

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ACCELERATION BAY LLC,)
)
Plaintiff,)
)
v.) C.A. No. 16-454 (RGA)
)
ELECTRONIC ARTS INC.,)
)
Defendant.)

**DEFENDANT ELECTRONIC ARTS INC.'S MOTION FOR LEAVE TO FILE A
SUPPLEMENTAL SUMMARY JUDGMENT BRIEF BASED ON LEGAL RULINGS OF
THE COURT**

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This Court’s March 23, 2020, Memorandum Opinion in *Acceleration Bay LLC v. Take-Two Interactive Software, et al.*,¹ clarified the scope of the claims, particularly with respect to the terms “participant” and “m-regular,” and found that the client-server network used in Take Two’s NBA2K videogame did not infringe because it was not an m-regular network. The Court rejected Acceleration’s argument that the Park Relay Server was not a “participant” in the accused network. It noted that Acceleration’s experts admitted that the Park Relay Server is a participant and found that it was a participant because it “transfers data back and forth between other network participants.”² The Court concluded that the patents’ claimed m-regular, incomplete network was “fundamentally different” than a “network with a central relay server.”

All of the accused EA games use client-server networks that are materially the same as NBA2K. Just as in *Take Two*, Acceleration argued that the EA Server is not always a participant in the accused network at the application layer; and therefore, the accused network is not actually a noninfringing client-server network. The Court’s findings in *Take Two* apply here as well. The EA DirtyCast server transfers data back and forth between other network participants, and Acceleration’s experts admit that it is a participant in the accused networks. Therefore, the Court’s summary judgment decision in *Take Two* should also preclude any finding of infringement of the topology patents (‘344,’966, ‘147, and ‘069 patents) against EA.³ EA requests 15 pages of supplemental briefing to explain why the *Take Two* holding applies in this case. EA is prepared to file that brief within five days from receiving permission to do so.

¹ C.A. No. 16-455 RGA, D.I. 492 (D. Del. March 23, 2020).

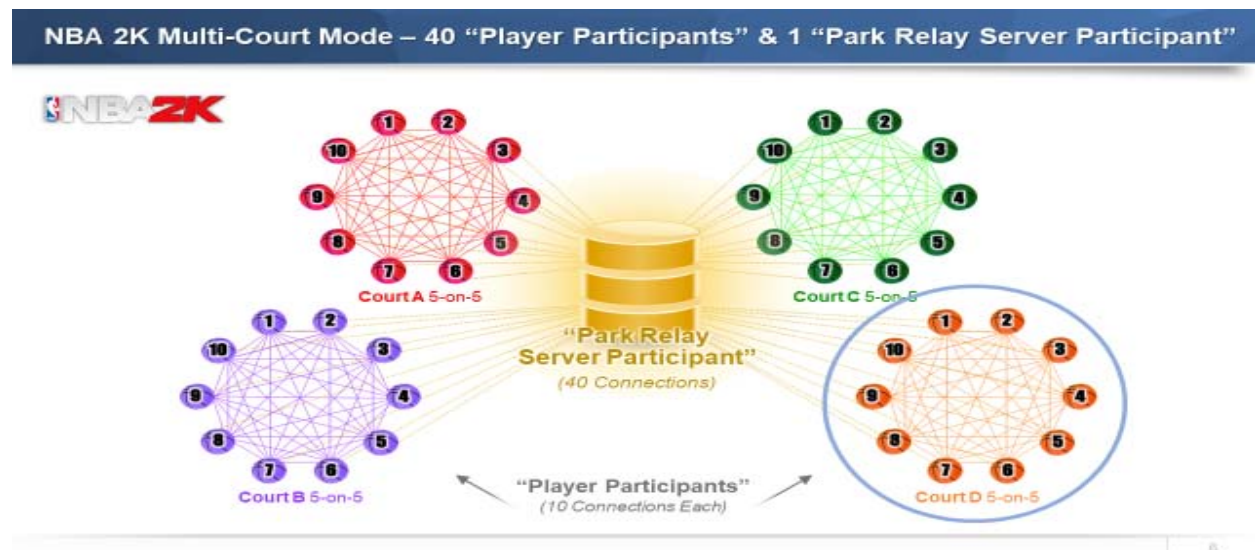
² *Id.*, at 17.

³ EA’s summary judgment brief is D.I. 426. Acceleration’s opposition brief is D.I. 467. EA’s reply brief is D.I. 476. The parties also submitted supplemental briefs at D.I. 526, 528, and 535. In this motion references to an exhibit of D.I. 426 are references to the exhibits EA submitted in support of summary judgment, which can be found at D.I. 427–434, 436, 466, and 477.

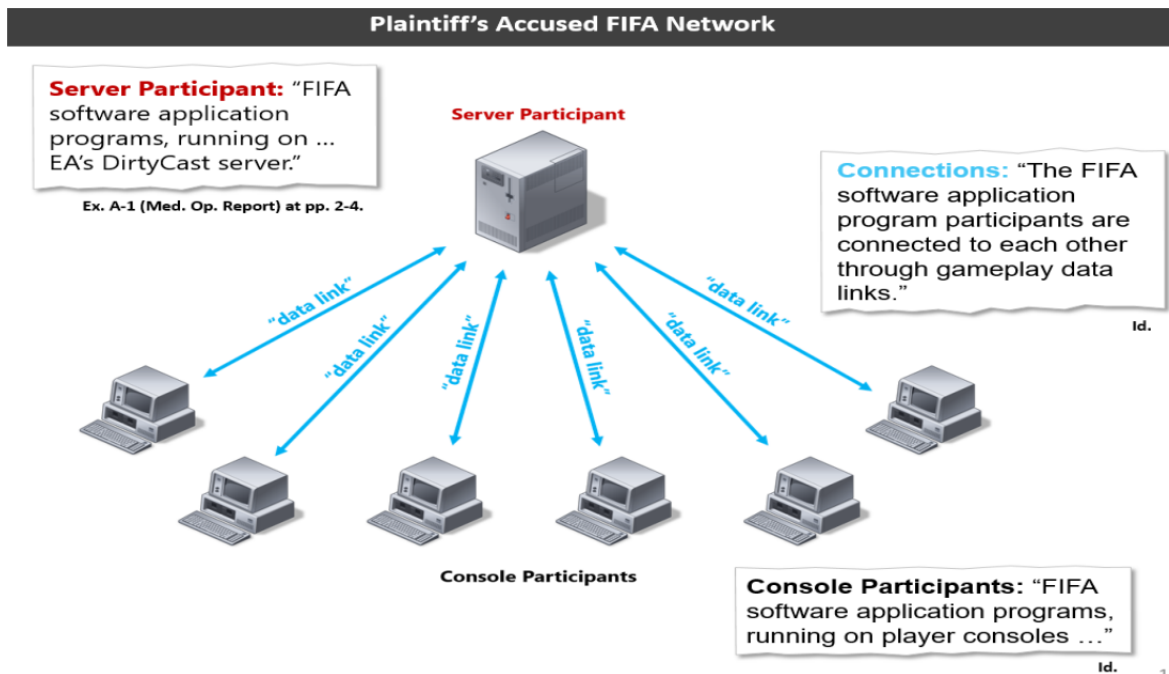
ARGUMENT

In opposition to EA’s Motion for Summary Judgment on the topology patents, Acceleration’s principal arguments were exactly the same as the arguments that the Court rejected in *Take Two* regarding NBA2K. Acceleration presented four infringement theories against EA, and EA explained how each of them failed because the accused network was a noninfringing client-server network where the “game console participants” were each directly connected to the “DirtyCast Server Participant.” As a result, the network can never be m-regular because the server always has more connections than the game console participants.

In *Take Two*, the Defendants presented a diagram of the accused “NBA2k Mesh Network” showing that each of the “Player Participants” is connected to the “Park Relay Server Participant”:



Similarly, EA presented a diagram showing that each of the “Console Participants” is connected to the “Server Participant”:



In *Take Two*, Acceleration acknowledged that the network depicted was the correct one and that it was a noninfringing client-server network. *Take Two* D.I.⁴ 463, Ex. E-5 (Mitz.Tr.) at 162:9–167:19. Acceleration argued that *NBA2K*'s client-server topology was the "network level" topology and that infringement was supposedly occurring at the "application layer." *Take Two* D.I. 490 at 89-100 (e.g. "our experts are pointing to the application layer"; "it's the number of connections at the application layer that makes the network both M-regular and incomplete.").

So too with EA. Acceleration acknowledged that EA's depiction was correct, but argued that the network was nevertheless infringing at the application layer. *See, e.g.* D.I. 467 at 2-3; D.I. 525, 73-100.⁵

⁴ "Take Two D.I." refers to the docket index in the *Take-Two Interactive Software* case.

⁵ E.g. 74:21-75:21 ("THE COURT: ...but at the network level, what is wrong with their diagram? Maybe it's an oversimplification, but if it bears any resemblance to reality at that level, it's not m-regular and incomplete. Right? MR. FRANKEL: That's correct, Your Honor." "THE COURT: ... if you have to win at the network level, you lose, on these four patents. MR. FRANKEL: For these games, yes.").

In both cases, Acceleration argued that the admittedly client-server network was nevertheless an infringing m-regular, incomplete network because, according to Acceleration, the Park Relay Server (Take Two) and DirtyCast Server (EA) are not participants at the “application layer” but were instead simply part of the “plumbing” of the network:

| <i>Take Two Interactive MSJ hearing</i> | <i>EA MSJ hearing</i> |
|---|--|
| <p>“MR. FRANKEL: It’s [the Park Relay Server] a participant -- so it’s a participant at the network layer, but not at the application layer.” Take Two D.I. 490 at 90:20-22.</p> <p>“MR. FRANKEL: ... they’ve added to this chart participant [the Park Relay Server], but it’s part of the plumbing that’s connecting everyone at the application layer. So there are ten application layer connections per participant. The park relay server is not playing the game. There are 40 players playing the game. <i>Id.</i> at 90:1-9.</p> | <p>“we have never said, we at Acceleration Bay or the experts, that the DirtyCast server is always a participant.” D.I. 525 at 94:15-94:24.</p> <p>“when the DirtyCast server is taking the messages and processing them, instead of just passing them along like plumbing, then it is a participant at the application layer. But that’s very rare. Almost all of the time it is a node at the network layer that receives the message and just passes it along.” <i>Id.</i> at 95:14-95:19.</p> <p>“The DirtyCast server is only a participant in limited circumstances. ... We have never said that the participant, that the DirtyCast server is always a participant at the application layer. <i>Id.</i> at 98:2-9.</p> |

In *Take Two*, the Court rejected Acceleration’s argument that there was infringement at the application layer because the Park Relay Server was not really a participant in the accused network. The Court clarified the meaning of the term “participant” appropriately rejected Acceleration’s argument that a central server in the network may be ignored for purpose of determining whether the network is m-regular:

Plaintiff counters that the server is not a participant in the game. (D.I. 490 at 90:16-17). This is surely true in the sense that the server is not playing basketball. The server is, however, a participant in the network because it transfers data back and forth between other network participants. These patent claims are directed to network management, so what matters is whether the server is a participant in the network, not whether it is making jump shots or grabbing rebounds. Dr. Mitzenmacher, Plaintiff’s own expert, wrote that the relay servers “are participants in the NBA 2K Mesh Network because they can equally send and

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