States-Mexico-Canada Agreement with its Canadian and Mexican counterparts, the United States Trade Representative, Robert Lighthizer, engaged in numerous rounds of discussion and negotiation with Members of Congress regarding the elements of the agreement,[110] making the enactment of the implementing legislation[111] nearly a foregone conclusion by the time the bill went to a vote.[112]

The digital trade chapter in USMCA, Chapter 19, provides legislative evidence of Congressional recognition of digital files as goods in trade.[113] The purpose of Chapter 19 is to promote cross-border data flows, international data-intensive trade, and e-commerce,[114] while limiting barriers on digital trade.[115] The chapter recognizes that digital trade is the way of the future, highlighting the "economic growth and opportunities provided by digital trade and the importance of frameworks that promote consumer confidence in digital trade."[116] Chapter 20, the intellectual property rights chapter in USMCA, recognizes that the protection of intellectual property rights contributes to economic and social welfare, while also providing that "[t]he protection and enforcement of intellectual property rights should contribute to the promotion of

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regulation of the Internet exceedingly difficult. Accordingly, Congress's past inability to pass Internet regulatory legislation that, among other things, explicitly included ITC authority over digital data in international trade has more to do with external pressures not to enact *any* regulation of the Internet than a lack of support in Congress to explicitly grant the ITC authority to adjudicate unfairly traded digital.

110. *See, e.g.*, *Top U.S. Trade Official Submits USMCA Ideas to Democrats: Lawmakers*, REUTERS (Sept. 19, 2019), https://www.reuters.com/article/us-usa-trade-usmca/top-u-s-trade-official-submits-usmca-ideas-to-democrats-lawmakers-idUSKCN1VW2NL; David Lawder & David Shepardson, *USTR Sees Progress in Talks on North American Trade Deal Vote: Senators*, REUTERS (May 21, 2019), https://www.reuters.com/article/us-usa-trade-usmca/ustr-sees-progress-in-talks-on-north-american-trade-deal-vote-senators-idUSKCN1SR2ER.

111. *See* United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116–113, 134 Stat. 11 (2020).

112. H.R. 5430, the United States-Mexico-Canada Agreement Implementation Act, passed the Senate with a vote of *89 Yeas, 10 Nays, and 1 Not Voting* and passed the House of Representatives with a vote of *385 Yeas, 41 Nays, and 5 Not Voting*. *Roll Call Vote 116th Congress – 2nd Session*, U.S. SENATE (Jan. 16, 2020), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00014; *Roll Call 701, Bill Number: H.R. 5430*, CLERK OF U.S. HOUSE OF REP. (Dec. 19, 2019), https://clerk.house.gov/Votes/2019701.

113. USMCA, *supra* note 9, ch. 19, at 19-1. Chapter 19, note 1 provides that the definition of a digital product "should not be understood to reflect a Party's view that digital products are a good or are a service." *Id.* at 19-1 n.1. By not categorizing digital products as either a good or a service, the signatories left open the possibility that digital products may be considered goods.

114. S. REP. NO. 116-283, at 18, 30–31 (2020).

115. USMCA, *supra* note 9, ch. 19, art. 19.2, at 19-2.

116. *Id.*

technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge."[117]

Under the Trade Promotion Authority provision of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, the ITC provides reports to Congress analyzing the likely impact on the United States of any trade agreements.[118] In April 2019, the ITC issued a report on the likely economic impact of the USMCA.[119] The USMCA's predecessor, the North American Free Trade Agreement ("NAFTA"), provided intellectual property protections[120] but did not conceive of digital trade or e-commerce.[121] The ITC's report evaluated the potential cross-cutting impacts of the intellectual property protections in USMCA and digital trade, noting that the agreement includes "updated standards to address infringement in the digital environment, such as increased protections against the circumvention of technological protection measures."[122]

USMCA Chapters 19 and 20 converge in the protection of intellectual property rights for goods in digital trade. Not only does USMCA include protections for digital trade and intellectual property rights separately, but both the digital trade and intellectual property chapters include a remedies provision.[123] The ITC report stated that "USMCA includes an extensive set of IPR enforcement obligations . . . includ[ing] the express application of enforcement procedures to the digital environment; mandatory requirements for remedies that were discretionary under NAFTA (such as . . . seizure and destruction of infringing goods); [and] . . . injunctive and provisional relief[.]"[124] The ITC received feedback demonstrating that industry representatives "broadly support enhanced border enforcement measures, including increased powers for customs officials to initiate border actions . . . and the ability to take action against infringing goods that are in transit from other countries or free trade zones."[125]

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117. *Id.* at ch. 20, art. 20.2, at 20-2.

118. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, § 105(c), 129 Stat. 347 (2015).

119. U.S. Int'l Trade Comm'n, U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, Inv. No. TPA 105–003, USITC Pub. 4889 at 13 (Apr. 2019) [hereinafter USITC Pub. 4889].

120. *See* Canada-Mexico-United States: North American Free Trade Agreement, Part Six Intellectual Property, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. NAFTA was the first trade agreement to include intellectual property rights protections. SHAYERAH ILIAS AKHTAR & IAN F. FERGUSSON, CONG. RSCH. SERV., IF11314, USMCA: INTELLECTUAL PROPERTY RIGHTS (IPR) (2020).

121. *The United States-Mexico-Canada Agreement Fact Sheet: Digital Trade*, https://ustr.gov/sites/default/files/files/Press/fs/USMCA/USMCA-Digital_Trade.pdf (last visited Dec. 30, 2021).

122. USITC Pub. 4889, *supra* note 119, at 205.

123. *See*, *e.g.*, USMCA, *supra* note 9, ch. 19-20, art. 19.14, 19.16, 20.81.

124. USITC Pub. 4889, *supra* note 119, at 206.

125. *Id.* at 212–13.

As a result of the *ClearCorrect* decision, the American government lost a powerful potential enforcement tool and intellectual property rights holders lost a powerful potential remedy when digital files that infringe their patents are imported into the United States. Considering the growing importance of digital data in the economy, the impact of this decision in terms of lost profits and harm to U.S. innovators could be substantial in the coming years.

III. ANALYSIS

It is generally accepted that courts in the United States decide "cases or controversies" and do not provide advisory opinions like the courts in some other countries.[126] Accordingly, rather than opining on the ITC's jurisdiction generally, the Federal Circuit's statutory interpretation of the Tariff Act of 1930 rightly began with the plain language of the statute.[127] Arguably, statutory ambiguity made the ITC's interpretation reasonable and congruent with Congressional intent, as demonstrated through related actions by other agencies, specifically the Dept. of Labor and U.S. Customs and Border Protection.[128] However, the Federal Circuit disagreed, holding that the statutory language was unambiguous, thus rendering the ITC's interpretation unreasonable.[129] The USMCA provides that the signatory parties are to provide a judicial remedy that includes the entry of goods that infringe intellectual property rights from entering the stream of commerce.[130] But without the ITC's power to issue exclusion orders over unfairly traded digital goods, the USMCA lacks practical enforceability of its new digital trade provisions.

A. Statutory interpretation issues

The Federal Circuit's statutory interpretation of the terms "goods" and "articles" raises several questions relevant to the impact of the *ClearCorrect* decision on the enforceability of the USMCA's intellectual property rights provisions as they apply to goods in digital trade.

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126. *See generally* U.S. CONST. art. III § 2. For a discussion of the historical development of the United States approach to this issue, *see* Manley O. Hudson, *Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970, 975–76 (1924). For a discussion of the ways that federal courts can provide advisory opinions embedded in decisions, *see* Phillip M. Kannan, *Advisory Opinions by Federal Courts*, 32 U. RICH. L. REV. 769, 769 (1998). *See also* Note, *Advisory Opinions and the Influence of the Supreme Court over American Policymaking*, 124 HARV. L. REV. 2064, 2064 (2011) (discussing the unintended influence of the judiciary over policymaking through the absence of advisory opinions). For a discussion of the role of advisory opinions in foreign courts, *see generally* Hugh Thirlway, *Advisory Opinions*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Oxford Univ. Press, 2006).

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

128. *See supra*, Section I.A.3.c (discussing the interpretation of the terms "goods" and "articles" by U.S. Customs and Border Protection and the U.S. Department of Labor).

129. *ClearCorrect*, 810 F.3d at 1294–99.

130. USMCA, *supra* note 9, ch. 20, art. 20.81, at 20-46.

In *ClearCorrect*, the court relied heavily on definitions from BLACK'S LAW DICTIONARY to interpret the statutory language,[131] with no evidence that the drafters of the statute employed those same definitions. For example, the court discusses the BLACK'S LAW DICTIONARY description of chattels as movable, extending that description to goods.[132] But, why must something movable be material? On the contrary, the BLACK'S LAW DICTIONARY definition in question states that the term "goods" applies to inanimate objects,[133] so the extension of the description of "movable" from "chattels" to "goods" is questionable.

Despite the general rule of statutory interpretation that the plain text of the statute controls if unambiguous, in the case of Tariff Act of 1930, the express terms of the statute did not yield a single clear interpretation.[134] This ambiguity arose precisely because the legislative drafters and others at the time used those terms broadly and interchangeably, thus demonstrating that there was no single "ordinary public meaning" of the terms "goods" and "articles."[135] Accordingly, where the term "article" *is* defined in the statute, the language is broad: "The term 'article' includes any commodity, whether grown, produced, fabricated, manipulated, or manufactured[.]"[136]

Although the court determined that the narrower use of the term "article" should be applied throughout, except where the broader definition was provided,[137] the contrasting use of the article in the narrower provisions clearly sets it apart from the typical use of the term article in Customs law, as in "articles in importation." Accordingly, logic dictates that the broader, more general definition should be used in provisions except where the term appears in contrast with other terms, therefore implicating the narrower definition. But even if the court opted to reject the broader, more general definition, the court had two extratextual sources to choose from: legislative history containing the words and usage of the legislators themselves, or contemporaneous dictionaries.[138] In *ClearCorrect*, the Federal Circuit interpreted definitions from BLACK'S LAW DICTIONARY and utilized those interpretations to define what the court termed the "literal text" of the statute.[139] By restricting the definition of the terms "goods" and "articles" to a modern reading of contemporaneous dictionary definitions, the court risks importing a different meaning into the statutory language than the meaning used by legislators themselves, thus falling into the trap that Justice Gorsuch cautioned against in *Bostock*.[140]

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131. *ClearCorrect*, 810 F.3d at 1294–1300.
132. *Id.* at 1298–99.
133. *Id.* at 1298.
134. *See Bostock*, 140 S. Ct. at 1737–38
135. *Id.*
136. Tariff Act of 1930, Pub. L. No. 71–361 § 332(e)(1), 46 Stat. 590, 698–99 (1930).
137. *ClearCorrect*, 810 F.3d at 1293.
138. *See supra*, Section I.A.3.
139. *Id.* at 1299.
140. *See generally Bostock*, 140 S. Ct. at 1737–38.

As discussed above, Congress freely used the term "article" broadly, so to provide a narrower definition would have been unnecessary and even counterproductive from the legislative perspective.[141] Although experts on legislative drafting generally discourage ambiguity, at times, the choice of ambiguous language is deliberate because it reflects the legislative sponsor's policy or is the only way for legislators to reach an agreement.[142] Where the legislative history provides evidence of the drafters' intent with regard to the statute as a whole, to import a narrower definition of the term than that used by drafters frustrates the intent of Congress. In such a situation, where the legislative history provides numerous examples of the terms in question, used *in situ*, the legislative history provides a more reliable extratextual source, providing a more accurate sense of the "ordinary public meaning" of the statutory language than choosing a single dictionary definition which provides a "plain language" definition. This is the contextual approach that the Federal Circuit could invoke after *Bostock*. Additionally, the Federal Circuit failed to consider that one of the maxims of legislative drafting is to utilize existing statutory language wherever possible.[143] To change the language of the Tariff Act of 1930 to explicitly include intangible articles would require changing language throughout the entire act, including many sections of the U.S. Code—or limiting the change to section 337[144]—and risk creating an unintended distinction between section 337 and related sections. Consequently, it is unsurprising that later amendments of the Tariff Act focused on minor changes, rather than adopting sweeping, definitional changes that would require application throughout the entire statute.

Finally, the court's implication and the concurrence's assertion that Congressional failure to pass legislation granting jurisdiction to the ITC over unfairly traded digital data in importation indicates that Congress did not intend for the ITC to have such jurisdiction; however, statistically, only a very small percentage of proposed bills become enacted laws.[145] Consequently, failure to

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141. *See supra*, Section I.A.3.b.

142. FILSON & STROKOFF, *supra* note 79, at 248–49. The authors add that an "agency's interpretation of an ambiguous term . . . may save the day, given the deference the courts accord agency interpretations of statutes, both under chapter 7 of title 5, United States Code, and under the *Chevron* doctrine." *Id.* at 248.

143. *Id.* at 247 (emphasizing the importance of using the same words to express a particular idea throughout an entire piece of legislation).

144. *See generally id.* As Filson and Strokoff note:

> [U]nwanted or inadvertent variations in style . . . not only interfere with the communication of ideas and concepts to the intended audience; they almost guarantee that your bill will contain substantive ambiguities, they give aid and comfort to people who are looking for grounds to misinterpret the language or to criticize the product or process involved, and they invite both courts and administrators to get the wrong result in close cases.

Id. at 247.

145. *See generally Statistics and Historical Comparison*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics (last visited Dec. 30, 2021) (providing statistics

pass legislation is not a fair measure of Congressional support for the ideas in a particular bill. Furthermore, the vast majority of legislation proposed in recent years regarding regulation of the Internet concerns Internet regulation generally and not the very narrow question of the ITC's jurisdiction over the adjudication of unfairly traded digital goods that infringe U.S. intellectual property rights.[146] Because the extant statute did not expressly deny the ITC's jurisdiction over unfairly traded digital data, it is reasonable to conclude that legislative drafters did not contemplate the change as necessary—section 337 had adapted to changing technological and economic environments for 85 years prior to *ClearCorrect* without clarification of the term "articles."

B. Implications of ClearCorrect for USMCA intellectual property protection enforcement obligations

For intellectual property holders to benefit economically from their developments, intellectual property must be protected against infringement. USMCA provided a remedy to intellectual property rights holders by requiring that the signatory countries provide injunctive remedies consistent with article 44 of the TRIPS Agreement.[147] In addition, USMCA Chapter 20 provides that Parties "shall ensure" that procedures facilitating the effective enforcement of intellectual property rights are available in actions against infringement, "including expeditious remedies to prevent infringements and remedies that constitute a deterrent to future infringements."[148] Moreover, article 20.78 specifies that "the enforcement procedures . . . shall be available to the same extent with respect to acts of trademark infringement, as well as copyright *or related rights infringement*, in the digital environment."[149]

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for Congressional legislation and demonstrating that in the past ten years, between 10,000 and 17,000 pieces of legislation were proposed in *each* Congressional session and no more than three percent of proposed bills have become enacted laws).

146. *See*, *e.g.*, Communications Decency Act of 1996, 47 U.S.C. § 230 (2018); Digital Trade Act of 2013, S. 1788, 113th Cong. §§ 2–3 (2013); Margaret Harding McGill & Ashley Gold, *Congress Unveils Bills to Dismantle Tech Giants*, AXIOS (June 11, 2021), https://www.axios.com/2021/06/11/congress-bills-dismantle-tech-giants (discussing five bills proposed in 2021 to regulate various aspects of the tech industry).

147. USMCA, *supra* note 9, ch. 20, art. 20.81, at 20-46.

148. *Id.* at ch. 20, art. 20.78(1), at 20-44. Kathleen Claussen highlights the gap between executive negotiation of trade agreements, legislative enactment of implementing statutes, and agency implementation of regulations and other procedures to effectuate the agreed-upon terms:

> As a matter of international law, there is no doubt that the United States, acting through the USTR, has an obligation to protect those products in its market. But as a matter of domestic law, the answer is less clear . . . FTAs are usually implemented through legislation. . . . That legislation provides the Executive with authority to implement through regulation, proclamation, or other executive authorities, regulatory changes as required by the agreement. But *how* executive-branch agencies ought to carry out this administrative implementation is not clear from the legislative package.

Claussen, *supra* note 6, at 275.

149. USMCA, *supra* note 9, ch. 20, art. 20.78(2), at 20-44 (emphasis added).

In addition to providing in Chapter 20 that the parties shall provide injunctive relief for the infringement of intellectual property rights,[150] USMCA Chapter 19 provides that digital products "should not be understood to reflect a Party's view that digital products are a good or are a service" under USMCA.[151] Accordingly, under USMCA, digital products may be goods in trade. When a digital product is a good, and that good is one with intellectual property rights that may be infringed, under USMCA, the United States *must* provide injunctive relief to prevent that good from entering the channels of commerce.

The ITC has the power to issue exclusion orders to prevent the entry of articles that infringe U.S. intellectual property rights.[152] However, following the Federal Circuit's holding in *ClearCorrect* that the ITC does not have jurisdiction over unfairly traded digital data because digital data is not one of the "articles" included under the statute,[153] the ITC no longer has the authority to issue exclusion orders when a digital medium is used to infringe U.S. intellectual property rights. If the ITC cannot issue exclusion orders on digital products deemed intangible goods, the United States cannot fulfill its obligations under the USMCA without substantial alteration of its current scheme of intellectual property rights enforcement. Due to Customs' determination not to regulate digital transmissions, problems of administrability and enforcement remain, resulting in harm to the domestic industry and innovation supported by robust intellectual property protections.

IV. COMMENT: POSSIBLE PATHS FORWARD TO FACILITATE U.S. OBLIGATIONS UNDER THE USMCA TO ENFORCE INTELLECTUAL PROPERTY RIGHTS IN DIGITAL TRADE

A. Legislative or Judicial Action

As the Federal Circuit suggested in *ClearCorrect*, the most clear-cut path forward to protect intellectual property rights holders is for Congress to amend section 337 to explicitly grant the ITC jurisdiction over unfairly traded digital goods in importation.[154] However, given the strong forces lobbying against any regulation of the Internet, e-commerce giants, or online platforms,[155] successful passage of such legislation in the near future appears unlikely.

If Congressional action is not a viable option, reconsideration by the Federal Circuit is an equally unlikely possibility. Considering the Supreme Court's opinion in *Bostock*, the Federal Circuit might be persuaded to reconsider its

150. *Id.* at ch. 20, art. 20.81(2), at 20-46.

151. *Id.* at ch. 19, at 19-1 n.1.

152. 19 U.S.C. § 1337(d) (2018).

153. *See* ClearCorrect Operating, LLC v. ITC, 810 F.3d 1283, 1301–02 (Fed. Cir. 2015).

154. *Id.* at 1302.

155. Jon Brodkin, *ISPs Spent $235 Million on Lobbying and Donations, "More than $320,000 a Day*," ARS TECHNICA (July 20, 2021, 2:50 PM), https://arstechnica.com/tech-policy/2021/07/isps-spent-235-million-on-lobbying-and-donations-more-than-320000-a-day/.

statutory analysis of the Tariff Act of 1930. Because it is unlikely that the ITC would institute a complaint based on the importation of infringing digital goods without substantial alternative grounds for a complaint, a complainant could appeal a denied injunction, hoping that the Federal Circuit would reconsider its holding in *ClearCorrect*. Barring this perfect constellation of facts, parties, and law, however, that outcome appears remote.

B. Customs Regulatory Action

Customs has express and implied authority to facilitate legitimate trade of the United States and enforce U.S. trade laws.[156] USMCA provides that signatory parties provide injunctive relief and other remedies, including seizure of infringing goods, to prevent goods that infringe intellectual property rights from entering the stream of commerce.[157] Under the U.S. system, injunctions do not provide Customs the power to stop goods at the border, but exclusion orders do. However, only the ITC can issue exclusion orders.[158] Customs could amend its regulations to provide intellectual property protections for digital goods in trade, either by expanding its enforcement actions to include regulation of digital transmissions or by expanding the enforcement of injunctions issued under the relevant USMCA provisions to include stopping infringing digital goods at the "border." This approach may raise potential nondelegation challenges as trade agreements fall under the Executive's purview, but the failure of all nondelegation challenges brought in the past near century[159] minimizes that risk. A more difficult challenge is that this option would likely require technological innovations to support this new form of twenty-first century trade enforcement before Customs could depart from its traditional position and begin enforcing intellectual property of digital goods in international trade.

C. USMCA Side Letters

The final proposed path to stronger enforcement of the USMCA intellectual property provisions as applied to digital data requires the Parties to the Agreement—the United States, Canada, and Mexico—to sign side letters that include explicit provisions for the enforcement of the intellectual property provisions or provide recourse if an intellectual property rights holder in one Party country faces infringement where the digital data is transmitted through another Party country.[160] Arguably, USMCA already provides for enforcement

156. *See* 19 U.S.C. § 4301(2) (2018) *et seq*.

157. *See* USMCA, *supra* note 9, at ch. 20, art. 20.81, at 20-46.

158. Hnath, *supra* note 33, at 351.

159. Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1849 (2019).

160. To date, the United States, Canada, and Mexico have signed sixteen "side letters" under USMCA, covering a broad range of issues, including section 232, auto safety standards, cheeses, distilled spirits, wine, research and development expenditures, and energy. *Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text*, OFF. OF U.S. TRADE

of its intellectual property provisions,[161] so side letters providing special remedies are unnecessary. However, given the fact that Article 44 of the TRIPS Agreement, with which the enforcement of USMCA's intellectual property protections must accord under USMCA article 20.81, focuses on physical goods,[162] a side letter specifically addressing intellectual property infringement of digital data may be a viable option to provide an alternate method of enforcement or remedy for U.S. intellectual property rights holders.

V. CONCLUSION

NAFTA defined trade relations between the United States, Canada, and Mexico for twenty-five years. Thanks to its sunset provision, USMCA will terminate after sixteen years unless the parties agree to an extension. But the digital trade provisions and increased intellectual property protections designed to promote innovation, spur economic growth, and protect domestic industry from unfair competition will live on in future trade agreements. USMCA contains language that requires the signatories to provide a mechanism to prevent goods that infringe intellectual property rights from entering the stream of commerce—language that is largely unenforceable, as applied to digital goods in the United States, because of the Federal Circuit's decision in *ClearCorrect*. *ClearCorrect* stands as a cautionary tale of the unintended consequences of statutory interpretation that focuses narrowly on one extratextual source over another. Justice Gorsuch's opinion in *Bostock* reminds jurists that thorough textual analysis reaches beyond the plain language of the text to the context and that legislative history can be a valuable tool for deciphering the ordinary meaning of statutory language. For intellectual property rights holders that wish to prevent the importation of digital goods that infringe their intellectual property rights without the availability of exclusion orders, the straight path—use of the ITC's exclusion orders to prevent the importation of infringing goods, whether tangible or intangible—is foreclosed, for now. Legislative and judicial options are theoretically possible, but unlikely. The more plausible path to successful enforcement of USMCA's intellectual property provisions, with respect to digital data, is for practitioners and intellectual property rights holders to lobby for Customs to amend its regulations to extend its enforcement actions to include regulation of digital transmissions.

REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between (last visited Dec. 31, 2021).

161. *See* USMCA, *supra* note 9, ch. 20, art. 20.81, at 20-46.

162. *Id.* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 44, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197. Article 44 provides that "judicial authorities shall have the authority to order a party to desist from an infringement, *inter alia* to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, *immediately after customs clearance of such goods*." *Id.* at art. 44(1), at 339 (emphasis added).