

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.,)	
)	
Defendant.)	

**DEFENDANT ACTIVISION BLIZZARD, INC.’S MOTION FOR LEAVE
TO FILE SUMMARY JUDGMENT BASED ON NEW FACTS**

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INTRODUCTION

Activision respectfully requests leave of Court to file a renewed motion for summary judgment to address non-infringement issues relating to the “m-regular” claim limitations and the extent to which Activision can be found to infringe method claims under §271(a) through the sale of software products. The Court previously denied Activision’s motion on these issues, noting that they were “at best cursorily briefed.” The Court currently is considering additional briefing on similar issues in the related *Acceleration Bay v. Electronic Arts* lawsuit.

Further briefing on these issues is needed because of the new damages theories set forth in Acceleration’s damages proffer, which reveal fatal flaws with its underlying liability theories, including (1) whether Acceleration has properly apportioned for what it now claims are the infringing networks and (2) whether Acceleration may seek damages based on product sales (including sales outside the United States) for the alleged infringement of method claims.

Activision, therefore, respectfully requests the opportunity renew its motion for summary judgment (D.I. 440, 442) on these focused and case dispositive liability issues that are foundational to the new damages theories proffered by Acceleration.

BACKGROUND

A. Summary Judgment

1. Both parties filed motions for summary judgment on February 2, 2018. (D.I. 439, 448; D.I. 440, 442). Oppositions and replies were filed were filed on February 23 and March 9, 2019, respectively. (D.I. 474, 475, 503, 505.)

2. Among other issues, Activision’s original motion sought summary judgment on the following issues relevant here: a) The accused Call of Duty and Destiny products cannot infringe the asserted method claims as a matter of law; and b) The accused products are not infringing because they are not configured to maintain an m-regular state.

3. The Court issued its Memorandum Opinion in August 2018. (D.I. 578). While the Court resolved many issues in Activision’s favor,¹ the Court declined to resolve the above issues which were admittedly cursorily briefed. (D.I. 578 at 23).

B. New Circumstances and Admissions After Summary Judgment Briefing

1. Continuance of the October 2018 Trial

4. On September 28, 2018, Activision filed a Motion to Preclude (D.I. 581) that “revealed the magnitude of the implications of [the Court’s] ruling” precluding Acceleration from relying on the *Uniloc* verdict at trial. (D.I. 619 at 1).

5. At the pretrial conference, “Plaintiff advocated ... that it still had admissible damages theories.” (*Id.*) And, even if it did not, Plaintiff assured the Court that it eventually would “com[e] up” with one. (D.I. 606 at 109:7-11).

6. The Court requested additional briefing, which was completed just five days before the scheduled trial. (*See* D.I. 601, 603, 609). Given the timing, the Court indefinitely postponed trial “pending resolution on the admissibility of Plaintiffs damages case.” (D.I. 619 at 2).

2. Acceleration Retains New Expert

7. After continuing trial, the Court granted Acceleration one “final opportunity to present [the Court] with an admissible damages case.” (D.I. 619 at 2).

8. A “supplemental” report from a new expert, Mr. Parr, was served on December 7, 2018. (D.I. 633.) Acceleration’s proffer was filed on March 15, 2019. (D.I. 641).

3. Mr. Parr’s New Opinions and Assumptions

¹ D.I. 578 at 7-9 (‘634 Patent invalid as indefinite), *id.* at 9-18, 19-20 (Call of Duty and Destiny do not infringe the asserted ‘344, ‘966, and ‘497 Patents); *id.* at 20-23 (‘147 and ‘634 Patents invalid as patent-ineligible), *id.* at 26-30 (excluding opinions of Dr. Lawton).

9. Mr. Parr’s “supplemental” report outlines seven different damages calculations: a) five based on alleged “costs-savings” Activision realized *in 2012-2014*; b) a sixth based on *worldwide revenues*; and c) a seventh based on *worldwide users*. (D.I. 642-1, Parr Report.) For each of these opinions, Mr. Parr assumed that the patents-in-suit “enable large-scale, unlimited online collaborations with numerous participants continually joining and leaving an application such as multiplayer online games.” (D.I. 642-1 at ¶35).

10. In his “cost-savings” opinions, “Mr. Parr opined that [Activision and Boeing] would have agreed to a royalty based on the development savings for the first non-infringing alternative that Activision would have needed” *in September 2012*. (D.I. 641 at 8). Because World of Warcraft “is always a multiplayer game,” Mr. Parr assumed “that the game is always infringing the Patents-in-Suit.” (D.I. 642-1 at ¶212).

11. Mr. Parr’s revenue- and user-based opinions rest on the following assumptions:

- “all U.S. sales of the infringing *products are infringing*” (*id.* at ¶213);
- “*sales outside the U.S. are infringing* to the extent ... the products being sold were made, used, sold, or offered for sale in the U.S.” (*id.*);
- “*a product manufactured in the United States*, but sold outside of the United States *is deemed to infringe*” (*id.*);
- “*foreign located players* [that] are participating in the networks ... hosted in the United States ... *should be deemed used in the United States* by Defendant” (*id.*); and
- “worldwide sales are infringing” because “people outside the United States are able to connect to people inside the United States” (*id.* at ¶¶ 214-215).

ARGUMENT

Recognizing, as the Court noted, that Activision’s earlier summary judgment briefing failed to adequately elucidate the issues presented to the Court, Activision respectfully requests leave to succinctly renew the issues outlined below based on various faulty assumptions of law and fact that permeate nearly every aspect of Acceleration’s damages proffer.

Addressing the issues below on summary judgment likely will simplify the Court's task in resolving all the various issues raised by the damages proffer, as they would either be dispositive of some or all liability issues, or at a minimum help explain Acceleration's infringement theories that are foundational to assessing the appropriateness of its damages proffer.²

A. Mr. Parr Assumed The Manufacture And Sale Of Call Of Duty And Destiny Infringe The Asserted Method Claims Despite Decades Of Precedent To The Contrary³

Acceleration seeks "a reasonable royalty" for the alleged infringement of method claims by Call of Duty and Destiny. There is no material dispute of fact, however, that Activision does not perform any of the claimed method steps. Rather than base his reasonable royalty calculation on the alleged infringement via performance of the patented methods, Mr. Parr relied on clearly erroneous assumption that "sales" and "manufacture[]" of these games are "deemed to infringe" the asserted method claims. (*See* ¶11).

Mr. Parr's assumptions run contrary to decades of Federal Circuit precedent. *Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 774-75 (Fed. Cir. 1993) ("The law is unequivocal that the sale of equipment to perform a process is not a sale of the process within the meaning of section 271(a)."); *Ricoh Co., Ltd. v. Quanta Comput. Inc.*, 550 F.3d 1325, 1335 (Fed. Cir. 2008) ("[A] party that sells or offers to sell software containing instructions to perform a patented method does not infringe the patent under § 271(a).").

Accordingly, based on the damages calculations raised in Acceleration's proffer,

² While Activision requests leave to address each of the listed issues, Activision would appreciate an opportunity to revisit either of these issues that are of particular interest to the Court.

³ Activision addresses the impact of this issue on the admissibility and reliability of Mr. Parr's opinions in its Proffer Response. Summary judgment is warranted for the reasons discussed there.

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