

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436

In the Matter of

**CERTAIN NETWORK DEVICES,
RELATED SOFTWARE AND
COMPONENTS THEREOF (I)**

Investigation No. 337-TA-944

RECOMMENDED DETERMINATION ON REMEDY AND BONDING

Administrative Law Judge David P. Shaw

Pursuant to the notice of investigation, 80 Fed. Reg. 4314 (Jan. 27, 2015), this is the Recommended Determination on remedy and bonding in *Certain Network Devices, Related Software and Components Thereof (I)*, United States International Trade Commission Investigation No. 337-TA-944.

For the reasons stated herein it is recommended that, unless the public interest requires that remedies be set aside or modified, if a violation of section 337 is found in this investigation, the Commission should (1) issue a limited exclusion order covering accused products found to infringe the asserted patents, (2) issue a cease and desist order against respondent Arista Networks, Inc., and (3) require a zero percent importation bond (*i.e.*, no bond) during the Presidential review period.

I. Procedural Background

The Commission's Rules provide that subsequent to issuing an initial determination on the question of violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, the administrative law judge shall issue a recommended determination containing findings of fact and recommendations concerning: (1) the appropriate remedy in the event that the Commission finds a violation of section 337, and (2) the amount of the bond to be posted by the respondent during Presidential review of Commission action under section 337(j). 19 C.F.R. § 210.42(a)(1)(ii).

On February 2, 2016, an initial determination ("ID") issued in this investigation, finding that a violation of section 337 of the Tariff Act, as amended, has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain network devices, related software and components thereof with respect to asserted claims 1, 2, 8-11, and 17-19 of U.S. Patent No. 7,162,537 ("the '537 patent"); asserted claims 6, 7, 20, and 21 of U.S. Patent No. 6,741,592 ("the '592 patent"); and asserted claims 5, 7, 45, and 46 of U.S. Patent No. 7,200,145 ("the '145 patent").¹ No violation was found as to asserted claims 1, 14-15, 29, 39, 63-64, or 71-73 of U.S. Patent No. 7,340,597 ("the '597 patent") or asserted claims 1, 5, 6, 9, or 18 of U.S. Patent No. 7,290,164 ("the '164 patent").

¹ The complainant is Cisco Systems, Inc. of San Jose, California ("Cisco" or "Complainant"). 80 Fed. Reg. 4314 (Jan. 27, 2015). The respondent is Arista Networks, Inc. of Santa Clara, California. ("Arista" or "Respondent"). *Id.* The Office of Unfair Import Investigations ("OUII" or "Staff") was also named as a party to this investigation. *Id.*

The Commission did not authorize the administrative law judge to take public interest evidence or to provide findings and recommendations concerning the public interest. *See* 80 Fed. Reg. 4314 (Jan. 27, 2015). Thus, in accordance with the usual Commission practice and the applicable Commission Rules, only the Commission can determine the role that public interest factors may play in this investigation. *See* 19 C.F.R. § 210.50(b)(1).

II. Limited Exclusion Order

The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding. *Viscofan, S.A. v. U.S. Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986). A limited exclusion order directed to a respondent's infringing products is among the remedies that the Commission may impose. *See* 19 U.S.C. § 1337(d).

Cisco takes the position that it is entitled to a limited exclusion order covering the following items:

Arista's imported networking equipment, and also components and software therein, such as switches and their components, operating systems and/or other software, and "all products covered by the patent claims as to which a violation has been found," not just specific models accused of infringement.

Compl. Br. at 445 (citing *Certain Hardware Logic Emulation Systems and Components Thereof*, Inv. No. 337-TA-383, Comm'n Op. at 9 (Mar. 1, 1998)).

Cisco argues that the limited exclusion order "should also apply to Arista's affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns." Compl. Br. at 445 (citing *Certain Semiconductor Chips With*

Minimized Package Size and Products Containing Same, Inv. No. 337-TA-605, Initial Determination at 71 (Dec. 1, 2008)). Cisco further argues:

There should also be no carve-out, as Arista contends, to permit Arista to offer replacement parts of the accused products to its customers, because such a carve-out would permit Arista to continue infringing the patents when there are other participants in the industry who could supply such parts to Arista's customers.

Compl. Br. at 445 (citing CX-0010C (Leonard WS) at Q/A 285-287).

Arista argues that "Cisco has not shown and cannot show that it is entitled to any remedy available to it, should it prevail on its claims of infringement." Resp. Br. at 432. Yet, "if the Commission determines that any remedial order is appropriate," Arista takes the position that the remedial order "should contain an exception to permit Arista's service and warranty support for existing customers." *See id.* at 432-33. In particular, Arista proposes "exempt[ing] replacement parts and products" from the scope of any remedial order "in view of the public interest in protecting customers' investments in the products at issue and their expectations of continued receipt of replacement parts and switches from the respondent (e.g., in the context of warranty service)." *See id.* at 433. It is further argued that "[a]ny exclusion order that issues should also include a provision whereby Arista can certify that the imported products are not subject to exclusion." *Id.* at 436 (citing *Laser Bar Code Scanner and Scan Engines, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-551, Comm'n Op. (Pub. Version) at 23 (June 14, 2007)).

In its post-hearing brief, the Staff takes the position that "[t]he evidence supports a limited exclusion order." Staff Br. at 130.

Having considered the arguments of the parties and the evidence of record, the administrative law judge recommends that in the event the Commission determines that a violation of section 337 has occurred, and if consideration of the statutory public interest factors does not require that remedies be set aside or modified, the Commission should issue a limited exclusion order covering products and components thereof that infringe the asserted claims.

Further, in the event the Commission does issue a limited exclusion order in this investigation, the exclusion order should include a provision that allows Arista to certify, pursuant to procedures to be specified by U.S. Customs and Border Protection, that it is familiar with the terms of the order, that it has made appropriate inquiry, and that, to the best of its knowledge and belief, the products being imported are not excluded from entry under the order. This would allow for the efficient administration and enforcement of the exclusion order inasmuch as it may be difficult to determine upon visual inspection whether or not certain products are subject to exclusion.

III. Cease and Desist Order

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for a violation of section 337. 19 U.S.C. § 1337(f)(1). The Commission may issue a cease and desist order when it has personal jurisdiction over the party against whom the order is directed.

Gamut Trading Co. v. U.S. Int'l Trade Comm'n, 200 F.3d 775, 784 (Fed. Cir. 1999).

The Commission “generally issues a cease and desist order only when a respondent maintains a commercially significant inventory of infringing products in the

United States.” *Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 24 (Mar. 26, 2009). Indeed, cease and desist orders are usually issued “when there is a commercially significant amount of infringing imported product in the United States that could be sold so as to undercut the remedy provided by an exclusion order.” *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Comm’n Op. at 28 (Nov. 19, 2012) (quoting *Certain Laser Bar Code Scanners and Scan Engines, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-551, Comm’n Op. (Pub. Version) at 22 (June 14, 2007)).

With respect to a cease and desist order, Cisco takes the following position:

[

] As a result, a CDO should issue against Arista and prohibit Arista or its agents, partners, distributors, suppliers or privies from (1) importing or selling for importation into the U.S. products found to be covered by one or more of the Asserted Patents, and any components of such products, including by way of electronic transmissions into

and out of the U.S.; (2) marketing, distributing, offering for sale, selling, or otherwise transferring (except for exportation) in the U.S. imported products found to be covered by one or more of the Asserted Patents, and any components of such products; (3) advertising imported products found to be covered by one or more of the Asserted Patents, and any components of such products; (4) soliciting U.S. agents or distributors for imported products found to be covered by one or more of the Asserted Patents, and any components of such products; or (5) aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer, or distribution of products found to be covered by one or more of the Asserted Patents, and any components of such products. *See Certain Coupler Devices for Power Supply Facilities, Components Thereof, & Prods. Containing Same*, Inv. No. 337-TA-590, Comm'n Op. at 2-3 (Dec. 20, 2007). The CDO should be directed broadly against Arista and any of its principals, stockholders, ownership or otherwise and majority-owned business entities, successors, and assigns.

Compl. Br. at 446-47.

Arista did not specifically address the issue of a cease and desist order in its post-hearing briefs. *See* Resp. Br. at 432-39; Resp. Reply Br. at 149-50.

In the Staff's view, "[t]he evidence shows that a cease and desist order is appropriate [

].” Staff Br. at 130-31 (citing CX-0010C (Leonard WS) at Q/A 88, Q/A 239).

As discussed by Cisco in its post-hearing brief, the record evidence demonstrates that [

]. Accordingly, it is recommended that in the event the Commission determines that a violation of section 337 has occurred, and if consideration of the statutory public interest factors does not require that remedies be set aside or modified, a cease and desist order should be issued as to Arista.

IV. Bond

Pursuant to section 337(j)(3), the administrative law judge and the Commission must determine the amount of bond to be required of a respondent during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. The purpose of the bond is to protect the complainant from any injury. 19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(ii), 210.50(a)(3).

When reliable price information is available, the Commission has often set bond by eliminating the differential in sales prices between the domestic product and the imported, infringing product. *Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. No. 2949, Comm'n Op. at 24 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, USITC Pub. No. 2670, Comm'n Op. at 41-43 (1995). A 100 percent bond has been required when no effective alternative existed. *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (a 100% bond imposed when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

With respect to the amount of bond appropriate in this investigation, Cisco

argues:

In this case, a bond is necessary to protect Cisco from injury resulting from the unauthorized use of its patents. Arista's economic expert, Dr. Vander Veen, conceded that at least some Cisco products compete directly with accused Arista products. Vander Veen Tr. 1220:15-19. Dr. Vander Veen also conceded that given the competition between the companies, if a violation is found Cisco could lose sales to infringing Arista products during the Presidential review period. Vander Veen Tr. 1220:20-25. Absent a bond, Cisco will suffer significant injury from sales lost to competing Arista products which would continue to be sold by Arista without penalty. CX-0010C (Leonard WS) at Q/A 244-245.

There is no established or reasonable royalty for the Asserted Patents, which have only been licensed by Cisco in broad cross-license agreements. CX-0010C (Leonard WS) at Q/A 247-252; CX-0118C-0141C (Cisco license agreements). Arista does not dispute that a royalty rate cannot be readily determined from Cisco's license agreements that include the Asserted Patents. RX-3895C (Vander Veen RWS) at Q/A 125. [

]. The third-party industry report relied on by Arista also does not establish 5% as a reasonable royalty as there is no evidence showing that the licenses relied on in that report are comparable to the present situation, such as where Arista is a direct competitor of Cisco, and Cisco has typically only granted licenses as part of a broad portfolio cross-license. CX-0010C (Leonard WS) at Q/A 288-290. There is also no evidence of a [

] between Arista's accused products and Cisco's domestic industry products. CX-0010C (Leonard WS) at Q/A 256-258. Accordingly, because there is no reasonable royalty rate that can be readily discerned, and [], the bond should be set at 100%. CX-0010C (Leonard WS) at Q/A 260.

Compl. Br. at 447-48.

Arista argues:

Here, Cisco provides no support for a requested bond, and Cisco's expert never offers an opinion on bond. Specifically, Mr. Dan Lang testified as Cisco's corporate representative on bond, but acknowledged that he was aware of no evidence in Cisco's possession supporting Cisco's bond request. *See* JX-0055C (Lang Depo.) at 275:2-275:16. And Cisco's economics expert, Dr. Leonard, admitted he was offering no opinion as to a specific bond amount, which is further reflected in his witness statement. *See* Hrg. Tr. (Leonard) at 666:3-5 ("Q. You are not offering an opinion on a specific bond request; isn't that right? A. That's correct."); *see also generally* CX-0010C (Leonard DWS) at 66-70.

Moreover, no bond is appropriate because Cisco has simply not demonstrated any harm. First, because Cisco has failed to ever previously assert the Asserted Patents, the value of the technologies allegedly patented in the Asserted Patents is (at best) incremental. *See* Hrg. Tr. (Lang) 733:16-19 ("Q. Other than its lawsuits against Arista, Cisco has never tried to enforce any of the patents asserted in this investigation against any other competitors; right? A. Not that I know of."); RX-0004C (Cisco Systems, Inc.'s Responses and Objections to Arista Networks, Inc.'s Second Set of Interrogatories (Nos. 92-100). Second, Cisco documents support that it believes that Arista products [

]. *See* RX-3895C (Vander Veen RWS) at Q123.

For example, again relying on the data without performing an investigation, Dr. Leonard calculated a [] between Cisco and Arista in his report. [

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Resp. Br. at 438-39 (footnote omitted).

Arista further argues:

If the Commission nevertheless determines a bond is required, industry rates place a reasonable limit on such a bond. *See, e.g., Semiconductor Chips with Minimized Chip Package Size*, Inv. No. 337-TA-605, Comm'n Op. (Pub. Version), at 74 (June 3, 2009) (adopting the ALJ's recommendation to base the bond rate on the

“median royalty rate in the semiconductor chip industry”). Specifically, publicly available studies provide average and median royalty rates by in the telecom industry and in the computer and office equipment industry. *See* RX-3898 (Licensing Economics Review: The Royalty Rate Journal of Intellectual Property (“LER”) for 2002), RX-3899 (LER for 2004), RX-3900 (LER for 2005), RX-3901 (LER for 2006), RX-3902 (LER for 2007), RX-3903 (LER for 2007), RX-3904 (LER for 2008), RX-3905 (LER for 2009), RX-3906 (LER for 2010), RX-3907 (LER for 20011). Dr. Vander Veen conducted an analysis of these and determined that the median royalty rates for the telecom and computer and office equipment industries range between 4.0 percent and 5.0 percent. *See* RX-3895C (Vander Veen RWS) at Q129. As such, should the Commission determine to require a bond during any Presidential review period for imports of Accused Arista Products, such a bond should be no more than 5 percent.

Resp. Br. at 439 (footnote omitted).

With respect to the appropriate amount of bond in this investigation, the Staff takes the following position:

Cisco’s witness for bond presented conclusory statements about why he believes a reasonable royalty or price differential is not appropriate for calculating a bond amount. *See* CX-0010 (Leonard WS) at 247-60. The evidence does not show that Cisco has carried its burden to prove that it is entitled to a 100% bond. In view of the fact that Cisco has not carried its burden of showing the appropriate bond, no bond should be required.

Staff Br. at 131-32.

Having considered the arguments of the parties and the evidence of record, the administrative law judge finds that Cisco has not shown that its proposed bond amount of 100% is warranted under the circumstances of this investigation. In particular, a finding that a reasonable royalty rate could not be calculated is not supported by the record evidence. Moreover, it has not been demonstrated that a price differential could not serve

as the basis for calculating a bond amount. Accordingly, it is recommended that in the event the Commission determines that a violation of section 337 has occurred, and if consideration of the statutory public interest factors does not require that remedies be set aside or modified, the bond for any importations of infringing products during the Presidential review period should be zero percent of entered value, *i.e.*, that no bond should be required from Arista.

V. Recommended Determination and Order

It is recommended that, unless the public interest requires that remedies be set aside or modified, if a violation of section 337 is found in this investigation, the Commission should (1) issue a limited exclusion order covering accused products found to infringe the asserted patents, (2) issue a cease and desist order against respondent Arista Networks, Inc., and (3) require a zero percent importation bond (*i.e.*, no bond) during the Presidential review period.

To expedite service of the public version, each party is hereby ordered to file with the Commission Secretary no later than February 19, 2016, a copy of this recommended determination with brackets to show any portion considered by the party (or its suppliers of information) to be confidential, accompanied by a list indicating each page on which such a bracket is to be found.² At least one copy of such a filing shall be served upon the

² Confidential business information (“CBI”) is defined in accordance with 19 C.F.R. § 201.6(a) and § 210.5(a). When redacting CBI or bracketing portions of documents to indicate CBI, a high level of care must be exercised in order to ensure that non-CBI portions are not redacted or indicated. Other than in extremely rare circumstances, block-redaction and block-bracketing are prohibited. In most cases, redaction or bracketing of only discrete CBI words and phrases will be permitted.

office of the undersigned, and the brackets shall be marked in red. If a party (and its suppliers of information) considers nothing in the initial determination to be confidential, and thus makes no request that any portion be redacted from the public version, then a statement to that effect shall be filed.



David P. Shaw
Administrative Law Judge

Issued: February 11, 2016

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

INV. NO. 337-TA-944

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **RECOMMENDED DETERMINATION** has been served by hand upon the Commission Investigative Attorney, **Andrew Beverina, Esq.**, and the following parties as indicated, on

FEB 29 2016



Lisa R. Barton, Secretary
U.S. International Trade Commission
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FOR COMPLAINANT CISCO SYSTEMS, INC.:	
D. Sean Trainor, Esq. KIRKLAND & ELLIS LLP 655 15th Street, NW Washington, DC 20005	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____
FOR RESPONDENT ARISTA NETWORKS, INC.:	
Lauren A. Degnan, Esq. FISH & RICHARDSON P.C. 1425 K Street, NW 11th Floor Washington, DC 20005	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____