

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

In the Matter of

**SYSTEMS FOR DETECTING AND
REMOVING VIRUSES OR WORMS,
COMPONENTS THEREOF, AND
PRODUCTS CONTAINING SAME**

Inv. No. 337-TA-510
**Consolidated Enforcement and
Advisory Opinion Proceeding**

**COMMISSION DETERMINATION NOT TO REVIEW AN INITIAL
DETERMINATION TERMINATING THE CONSOLIDATED ENFORCEMENT AND
ADVISORY OPINION PROCEEDING; RESCISSION OF THE LIMITED EXCLUSION
ORDER AND CEASE AND DESIST ORDER ISSUED IN THE UNDERLYING
INVESTIGATION; VACATUR OF A SUMMARY INITIAL DETERMINATION ISSUED
IN THE CONSOLIDATED ENFORCEMENT AND ADVISORY OPINION
PROCEEDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) terminating the above-captioned proceeding. The Commission has also determined to rescind the limited exclusion and cease and desist orders previously issued in the underlying investigation and to vacate a summary ID previously issued in the proceeding.

FOR FURTHER INFORMATION CONTACT: Timothy P. Monaghan, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-3152. Copies of the public version of the ID and all nonconfidential 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. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server

(<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>.

SUPPLEMENTARY INFORMATION: This investigation was instituted by the Commission on June 3, 2004, based on a complaint filed by Trend Micro Inc. (“Trend Micro”) of Cupertino, California under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337. 69 *Fed. Reg.* 32044-45 (June 8, 2004). The complaint alleged violations of section 337 in the importation into the United States, the sale for importation into the United States, or the sale within the United States after importation of certain systems for detecting and removing computer viruses or worms, components thereof, and products containing same by reason of infringement of claims 1-22 of U.S. Patent No. 5,623,600 (“the ‘600 patent”). The notice of investigation named Fortinet, Inc., of Sunnyvale, California (“Fortinet”) as the sole respondent.

On May 9, 2005, the ALJ issued his final ID in this investigation finding a violation of section 337 based on his findings that claims 4, 7, 8, and 11-15 of the ‘600 patent are not invalid or unenforceable, and are infringed by respondent’s products. On July 8, 2005, the Commission issued notice that it had determined not to review the ALJ’s final ID on violation, thereby finding a violation of section 337. 70 *Fed. Reg.* 40731 (July 14, 2005). The Commission also requested briefing on the issues of remedy, the public interest, and bonding. *Id.* Submissions on the issues of remedy, the public interest, and bonding were filed by all parties. On August 8, 2005, the Commission terminated the investigation, and issued a limited exclusion order and a cease and desist order covering respondent’s systems for detecting and removing computer viruses or worms, components thereof, and products containing same that infringe claims 4, 7, 8, and 11-15 of the ‘600 patent.

On September 13, 2005, complainant Trend Micro filed a complaint for enforcement of the Commission's remedial orders. On October 7, 2005, the Commission determined to institute a formal enforcement proceeding to determine whether Fortinet was in violation of the Commission’s cease and desist order issued in the investigation and what, if any, enforcement measures were appropriate. 70 *Fed. Reg.* 76076 (December 22, 2005).

On October 26, 2005, Fortinet filed a request for an advisory opinion under Commission rule 210.79, 19 C.F.R. § 210.79, that would declare that Fortinet’s anti-virus “FortiGate” products incorporating Fortinet’s newly redesigned anti-virus software does not infringe claims 4, 7, 8, and 11-15 of the ‘600 patent and, therefore, is not covered by the Commission’s cease and desist and limited exclusion orders, issued on August 8, 2005. On December 16, 2005, the Commission determined to institute an advisory opinion proceeding to determine whether Fortinet’s redesigned anti-virus software infringes the asserted claims of the ‘600 patent.

On January 11, 2006, the presiding ALJ consolidated the enforcement proceeding and advisory opinion proceeding.

On December 16, 2005, Trend Micro moved for summary determination that Fortinet had violated sections III(B), III(D), and III(E) of the cease and desist order. On January 12, 2006,

the ALJ issued an ID (Order No. 26) granting Trend Micro's motion for summary determination that Fortinet violated section III(B) of the cease and desist order. On February 9, 2006, the Commission determined not to review Order No. 26.

On December 21, 2005, Fortinet filed a request for an additional advisory opinion concerning the so-called Clearswift license, which it later withdrew on February 15, 2006.

On January 27, 2006, Trend Micro and Fortinet entered into a settlement agreement that resolves their dispute before the Commission. On February 14, 2006, Trend Micro and Fortinet filed a joint motion to terminate the consolidated proceedings on the basis of the settlement agreement. The joint motion included a petition to rescind the limited exclusion and cease and desist orders issued in the investigation, and a petition to vacate Order No. 26. On February 27, 2006, the Commission investigative attorney filed a response in support of the joint motion to terminate and in support of the joint petitions to rescind the limited exclusion and cease and desist orders and to vacate Order No. 26.

On February 28, 2006, the ALJ issued an ID (Order No. 31) granting the joint motion to terminate the consolidated enforcement and advisory opinion proceedings based on the settlement agreement. The ALJ also recommended that the Commission rescind the limited exclusion order and cease and desist order issued in the investigation and vacate Order No. 26. No party petitioned for review of the ID.

The Commission has determined not to review the subject ID granting the parties' joint motion to terminate the consolidated enforcement and advisory opinion proceeding. Additionally, the Commission has determined that the parties' settlement agreement satisfies the requirement of section 337(k) and Commission rule 210.76(a)(1), 19 C.F.R. § 210.76(a)(1), for changed conditions of fact or law and has therefore issued an order rescinding the limited exclusion order and cease and desist order previously issued by the Commission in the underlying investigation. Finally, in view of specific terms in the settlement agreement, the Commission has determined to vacate Order No. 26.

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 sections 210.42 and 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42 and 210.76).

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: March 29, 2006