

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN NETWORK DEVICES,
RELATED SOFTWARE AND
COMPONENTS THEREOF (II)

Investigation No. 337-TA-945

NOTICE OF COMMISSION FINAL DETERMINATION OF VIOLATION
OF SECTION 337; TERMINATION OF INVESTIGATION;
ISSUANCE OF LIMITED EXCLUSION ORDER AND CEASE AND DESIST ORDER

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has found a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“section 337”) in the above-captioned investigation. The Commission has determined to issue a limited exclusion order. The investigation is terminated.

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 five (5) percent 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. 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).

On March 1, 2017, the Commission determined to review the Final ID in part. Notice of

Review (Mar. 1, 2017); 82 FR 12844-47 (Mar. 7, 2017).

With respect to the '577 patent, the Commission 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 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 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 determined to review the Final ID's claim construction findings with respect to claim elements (c), (d), and (f) of claim 46. The Commission also determined to review the Final ID's findings concerning direct and indirect infringement regarding the '853 patent. The Commission further determined to review the Final ID's finding that assignor estoppel applies to validity challenges based on indefiniteness. The Commission 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 determined to review the Final ID's finding of no direct infringement and the related finding of no indirect infringement. The Commission 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 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 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 determined not to review the remaining issues decided in the Final ID.

The Commission also requested briefing from the parties on nine questions concerning the issues under review, as well as remedy, the public interest, and bonding. See Notice of Review at 4-5; 82 FR at 12845-46.

On March 15, 2017, the parties submitted initial briefing in response to the notice of review. On March 24, 2017, the parties filed response submissions.

Having examined the record of this investigation, including the Final ID, the petitions for review, the responses thereto, and the parties' submissions on review, the Commission has determined to find that a violation of section 337 has occurred with respect to the asserted claims of the '577 and '668 patents.

Specifically, with respect to the '577 patent, the Commission did not review the Final ID's finding that all of Arista's Accused ACL Products directly infringe claims 1, 7, 9-10, and 13 of the '577 patent. The Commission has determined to affirm the Final ID's finding that Arista

induces infringement of the '577 patent by importing both the Blank Switches and Imported Components (as defined at Final ID at 110 and Respondent Arista Networks Inc.'s Petition for Review of the Initial Determination on Violation of Section 337 (Dec. 29, 2016) at 77, 80). The Commission has further determined to affirm the Final ID's finding that Arista contributorily infringes by importing the Blank Switches. The Commission has determined not to reach the issue of whether Arista contributorily infringes the asserted claims of the '577 patent by importing the Imported Components. Based on the Final ID's unreviewed finding that assignor estoppel applies with respect to the '577 patent, the Commission has determined not to reach the issue of whether Feldmeier anticipates the '577 patent.

With respect to the '668 patent, the Commission has determined to affirm the Final ID's finding that several variations of the '668 Accused Products—including Control-Plane Access Control List, Control Plane Policing, and non-configurable Per-Input Port Control Plane Policing ("PiP CoPP")—infringe asserted claims 1, 2, 4, 5, 7, 8, 10, 13, 56, and 64 of the '668 patent, and to affirm with modification the Final ID's finding that the variation including configurable PiP CoPP infringes those claims, to supply the Commission's reasoning. With respect to claim 64, the Commission has determined to affirm with modification the Final ID's finding of infringement with respect to claim 64 to correct a misstatement in the Final ID. The Commission has also determined to affirm the Final ID's finding that Arista induces infringement of the asserted claims of the '668 patent by importing fully assembled Blank Switches and the Imported Components. The Commission has further determined to affirm the Final ID's finding that Arista contributorily infringes asserted claims 1, 2, 4, 5, 7, 8, 10, 13, 56, and 64 by importing fully assembled Blank Switches. The Commission has determined not to reach the issue of whether Arista contributorily infringes the asserted claims of the '668 patent by importing the Imported Components.

The Commission has determined to find no violation of section 337 with respect to the remaining asserted claims of the '853, '875, '492, and '211 patents.

Specifically, with respect to the '853 patent, the Commission has determined to affirm with modification, to supply the Commission's reasoning, the Final ID's finding that Arista's Accused ACL Products do not directly infringe claim 46, and to affirm the Final ID's finding that Arista does not directly infringe claim 63 of the '853 patent. Accordingly, the Commission has determined to affirm the Final ID's finding of no indirect infringement with respect to those claims. Based on the Final ID's unreviewed finding that assignor estoppel applies with respect to the '853 patent, the Commission has determined not to reach the issue of whether Feldmeier anticipates the '853 patent.

With respect to the '875 and '492 patents, the Commission has determined to affirm with modification the Final ID's finding of no infringement of the asserted claims and that Cisco has failed to satisfy the technical prong of the domestic industry requirement.

With respect to the '211 patent, the Commission did not review the Final ID's finding of no infringement with respect to the asserted claims of the '211 patent. The Commission has also determined to vacate the Final ID's finding with respect to the validity of claims 1 and 12 of the '211 patent, and declines to reach the technical prong issue.

The Commission has determined that the appropriate form of relief is a limited exclusion order under 19 U.S.C. § 1337(d)(1), prohibiting the unlicensed entry of network devices, related software and components thereof that infringe any of 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, and an order that Arista cease and desist from importing, selling, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors, and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of certain network devices, related software and components thereof that infringe any of 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 Commission has determined that the public interest factors enumerated in section 337(d) and (f), 19 U.S.C. § 1337(d) and (f), do not preclude the issuance of the limited exclusion order or cease and desist order. The Commission has determined that bonding at five (5) percent of the entered value of the covered products is required during the period of Presidential review, 19 U.S.C. § 1337(j).

The Commission's order and opinion were delivered to the President and the United States Trade Representative on the day of their issuance.

The investigation is terminated.

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: May 4, 2017

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Monica Bhattacharyya, Esq., and the following parties as indicated, on **May 4, 2017**.



Lisa R. Barton, Secretary
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