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6 *Counsel of Record
7
8 Of Counsel:
9 SCOTT HOVER-SMOOT
10
11 Attorneys for Defendant-Appellant
12 Activision, Inc.

HOWARD
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CANADY
ROBERTSON
& FALK
A Professional Corporation

11 UNITED STATES COURT OF APPEALS
12 FOR THE FEDERAL CIRCUIT

14 THE MAGNAVOX COMPANY, a corpora-) No. 86-852
15 tion, and SANDERS ASSOCIATES,)
16 INC., a corporation,)
17 Plaintiffs-Appellees,)
18 vs.)
19 ACTIVISION, INC., a corporation,)
20 Defendant-Appellant.)
21)
22)
23)
24)
25)
26)

DECLARATION OF MARTIN R. GLICK IN SUPPORT OF ACTIVISION, INC.'S BRIEF REGARDING MAGNAVOX' MOTION TO DISMISS APPEAL AND FOR SANCTIONS

21 I, Martin R. Glick, declare:
22 1. I am a member of the Bar of the State of California
23 and of this Court, and a member of the law firm of Howard, Rice,
24 Nemerovski, Canady, Robertson & Falk, a Professional Corporation,
25 attorneys for Defendant-Appellant Activision, Inc. ("Activision") in
26 the above-referenced action. I am counsel of record for Activision

1 in this appeal. Except as otherwise indicated, I have personal
2 knowledge of the matters set forth below, and if called upon to do
3 so, I could and would testify competently to them.

4 2. On January 2, 1986, counsel for Activision received a
5 document from the District Court dated December 27, 1985 and enti-
6 tled "Findings of Fact." For the reasons set forth in the attached
7 brief, Activision believed in good faith that this document entitled
8 it to take an interlocutory appeal pursuant to 28 U.S.C. §1292(c)(2)
9 and that in any event, Activision could not permit the jurisdic-
10 tional time limits for filing such an appeal to pass. Activision
11 filed its Notice of Appeal on January 8, 1986. True and correct
12 copies of pages 1 and 45 from the Findings of Fact and "Finding of
13 Fact" No. 94 (from p.25) are attached hereto as Exhibit A.

14 3. On January 9, 1986, I telephoned James Williams, one
15 of Magnavox' attorneys, to inform him of Activision's decision to
16 file a notice of appeal. I explained why Activision believed it had
17 no choice but to file the notice of appeal as promptly as it had.
18 At the same time, I offered to cooperate in clearing up any ambigu-
19 ity as to the form of the District Court's order, and told Magnavox'
20 counsel that Activision was more than willing to ultimately save
21 both our clients' time and money by consenting to entry of an addi-
22 tional order. The following day, January 10, 1986, I sent a letter
23 to Magnavox' counsel confirming our telephone conversation and
24 enclosing a proposed form of "Judgment" which Activision would agree
25 to have the District Court enter. As I indicated in my letter to
26 Magnavox' counsel, in phrasing the proposed Judgment, Activision

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1 very carefully used the exact language used by the District Court in
2 its "Findings" so that the document would accurately reflect the
3 District Court's decision. A true and correct copy of my confirming
4 letter of January 10, 1986 to counsel for Magnavox is attached as
5 Exhibit B.

6 4. On January 13, 1986, I spoke by telephone with
7 Theodore W. Anderson, lead counsel for Magnavox. Mr. Anderson
8 expressed concern that Activision's proposed Judgment did not con-
9 tain an injunction. I made clear to Mr. Anderson at that time that
10 Activision wanted simply to clear up any ambiguity and take an
11 interlocutory appeal, and that Activision was perfectly willing to
12 agree to the District Court entering a Judgment without prejudice to
13 Magnavox' right to seek entry of an injunction on a separate docu-
14 ment. Mr. Anderson said he would consider the matter, but probably
15 would not agree. Attached hereto as Exhibit C is a true and correct
16 copy of a letter dated January 14, 1986 addressed to me from
17 Theodore Anderson, Magnavox' counsel, rejecting Activision's offer
18 of cooperation. In that letter, Magnavox acknowledged Activision's
19 "expressed desire to expedite the appeal in this case."

20 5. Late in the afternoon on Friday, January 17, 1986,
21 and without any warning whatsoever, counsel for Activision was
22 served with Magnavox' motion--made to the District Court--to strike
23 Activision's notice of appeal and for entry of conclusions of law
24 and judgment, including an injunction.

25 6. On January 29, 1986, Activision filed a timely
26 opposition in the District Court to Magnavox' motion to strike

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1 Activision's notice of appeal. (A true and correct copy of Activi-
2 sion's brief is attached to Magnavox' moving papers filed in this
3 Court, and for the sake of brevity will not be reproduced and
4 attached here.) As the brief makes clear, at no time did Activision
5 ever argue to the District Court that the District Court was without
6 jurisdiction to enter a judgment (with or without an injunction) or
7 conclusions of law. Moreover, at no time did Activision ever make
8 such an argument orally to the District Court.

9 7. On February 5, 1986, the parties appeared at a status
10 conference before the District Court. True and correct copies of
11 excerpts from pages 1-2 and 40-41 from the Court Reporter's tran-
12 script of the status conference are attached hereto as Exhibit D.
13 The excerpts from the transcript reflect that the District Court
14 announced at the outset that he had in fact not intended to do
15 anything more on the issues of validity and infringement and that he
16 considered that he had completed the "liability end of the case"
17 (p.2); that the District Court stated it did not have the power to
18 strike Activision's Notice of Appeal; that it would take the motions
19 regarding an injunction and a stay pending accounting under submis-
20 sion; and that it intended to issue conclusions of law and a

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judgment at the end of February (p.40-41).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California, on February 20, 1986.


MARTIN R. GLICK

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& FALK
A Professional Corporation

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL
FILED

DEC 27 1985

CLERK, U. S. DIST. COURT
SAN FRANCISCO

3 THE MAGNAVOX COMPANY,)
4 a corporation, and SANDERS)
5 ASSOCIATES, INC.,)
6 a corporation,)

6 Plaintiffs,)

7 v.)

8 ACTIVISION, INC.,)
9 a corporation,)

9 Defendant.)

No. C-82-5270-CAL

FINDINGS OF FACT

10 _____)
11 AND RELATED CROSS-ACTION.)
12 _____)

13
14 The issues in this case, other than damages, were
15 tried to this court sitting without a jury and were submitted.
16 The court has reviewed all of the exhibits admitted into
17 evidence, and has heard and reviewed the testimony of the
18 witnesses.¹ The court now makes the following findings of
19 facts.

20 I. PARTIES AND CLAIMS

21 1. This case concerns United States Letters Patent
22 Re. 28,507 (hereinafter called "the '507 patent").
23

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25 _____
26 ¹ The court denies defendant's motion to strike the
27 testimony of Dr. Alvin Star and overrules defendant's
28 objection to plaintiff's proposed exhibits Nos. 132, 228 and
229.

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94. Activision has not sustained its burden of proving that any of claims 25, 26, 51, 52, or 60-62 of the '507 patent is invalid.

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which is played with the combination. The cartridge itself is critical to determining whether the resulting combination is or is not within the coverage of the '507 patent.

140. The use of an accused cartridge with a 2600 console is not a permitted adaptation.

XI. FURTHER PROCEEDINGS .

A status conference is scheduled for February 5, 1986 at 11:00 a.m. At the conference, the parties should be prepared to advise the court of their proposed schedules for the remainder of the case. If the parties agree to a discovery cut-off date, a pretrail conference date, and a trial date, that stipulation may be submitted to the court in writing and no appearance will be required on February 5, 1986.

DATED: December 27, 1985.



CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

Law Offices Of

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January 10, 1986

James T. Williams, Esq.
Neuman, Williams, Anderson & Olson
77 West Washington Street
Chicago, Illinois 60602

Re: Magnavox v. Activision

Dear Jim:

This letter will confirm the major points discussed during my telephone call to you yesterday.

1. As you know, we have filed our Notice of Appeal from the "Findings of Fact" entered by Judge Legge, as it appears from the document that it was intended to be the final action of the Court other than proceeding with an accounting. As I told you, we are more than willing to cure any ambiguity and thus, ultimately, save both our clients' time and money by consenting to entry of an order. To that end, I enclose with this letter a proposed Judgment which might serve that purpose. In phrasing the proposed Judgment we very carefully lifted the exact language used by the Judge in the "Findings." Please let me know your views.

2. The Judge has requested us to work together to try and arrive at a mutually agreed discovery schedule and suggestions for trial and pretrial on the damages issue. While it is possible, if not probable, that we will seek a stay of the accounting pending appeal, it is difficult to make that decision and virtually impossible to project the appropriate discovery schedule without knowing what you are contending in regard to damages. More specifically, we need to know what you believe to be the damage issues that the Court should consider: whether you contend for lost profits or a reasonable royalty; whether you believe there is an

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OF COUNSEL
*ADMITTED IN NEW YORK STATE

EXHIBIT "B"

James T. Williams, Esq.
January 10, 1986
Page Two

established royalty and if so what that is; and what your position is as to the proper method to compute pre-judgment interest. Finally we need to know whether you plan to employ expert testimony during the accounting phase of these proceedings. As soon as you or Ted can give us this information either by phone or in writing, we will be prepared to talk about an appropriate schedule as well as our position on a stay pending appeal. By all means either you or Ted can call if you have any questions about any of the above.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mart" with a stylized flourish extending from the end.

MARTIN R. GLICK

MRG/js
Enclosures

NEUMAN, WILLIAMS, ANDERSON & OLSON

ATTORNEYS AND COUNSELORS

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JAN 16 1986

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JAMES P. NAUGHTON	NORMAN M. SHAPIRO
LAWRENCE E. APOLZON	ASSOCIATE COUNSEL

January 14, 1986

Martin R. Glick, Esq.
Howard, Rice, Nemerovski,
Canady, Robertson & Falk
Three Embarcadero Center
Seventh Floor
San Francisco, California 94111

Re: Magnavox v. Activision

Dear Marty:

This will confirm your telephone conversation with Jim Williams on Friday, the 10th, your telephone conversation with me yesterday and your letter of January 10 which we received yesterday. We concur in your expressed desire to expedite the appeal in this case. We think it is equally important to expedite the accounting and conclude this matter as rapidly as possible.

With respect to the details of your letter and our conversation, we do not agree that the "Findings of Fact" entered by Judge Legge were intended to be the final action of the Court or a Judgment. Your draft Judgment refers to a "final Order" and we have received nothing which could be construed as a final Order. We believe that the Court expects to enter Conclusions of Law and a Judgment and we believe that the appropriate way to proceed is to urge that the Court enter such a Judgment with supporting Conclusions of Law as quickly as possible. We cannot join in your proposed Judgment which would probably not be in compliance with Rule 52(a). We certainly do not agree that there is any ambiguity in the Findings of Fact.

Martin R. Glick, Esq.
January 14, 1986
Page Two

With respect to Section 2 of your letter, we will advise you as soon as possible as to the discovery which we believe will be necessary for purposes of the accounting.


It now appears that plaintiffs will pursue damages based in large part upon its established royalty policy and license agreements as well as what would constitute a reasonable royalty taken in a proper context. I understand you are now assembling detailed sales data which you will be providing to us rather promptly. Perhaps when we see that we can define the proposed pretrial procedures in greater detail. Please let us have the material as soon as possible. That may well reduce the necessary discovery to the verification of the records on which Activision has relied in assembling the data and any related documents or testimony that might be necessary to fill out the picture.

With respect to the requirement of expert testimony in the accounting, we have not yet firmly reached any conclusion on that question either. However, it is our present reaction that there probably will be a need for expert testimony in the accounting and we can discuss that with you at a future date. In view of the foregoing, we would be interested in knowing whether you plan to have expert testimony or not.

Very truly yours,

NEUMAN, WILLIAMS, ANDERSON & OLSON

By


Theodore W. Anderson

TWA/sjm

CC: Robert Ebe, Esq.
Thomas A. Briody, Esq.
Algy Tamoshunas, Esq.
Louis Etlinger, Esq.
James T. Williams, Esq.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE: THE HONORABLE CHARLES A. LEGGE, JUDGE

THE MAGNAVOX COMPANY, A CORPORATION,) C-82-5270 CAL
AND SANDERS ASSOCIATES,)
INC., A CORPORATION,) SAN FRANCISCO, CA
PLAINTIFFS,) FEBRUARY 5, 1986
VS.)
ACTIVISION, INC., A CORPORATION,)
DEFENDANT.)

AND RELATED CROSS-ACTION)

TRANSCRIPT OF PROCEEDINGS

A P P E A R A N C E S:

FOR THE PLAINTIFFS:

THEODORE W. ANDERSON, ESQUIRE
NEUMAN, WILLIAMS, ANDERSON & OLSON
77 WEST WASHINGTON STREET
SUITE 2000
CHICAGO, ILL 60602

FOR THE DEFENDANT:

MARTIN R. GLICK, ESQUIRE
HOWARD, RICE, NEMEROVSKI, CANADY,
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THREE EMBARCADERO CENTER
7TH FLOOR
SAN FRANCISCO, CA 94111

COURT REPORTER:

RAYMOND LINKERMAN
450 GOLDEN GATE AVENUE
BOX 36052
SAN FRANCISCO, CA 94102

EXHIBIT "D"

1 WEDNESDAY, FEBRUARY 5, 1986

2 THE COURT: ALL RIGHT, COUNSEL.

3 THE CLERK: THIS IS CIVIL 82-5270, MAGNAVOX V.
4 ACTIVISION. COUNSEL PLEASE STATE THEIR APPEARANCES.

5 MR. ANDERSON: THEODORE ANDERSON FOR THE PLAINTIFF,
6 YOUR HONOR. PLAINTIFFS.

7 MR. GLICK: MARTIN GLICK FOR DEFENDANTS, YOUR HONOR.

8 THE COURT: NOW, LET ME TELL YOU PRELIMINARILY WHAT MY
9 THOUGHTS ARE WITH RESPECT TO FURTHER PROCEEDINGS HERE. I HAD
10 ANTICIPATED THAT WHAT WOULD HAPPEN IS THAT AFTER I MADE MY
11 FINDINGS ON WHAT I SHOULD CALL -- I WILL CALL THE LIABILITY END
12 OF THE CASE, THAT YOU WOULD THEN GO AHEAD WITH WHAT DISCOVERY
13 YOU HAD REMAINING, AND COMPLETE, WHEN WE TRY THE DAMAGES
14 PORTION, WRAP IT ALL UP WITH WHATEVER FINDINGS ARE NEEDED ON
15 THAT, CONCLUSIONS OF LAW, AND A JUDGMENT, AND THEN APPEAL.
16 THAT'S WHY THE FINDINGS THAT I MADE WERE LIMITED TO FINDINGS OF
17 FACT, AND INDEED, I THINK THAT WAS CONSISTENT WITH THE FORMS
18 WHICH BOTH SIDES HAD SUBMITTED TO ME.

19 NOW, I GATHER THAT BOTH OF YOU ARE IN AGREEMENT,
20 HOWEVER, THAT YOU WANT THE FIRST ASPECT, THE LIABILITY ASPECT OF
21 THE CASE, TO GO ON UP TO THE COURT OF APPEALS IMMEDIATELY.

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THE COURT: OKAY. ALL RIGHT, I'M GOING TAKE THESE
MOTIONS UNDERSTAND SUBMISSION. I WILL TELL YOU -- WELL, FIRST

1 OF ALL, I'M NOT GOING TO STRIKE THE NOTICE OF APPEAL. I DON'T
2 THINK I HAVE THE POWER TO DO THAT, EVEN IF MR. GLICK'S
3 PROCEDURES WERE NOT CORRECT.

4 I WILL BE ENTERING CONCLUSIONS OF LAW AND A JUDGMENT,
5 SO YOU CAN GET YOUR APPEAL PROCESSES, YOUR BRIEF WRITING, WHAT
6 HAVE YOU, AND THE TRANSCRIPT ALTOGETHER. I WILL GIVE YOU A
7 RULING -- AT THE SAME TIME THAT I ENTER FINDINGS AND CONCLUSIONS
8 OF LAW, JUDGMENT, I WILL GIVE YOU A RULING ON THE INJUNCTION
9 ISSUE, AND ON THE ISSUE OF WHETHER THE DAMAGE ACTION CASE SHALL
10 PROCEED OR SHALL BE STAYED.

11 MR. GLICK: YOUR HONOR --

12 MR. ANDERSON: YOUR HONOR, WE HAD NO OPPORTUNITY TO
13 RESPOND TO THEIR TWO NEW MOTIONS, WHICH -- AND I WOULD LIKE TO
14 FILE A PIECE OF PAPER, AT LEAST REPEATING WHAT I'VE SAID HERE,
15 AND PERHAPS ADDING --

16 THE COURT: WELL, I DON'T THINK YOU NEED TO FILE
17 ANYTHING REPEATING, MR. ANDERSON. I THINK I UNDERSTAND YOUR
18 POSITION. IF YOU WANT TO FILE SOMETHING MORE, FINE. I SEE HE'S
19 LOOKING AT THE CALENDAR HERE. THE REALITY OF IT IS I'M
20 LEAVING -- LAST DAY WILL BE TOMORROW, I WON'T BE BACK UNTIL THE
21 18TH. IT'S GOING TO BE...

22 (PAUSE IN PROCEEDINGS.)

23 THE COURT: IT'LL BE THAT WEEK OR THE FOLLOWING WEEK
24 THAT I GET THESE JUDGMENTS --

25