

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
(Advisory Opinion Proceedings)**

**NOTICE OF COMMISSION DETERMINATION TO INSTITUTE
ADVISORY OPINION PROCEEDINGS**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to institute advisory opinion proceedings in the above-captioned investigation.

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 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 under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), was instituted by the Commission on June 3, 2004, based on a complaint filed by Trend Micro Inc. ("Trend Micro") of Cupertino, California. 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 of Sunnyvale, California as the sole respondent.

On May 9, 2005, the ALJ issued his final initial determination (“ID”) 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. The ALJ also found that claims 1 and 3 of the ‘600 patent are invalid as anticipated by prior art and that a domestic industry exists. He also issued a recommended determination on remedy and bonding.

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 on July 18, 2005, by all parties. All parties filed response submissions on July 25, 2005. 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 viruses or worms, components thereof, and products containing same covered by claims 4, 7, 8, and 11-15 of the ‘600 patent.

On September 13, 2005, complainant Trend Micro filed a complaint for enforcement proceedings of the Commission's remedial orders. On October 7, 2005, the Commission determined to institute formal enforcement proceedings based on the complaint to determine whether Fortinet is in violation of the Commission’s cease and desist order issued in the investigation, and what if any enforcement measures are appropriate.

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 FortiGate products incorporating Fortinet’s newly redesigned anti-virus software do not infringe claims 4, 7, 8, and 11-15 of the '600 patent and, therefore, are not covered by the Commission's cease and desist order and limited exclusion order, issued on August 8, 2005.

The Commission has examined Fortinet’s request for an advisory opinion and has determined that the request complies with the requirements for institution of an advisory opinion proceeding under Commission rule 210.79(a). Accordingly, the Commission has determined to institute an advisory opinion proceeding and has referred Fortinet’s request to the presiding ALJ for issuance of an initial advisory opinion.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19

U.S.C. § 1337, and Commission rules 210.75(a) and 210.79(a), 19 C.F.R. §§ 210.75(a), 210.79(a).

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: December 16, 2005