UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN NETWORK DEVICES, RELATED SOFTWARE AND COMPONENTS THEREOF (I)**	**Inv. No. 337-TA-944**

Order No. 25

Pursuant to Commission Rule 210.18, complainant Cisco Systems, Inc. ("Cisco") filed a Motion for Summary Determination on Arista's Fourth Additional Defense of Unenforceability, and a memorandum in support thereof. Motion Docket No. 944-37. Respondent Arista Networks, Inc. ("Arista") opposed the motion, and the Commission Investigative Staff ("Staff") filed a response supporting the motion in part.

Cisco argues that "Arista has come forward with no legally cognizable theory that could support any of its equitable defenses" set forth in paragraph 16 of its Response to the Complaint and Notice of Investigation, namely, "(i) laches, (ii) equitable estoppel, (iii) implied license, (iv) waiver, (v) patent misuse, and (vi) inequitable conduct," and that Cisco should be granted summary determination on these equitable defenses. *See* Mem. at 1 (citing Arista's Response to the Complaint and NOI ¶ 16 (Fourth Additional Defense) (Feb. 11, 2015)). It is argued that, "[a]t bottom, the key requirements to establish these defenses—*e.g.*, unreasonable affirmative conduct by Cisco; reliance by Arista; prejudice, etc.—are wholly missing from both Arista's allegations and the record evidence." *Id.* at 2. It is furthered argued that "these defenses . . . are:

all smoke, and no fire, designed to cloud the true issues in this investigation—namely, Arista's blatant infringement of numerous Cisco patented technologies . . . ." *Id.*

In opposition to the pending motion, Arista argues:

> Arista has gathered evidence that is at least sufficient to raise genuine issues of material fact that prevent summary determination on Arista's equitable estoppel defense. Viewing the evidence in the light most favorable to Arista, as one must when evaluating a motion for summary determination, the evidence shows that Cisco should be equitably estopped from asserting its patents against Arista due to Cisco's conduct that lead Arista to infer that Cisco would not assert any rights that it legitimately held.

Opp'n at 19.

With respect to the other equitable defenses at issue in the pending motion, Arista argues that "Cisco's standard-setting activities support Arista's defenses of waiver, implied license, and patent misuse," and that "the law regarding laches is under review and granting summary determination would not meaningfully streamline the investigation." Opp'n at 28, 33.[1]

The Staff argues: "[l]aches is not a valid defense to infringement at the Commission and so summary determination should be granted on this defense." Staff Resp. at 6. The Staff further argues that "[t]here remain disputed issues of fact for the remaining equitable defenses so summary determination should not be granted." *Id.*

The Commission Rules provide that "[a]ny party may move with any necessary supporting affidavits for a summary determination in its favor upon all or part of the issues to be determined in the investigation." 19 C.F.R. § 210.18(a). Summary determination "shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file,

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[1] With respect to inequitable conduct, "Arista . . . does not consider this defense to be in the case." *See* Opp'n at 2 n.2. Inasmuch as Arista represents that it is not asserting an inequitable conduct defense in this investigation, the pending motion for summary determination is denied as to inequitable conduct.

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law." 19 C.F.R. § 210.18(b).

To establish the affirmative defense of estoppel, an alleged infringer must demonstrate: "(1) misleading conduct, which may include not only statements and action but silence and inaction, leading another to reasonably infer that rights will not be asserted against it; (2) reliance upon this conduct; and (3) due to this reliance, material prejudice if the delayed assertion of such rights is permitted." *Certain Bearings and Packaging Thereof ("Bearings")*, Inv. No. 337-TA-469, Initial Determination at 28 (Apr. 10, 2003) (citations omitted). "Reliance is not the same as prejudice or harm, although frequently confused . . . [t]o show reliance, the infringer must have had a relationship or communication with the plaintiff which lulls the infringer into a sense of security." *Id.* (quoting *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1043 (Fed. Cir. 1992) (en banc)). Material prejudice may be established by a showing of "change of economic position or loss of evidence." *Aukerman*, 960 F.2d at 1043. Additionally, egregious conduct on the part of the alleged infringer must also be considered. *Bearings*, Initial Determination at 28 (citation omitted). All relief, including prospective relief, may be barred by equitable estoppel, but application of the doctrine is given to the sound discretion of the trial judge. *Aukerman*, 960 F.2d at 1041.

"To support a finding of implied waiver in the standard setting organization context, the accused must show by clear and convincing evidence that '[the patentee's] conduct was so inconsistent with an intent to enforce its rights as to induce a reasonable belief that such right has been relinquished.'" *Hynix Semiconductor Inc. v. Rambus, Inc.*, 645 F.3d 1336, 1348 (Fed. Cir. 2011) (citing *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1020 (Fed. Cir. 2008)).

An implied license may arise "where the circumstances plainly indicate that the grant of a license should be inferred." *See Bandag, Inc. v. Al Bolser's Tire Stores, Inc.*, 750 F.2d 903, 925 (Fed. Cir. 1984). An implied license "signifies a patentee's waiver of the statutory right to exclude others from making, using, or selling the patented invention," and may be established "by acquiescence, by conduct, by equitable estoppel . . . , or by legal estoppel." *Wang Labs., Inc. v. Mitsubishi Elecs. Am., Inc.*, 103 F.3d 1571, 1580, 1581 (Fed.Cir.1997).

"Patent misuse is an equitable defense to patent infringement." *U.S. Philips Corp. v. Int'l Trade Comm'n*, 424 F.3d 1179, 1184 (Fed. Cir. 2005). A finding of misuse renders a patent temporarily unenforceable until the misuse has been purged. *Qualcomm*, 548 F.3d at 1025 (citation omitted). "The doctrine of patent misuse is . . . grounded in the policy-based desire to 'prevent a patentee from using the patent to obtain market benefit beyond that which inheres in the statutory patent right.'" *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1328 (Fed. Cir. 2010) (en banc) (quoting *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 704 (Fed. Cir. 1992)). "[T]he key inquiry under the patent misuse doctrine is whether, by imposing the condition in question, the patentee has impermissibly broadened the physical or temporal scope of the patent grant and has done so with anticompetitive effects." *Id.* (citing *B. Braun Med., Inc. v. Abbot Labs.*, 124 F.3d 1419, 1426 (Fed. Cir. 1997)).

Laches is the "neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar." *Aukerman*, 960 F.2d at 1028-29. An accused infringer "has the burden to prove two factors: (1) the plaintiff delayed filing suit for an unreasonable and inexcusable length of time from the time the plaintiff knew or reasonably should have known of

its claim against the defendant, and (2) the delay operated to the prejudice or injury of the defendant. *Id.* at 1032.

Having considered the arguments of the parties, as well as the evidence submitted in conjunction with the pending motion, it is the determination of the administrative law judge that Cisco has failed to show it is entitled to summary determination as a matter of law. In particular, Arista has proffered evidence regarding Cisco's conduct with respect to standard-setting and other activities demonstrating that summary determination is not warranted under the circumstances of this investigation. Inasmuch as ruling on the types of equitable defenses recited in Arista's Fourth Affirmative Defense requires a balancing of the equities with the evidence viewed in the light most favorable to Arista, summary determination cannot be granted at this time.

Accordingly, Motion No. 944-37 is denied.

David P. Shaw
Administrative Law Judge

Issued: September 8, 2015

CERTAIN NETWORK DEVICES, RELATED SOFTWARD AND COMPONENTS THEREOF (I):

INV. NO. 337-TA-944

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER NO. 25** has been served by hand upon the Commission Investigative Attorney, **Andrew Beverina, Esq.**, and the following parties as indicated, on SEP 08 2015.

Lisa R. Barton, Secretary
U.S. International Trade Commission
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