



7020-02

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-945]

### Certain Network Devices, Related Software and Components Thereof (II) (Modification 2)

#### Modification of Limited Exclusion Order and Cease and Desist Order; Termination of the Modification Proceeding as to U.S. Patent No. 6,377,577 and Suspension of the Modification Proceeding as to U.S. Patent No. 7,224,668

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to modify a limited exclusion order and a cease and desist order (“the remedial orders”) issued against Arista Networks, Inc. of Santa Clara, California (“Arista”) in Inv. No. 337-TA-945. The above-captioned modification proceeding is terminated as to U.S. Patent No. 6,377,577 (“the ’577 patent”) and is suspended as to U.S. Patent No. 7,224,668 (“the ’668 patent”).

**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 (“section 337”), by reason of infringement of certain claims of U.S. Patent Nos. 7,023,853 (“the ’853 patent”); the ’577 patent; 7,460,492 (“the ’492 patent”); 7,061,875 (“the ’875 patent”); the ’668 patent; and 8,051,211 (“the ’211 patent”). The Complaint further alleges the existence of a domestic industry. The Commission’s Notice of Investigation named Arista as the respondent. The Office of Unfair Import Investigations (“OUII”) was also named as a party to the investigation. The Commission terminated the investigation in part as to certain claims of the asserted patents. Notice (Nov. 18, 2015) (see Order No. 38 (Oct. 27, 2015)); Notice (Dec. 1, 2015) (see Order No. 47 (Nov. 9, 2015)).

On June 11, 2016, the Patent Trial and Appeal Board (“PTAB”) of the U.S. Patent and Trademark Office instituted separate *inter partes* review (“IPR”) proceedings concerning the ’577 and ’668 patents. *Arista Networks, Inc. v. Cisco Systems, Inc.*, Case IPR2016-00303 (regarding the ’577 patent); *Arista Networks, Inc. v. Cisco Systems, Inc.*, Case IPR2016-00309 (regarding the ’668 patent).

On May 4, 2017, the Commission found a violation of section 337 with respect to certain of the asserted claims of the ’577 and ’668 patents. Notice (May 4, 2017); 82 FR 21827-29 (May 10, 2017); *see also* Notice of Correction (May 30, 2017); 82 FR 25811 (June 5, 2017). The Commission issued a limited exclusion order (“LEO”) and a cease and desist order (“CDO”) against Arista. *Id.* The Commission did not find a violation with respect to the ’853, ’875, ’492, and ’211 patents. *Id.*

On May 25, 2017, the PTAB issued its final written decision finding claims 1, 7-10, 12-16, 18-22, 25, and 28-31 of the '577 patent unpatentable based on prior art not presented in the Commission investigation. On June 1, 2017, the PTAB issued its final written decision finding claims 1-10, 12, 13, 15-28, 30, 33-36, 55-64, 66, 67, and 69-72 of the '668 patent unpatentable based on certain combinations of prior art not presented in the Commission investigation.

On June 30, 2017, Cisco filed a notice of appeal with the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), seeking review of the Commission's finding of no violation as to the '853, '875, '492, and '211 patents. *Cisco Sys., Inc. v. Int'l Trade Comm'n*, Appeal No. 17-2289. On July 21, 2017, Arista filed a notice of appeal with the Federal Circuit, seeking review of the Commission's finding of violation as to the '577 and '668 patents. *Arista Networks, Inc. v. Int'l Trade Comm'n*, Appeal No. 17-2336. On August 3, 2017, the Federal Circuit consolidated the Arista and Cisco appeals. *Cisco Sys., Inc. v. Int'l Trade Comm'n*, Appeal No. 17-2289, Dkt. No. 20. The consolidated appeal is currently pending before the Federal Circuit.

On August 25, 2017, Arista filed a motion with the Federal Circuit seeking to stay the Commission's remedial orders pending resolution of the appeal on the merits. On September 22, 2017, the Federal Circuit denied this request "subject to the condition that the product redesign on which Cisco relies to deny irreparable harm must be permitted to enter the country, without being blocked by the Commission order under review in this case, unless and until Commission proceedings are initiated and completed to produce an enforceable determination that such a redesign is barred by the order here under review or by a new or amended order." *Cisco Sys, Inc. v. ITC; Arista Networks, Inc. v. ITC*, Appeal Nos. 2017-2289, -2351, Order at 3 (Fed. Cir. Sept. 22, 2017).

On September 27, 2017, Cisco petitioned for a modification proceeding to determine whether Arista's redesigned switches infringe the patent claims that are the subject of the LEO and CDO issued in this investigation and for modification of the remedial orders to specify the status of these redesigned products.

On November 1, 2017, the Commission instituted the modification proceeding. 82 FR 50678 (Nov. 1, 2017). On November 7, 2018, the Commission issued a notice clarifying that OUII is not named as a party in the modification proceeding. 82 FR 52318 (Nov. 13, 2017).

On February 14, 2018, the Federal Circuit summarily affirmed the PTAB's decision finding the claims of the '668 patent unpatentable. *Cisco Systems, Inc. v. Arista Networks, Inc.*, Appeal No. 17-2384, Order (Feb. 14, 2018). The Court issued the mandate on March 23, 2018. *Id.*, Dkt. No. 54.

On March 15, 2018, Arista filed a motion before the Commission to stay the Commission's remedial orders as to the '668 patent. On March 26, 2018, Cisco filed its response stating that it takes no position on Arista's motion.

On March 23, 2018, the ALJ issued a recommended determination in the modification proceeding ("MRD"), finding that Arista's redesigned products infringe the relevant claims of the '668 patent but do not infringe the relevant claims of the '577 patent. MRD (Mar. 23, 2018). Also on March 23, 2018, the ALJ issued an order denying Arista's motion to stay the modification proceedings or to stay the remedial orders with respect to the '668 patent. Order No. 20 (Mar. 23, 2018).

On April 5, 2018, the Commission determined to modify the remedial orders to suspend enforcement of those orders with respect to the '668 patent. Notice (Apr. 5, 2018); Comm'n Order (Apr. 5, 2018).

Also on April 5, 2018, Cisco filed comments to the MRD, requesting review of the ALJ's findings that Arista's redesigned products do not infringe the relevant claims of the '577 patent. On the same day, Arista filed comments to the MRD, requesting review of the ALJ's finding that its redesigned products infringe the relevant claims of the '668 patent and preserving certain alternative grounds of affirmance regarding the ALJ's finding that the redesigned products do not infringe the relevant claims of the '577 patent.

Further on April 5, 2018, Arista filed a motion to stay the modification proceeding as to the '668 patent based on the Federal Circuit's affirmance of the PTAB's determination that the relevant claims of the '668 patent are unpatentable.

On April 12, 2018, Cisco and Arista filed responses to each other's comments.

On April 16, 2017, Cisco filed a response to Arista's stay motion.

Having examined the record of this modification proceeding, including the MRD, the comments to the MRD, and the responses thereto, the Commission has determined to find that Cisco has failed to show by a preponderance of the evidence that Arista's redesigned products infringe claims 1, 7, 9, 10, and 15 of the '577 patent or that Arista has indirectly infringed those claim by contributing to or inducing infringement by its customers. Accordingly, the Commission has determined to modify the remedial orders to exempt Arista's redesigned products that were the subject of this modification proceeding. The modification proceeding is terminated with respect to the '577 patent.

The Commission has also determined to suspend the modification proceeding with respect to the '668 patent and to deny Arisa's motion to stay the modification proceeding as to the '668 patent as moot in light of the Commission's prior suspension of the remedial orders with respect to the '668 patent.

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 CFR part 210).

By order of the Commission.

Issued: June 26, 2018.

Lisa Barton,  
Secretary to the Commission.

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