

FEB 7 1983

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE MAGNAVOX COMPANY,)
a corporation, and)
SANDERS ASSOCIATES, INC.,)
a corporation,)
Plaintiffs,)
v.)
ACTIVISION, INC.,)
a corporation,)
Defendant.)

NO. C 82-5270 TEH

ORDER DENYING MOTION TO DISMISS COUNTERCLAIM

This cause came on for hearing on January 10, 1983 on plaintiff Magnavox's motion to dismiss defendant's second counterclaim. After considering the briefs and oral argument from counsel for both sides, including plaintiff Magnavox's sur-reply memorandum filed January 17, 1983, for the reasons herein-after stated,

IT IS HEREBY ORDERED THAT plaintiff Magnavox's motion to strike defendant's second counterclaim is denied.

LEGAL STANDARD

A claim seeking a declaratory judgment that a patent is invalid is a case or controversy if and only if the claimant "has a real and reasonable apprehension that he will be subject to liability if he continues to manufacture his product."

Societe de Conditionnement v. Hunter Engineering, 655 F.2d 938,

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1 Magnavox supports this argument by pointing to the pending Baer
2 reissue, and to its own unilateral decision to desist from liti-
3 gation and licensing regarding the Baer original. However, de-
4 fendant persuasively notes that no guarantee exists that the
5 Baer reissue will ever become official, and plaintiff's unilateral
6 decision not to enforce the Baer original--a decision which is
7 obviously revocable at any time--is hardly the sort of assurance
8 which would allay defendant's otherwise "real and reasonable
9 apprehension of liability" arising from the interrelatedness
10 of the Rusch reissue and the Baer original. Defendant has stated
11 on the record that it will dismiss its counterclaim regarding
12 the Baer original provided plaintiffs stipulate that the Baer
13 original as it stands is invalid, but plaintiffs have declined
14 to so stipulate. In the absence of such a stipulation, and at
15 least during the pendency of the Baer reissue, the Court finds
16 that the defendant has shown a "real and reasonable apprehension
17 of liability" sufficient to create a case or controversy under
18 28 U.S.C. §§ 2201-02. See Societe de Conditionnement, 655 F.2d
19 at 944. Accordingly, plaintiff Magnavox's motion to dismiss
20 defendant's second counterclaim is denied.

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23 DATED: February 7, 1983



THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

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