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How Cisco's IP Strategy to Stop Arista Went Bust

By Scott Graham

Two and a half years ago, Cisco Systems Inc. declared IP war on networking rival Arista Networks Inc.

Cisco general counsel Mark Chandler announced on his blog "official action to stop Arista's brazen misappropriation of the fruits of our engineers' labor." He listed 14 patents that Arista was allegedly infringing and called out copyright infringement that was "a strategy, not an accident."

Today, Cisco's case against Arista is hanging by a few tenuous threads. The company lost its copyright trial in December. Cisco has dropped or Arista has been found not to infringe nine of the 14 patents. Of the five that the International Trade Commission has found infringing, Arista has successfully designed around three, with an administrative judge signing off on the third Wednesday.

"They were trying to shut down billions of dollars in sales," said Latham & Watkins partner Douglas Lumish, who represented Arista at the ITC.

That leaves two patents that the ITC has found valid and infringed—and in the last month the Patent Trial and Appeal Board has ruled the opposite, finding both patents invalid.

Cisco is urging the ITC to ignore the PTAB decisions, which aren't yet final, and press ahead with an exclusion order. Arista is pleading with the ITC to hold off until the U.S. Court of Appeals for the Federal Circuit can make final decisions on patent validity.

Photo: Diego M. Radzinschi/ALM

Mark Chandler, Senior Vice President and General Counsel of Cisco Systems, Inc.

But the market has already declared Arista the winner: Its stock is up 60 percent since the December copyright trial and 135 percent in the 30 months since Cisco commenced hostilities. Cisco is up 6 percent and 26 percent over those same periods.

Chandler said on his blog that Cisco will appeal Wednesday's redesign decision to the full commission, but sounded ready to live with the result. "Ultimately, we want Arista to stop using our IP," Chandler wrote, "and if they have indeed redesigned to avoid the involved Cisco patent, we would welcome it as progress in the right direction."

Arista GC Mark Taxay said in a written statement that the ALJ's decision "is an important step in bringing the 944 Investigation to conclusion and we look forward to the commission's final determination."

The two ITC investigations didn't start off well for Arista. An ALJ and later the full commission found that Arista willfully infringed Cisco's 7,162,537 SysDB patent and two others on private virtual networks. The ITC found that Arista, which was founded by executives from Cisco, "has a practice of copying or consulting Cisco features, technology, and manuals in designing its products." Chandler's blog post on the initial ruling was headlined, "The Beginning of the End."

Not long after, Arista brought in Latham & Watkins to take over the ITC proceedings from Fish & Richardson.

Lumish, who in an unrelated case had guided Arista to a high-profile 2015 jury trial win, was joined by Latham partners Bert Reiser, Jeffrey Homrig and Julie Holloway, among others.

They focused Arista's strategy on redesigning its software to adapt to the ITC decisions. Latham and Arista's in-house team worked with "dozens and dozens of engineers" to rewrite the software, and then persuade the ITC there was no longer any need to ban Arista imports—or impose the $560 million penalty Cisco was seeking for just a few months' sales.

"What they really wanted the commission to do is tell Arista to stop selling switches," Lumish said.

Assuming the full commission follows Wednesday's recommendation, that effectively ends the first of the two ITC investigations. But the second investigation also ended in findings of patent infringement, and an import ban that is currently pending review by the U.S. trade representative.

During the last month the PTAB knocked out all of the relevant claims of the two infringed patents in the second investigation—the 6,377,577 and the 7,224,668. Fish & Richardson and Matthew Powers of Tensegrity Law Group teamed up for Arista at the PTAB.

The ITC's administrative law judge had likewise found found the '577 patent claims invalid—but ruled that Arista's challenge is barred by assignor estoppel. That rule forbids named inventors and their privies from assigning their patent rights to another party and then later challenging the patent's validity. Arista executives Andy Bechtolsheim and David Cheriton invented the '577 patent while working at Cisco.

The PTAB doesn't recognize assignor estoppel because the America Invents Act allows anyone to challenge a patent via inter partes review. The Federal Circuit ruled last year that the PTAB's position is unreviewable.

It's not entirely clear what happens when the ITC and PTAB have conflicting views of patent validity. Chandler has said on his blog that while Cisco is disappointed in the PTAB ruling, Cisco intends to appeal and "an import ban and cease and desist order are expected to go into effect beginning July 4."

Stanford law professor Mark Lemley noted that under Federal Circuit case law, a decision of invalidity from either a district court or the PTAB can render a patent unenforceable. "The patentee needs to win in both places," he said.

University of Santa Clara law professor Brian Love said that the ITC has issued an exclusion order under similar circumstances, but stayed it pending Federal Circuit review.

Similarly, Arista is now asking the ITC to at least hold off enforcing the '577 or the '668 patents until the Federal Circuit can review the PTAB's validity decisions.

Cisco argues in response that—unlike district court findings of invalidity—PTAB rulings aren't binding on the ITC until they're affirmed by the Federal Circuit. And that outcome in this case is "highly dubious," Adduci, Mastriani & Schaumberg partner Paul Bartkowski argues in Cisco's opposition.

"Arista's founders developed the '577 technology when they worked at Cisco, assigned it to Cisco for substantial consideration, left Cisco and built their new business by copying that technology, and when challenged by Cisco for doing so turned around and argued that their '577 invention has been invalid all along," states Bartkowski, whose firm has been teaming up with Kirkland & Ellis at the ITC.

Meanwhile, Cisco last week launched its Federal Circuit appeal from the San Jose district court copyright trial. A jury found that Arista had infringed the copyright on at least one of Cisco's command line interfaces, but that the interface was not protectable under the scenes-a-faire doctrine, which covers "widely accepted programming practices within the computer industry."

Judge Beth Labson Freeman dismissed Cisco's JMOL motion last month. She noted that it was Cisco itself that had proposed the jury instruction on scenes-a-faire.

Cisco also can still pursue damages over the same patents in district court that it has asserted in the ITC. In fact, Chandler vowed to do as much in Wednesday's blog post. "Cisco's goal," he wrote, "remains to stop Arista from the continued intentional and pervasive infringement of our IP.

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