

1
2 IN THE UNITED STATES DISTRICT COURT

3 IN AND FOR THE DISTRICT OF DELAWARE

4 INTERNATIONAL BUSINESS MACHINES)
5 CORPORATION,)
6 Plaintiff,)
7 v.) C.A. No.
8 ZYNGA INC., and CHARTBOOST, INC.,) 22-cv-590-GBW
9 Defendant.)

10
11 - - - -
12 Wilmington, Delaware
13 Thursday, September 12, 2024
14 Trial Transcript Volume 4
15 - - - -

16 BEFORE: HONORABLE GREGORY B. WILLIAMS
17 UNITED STATES DISTRICT COURT JUDGE
18
19
20
21
22
23
24
25

Michele L. Rolfe, RPR, CRR

1 **APPEARANCES:**

2
3 POTTER, ANDERSON & CORROON LLP
4 BY: DAVID E. MOORE, ESQ.
5 BINDU A. PALAPURA, ESQ.
6 ANDREW L. BROWN, ESQ.

7 -and-

8 DESMARAIS LLP
9 BY: JOHN M. DESMARAIS, ESQ.
10 SUMEET DANG, ESQ.
11 TAMIR PACKIN, ESQ.
12 TUHIN GANGULY, ESQ.
13 RAYMOND N. HABBAZ, ESQ.
14 CAITRIANNE FEDDELER, ESQ.
15 MICHAEL HILYARD, ESQ.
16 KYLE G. PETRIE, ESQ.
17 For the Plaintiff

18 FARNAN LLP
19 BY: MICHAEL FARNAN, ESQ.
20 BRIAN E. FARNAN, ESQ.
21 -and-

22 ORRICK, HERRINGTON & SUTCLIFFE LLP
23 BY: CLEMENT ROBERTS, ESQ.
24 SARAH MULLINS, ESQ.
25 ALYSSA CARIDIS, ESQ.
26 BROOKS KENYON, ESQ.
27 JOSEPH KOLKER, ESQ.
28 WILL MELEHANI, ESQ.
29 GEOFFREY MOSS, ESQ.
30 EVAN D. BREWER, ESQ.
31 ELIZABETH MOULTON, ESQ.
32 For the Defendant

33 - - - - -

34 P R O C E E D I N G S

35 (REPORTER'S NOTE: The following trial was held in

1 Courtroom 6-B beginning at 9:07 a.m.)

2 THE COURT: Good morning. You may be seated.

3 So we're going to start with the time. So we
4 made the adjustment for the time for the plaintiff, so -- so
5 you got 26 minutes back. So on the 10th, you used 5 hours
6 and 9 minutes as opposed to the five -- whatever I told you,
7 5, 34, I believe.

8 Yesterday, you used 1 hour and 50 minutes, so
9 you've used a total of 8 hours and 55 minutes, so you have
10 2 hours and 5 minutes remaining.

11 Defendant, yesterday, you used 4 hours and
12 26 minutes, so you've used a total of 7 hours and
13 32 minutes, so you have 3 hours and 28 minutes remaining.

14 MR. PACKIN: Your Honor, I very much appreciate
15 the correction in the discrepancy. I would like to
16 respectfully request -- during Mr. Thompson's testimony, he
17 spent, I would say -- I mean, we were over here probably
18 over 30 minutes just looking through documents, to which
19 there was actually no objection. There was no objection
20 lodged ahead of time. They objected in court, they made him
21 do it and then they withdraw their objection just to burn
22 our time.

23 And at the pretrial conference, we agreed that
24 you don't need to have foundation for experts and they never
25 raised that objection, it's just in court as a time

1 going around trying to sell a patent -- a portfolio of
2 patents that included the '849.

3 And this is a page out of the presentation that
4 IBM gave to Netflix. And what it shows -- you can see that
5 it's the '849 patent. I'm sorry that the quality of this
6 makes it very hard to read. This is what we got from IBM.
7 So what I've had to do is sort of highlight some things.

8 So you can see that this is discussing the '849
9 patent, and you can see sort of in the bottom right that
10 they're discussing an advertisement that's being shown on
11 Fox. And it's a little harder to see, but the advertisement
12 they're calling out is an ad for a Fox show called New
13 Girls. Okay? So what IBM is telling Netflix is it's
14 suggesting that Fox is using the '849 patent just by showing
15 an ad. So what IBM is suggesting is that if you show an ad,
16 you're using the '849 patent.

17 Q. Did any of the other Georgia-Pacific factors
18 materially impact your analysis for the '849 patent?

19 A. Not materially. As I said before, there were -- I
20 looked through all the factors. Some of them didn't matter
21 at all. Some of them suggested upward, some of them
22 suggested a downward adjustment; in other words, pay less or
23 pay more. But at the end, I determined that they sort of
24 balanced each other out.

25 Q. So what was your ultimate opinion about the

DIRECT EXAMINATION - DOUGLAS KIDDER

1 reasonable royalty Zynga and IBM would have agreed to at the
2 hypothetical negotiation for the '849 patent?

3 A. So this is a basis of my \$2 million number we just
4 talked through. I believe they would have agreed to a
5 \$2 million lump sum, that IBM would have understood what it
6 was able to charge Netflix, DIRECTV, and Verizon.

7 Now, I also believe this is being very generous
8 to IBM because Zynga is a small start-up that's only getting
9 one patent. It's not getting 90-plus patents like the big
10 technology companies it negotiated with. But still to be
11 generous and conservative, I believe that \$2 million is the
12 lump sum that Zynga and IBM would have agreed upon at the
13 hypothetical negotiation in 2007.

14 Q. Let's move to your analysis for the '719 patent. Can
15 you please remind the jury what the circumstances would have
16 been at the hypothetical negotiation for that patent?

17 A. Yes. So the hypothetical negotiation for the '719
18 patent happens in March of 2017, and this is IBM and Small
19 Giant negotiating.

20 Q. And so for the '719 patent, what were the starting
21 points for your analysis?

22 A. Well, I did the same thing. I looked at all the IBM
23 licenses, and IBM has not -- never signed a license that
24 explicitly says, You get a license to the '719. It might
25 have been buried in a -- in a broad portfolio cross-license,

DIRECT EXAMINATION - DOUGLAS KIDDER

1 no explicit licenses. Second, I looked at Small Giant. I
2 looked for a comparable license. You know, has Small Giant
3 ever licensed a patent? And the answer was no. There was
4 nothing there.

5 So then I looked at the 12 patent agreements
6 that Zynga had signed and produced in this case. And this
7 is under Georgia-Pacific factor 12. It says look at other
8 industry agreements. So the 12 of these agreements, I
9 screened them for economic comparability, and only three
10 came out as being economically comparable: Atwater
11 Ventures, Hands-On Mobile, and First Technology.

12 I then asked Dr. Bennett to review the patents
13 that had been licensed in those three agreements to see if
14 any of them were technically comparable. And you just heard
15 him testify that the '172 patent in the Hands-On Mobile
16 agreement was technically comparable to the '719 that --
17 yes.

18 Q. And what are the terms of the Hands-On Mobile
19 agreement?

20 A. So the Hands-On Mobile agreement was a purchase of a
21 single patent for \$2 million. So Zynga bought this patent
22 from Hands-On Mobile, and it was just the '172 patent, so
23 there's no other patents involved in that. And this
24 agreement has been admitted as DTX-0884, if you want to
25 review it.

DIRECT EXAMINATION - DOUGLAS KIDDER

1 Q. How did you use Zynga's agreement with Hands-On
2 Mobile in your Georgia-Pacific analysis?

3 A. So, once again, it was the starting point, it was the
4 comparable license.

5 Q. And what adjustments, if any, did you make to that
6 starting point?

7 A. Well, I looked at the other Georgia-Pacific factors
8 and, again, the duration of the license was different. And
9 we also heard from Mr. Lemer and Mr. Wilkman that there are
10 other ways to do cheat detection, and that's Georgia-Pacific
11 factors 9 and 10, looking at the technical utility of the
12 patents. So both of those would suggest downward
13 adjustments.

14 In addition, the fact there was a purchase as
15 opposed to a nonexclusive license, you -- would suggest that
16 Zynga would pay less. On the other hand, the -- there's an
17 assumption at the hypothetical negotiation that the patent
18 is valid and infringed, that would suggest an increase. Put
19 all those together, again, you come to a conclusion that
20 there's not a strong argument to go up or down.

21 Q. What was your ultimate conclusion on what IBM and
22 Small Giant Games would have agreed to at the hypothetical
23 negotiation for the '719 patent?

24 A. So it's my opinion that the parties would have agreed
25 to a \$2 million lump sum, again, based on the evidence I

1 So if there's anything when we send you this, if
2 there's anything that -- you know, typos or anything
3 inconsistent with the rulings or that you can't agree upon,
4 indicate that. And then if there are, then we'll meet at
5 8:30 to resolve those before we get -- before we get started
6 with the jury.

7 This ain't the time to make additional
8 arguments. We got the transcript. It's just whether -- if
9 we got something wrong in terms of making those changes.
10 All right.

11 MR. PACKIN: Thank you, Your Honor.

12 MR. ROBERTS: Thank you, Your Honor.

13 (Whereupon, the following proceeding concluded
14 at 5:17 p.m.)

15 I hereby certify the foregoing is a true
16 and accurate transcript from my stenographic notes in the
17 proceeding.

18 /s/ Michele L. Rolfe, RPR, CRR
19 U.S. District Court
20
21
22
23
24
25