



7020-02

INTERNATIONAL TRADE COMMISSION

Investigation No. 337-TA-945

Certain Network Devices, Related Software and Components Thereof (II)

Commission Decision to Review in Part a

Final Initial Determination Finding a Violation of Section 337;

Request for Written Submissions

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the presiding administrative law judge's ("ALJ") final initial determination ("Final ID") issued on December 9, 2016, finding a violation of section 337 of the Tariff Act of 1930, as amended, ("section 337") in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2301. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on January 27, 2015, based on a Complaint filed by Cisco Systems, Inc. of San Jose, California (“Cisco”). 80 FR 4313-14 (Jan. 27, 2015). The Complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the sale for importation, importation, and sale within the United States after importation of certain network devices, related software and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 7,023,853; 6,377,577; 7,460,492; 7,061,875; 7,224,668; and 8,051,211. The Complaint further alleges the existence of a domestic industry. The Commission’s Notice of Investigation named Arista Networks, Inc. of Santa Clara, California (“Arista”) as respondent. The Office of Unfair Import Investigations (“OUII”) was also named as a party to the investigation. The Commission previously terminated the investigation in part as to certain claims of the asserted patents. Order No. 38 (Oct. 27, 2015), unreviewed Notice (Nov. 18, 2015); Order No. 47 (Nov. 9, 2015), unreviewed Notice (Dec. 1, 2015).

On December 9, 2016, the ALJ issued her Final ID, finding a violation of section 337 with respect to claims 1, 7, 9, 10, and 15 of the ’577 patent; and claims 1, 2, 4, 5, 7, 8, 10, 13, 18, 56, and 64 of the ’668 patent. The ALJ found no violation of section 337 with respect to claim 2 of the ’577 patent; claims 46 and 63 of the ’853 patent; claims 1, 3, and 4 of the ’492 patent; claims 1-4, and 10 of the ’875 patent; and claims 2, 6, 13, and 17 of the ’211 patent.

In particular, the Final ID finds that Cisco has shown by a preponderance of the evidence that the accused products infringe asserted claims 1, 7, 9, 10, and 15 of the ’577 patent; and asserted claims 1, 2, 4, 5, 7, 8, 10, 13, 18, 56, and 64 of the ’668 patent. The Final ID finds that Cisco has failed to show by a preponderance of the evidence that the accused products infringe asserted claim 2 of the ’577 patent; asserted claims 46 and 63 of the ’853 patent; asserted claims

1, 3, and 4 of the '492 patent; asserted claims 1-4, and 10 of the '875 patent; and asserted claims 2, 6, 13, and 17 of the '211 patent.

The Final ID also finds that assignor estoppel bars Arista from asserting that the '577 and '853 patents are invalid. The Final ID finds, however, that if assignor estoppel did not apply, Arista has shown by clear and convincing evidence that claims 1, 7, 9, 10, and 15 of the '577 patent and claim 46 of the '853 patent are invalid as anticipated by U.S. Patent No. 5,920,886 ("Feldmeier"). The Final ID further finds that Arista has failed to show by clear and convincing evidence that any of the remaining asserted claims are invalid. The Final ID also finds that Arista has not proven by clear and convincing evidence that Cisco's patent claims are barred by equitable estoppel, waiver, implied license, laches, unclean hands, or patent misuse.

The Final ID finds that Cisco has satisfied the economic prong of the domestic industry requirement for all of the patents-in-suit pursuant to 19 U.S.C. § 337(A), (B), and (C). The Final ID finds, however, that Cisco has failed to satisfy the technical prong of the domestic industry requirement with respect to the '875, '492, and '211 patents. The Final ID finds that Cisco has satisfied the technical prong with respect to the '577, '853, and '668 patents.

The Final ID also contains the ALJ's recommended determination on remedy and bonding. The ALJ recommended that the appropriate remedy is a limited exclusion order with a certification provision and a cease and desist order against Arista. The ALJ recommended the imposition of a bond of 5% during the period of Presidential review.

On December 29, 2016, Cisco, Arista, and OUII each filed petitions for review of various aspects of the Final ID. As described below, some of the issues presented for review were in the form of contingent petitions.

Cisco petitions for review of the Final ID's construction of certain limitations recited in claim 46 of the '853 patent and the resulting finding that Arista's accused products do not infringe that claim. Cisco also petitions for review of the Final ID's findings of non-infringement and non-satisfaction of the technical prong of the domestic industry requirement with respect to the '875, '492, and '211 patents. Cisco requests contingent review of the Final ID's finding that Arista does not indirectly infringe the asserted claims of the '577 patent should the Commission review the Final ID's finding that Arista's post-importation direct infringement cannot alone support a finding of violation of section 337. Cisco also requests contingent review of the Final ID's finding that Feldmeier anticipates the asserted claims of the '577 patent should the Commission review the Final ID's finding that assignor estoppel applies.

Arista petitions for review of the Final ID's construction of certain limitations recited in the asserted claims of the '577 and '668 patents and the resulting finding that certain of Arista's accused products infringe those claims. Arista also petitions for review of the Final ID's findings of indirect infringement with respect to the '577 and '668 patents. Arista further petitions for review of the Final ID's finding that assignor estoppel precludes Arista from challenging the validity of the '577 and '853 patents. Arista requests contingent review of the Final ID's finding that claim 46 of the '853 patent is invalid as anticipated and indefinite should the Commission review the ALJ's non-infringement findings with respect to that claim. Arista also requests contingent review of the issue of indirect infringement regarding the '853, '211, '875, and '492 patents should the Commission review the Final ID's findings of no direct infringement with respect to those patents.

OUII petitions for review of the Final ID's finding that the "configurable PiP CoPP" implementation in Arista's accused products infringes the asserted claims of the '668 patent.

OUII also petitions for review of the Final ID's reliance on the Patent Trial and Appeal Board decision in finding that claims 1 and 12 of the '211 patent are invalid as anticipated. OUII requests contingent review of the Final ID's finding that Feldmeier anticipates the asserted claims of the '577 patent should the Commission review the Final ID's finding that assignor estoppel applies. OUII further requests contingent review of the Final ID's construction of certain means-plus-functions claims recited in claim 46 of the '853 patent should the Commission review the Final ID's finding that the accused products do not infringe that claim.

On January 10, 2017, Cisco, Arista, and OUII filed responses to the various petitions for review.

On January 11, 2017, Cisco and Arista each filed a post-RD statement on the public interest pursuant to Commission Rule 210.50(a)(4). No responses were filed by the public in response to the post-RD Commission Notice issued on December 20, 2016. *See* Notice of Request for Statements on the Public Interest (Dec. 20, 2016); 81 FR 95194-95 (Dec. 27, 2016).

Having examined the record of this investigation, including the Final ID, the petitions for review, and the responses thereto, the Commission has determined to review the Final ID in part.

With respect to the '577 patent, the Commission has determined to review the Final ID's finding that Arista has indirectly infringed the '577 patent by importing Imported Components, as referenced at page 110 in the Final ID. The Commission has also determined to review the Final ID's finding that Arista's post-importation direct infringement cannot alone support a finding of violation of section 337. The Commission has further determined to review the Final ID's finding that Feldmeier anticipates claims 1, 7, 9, 10, and 15 of the '577 patent.

With respect to the '853 patent, the Commission has determined to review the Final ID's claim construction findings with respect to claim elements (c), (d), and (f) of claim 46. The

Commission has also determined to review the Final ID's findings concerning direct and indirect infringement regarding the '853 patent. The Commission has further determined to review the Final ID's finding that assignor estoppel applies to validity challenges based on indefiniteness. The Commission has also determined to review the Final ID's finding that Feldmeier does not anticipate claim 46.

With respect to the '875 and '492 patents, the Commission has determined to review the Final ID's finding of no direct infringement and the related finding of no indirect infringement. The Commission has also determined to review the Final ID's finding that Cisco has failed to satisfy the technical prong of the domestic industry requirement with respect to the '875 and '492 patents.

With respect to the '668 patent, the Commission has determined to review the Final ID's finding of direct infringement and the Final ID's finding of indirect infringement, in particular as concerns Arista's importation of Imported Components.

With respect to the '211 patent, the Commission has determined to review the Final ID's finding that Cisco has failed to satisfy the technical prong with respect to claims 1 and 12 of the '211 patent, including the Final ID's finding that claims 1 and 12 are invalid.

The Commission has determined not to review the remaining issues decided in the Final ID.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in responses to the following questions:

1. Discuss the relevant case law regarding the requirement, pursuant to 35 U.S.C. § 271(c), that to be found liable for contributory infringement, the accused

infringer must import into the United States or sell within the United State a device that constitutes a “material part of the invention.” In addition, please address whether the Imported Components satisfy this requirement with respect to the ’577, ’853, and ’668 patents. Please cite to and discuss any relevant evidence in the record.

2. Please address whether the Accused ACL Products infringe asserted claim 46 of the ’853 patent if the 35 U.S.C. § 112, ¶ 6 (means-plus-function) limitation “means for matching matchable information, said matchable information being responsive to said packet label, with said set of access control patterns in parallel” is construed to require as the corresponding structure an access control memory, including one or more content-addressable memory units of the type shown in Figure 2 of the ’853 patent.
3. Please address whether the Accused ACL Products infringe asserted claim 46 of the ’853 patent if the 35 U.S.C. § 112, ¶ 6 (means-plus-function) limitation “means for generating a set of matches in response thereto, each said match having priority information associated therewith” is construed to require as the corresponding structure an access control memory, including one or more content-addressable memory units of the type shown in Figure 2 of the ’853 patent.
4. Please address whether the Accused ACL Products with the Petra chip infringe asserted claim 46 of the ’853 patent, in particular with respect to the 35 U.S.C. § 112, ¶ 6 (means-plus-function) limitation “means for selecting at least one of said matches in response to said priority information, and generating an access

result in response to said at least one selected match.”

5. Regarding the 35 U.S.C. § 112, ¶ 6 (means-plus-function) limitation “means for making a routing decision in response to said access result” recited in asserted claim 46 of the ’853 patent, please address whether any corresponding structure disclosed in the specification of the ’853 patent satisfies the claimed function, other than the structure recited in the Final ID’s claim construction or the structures previously proposed by the parties.
6. With reference to question five, please address whether the Accused ACL Products infringe claim 46 of the ’853 patent under the proper construction of the 35 U.S.C. § 112, ¶ 6 (means-plus-function) limitation “means for making a routing decision in response to said access result.”
7. Please address whether the Accused Loop Guard Products and the DI Loop Guard Products practice the limitation “including a discarding state” recited in claims 1 and 10 of the ’875 patent and/or the limitation “including a discarding port state” recited in claim 1 of the ’492 patent under the ALJ’s claim construction of “discarding [port] state,” which requires “a port state in a spanning tree protocol or algorithm in which data frames are neither forwarded to nor received from the port.” Please cite to and discuss any relevant evidence in the record.
8. Please address whether the Accused Loop Guard Products and the DI Loop Guard Products practice the limitation “including . . . a listening state” recited in claims 1 and 10 of the ’875 patent and/or the limitation “including . . . a listening [port] state” recited in claim 1 of the ’492 patent. In particular, please discuss the disclosure in exhibit CX-0653 at pages 63, 66, and 67. In addition, please cite to

and discuss any other relevant evidence in the record.

9. With respect to the '668 patent, please address whether the Pip CoPP feature in the '668 Accused Products is a physical port service. In particular, please address the significance of the ALJ's finding on page 196 of the Final ID. In addition, please cite to and discuss any relevant evidence in the record.

The parties have been invited to brief only these discrete issues, as enumerated above, with reference to the applicable law and evidentiary record. The parties are not to brief other issues on review, which are adequately presented in the parties' existing filings.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are

like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation, including the Office of Unfair Import Investigations, are requested to file written submissions on the issues identified in this notice. Parties to the investigation, including the Office of Unfair Import Investigations, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainant and the Office of Unfair Import Investigations are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to state the dates that the patents expire, the HTSUS numbers under which the accused products are imported, and any known importers of the accused products. The written submissions and proposed remedial orders must be filed no later than close of business on **March 15, 2017**. Initial submissions are limited to 50 pages, not including any attachments or exhibits related to discussion of the public interest. Reply submissions must be filed no later than the close of business on **March 24, 2017**.

Reply submissions are limited to 25 pages, not including any attachments or exhibits related to discussion of remedy, the public interest, and bonding. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.4(f)). Submissions should refer to the investigation number (“Inv. No. 337-TA-945”) in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract

personnel^[1], solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: March 1, 2017

^[1] All contract personnel will sign appropriate nondisclosure agreements.

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