

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,

Plaintiff,

v.

ACTIVISION BLIZZARD INC.,

Defendant.

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Civil Action No. 16-453-WCB

ORDER RESOLVING EVIDENTIARY DISPUTES

This order rules on various evidentiary disputes that the parties have raised through letter briefs:

I. Survey Evidence

Acceleration Bay may use the contested survey evidence for the limited purpose of establishing that the allegedly infringing large game modes in Call of Duty are of equal or greater importance compared to the small, non-infringing game modes.

The court has twice addressed the survey evidence Acceleration Bay seeks to introduce. The surveys at issue are Activision's own surveys, PTX 123, 124, and 718. In Dkt. No. 692, the court excluded various opinions of Mr. Parr, in which he used the contested survey evidence as the basis for apportioning the value of the patented technology. The court reasoned that Mr. Parr's methodology failed to account for features such as the "story, characters, game quality, ease of use, quality of customer service, and compatibility with popular platforms." *Id.* at 9. In Dkt. No. 762, the court reiterated that "Acceleration will not be permitted to rely on damages theories that have

already been excluded,” including apportionment based on Activision’s consumer survey evidence. The court did not, however, categorically exclude the surveys.

Acceleration Bay now represents that it intends to introduce the surveys to establish that the infringing large Call of Duty game modes are at least as important to Activision customers as the small modes that do not implicate the patented technology. Among other things, the surveys at issue identify large multiplayer game modes as the “primary mode driving” the purchase of Call of Duty games. The surveys are a reliable means of establishing this limited fact. Acceleration Bay’s use of the surveys for this limited purpose does not contradict the court’s previous orders excluding Mr. Parr’s damages apportionment opinions based on the same surveys.

II. Foreign Sales of World of Warcraft

Acceleration Bay may introduce evidence of foreign sales of World of Warcraft if it provides evidence that foreign World of Warcraft users are supported by the allegedly infringing U.S. based system of servers. If, at the point that Acceleration Bay seeks to introduce evidence of foreign World of Warcraft sales, Acceleration Bay has not yet introduced such evidence, the evidence of foreign World of Warcraft sales may be conditionally admitted.

Activision objects to the admission of documents containing revenues attributable to foreign sales of World of Warcraft. Acceleration Bay’s theory is that Activision uses the infringing system, which consists of servers located entirely within the United States, to support North and South American foreign World of Warcraft players. Activision contends that Acceleration Bay cannot prove that Activision serves foreign World of Warcraft players via its U.S. based system.

Acceleration Bay’s infringement theory as to North and South American World of Warcraft players is plausible. Accordingly, Acceleration Bay will be permitted to introduce evidence of foreign World of Warcraft sales and revenues.

III. Offers to License/Sell Patented Technology

Activision may introduce evidence regarding Boeing's offers to sell or license the patents at issue. Activision may not introduce evidence that Boeing's offers were declined.

Activision seeks to introduce, over Acceleration Bay's objection, that in 2010 Boeing offered to sell the patents at issue in this case, together with others, for \$1,000,000. No sale was consummated at that time. Acceleration Bay argues that evidence of offers to sell or license patents is not admissible to show the value of a license to the patents in suit under Fed. R. Evid. 403. The cases cited by Acceleration Bay for that proposition, however, relate to efforts by patent owners to introduce evidence of the offers made by the patent owner to sell or license the patents. The courts have regularly rejected such evidence on the ground that the patent owner could offer to sell the patent at a vastly overstated price, which would not bear any relationship to the actual value of the patent. *See Whitserve, LLC v. Computer Packages, Inc.*, 694 F.3d 10, 29–30 (Fed. Cir. 2012) (“We acknowledge that proposed licenses may have some value for determining a reasonable royalty in certain situations. Their evidentiary value is limited, however, by, *inter alia*, the fact that patentees could artificially inflate the royalty rate by making outrageous offers.”); *see also Deere & Co. v. Int'l Harvester Co.*, 710 F.2d 1551, 1557 (Fed. Cir. 1983); *Atl. Thermoplasstics Co. v. Faytex Corp.*, 5 F.3d 1477, 1482 (Fed. Cir. 1993); *Miics & Partners*, No. 14-804, 2017 WL 6268072, at *4 (D. Del. Dec. 7, 2017); *Wi-Lan, Inc. v. LG Elecs., Inc.*, No. 18-cv-1577, 2019 WL 5681622 at *7 (S.D. Cal. Nov. 1, 2019).

In this case, by contrast, the offer is not being used by the patent owner, but by the accused infringer to show that the patent owner was willing to license or sell the patents for a particular amount. In that setting, the amount of the offer is quite relevant, as it shows that a license could have been acquired for the price being offered by the patent owner. *See In re ChanBond, LLC*

Patent Litig., No. 15-842, 2020 WL 550786, at *3 (D. Del. Feb. 4, 2020) (“Outside of the market approach, the 2012 AST offer itself is independently relevant to the valuation of the patents-in-suit and may come in as evidence of such.”); *ViaTech Techs., Inc. v. Adobe, Inc.*, No. 20-358, 2023 WL 5975219, at *13-14 (D. Del. Sept. 14, 2023); *AVM Techs., LLC v. Intel Corp.*, No. 15-33, 2017 WL 1787562, at *2 (D. Del. May 1, 2017). In both *ChanBond* and *ViaTech*, the court held the evidence of the offer admissible but ruled that the proponent of the evidence would not be permitted to introduce the fact that the offer was not accepted, on the ground that such additional evidence would be unduly prejudicial.¹

Accordingly, evidence of Boeing’s offers to sell or license the patented technology will be admitted for purposes of establishing Boeing’s valuation of the patents. Activision may not further introduce evidence that the offers were not accepted.

IV. Top Line User Numbers

Acceleration may introduce evidence regarding the total number of Call of Duty and World of Warcraft users.

¹ Acceleration Bay argues that Judge Andrews in *ChanBond* found the evidence of the to be inadmissible. That is not an accurate reading of the case. The court in that case excluded the evidence of the offer as the basis for the defendant’s “market approach” calculation of the reasonable royalty. However, the court stated that evidence of a patent owner’s offer would be relevant in other settings, as long as evidence was not admitted that the offer was not accepted. Judge Andrews’ ruling on that point is clear not only from his opinion in *ChanBond*, but also from his later opinion in *ViaTech*, in which he held such an offer was admissible as long as it was not accompanied by evidence that the offer was not accepted. *See ViaTech*, 2023 WL 5975219, at *14 (“While *ViaTech*’s offers to see the ’567 patent are relevant to Dr. Mody’s damages opinions, since they represent *ViaTech*’s placement of a value on owning the patents, the fact that *ViaTech* was unsuccessful is irrelevant and would be unfairly prejudicial. Any reference to *ViaTech*’s failure to sell or license the patent are excluded.”). Likewise statements Judge Andrews made during the hearing that led to the opinion in *ChanBond* make it clear that he regarded evidence of a patent owner’s offer to sell or license the patent to be relevant. *See* No. 15-cv-842, Dkt. No. 471, at 55, 114 (Nov. 25, 2019) (“I think to the extent that there is an offer to sell, that’s a kind of check on the reasonableness of the damages opinions being offered by plaintiff’s damages expert that seems to be very relevant.”).

Activision objects to the inclusion of total user numbers for World of Warcraft and Call of Duty because the court has excluded any per-user damages opinions. Activision instead would have Acceleration refer to the number of users who use the accused functionality, which Activision engineers testified to in their depositions. Acceleration argues that the total number of users is relevant to various disputed issues, such as the overall profitability, popularity, and commercial success of the games.

The total number of users is at least minimally relevant to the issues Acceleration Bay highlights. That evidence does not unfairly prejudice Activision. Accordingly, Activision's objection on this issue is overruled. Acceleration Bay may introduce evidence of the total number of Call of Duty and World of Warcraft players; however, Acceleration Bay may not attempt to equate the number of users to the royalty award.

V. Form of World of Warcraft Revenues

Acceleration may present streamlined spreadsheets showing only annual revenues for World of Warcraft. Activision objects to Acceleration Bay presenting simplified versions of the revenues, and instead seeks to require Acceleration to present those World of Warcraft revenues in the form in which they were produced, which was on a quarterly basis. The essence of Activision's argument is that Acceleration Bay's simplification of the data obscures the downward trend in revenues. If Activision believes this is important to its case, it may develop that argument on cross. Acceleration Bay may use the data in its simplified form.

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