

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

ANCORA TECHNOLOGIES, INC.,

Plaintiff,

v.

NINTENDO CO., LTD., and RETRO
STUDIOS, INC.

Defendants.

CIVIL NO. 6:21-CV-738-ADA

**RETRO STUDIOS, INC.'S MOTION FOR
SUMMARY JUDGMENT OF NON-INFRINGEMENT**

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1. Introduction

Retro does not belong in this patent infringement case. The Complaint alleges infringement based on the use of over-the-air updates to Nintendo game consoles, and then verification of the updates on the Nintendo game consoles. Because Retro is a game development studio and has no involvement in either of these activities, there can be no dispute of material fact that Retro does not infringe the asserted patent.

Retro previously moved to dismiss the Complaint because Ancora failed to plead any activities performed by Retro, as opposed to Retro's parent, Nintendo Co., Ltd. ("NCL"). *See* Dkt. 17 ("Motion to Dismiss"). Ancora's recently-served preliminary infringement contentions ("PICs") now confirm that all of the allegedly infringing activities are activities performed by NCL or non-party Nintendo of America Inc. ("NOA"), and not Retro.

Ancora makes only two, faulty attempts to implicate Retro. First, Ancora relies on a statement in an unrelated complaint by NOA that does not mention Retro at all, but says that game software and system software (e.g., the operating system) use similar security measures. But as explained by the sworn declarations attached hereto, NCL—not Retro—is responsible for the security measures for both game software and system software. Second, Ancora presents unsupported allegations that Retro controls the over-the-air update and verification processes. But far from controlling those processes, Retro has essentially no involvement in either.

Retro is not responsible for and does not perform the functionality accused of infringement, so judgment of non-infringement is appropriate as to Retro.

2. Relevant Facts

2.1 The Complaint

The Complaint names NCL and Retro as defendants. Ancora accuses NCL and Retro of directly infringing U.S. Patent No. 6,411,941 ("the '941 patent"). Compl. (Dkt. 1), ¶ 34. The '941

patent expired over three years ago. *See* '941 Patent (Dkt. 17-2) (priority claim to 1998). Ancora does not allege that Retro indirectly infringes the '941 patent, presumably because Ancora gave no pre-expiration notice of the patent.

2.2 Retro Studios, NCL, and NOA

Retro is a game development studio that develops games for Nintendo game consoles. Little Decl., ¶ 4; Compl. ¶ 4. Retro is one among hundreds of game developers that develop games for Nintendo game consoles, and it has developed six game titles. Dkt. 17-3 (www.retrostudios.com/games/). Retro submits the games it develops to NOA and NCL for approval. Little Decl., ¶¶ 5–6. After submitting a game to NOA and NCL, Retro has no involvement in the sales or distribution of that game to end users or to Nintendo game consoles. *Id.* Retro does not develop software for any Nintendo over-the-air update server, or any game console system software (i.e., the operating system and boot-related software). Little Decl., ¶¶ 10–12.

NCL and NOA are responsible for the distribution, sales, and delivery of the games that Retro develops, as well as for the Nintendo game consoles themselves. NCL is responsible for designing and coordinating manufacture of Nintendo game consoles. Tokunaga Decl., ¶¶ 5–9; Wada Decl., ¶¶ 5–9. NOA is responsible for sales and distribution of the Nintendo game consoles in the United States. Kiel Decl., ¶ 5. When Retro delivers game software to NCL and NOA for approval, it is NCL and NOA that approve, package, and deliver that game software to game consoles in any over-the-air updates. Little Decl., ¶¶ 5–6; Tokunaga Decl., ¶¶ 10–14; Wada Decl., ¶¶ 10–13. The software on the game consoles that performs the alleged “verification” and installation of the game update is developed by NCL. Tokunaga Decl., ¶¶ 7–11, 15–17; Wada Decl., ¶¶ 7–11, 14–16.

2.3 The '941 Patent

The '941 patent describes a method of using license information to verify that software is

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