

Σummations:

An Intellectual Property Newsletter



October 2017

EN BANC FEDERAL CIRCUIT REQUIRES PETITIONER TO PROVE AMENDED CLAIMS ARE UNPATENTABLE DURING INTER PARTES REVIEW PROCEEDING UNDER AIA

In its October 4, 2017 *en banc* decision in *Aqua Products, Inc. v. Matal*, the United States Court of Appeals for the Federal Circuit decided that the Petitioner in an *Inter Partes* Review (“IPR”) proceeding under the America Invents Act (“AIA”) has the burden of proving whether amended claims that are offered by the patent owner during the IPR are unpatentable. In doing so, the *en banc* Federal Circuit overruled several prior precedents which ruled that the patent owner had the burden of proving the amended claims are patentable.

In an IPR proceeding, a Petitioner may request that the Patent Trial and Appeal Board (“PTAB”) of the U.S. Patent and Trademark Office review whether the claims of an already issued U.S. patent are patentable over prior art that consists of patents and printed publications. Section 316(d) of the AIA allows a patent owner to present amendments to the claims of the issued patent during an IPR by filing a Motion with the PTAB. This is typically done in order to avoid the prior art references that have been cited against the patent by the Petitioner. The patentability of such amendments is then decided by the PTAB based only on a preponderance of the evidence before it, according to the “broadest reasonable interpretation of the challenged claims...” Although the right to amend is a fundamental right of the patent owner in an IPR, the PTAB had previously granted only a small number of such motions to amend, while denying over 100 such motions.

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Table of Contents:

En Banc Federal Circuit Requires Petitioner to Prove Amended Claims Are Unpatentable During Inter Partes Review Proceeding Under AIA, PAGE 1.

Federal Circuit Finds Patent Claims Directed to Public Transit Fare Systems Ineligible Subject Matter Under Section 101, PAGE 4.

Federal Circuit Finds That the PTAB’s Construction of a Critical Patent Claim Term Was Too Broad, PAGE 6.

During the course of an IPR of its U.S. Patent No. 2,873,183, which is directed to a jet-propelled pool cleaner with controlled directional movement, patent owner Aqua Products filed a motion with the PTAB to amend the '183 Patent's claims. Aqua Products argued that its proposed new claims 22, 23 and 24 met the requirements for such amendments that are stated in Section 316(d) of the AIA, because they did not enlarge the scope of the original claims or introduce new matter. Aqua Products also argued that the substitute claims responded to, and were patentable over the combination of prior art references that the Petitioner had relied on to assert that the claims of the '183 Patent were unpatentable for obviousness.

The PTAB denied Aqua Products' motion to amend. Although the PTAB found that the proposed new patent claims met the requirements of Section 316(d), and did not enlarge the scope of the original claims or introduce new matter, the PTAB concluded that Aqua Products had failed to prove that the substitute claims were patentable. Aqua Products appealed that decision to the Federal Circuit. On appeal, Aqua Products argued that it did not bear the burden under AIA Section 316(e) of proving that its proposed new claims were patentable, because that provision assigned the burden of proof to the Petitioner. A three-judge panel of the Federal Circuit upheld the PTAB's decision based on that Court's existing precedent, which allocated to the patent owner the burden of showing that its proposed amendments would overcome the cited prior art references. The panel also rejected Aqua Products' argument that the PTAB was required to consider the entirety of the evidentiary record before it when assessing the patentability of the proposed new claims, and not just the evidence and arguments presented in the motion to amend itself. Aqua Products sought a rehearing of the panel's decision by all of the judges of the Federal Circuit sitting *en banc*.

The judges of the Federal Circuit were deeply divided on whether the patent owner or the Petitioner had the burden of proving and producing evidence that the amended or new claims are patentable, and whether the PTAB committed legal error by failing to determine whether the amended/new claims were patentable based on the entire evidentiary record before it. A total of five (5) judicial opinions were issued as a result of the Federal Circuit's *en banc* review of the *Aqua Products* case, with different combinations of judges joining in each opinion in order to express their agreement

Table of Contents:

Federal Circuit Upholds Limited Exclusion Order Entered By U.S. International Trade Commission, *PAGE 9*

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with the *en banc* Court's ultimate decision, or to dissent from it. Therefore, it is at least unclear whether there is truly a majority of judges who have agreed with each of the fundamental rulings of the Court.

In the majority opinion that stated the decision of the Court, the Federal Circuit reviewed the requirements of the AIA for amending patent claims during an IPR. The court acknowledged that a patent holder may file one (1) motion to amend as of right, either by cancelling any challenged patent claim or by proposing a reasonable number of substitute claims. Additional motions to amend the claims may only be presented jointly by the parties if they "materially advance the settlement of a proceeding ..." Under AIA Section 316(d)(3), an amendment "may not enlarge the scope of the patent or introduce new matter." The Court further noted that Section 316(e) provides that in an IPR "the petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence."

The AIA also delegates authority to the Director of the USPTO to enact regulations which set forth the standards and procedures for seeking amendment of a patent's claims during an IPR. Pursuant to that authority, the Director enacted regulations which limited a patent owner to filing only a reasonable number of substitute claims at the time that it files its response to the Petition, unless the PTAB sets an alternative deadline. On appeal, the USPTO argued that those regulations also placed the burden on the patent owner to demonstrate, by a preponderance of the evidence, that any proposed amended claims are patentable, and that it must do so in light of prior art not already part of the IPR. In a prior decision, the PTAB had ruled that a patent owner must show why the proposed amended claims are "patentable over not only the prior art at issue in the IPR, but also "over prior art not of record, but known to the patent owner." Prior decisions of the Federal Circuit endorsed the PTAB's practice of placing the burden of demonstrating the patentability of amendments on the patent owner.

The Court's majority opinion in *Aqua Products* found instead that it was clear that the U.S. Congress placed the burden of persuasion to prove unpatentability on the Petitioner in an IPR for all claims, including amended claims. A literal reading of the language of Sections 316(d) and (e) supported this result. The Court found that the USPTO's arguments that those statutes placed the burden on the patent owner would render the amendment process virtually meaningless, rather than allow the amendment of claims as a matter of right, which is a central feature of the IPR. In contrast to the USPTO's position, the Court found that the Office's regulations implementing the claim amendment process did not address which party had the burden of proof once the amended claims are entered in the IPR. Therefore, the Court did not have to give deference to any interpretation of Section 316(d) or (e) on that subject that had been made by the USPTO, which allowed the Court to arrive at its own interpretation of those statutes.

The Court found, affirmatively, that the USPTO does not have the authority to enact regulations that allocate burdens of proof that are contrary to the express language of Section 316(e), which allocates the burden to the Petitioner. The Court also rejected the USPTO's argument that because the patent owner must present its amendments by motion, it must have the burden of proving that its motion, and the requested amendments have merit. To the contrary, the Court found that in presenting its motion, the patent owner only has the burden of proving that the proposed amended or new claims meet the threshold requirements of not enlarging the scope of the claims, and not introducing new matter, so that the amended/new claims may be entered into the IPR. That does not change the fact that Section 316(e) places the ultimate burden of proving unpatentability on the Petitioner, once the amended/new claims have been

entered. The majority then engaged in a lengthy analysis of the meaning and requirements of the statutory provisions of the AIA that govern the conduct of IPRs, as well as their legislative history.

The Court determined that the PTAB must base its decision on whether to grant the motion to amend the patent's claims on the totality of the evidentiary record that is before it, and not only on the factual evidence and legal arguments that are contained within the motion to amend itself. The PTAB must also provide a satisfactory explanation of its decision, including its reasoning; it cannot simply provide a conclusion. The PTAB's refusal to consider evidence on the issue before it, *i.e.* the patentability of the claims of the '183 Patent, is by definition arbitrary and capricious. The PTAB must take into consideration all evidence of record, including that which goes against the conclusion that the PTAB ultimately draws. Therefore, the Court concluded that the PTAB's decision to reject Aqua Products' proposed amended claims without consideration of the entirety of the IPR record was an abuse of discretion which provided an independent basis for the Court to vacate the PTAB's judgment in this case.

Prior to *Aqua Products*, a large majority of the IPR proceedings that were institute resulted in at least one patent claim being found unpatentable because it is either anticipated or rendered obvious by the cited prior art. To the extent that the PTAB's current practice of denying a high percentage of patent owners' requests to amend are a contributing factor to the removal of claims from those patents, then *Aqua Products* may level the playing field between patent owners and Petitioners. Since Petitioners will have the burden of proving unpatentability of the proposed amended or new claims, and all of the evidence that is of record in the IPR will be considered, this may result in a higher percentage of motions to amend patent claims being granted by the PTAB. If that occurs, then there may be fewer instances where a patent owner will face the complete removal of one or more claims from its patents, and thus the complete loss of property rights relating to the elements of the invention that are included in those lost claims. Patent owners may instead have a greater likelihood of entering amendments or introducing new claims into an IPR that would preserve (albeit more narrowly or in a different form) as many aspects of their inventions as are distinct from the prior art, rather than face an "all or nothing" situation under the PTAB's current practice of effectively not allowing amendments to claims.

FEDERAL CIRCUIT FINDS PATENT CLAIMS DIRECTED TO PUBLIC TRANSIT FARE SYSTEMS INELIGIBLE SUBJECT MATTER UNDER SECTION 101

In an October 18, 2017 decision, the U.S. Court of Appeals for the Federal Circuit in *Smart Systems Innovations, LLC v. Chicago Transit Authority* held that four (4) of Smart Systems' U.S. patents are invalid, because they claimed subject matter that was ineligible for patenting under 35 U.S.C. 101. Smart Systems had sued the Chicago Transit Authority and others for alleged infringement of its patents, which were directed systems and methods for conducting open payment of fares that allow access to mass transit systems. Open fare systems, like the ones claimed by Smart Systems' patents, allow riders to access mass transit systems by using their existing credit and debit cards, without the need to use dedicated fare cards, paper tickets or tokens. Claim 14 of U.S. Patent No. 7,566,003 was relied upon by the Court as a representative claim:

A method for validating entry into a first transit system using a bankcard terminal, the method comprising:

downloading, from a processing system associated with a set of transit systems including the first transit system, a set of bankcard records comprising, for each bankcard record in the set, an identifier of a bankcard previously registered with the processing system, and wherein the set of bankcard records identifies bankcards from a plurality of issuers;

receiving, from a bankcard reader bankcard data comprising data from a bankcard currently presented by a holder of the bankcard, wherein the bankcard comprises one of a credit card and a debit card;

determining an identifier based on at least part of the bankcard data from the currently presented bankcard;

determining whether the currently presented bankcard is contained in the set of bankcard records;

verifying the currently presented bankcard with a bankcard verification system, if the bankcard was not contained in the set of bankcard records; and

denying access, if the act of verifying the currently presented bankcard with the bankcard verification system results in a determination of an invalid bankcard.

Defendant Chicago Transit filed a motion for judgment on the pleadings, alleging that the asserted claims of Smart Systems' patents were invalid because they failed to claim patentable subject matter under Section 101. This is an increasingly common tactic that defendants have employed in patent infringement cases involving computer-based inventions. A motion for judgment on the pleadings is usually filed at the very beginning of the case, so that the Court will have the opportunity to decide whether the patents-in-suit claim eligible subject matter, so that the case may move forward to more advanced stages of the litigation. If not, then the case is dismissed before the parties expend substantial resources on discovery and trial.

In *Smart Systems*, the District Court determined that the claims of Smart Systems' patents were not directed to eligible subject matter, because they claimed abstract ideas and otherwise lacked an inventive concept, which is the two-part test for determining patentable subject matter that was announced by the U.S. Supreme Court in *Alice Corp. Pty Ltd. v. CLS Bank International*. Smart Systems appealed the District Court decision. In its ruling, the Federal Circuit agreed with the District Court that Smart Systems' patents did not claim eligible subject matter under Section 101.

In making its decision, the Federal Circuit focused on whether the claims are directed to a specific means or method that improved the relevant technology, or whether they are instead directed to a function, result or effect that itself is the abstract idea, and merely invoke generic processes and machinery to accomplish that outcome. The District Court had determined that the claims were directed to the abstract concept of

paying for a subway or bus ride with a credit card. Although the District Court acknowledged that the Smart Systems patents disclose inventions that would allow riders to more quickly and efficiently access a mass transit network, they are at their core directed to the performance of generic financial transactions, *i.e.*, paying a fare using various bank cards, that must be characterized as abstract ideas.

The Federal Circuit essentially agreed with this analysis. The Court found that, taken together, the asserted claims of the Smart Systems patents were directed to the formation of financial transactions in a particular field (*i.e.*, public transit), and data collection related to such transactions. The asserted claims were not found to be a new type of improved bankcard, turnstile or database, nor do the claims provide a method for processing data that improves existing technological processes. Rather, the claims are directed to the collection, storage and recognition of data, which the Court has repeatedly held was an abstract idea. The Court did not believe it was sufficient that the patents improved the prior system of fare collection itself by speeding up the process at the turnstile, as the inventions were not directed to an improvement in the underlying computer technology, nor were they directed to specific rules that improve a technological process. Instead, these processes merely invoke computers in the collection and arrangement of data, which are well-known, generic processes. Merely limiting the field of use to mass transit did not make the claims any less abstract either.

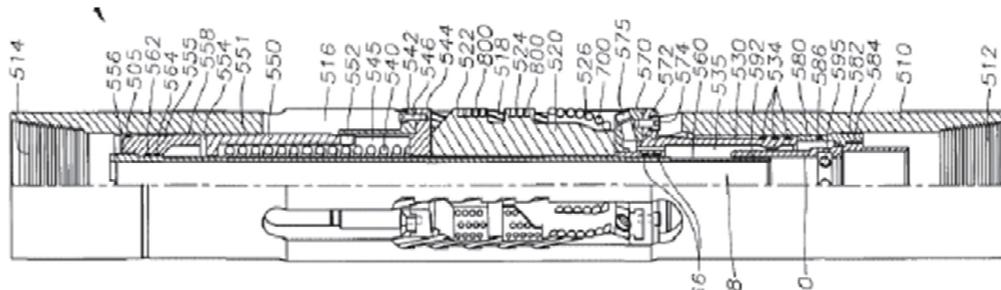
The District Court also found that the Smart System patents lack an inventive concepts because they recite general computer and technological components like “processor, “hash identifier,” “identifying token,” and “writeable memory, while the technical details of those components are not described. Therefore, the District Court concluded that these systems and processes amounted to nothing more carrying out a standard bankcard sale, which is an abstract business practice. The Federal Circuit agreed, because the asserted patent claims merely require generic computer implementation using generic compute components and machinery. As such, they did not constitute a specialized machine that transformed data into another useable form, which would have been patent eligible.

Consequently, *Smart Systems* joins an increasing number of cases where the Federal Circuit has invalidated U.S. patents that are directed to computer systems because they do not improve the underlying technology used to carry out the intended process, and because they employ generic computer components and methods to accomplish standard, well-known functions. Therefore, unless it can be persuasively demonstrated that the patented system or method improves the operation and efficiency of the underlying technology that is used to conduct the desired process, rather than improve the efficiency of the process itself, the patents will likely be subject to challenge for claiming ineligible subject matter under Section 101.

FEDERAL CIRCUIT FINDS THAT THE PTAB’S CONSTRUCTION OF A CRITICAL PATENT CLAIM TERM WAS TOO BROAD

In its September 26, 2017 decision in *In re Smith*, Appeal No. 2016-2303, the U.S. Court of Appeals for the Federal Circuit reversed a decision of the Patent Trial and Appeal Board (“PTAB”) at the USPTO in which the PTAB had upheld the final rejection of Smith’s patent claims in an *ex parte* reexamination proceeding, because the PTAB’s construction of the claim term “body” was too broad. Smith’s parent company, Schlumberger, has sued rival Baker Hughes for infringement of U.S. Patent No. 6,732,817, entitled “Expandable Underreamer/Stabilizer”, which is directed to a downhole drilling tool for oil and gas

operations. The '817 patent describes an “expandable tool 500” having “a generally cylindrical tool body 510 with a flowbore 508 extending therethrough” and “one or more moveable, non-pivotable tool arms 520.” Figure 4 of the '817 shows the drilling tool that is the subject of the patent.



During the litigation, Baker Hughes filed a request for *ex parte* reexamination of the '817 Patent, which the USPTO granted. During the reexamination, Smith added and cancelled certain claims, and amended several other claims. Amended claim 28 is representative:

28. An expandable downhole tool for use in a drilling assembly positioned within a wellbore having an original diameter borehole and an enlarged diameter borehole, comprising:

a body; and

at least one non-pivotable, moveable arm having at least one borehole engaging pad adapted to accommodate cutting structures or wear structures or a combination thereof and having angled surfaces that engage said body to prevent said arm from vibrating in said second position;

wherein said at least one arm is moveable between a first position defining a collapsed diameter, and a second position defining an expanded diameter approximately equal to said enlarged diameter borehole.

The Examiner rejected amended Claim 28 and others because it was obvious over a combination of the Eddison, Jewkes and Wardley prior art references that had been cited by Baker Hughes. Smith appealed this final rejection to the PTAB, which affirmed all of the Examiner's final rejections of the claims. The PTAB agreed with the Examiner's interpretation of the term “body” as a broad term that may encompass other components discussed in the '817 patent, such as the “mandrel” and “can sleeve,” because only the term “body” is recited in the claims without further limiting features, and that the specification neither defines the term “body,” nor prohibits the Examiner's broad reading of it. Based on this interpretation of “body,” the PTAB agreed that the patent claims are unpatentable over the cited prior art.

Smith appealed the PTAB's decision to the Federal Circuit. The Court noted that in *ex parte* reexaminations of this type, the PTAB gives claim terms their broadest reasonable interpretation in light of the claim language and specification. The PTAB had determined that “body” is “a generic term such as ‘member’ or ‘element’ that by itself provides no structural specificity. The PTAB reasoned that although “the

specification *describes* the body as a discrete element separate from other elements,” the specification did not “*define*[] the term ‘body’” or “preclude the Examiner’s interpretation.” The PTAB had rejected Smith’s argument that a person of ordinary skill in the art would understand the term “body” as a distinct element from other components, because Smith “has not shown that the parts identified in the prior art as bodies are so similar as to create a specific identity of what a body is.” As a result, the PTAB concluded that the broadest reasonable interpretation that should be given to the term “body” was “the overall portion or portions of the downhole tool that define the bore and may include one or more other elements.

The Court disagreed with the PTAB’s construction of the term “body” because it was unreasonably broad. The Court found that when giving claim terms their broadest reasonable construction, the PTAB “cannot construe the claims ‘so broadly that its constructions are *unreasonable* under general claim construction principles.’” The Court noted that although it was true that some of the claims of the ‘817 Patent recite a broad term “body” without further explanation of what the term “body” includes, the remainder of the specification does not use the term “body” generically. The ‘817 Patent’s specification consistently describes and refers to the body as a component distinct from the other components, such as the mandrel, piston and drive ring. Therefore, the PTAB was incorrect in its reasoning that because the specification does not “in and of itself proscribe the Examiner’s construction,” then that interpretation was reasonable.

Instead the Federal Circuit emphasized that the correct inquiry in giving a claim term its broadest reasonable interpretation in light of the specification *is not* whether the specification proscribes or precludes some broad reading of the claim term adopted by the Examiner. A correct interpretation is not simply an interpretation that is not inconsistent with the specification. It is an interpretation that corresponds with what and how the inventor describes his invention in the specification. If the PTAB’s reasoning were adopted, then any description of a claim term found in the specification that fell short of an express definition or disclaimer would result in an adoption of a broadest *possible* interpretation of a claim term, irrespective of repeated and consistent descriptions in the specification that indicate otherwise. That would not be properly giving the claim term its broadest reasonable interpretation *in light of* the specification. As a result, the Federal Circuit concluded that the term “body” in the ‘817 Patent is a distinct component from other separately identified components in the specification, such as the mandrel, and cannot be understood to include the “can sleeve” feature disclosed in the prior art. Therefore, the Court also reversed the PTAB’s conclusion that the claims of the ‘817 Patent were unpatentable for obviousness.

The Federal Circuit’s decision in *Smith* addresses one of the criticisms of the PTAB’s recent decisions regarding the patentability of challenged patent claims in reexamination proceedings, and also in the new *Inter Partes* Review and Post-Grant Review proceedings created as part of the America Invents Act. The PTAB has been criticized for the relatively high rate at which it has found at least one claim of a challenged U.S. patent or patent application to be unpatentable based on the cited prior art. It has been argued that this high rate of rejection of patent claims is caused by the relatively low standard of proof in such cases (*i.e.* a preponderance of the evidence) relative to the standard of proof for invalidating the claims of an already issued patent in an action brought in federal district court (*i.e.* clear and convincing evidence), as well as the overly broad interpretation of patent claim terms that the PTAB has allegedly adopted to support its

decisions regarding unpatentability. Critics have argued that the combination of this low standard of proof and the overly broad interpretation of claim terms has allegedly made it too easy for challengers of a patent's claims to obtain a ruling of unpatentability from the PTAB.

The Federal Circuit's decision in *Smith* may therefore serve to discipline the PTAB by focusing its attention on how a claimed invention is described in the specification, so that its construction of claim terms is focused on that description, and is limited by that description, so that it is not based on the broadest possible interpretation of those terms in the abstract, as appeared to be the case in *Smith*. This may result in generally narrower constructions of claim terms being adopted by the PTAB. If the PTAB consistently applies the claim interpretation guidance provided by the Federal Circuit in *Smith*, then there may be fewer instances in the future in which the PTAB will find that a patent's claims are unpatentable based on the prior art or otherwise.

FEDERAL CIRCUIT UPHOLDS LIMITED EXCLUSION ORDER ENTERED BY U.S. INTERNATIONAL TRADE COMMISSION

In its September 27, 2017 precedential ruling in *Cisco Systems, Inc. v. International Trade Commission*, the U.S. Court of Appeals for the Federal Circuit upheld the scope of a limited exclusion order that had been entered by the U.S. International Trade Commission ("ITC") in order to prevent the entry into the United States of products that infringed three of Cisco Systems' U.S. Patents. Under Section 337 of the Tariff Act of 1930, the ITC is empowered to conduct unfair importation investigations to determine whether products that are being imported into the United States infringe valid U.S. patent, trademark and trade dress rights. If such infringement is found, then the ITC may enter a general or limited exclusion order directing the U.S. Customs and Border Protection Service to prevent entry of the infringing products into the United States during the period in which the patents or other property rights are in force.

In this case, Cisco Systems had requested that the ITC institute an unfair import investigation against Arista Networks, Inc. alleging that Arista's importation of certain network devices, related software and components infringed six (6) of its U.S. Patents. The accused Arista products included fixed and modular network switches typically used in computer data centers. An Administrative Law Judge ("ALJ") of the ITC then entered a final initial determination finding that Arista had violated Section 337 by infringing three (3) of Cisco's six (6) asserted patents. On review to the Commission, the ITC agreed with the ALJ's decision. Based on that finding, the ITC entered a limited exclusion order against imports by Arista of "certain network devices, related software and components thereof" that infringe certain claims of the three Cisco patents for which a violation of Section 337 was found.

Arista then appealed the ITC's finding of patent infringement, and the scope of the limited exclusion order to the Federal Circuit. The Federal Circuit agreed with the ITC that the Cisco patents were properly interpreted and that they were infringed by the Arista products. The Court then focused its attention of the scope of the ITC's limited exclusion order. On appeal, Arista challenged the limited exclusion order because the ITC did not make specific findings that the *components* of the accused products contribute to

or induce infringement of the Cisco patents, and thus the ITC exceeded its authority to regulate “articles that infringe” under Section 337(a)(1)(B)(i) of the Tariff Act.

The Federal Circuit disagreed, and found instead that the ITC sufficiently stated its findings that the components of Arista’s accused products induce infringement of the Cisco Patents. The Federal Circuit therefore concluded that the limited exclusion order properly bars the importation of components of Arista’s infringing products.

In making its decision, the Federal Circuit noted that the ITC has broad discretion in selecting the form, scope, and extent of a remedy for violations of Section 337, and therefore judicial review of its choice of remedy is necessarily limited. A court will not interfere in the ITC’s remedy determination except when “the remedy selected has no reasonable relation to the unlawful practices found to exist.” Under this standard, if the ITC has considered the factors that are relevant to its choice of remedy for the violation, and has not made a clear error of judgment, then the Federal Circuit will uphold its choice of remedy. In *Cisco Systems*, the Federal Circuit recognized that blocking the importation of articles that induce infringement has a reasonable relationship to stopping unlawful trade acts, and it did not see any error in the ITC’s limited exclusion order.

The Federal Circuit’s decision in *Cisco Systems* thus confirms the ITC’s standing as a powerful enforcer of U.S. intellectual property rights that are being infringed by products imported into the United States. After *Cisco Systems*, the ITC retains its authority to issue broad exclusion orders which prevent the entry of products and components which are found to infringe valid U.S. intellectual property rights. If the ITC’s findings that the underlying property rights are valid and infringed are upheld, then the Federal Circuit will continue to give substantial deference to the ITC’s choice of exclusion orders as the remedy for violations of Section 337, and will not overrule or limit them except in unusual circumstances.

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