

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.,)	REDACTED
)	PUBLIC VERSION
Defendant.)	

**DEFENDANT’S MOTION TO PRECLUDE THE NEW DAMAGES THEORIES
PLAINTIFF RAISED AT THE PRETRIAL CONFERENCE**

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That a prevailing patentee is entitled to no less than a reasonable royalty “does not mean that the rules of evidence do not apply.” *AVM Techs., LLC v. Intel Corp.*, 927 F. Supp. 2d 139, 146 (D. Del. 2013). Acceleration “cannot introduce a damages theory to the jury without establishing its reliability.” *Id.* at 147. After the Court excluded Acceleration’s two attempts to state an admissible claim for a reasonable royalty, Acceleration now intends to present to the jury two “fact-based” approaches it described at the pretrial conference – (1) the cost to write the entire code base for the accused products, including code having nothing to do with accused networking functions and (2) the revenue for the accused products based on product sales.¹ These are nothing more than the bases for the royalty rates that the Court previously excluded because plaintiff could not identify admissible evidence to support its proposed rate. D.I. 600. Now that both of its proposed rates have been excluded, these untethered proposed royalty bases cannot become admissible when recast as “fact-based” theories.

To be clear, what Acceleration is proposing is to put [REDACTED] numbers before the jury with no reasonable royalty calculation, and to ask the jury to award a large verdict. That is legally impermissible. *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1315 (Fed. Cir. 2011). Damages must be based on admissible facts. Contrary to Acceleration’s arguments, *Apple Inc. v. Motorola, Inc.*, does not support a different rule. In that case, the plaintiff’s damages expert actually put forward an admissible calculation of reasonable royalty damages. 757 F.3d 1286, 1329 (Fed. Cir. 2014). Acceleration’s failure to propose any admissible evidence requires exclusion of its new damages theories and related facts.

¹ At the pretrial conference, Acceleration also described a revenue approach based on the number of users. Yesterday afternoon, Acceleration advised that it would not rely on the number of users as a separate royalty base, but maintains it will present that information to the jury. Ex. 2.

I. Background

On August 29, 2018, the Court excluded Acceleration's only expert opinion on a reasonable royalty calculation. D.I. 578. Acceleration proposed a new reasonable royalty of 15.5% applied to three royalty bases. On October 17, 2018, the Court precluded this royalty rate and its associated royalty bases as unsupported by admissible evidence. D.I. 600.

At the pretrial conference, Acceleration for the first time stated that it would present a "fact-based damages theory" to the jury. In truth, this "fact-based damages theory" is nothing more than the same royalty bases excluded by the Court's October 17 Order but now with no royalty rate or damages calculation whatsoever attached to them. Stated simply, Acceleration plans to present billion-dollar figures that supposedly constitute a "fact-based damages theory" together with a purported apportionment and a *Georgia-Pacific* analysis that is not tied to any royalty analysis or damages calculation, and then leave it to the jury to speculate on a damages award.

Acceleration's first theory is a purported "cost savings" model based on Dr. Valerdi's estimate that re-architecting the accused games would have cost [REDACTED]. Ex. 1 (Pretrial Conf. Tr.) at 4:9–11. Dr. Valerdi did not provide a "cost savings" analysis for purposes of determining damages. Rather, Dr. Valerdi provided a cost estimate for writing and maintaining the entire code base for the accused products.² To do this, Dr. Valerdi used a computer model to estimate the amount the accused games should have cost in total to develop, and declared that estimate to be the same as a redesign cost. Ex. 3, Valerdi Dep. Tr. 100:6–11. He input into this model an estimate of the total lines of compiled code in the accused products. Valerdi Report (D.I. 444, Ex. C-2) at 4, 12–13; Ex. 5 (Valerdi errata). He did not confine his cost analysis to the code related to the accused

²"I further relied on their opinions that there are no viable non-infringing alternatives to the Asserted Claims, but that, if there were such an alternative, it would require rearchitecting the game to develop a new network architecture and associated functionality. I set forth to estimate the cost to do so." Valerdi Report (D.I. 444, Ex. C-2) at 3.

functionality in this case. *Id.*; *see also* Ex. 3, Valerdi Dep. Tr. 97:19–98:15. His analysis has nothing to do with the patented technology, and he testified (a) he did not know what is accused of infringement in the games, (b) he did not consider the patents at all in his analysis. Ex. 3, Valerdi Dep. Tr. 97:19–98:15. He also did not consider the actual cost to design the games. Ex. 3, Valerdi Dep. Tr. 100:12–20.

Dr. Meyer stated that Dr. Valerdi’s estimates *were not* an “indicator of value” for the patents that would have been used by the parties in a hypothetical negotiation:

“The conservative estimates by Dr. Valerdi, taking into account only a portion of the necessary costs and not accounting for the risk of delay or failure, further reinforce that an NIA [non-infringing alternative], even if one were to be technologically feasible, would have been unlikely to be economically viable **at the time of the hypothetical negotiation**. Hence, while the maximum willingness of the Defendants to pay a royalty is likely to have been quite high, **it is necessary to rely on other indicators of value available in the marketplace to determine a reasonable royalty in this matter.**”

Meyer Report (D.I. 444, Ex. C-3) at ¶57 (emphasis added).

Acceleration’s second proposed royalty theory is a “revenue model” based on “revenue and the profits of the infringing technology over the relevant time period.”³ Ex. 1 (Pretrial Conf. Tr.) at 4:14–17. Acceleration also stated that it plans to introduce evidence of the number of users and units of the games as an additional data point.

Acceleration stated that Dr. Meyer would apportion one or more of these royalty bases in the manner set forth in her expert report. With respect to World of Warcraft, Dr. Meyer did not provide any apportionment—she opined that one hundred percent of World of Warcraft revenues (from both product sales and user subscriptions) are attributable to the alleged infringement. At the pretrial conference, Acceleration confirmed that the alleged infringement claim for World of Warcraft was

³ Acceleration has not indicated what a “revenue-based model” based on “revenue and profits of the infringing technology” actually is. It is unclear whether Acceleration plans to use both revenue or profits or both. In any event, Acceleration has no witness who can explain such a model.

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