

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

ACCELERATION BAY LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 16-453 (RGA)
)	
ACTIVISION BLIZZARD, INC.,)	PUBLIC VERSION
)	
Defendant.)	
)	

**PLAINTIFF ACCELERATION BAY LLC’S SUPPLEMENTAL
BRIEF REGARDING ACTIVISION BLIZZARD, INC.’S INFRINGEMENT
THROUGH THE SALE, MANUFACTURE AND USE OF SOFTWARE**

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Acceleration Bay LLC (“Acceleration Bay”) submits this supplemental brief in opposition to Activision Blizzard, Inc.’s supplemental opening brief (D.I. 565).

I. INTRODUCTION

Activision admits that *it sells* Destiny and Call of Duty. *See e.g.*, D.I. 565 at 13. Indeed, Activision receives billions of dollars in profits from its sales of millions of copies of these games and retains full ownership and total control over every aspect of the games and the infringing networks they comprise. These facts alone are sufficient to deny Activision’s motion for summary judgment that it does not make, use *or sell* the infringing systems.

Nonetheless, Activision seeks to immunize itself from infringement, arguing that the video games cannot infringe the Asserted Claims of the ‘344 and ‘966 Patents based on the infirm position that video games are software and software supposedly cannot infringe system claims. At the recent May 17th hearing on this motion, Activision went a step further and claimed that a valid system claim cannot cover software. This position flies in the face of recent Federal Circuit cases which affirmatively found that software system claims are patent eligible.

Activision also *makes and uses* the accused infringing systems. There is abundant evidence that Activision makes and uses the computer network systems covered by the Asserted Claims. The *Centillion* case and other controlling authorities establish that an accused infringer makes or uses a computer system by making or selling the components of the system and uses a computer system by putting into use the components and benefiting from their use. *Centillion Data Sys., LLC v. Qwest Commc’ns Int’l, Inc.*, 631 F.3d 1279, 1284 (Fed. Cir. 2011).

Here, the claim elements at issue for the claimed networks are “participants,” which has been construed to mean computer processes, *i.e.*, software. There is ample evidence that Activision makes, sells and uses the infringing software, much of which Activision simply

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