

2014-1527

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CLEARCORRECT OPERATING, LLC
and CLEARCORRECT PAKISTAN (PRIVATE), LTD.,
Appellants,

v.

INTERNATIONAL TRADE COMMISSION
Appellee,
and

ALIGN TECHNOLOGY, INC.,
Intervenor.

Appeal from the United States International
Trade Commission in Investigation No. 337-TA-833

**BRIEF OF THE MOTION PICTURE ASSOCIATION OF AMERICA
AND THE RECORDING INDUSTRY ASSOCIATION OF AMERICA
AS *AMICI CURIAE* IN SUPPORT OF THE U.S. INTERNATIONAL
TRADE COMMISSION'S PETITION FOR REHEARING EN BANC**

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Form 9

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CLEARCORRECT OPERATING, LLC et al v. INTERNATIONAL TRADE COMMISSION et al

No. 2014-1527

CERTIFICATE OF INTEREST

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Motion Picture Association of America, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

N/A

4. ☒ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Adduci, Mastriani, & Schaumberg L.L.P.: Tom M. Schaumberg, Jonathan J. Engler, Thomas R. Burns, Jr.

February 25, 2015

Date

/s/ Jonathan J. Engler

Signature of counsel

Jonathan J. Engler

Printed name of counsel

Please Note: All questions must be answered

cc: All counsel of record

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4. ☒ The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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Signature of counsel

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I. STATEMENT OF IDENTITY AND INTEREST¹

The Motion Picture Association of America, Inc. (MPAA) is a not-for-profit trade association founded in 1922 to address issues of concern to the U.S. motion picture industry. Its members include Paramount Pictures Corp., Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corp., Universal City Studios LLLP, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. MPAA's members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home entertainment markets.

The Recording Industry Association of America (RIAA) is a nonprofit trade association founded in 1952 to represent the American recording industry. RIAA's record company members include UMG Recordings, Inc.; Sony Music Entertainment; Warner Music Group Corp.; and Capitol Records, LLC. RIAA's members create, manufacture, and/or distribute approximately eighty-five percent of all authorized sound recordings produced and sold in the United States.

Effective copyright protection for electronically transmitted goods is essential to the health of the motion picture and music industries and to the U.S. economy as a whole. Infringing transmissions of copyrighted works into the United States are

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for the MPAA and RIAA authored this brief. No party, counsel for any party, or any person – other than the amici curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

causing, and threaten to cause, significant harm to the U.S. market for legitimate motion pictures and music recordings.

The Panel's denial of the Commission's authority under the Tariff Act to regulate the importation of digital goods is contrary to clear Congressional intent, governing precedent that electronically transmitted goods are "articles of commerce" for purposes of the Copyright Act, and cannot be reconciled with this Court's holding in *Suprema, Inc. v. International Trade Commission*, 796 F.3d 1338 (Fed. Cir. 2015) ("*Suprema*").

II. SUMMARY OF ARGUMENT

The Panel's holding that electronic goods are not "articles" within the meaning of Section 337 is inconsistent with governing precedent that digital goods are "articles" within the meaning of the Tariff Act, the Copyright Act, and this Court's holding in *Suprema* that the Commission has broad discretion to remedy unfair acts in international trade. *Id.* at 1350-53. The Panel's erroneous holding, if allowed to stand, would effectively remove copyright protection for the motion picture and recording industries from Section 337, given that most films and music today are distributed digitally. U.S. manufacturers also would be left without defenses in the rapidly-growing world of 3D printing, where infringing electronic design files frequently are sent across borders and printed domestically on 3D printers. The Commission, with its authority to order U.S. parties to cease and desist

from unfair methods of competition that have a nexus to import trade, is uniquely situated to offer a meaningful remedy for affected U.S. industries. If the Panel's erroneous holding is allowed to stand, U.S. industries will lose existing protections under the Tariff Act against unfairly traded, imported electronic articles.

III. ARGUMENT

A. The Panel's Interpretation of "Articles" Is at Odds with Well-Established Principles of Copyright Law

The Panel's decision, in holding that the term "articles" in Section 337 excludes electronic articles of commerce, conflicts with well-established copyright law. It is indisputable that, by the time Section 337 was amended in 1988 to strengthen protection for "valid and enforceable United States copyright[s]," U.S. copyright protection expressly extended to the digital transmission of works. 19 U.S.C. § 1337(a)(1)(B)(i). The Panel's sole reliance in its opinion on ambiguous and historically outdated pre-Great Depression era dictionary definitions of the term "articles," in complete disregard for an intervening century's worth of legal and commercial development, would, as a practical matter, eliminate the Commission's authority to protect U.S. industries from cross-border violations of U.S. copyright law. This cannot be reconciled with black letter U.S. copyright law and the express intent of Congress.

First, it is clear that, by the 1970s, Congress intended copyright protection to extend to the distribution of works, regardless of the manner in which they were

distributed – including by electronic transmission. Congress, in passing the 1976 Copyright Act, explicitly stated its intent that federal copyright protection extend to electronic transmissions of protected works:

The corresponding definition of “display” covers any showing of a “copy” of the work, “either directly or by means of a film, slide, television image, or any other device or process.” . . . In addition to the direct showings of a copy of a work, “display” would include the projection of an image on a screen or other surface by any method, **the transmission of an image by electronic or other means**

H.R. REP. NO. 94-1476, at 64 (1976) (emphasis added); *see id.* at 80 (“Unless [excused under some other provision of the Copyright Act] . . . transmission of an image to the public over television or other communication channels, would be an infringement for the same reasons that reproduction in copies would be.”).

The courts, in interpreting the Copyright Act of 1976, have, accordingly, consistently recognized that federal copyright protection extends to electronic copies of protected works. *See, e.g., Sega Enters. v. MAPHIA*, 948 F. Supp. 923, 931-33 (N.D. Cal. 1996) (holding that uploading and downloading a copyrighted computer game to a computer bulletin board constituted making copies of the work); *Sega Enters. v. Sabella*, No. C 93-04260, 1996 WL 780560, at *6, 8 (N.D. Cal. Dec. 18, 1996) (“[C]opies were made when the Sega game files were uploaded to or downloaded from [the defendant’s] BBS” and the making of those copies constituted “direct copyright infringement by [the defendant’s] BBS users.”); *see also A&M*

Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001) (“Napster users infringe at least two of the copyright holders’ exclusive rights Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights. Napster users who download files containing copyrighted music violate plaintiffs’ reproduction rights.”); *Playboy Enters. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 513 (N.D. Ohio 1997) (Unlawful distribution occurs where “[f]iles of [copyrighted] information are stored in the central system, and subscribers may either ‘download’ information into their [computers], or ‘upload’ information from their [computers] into the central files.”).

There is no question, therefore, that, for 40 years, the Copyright Act has extended protection to electronic transmissions – long before Section 337 was amended expressly to strengthen the protection against the importation of unauthorized copies of works protected by an “enforceable United States copyright registered under title 17.” 19 U.S.C. § 1337(a)(1)(B)(i).

The Panel’s decision to strip copyright protection from digital works in import trade, therefore, cannot be reconciled with the Copyright Act or clear Congressional intent. The glaring disjuncture between the clear, longstanding extension of U.S. copyright protection to electronically transmitted articles of commerce, and the Panel’s anachronistic construction of the term “articles” to exclude such electronic works from the Tariff Act, clearly illustrates the Panel’s error. As Judge Newman

correctly noted in her dissent, “[d]igital articles of commerce did not exist when the Tariff Act was first enacted,” but

[i]t cannot have been the legislative intent to stop the statute with the forms of “article” then known. . . . Section 337 was written in broad terms, whereby no field of invention, past, present, or future, was excluded. It is not reasonable to impute the legislative intent to exclude new fields of technology, and inventions not yet made, from a statute whose purpose is to support invention.

ClearCorrect Operating, LLC v. Int’l Trade Comm’n, No. 2014-1527, 2015 WL 6875205, at *21-22 (Fed. Cir. Nov. 10, 2015) (Newman, J., dissenting). These “unforeseen, later-discovered technologies” (*id.* at *21) – i.e., digital versions of copyrighted works – existed in 1988 when Congress amended Section 337 to strengthen the law for copyright owners, by which time Congress and the courts had long recognized that digital versions of copyrighted works were protected by the Copyright Act.

The Panel, by finding that Congress cannot have intended Section 337 to reach electronic articles, because ITC exclusion orders directed to such articles could not be enforced by U.S. Customs and Border Protection, misapprehends the key role ITC cease and desist orders play in enjoining unfair domestic conduct in connection with unfair import trade. 19 U.S.C. § 1337(f). The ITC cease and desist order is as powerful a remedy as the exclusion order. Congress authorized the ITC to issue cease and desist orders because it recognized there are circumstances in which an

exclusion order might not be effective. Indeed, in *Suprema*, the ITC’s cease and desist order – prohibiting the unlawful combination in the United States of domestically-produced software with imported scanning devices that were staple articles of commerce – was the **primary** remedy. 796 F.3d at 1342. *Suprema* illustrates the power and viability of domestic cease and desist orders to enjoin unfair acts in international trade when an exclusion order would be inadequate to remedy the underlying unfair act.

In short, Section 337 was intended “to reach ‘every type and form’ of unfair competition arising from importation,” including the digital importation of articles of commerce. *ClearCorrect*, 2015 WL 6875205, at *19. The law, facts, and circumstances surrounding the electronic transmission of digital copies of copyrighted works – which Congress and the courts have long understood to be articles of commerce protected by the Copyright Act – clearly demonstrate the error of the Panel’s construction of the term “articles” to preclude protection under Section 337. Rehearing *en banc* is appropriate.

B. The Panel’s Decision Is Inconsistent with the Court’s Recent *en banc* Opinion in *Suprema*, Which Confirms the Commission’s Broad Remedial Authority

Issued only a day prior to oral argument in this case, this Court’s *en banc* decision in *Suprema* reaffirmed the Commission’s broad remedial authority. 796 F.3d at 1338. The Panel’s opinion in this case, with respect to the breadth of the

Commission's remedial authority, cannot be reconciled with the *en banc* panel's decision in *Suprema*. In *Suprema*, as here, the case turned on interpretation of the phrase, "articles that infringe." *Id.* at 1340-41. The Court found that "Suprema has not shown that the phrase 'articles that infringe' has a clearly established usage limited to product claims or to direct or contributory infringement, much less a usage that excludes induced infringement of a method claim." *Id.* at 1347. Similarly, here, the term "articles" as used in Section 337 does not have a clearly established usage limited to tangible goods, much less a usage that specifically excludes digital articles. Indeed, as discussed above, it was well-established by 1988, when Section 337 was amended expressly to strengthen the protection of copyrighted works, that digital transmissions of protected works were unambiguously protected under the Copyright Act.

The Panel's narrow, restrictive reading of the Commission's remedial authority as being limited to "articles" as understood during the Coolidge Administration also cannot be reconciled with the broad scope of the ITC's jurisdiction, as set forth in *Suprema*. As the Court explained:

The technical interpretation adopted by the panel weakens the Commission's overall ability to prevent unfair trade acts involving infringement of a U.S. patent. The panel's interpretation of Section 337 would eliminate relief for a distinct unfair trade act and induced infringement. There is no basis for curtailing the Commission's gap-filling authority in that way. Indeed, the practical consequence would be an open invitation to foreign entities (which

might for various reasons not be subject to a district court injunction) to circumvent Section 337 by importing articles in a state requiring post-importation combination or modification before direct infringement could be shown.

Id. at 1352.

The Panel's decision in this case, however, would eliminate Section 337 protection for digital copies of copyrighted works, and is therefore inconsistent with Congress' broadening purpose in amending Section 337 in 1988 to strengthen copyright protection and with this Court's reasoning in *Suprema*.

IV. CONCLUSION

The Panel's artificially narrow construction of the term "articles" effectively writes the 1988 copyright protection provisions of Section 337 out of the statute. The Panel's decision cannot be reconciled with the express intent of Congress that the ITC have authority to reach any imported goods, whatever their form, that infringe an "enforceable United States copyright registered under title 17." 19 U.S.C. § 1337(a)(1)(B)(i).

Moreover, the Panel's decision contradicts the Court's *en banc* decision in *Suprema*. There, the Court made clear that the Commission has broad remedial authority over a variety of unfair acts. The same broad authority applies here in the context of the form of articles over which the Commission has jurisdiction.

For these reasons, the Court should grant rehearing *en banc*.

Dated: February 10, 2016

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