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Federal Circuit overturns panel decision and upholds Commission in *Suprema, Inc. v. International Trade Commission* rehearing en banc



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En banc Court reverses panel decision 6-4 and upholds U.S. International Trade Commission determination that it has broad authority to address acts of induced infringement based upon post-importation conduct.

Procedural Background

Suprema v. ITC, issued on August 10, 2015, is an *en banc* rehearing of an appeal of the U.S. International Trade Commission's decision in Investigation No. 337-TA-720.¹ The underlying dispute is based on a complaint filed by Cross Match Technologies, Inc. naming *Suprema, Inc.* and *Mentalix, Inc.* as respondents.

By way of background, *Suprema* manufactured and imported optical scanners for capturing fingerprints. Some of these scanners were then sold to *Mentalix*, who integrated them with its own software to create the accused system. The Commission found that *Mentalix*'s use of this integrated system directly infringed *Cross Match*'s patented methods. The Commission further found that *Suprema* induced infringement through willful blindness and issued an exclusion order preventing, *inter alia*, the importation of the scanners.

Suprema appealed and the Federal Circuit vacated the Commission's decision in an opinion that effectively foreclosed the use of induced infringement in Section 337 investigations. The panel reasoned that there cannot be any "articles that infringe" at the time of importation because induced infringement, by its very nature, requires a subsequent act of direct infringement that can only occur post-importation. The Commission and *Cross Match* petitioned for rehearing *en banc* and the Court vacated the panel decision and granted the petition.

The Majority Opinion Upholds the Commission's Decision

During an *en banc* review the Court voted 6-4 to uphold the Commission's decision that Section 337 gives it the authority to address acts of unfair trade based upon allegations of indirect infringement. As a threshold matter the Court found that it must apply *Chevron* deference to evaluate the Commission's interpretation of Section 337 because the Commission is a widely-recognized formal adjudicative agency.

Chevron deference requires a court to first determine if a statute's language is ambiguous, and, if it is, whether an agency's construction of the statute was reasonable. After a thorough analysis of Section 337's text and history the Court determined that the phrase "articles that infringe" in Section 337 was ambiguous as to whether inducement of infringement post-importation was indeed permitted or statutorily excluded. This allowed the Court to procedurally address the next step in the *Chevron* analysis, i.e., to determine if the Commission's interpretation of the phrase (from its final determination) was indeed a reasonable one.

The Court concluded that the Commission's interpretation was reasonable because it was consistent with not only the plain language of Section 337, but also with its legislative history and Congress's intent to provide the Commission with broad authority to regulate international commerce. Throughout the

¹ The majority opinion was written by Judge Reyna, with dissents filed by Judge Dyk and Judge O'Malley.

history of Section 337 the Commission has interpreted its own authority broadly and Congress, through amendments to Section 337, has continued to expand the scope of the Commission's authority further. In light of this history, the Court found that it was reasonable for the Commission to interpret Section 337 as giving it authority broad enough to address unfair trade acts based on theories of induced infringement.

Accordingly, the Court reversed the panel decision and upheld the Commission's interpretation that the phrase "articles that infringe" in Section 337 covers goods used to directly infringe a patent *after importation*, and, as such, the Commission has authority to find unfair trade practices under a theory of induced infringement based upon actions occurring within the United States.

The Impact of *Suprema* on Importers

The decision is largely a return to the status quo with regard to indirect infringement allegations and how they are adjudicated and interpreted by the Commission. Importantly, however, the decision reflects the level of deference given by the Federal Circuit to the Commission and its interpretation of Section 337. Although the Court's holding might result in a heightened awareness to new threats of exclusion for staple articles and how they are utilized via downstream actions, it largely reconciles the true protectionist intent behind Section 337 to afford domestic patent holders a full scope of remedies available to police against unlawful acts of competition in the import trade.

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