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13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15  
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17 THE MAGNAVOX COMPANY, a corpora- )  
tion, and SANDERS ASSOCIATES, )  
18 INC., a corporation, )  
19 Plaintiffs, )  
20 vs. )  
21 ACTIVISION, INC., a corporation, )  
22 Defendant. )  
23 \_\_\_\_\_ )  
24 AND RELATED CROSS-ACTION. )  
25  
26

No. C 82 5270 CAL

PRETRIAL STATEMENT OF  
ACTIVISION, INC. REGARDING  
DISPUTED FACTUAL ISSUES  
(Local Rule 235-7(e))

Pretrial Conference:  
December 13, 1984

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Defendant and Counterclaimant Activision, Inc. ("Acti-  
vision") submits the following plain and concise statement of  
disputed factual issues pursuant to Local Rule 235-7(e).

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1           1.    In 1954, a video pool game was developed at the  
2 University of Michigan ("Michigan pool game"). The Michigan pool  
3 game could be played by two persons using a cathode ray tube  
4 display. The view on the screen was that of a pool table, seen from  
5 the top down: there was a circular figure representing a cue ball  
6 at one end of the display, and 15 "balls" in a triangular "rack" at  
7 the other. When the ball hit the "pocket," the ball disappeared.  
8 When the cue ball hit the object ball, the object ball would move in  
9 a direction and with a velocity proportional to the speed and  
10 velocity of the cue ball. The same movement would occur when two  
11 object balls hit each other or hit a pool table rail. The Michigan  
12 pool game generated a hitting symbol (the player controlled cue  
13 stick), and a hit symbol (the cue ball). In addition, it  
14 ascertained coincidence between the hitting symbol and the hit  
15 symbol, and imparted a distinct motion to the hit symbol upon  
16 coincidence. The Michigan pool game provided horizontal and  
17 vertical control signals for varying the horizontal and vertical  
18 positions of the hitting symbol. The Michigan pool game is prior  
19 art with respect to the '507 patent.

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2. In 1957, Dr. William A. Higinbotham developed a video tennis game for "open house" day at the Brookhaven National Laboratories in Upton, New York ("Higinbotham tennis game"). Thousands of people, including school children, attended the open house and saw the game being played. Some actually played the game.

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3. Dr. Higinbotham's video tennis game was played on a cathode ray tube display. The tennis game could be played by two persons, each of whom controlled an invisible "racket" by means of a hand control. The view on the screen was that of a tennis court, seen from the perspective of one standing on the sidelines. The "net" was a vertical line in the middle of the screen. When a player "hit" the "ball," the ball would appear to move in a realistic fashion, depending upon how it was "hit." Thus, the "ball" would appear to bounce off the court, bounce off the net (if the net were hit) or move beyond the baseline. When the ball was hit by the invisible racket, the ball would reverse direction and move with a velocity controlled by the player. The tennis game contained electronic analog circuitry. Dr. Higinbotham's tennis game also provided horizontal and vertical control signals so that the horizontal and vertical positions of the ball symbol could be varied. The Higinbotham tennis game is prior art with respect to the '507 patent.

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7. On August 12, 1958, United States Patent No. 2,847,661 was issued to Charles F. Althouse. Althouse invented a device for displaying dots on a television screen or other display, which dots (symbols) could be moved by the user realistically to approximate the location of aircraft, helicopters or ships. The Althouse invention comprised an apparatus which was used in combination with a standard television receiver to generate at least one symbol upon the television screen. The location of this symbol could be altered by the user of the device. The Althouse invention further contained the electronic analog circuitry to generate horizontal and vertical control signals for varying the horizontal and vertical positions of the symbol.

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1           8.    On June 2, 1964, U.S. Patent No. 3,135,815 was issued  
2 to Fritz Spiegel. Spiegel invented a device for using a standard  
3 television set or other display to simulate target shooting with  
4 guided missiles. The goal of the exercise was for the user to  
5 manipulate a "guided missile" to "hit" the target that was displayed  
6 on the screen, at which point the missile and the target appeared to  
7 explode. The device was used in several ways: the target could be  
8 kept stationary, the target could move randomly in response to the  
9 electronic circuitry in the device, or a second person could move  
10 the "target" while the first person was trying to steer the "guided  
11 missile" to "hit" the target. The Spiegel invention contained the  
12 electronic analog circuitry to generate symbols upon the screen of  
13 the television receiver to be manipulated by at least one  
14 participant. The Spiegel patent further comprised the circuitry to  
15 generate a hitting symbol (the guided missile), generate a hit  
16 symbol (the target), and circuitry to ascertain coincidence between  
17 the hitting symbol and the hit symbol. The Spiegel patent further  
18 contained the electronic analog circuitry to provide horizontal and  
19 vertical control signals so that the horizontal and vertical  
20 positions of the hitting symbol could be varied.

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9. In 1964, the National Aeronautics and Space Administration (NASA) purchased a system from General Electric Co. which, with NASA equipment, portrayed scenes on a raster scan television screen for design engineers to simulate astronaut docking and landing maneuvers in outer space ("the NASA scene generator").

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10. In 1967, NASA purchased from General Electric equipment and programs for the NASA scene generator, which allowed for three-dimensional objects to be generated on the television screen. The NASA scene generator could then be used to simulate a lunar excursion module landing on the moon, a rendezvous in outer space in which the lunar excursion module docks with the command module, a tank game which was used for demonstrations, and an aircraft carrier landing.

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1           14.    In the aircraft carrier landing simulation, the view  
2 on the screen was an aircraft carrier from the perspective of a  
3 pilot in an airplane.  The pilot controlling the airplane, using a  
4 device similar to a joystick, landed the airplane on the deck of the  
5 carrier.  The simulator detected coincidence between the airplane  
6 and the aircraft carrier.

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15. In San Francisco, California at the Fall 1966 Joint  
Computer Conference sponsored by the American Federation of  
Information Processing Societies and the Association of Computing  
Machineries, a video game for playing pool, written by John  
Drumheller, was publicly demonstrated and played. ("Drumheller pool  
game").

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16. The Drumheller pool game was similar in appearance to the Michigan pool game. In Drumheller's version, the player-controlled symbol was the cue stick, and the distinct motion imparted to the cue ball, when hit by the cue stick, was proportional to the velocity with which the cue stick was moved. In 1967 Patrick Mullarky and Drumheller collaborated to produce a similar pool game for demonstration at the Spring 1967 Joint Computer Conference. Both of these pool games are prior art with respect to the '507 patent.

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17. From September 28 through October 1, 1967, RCA held an open house for the 25th anniversary of the David Sarnoff Research Center in Princeton, New Jersey. A pool game similar to Drumheller's pool game was demonstrated to and played by visitors at the open house. The RCA pool game is prior art with respect to the '507 patent.

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18. From 1961 through the early 1970's, Ralph Baer was the Division Manager for the Equipment Design Division of Sanders Associates. As part of his job, Ralph Baer oversaw the development of electronic display systems that Sanders designed for the military. In early 1967, a technician named William Harrison came to work with Baer.

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1           19.    In September of 1966, Baer wrote a memorandum  
2 indicating he was considering the development of video games.  The  
3 memorandum describes no circuitry or other means for implementing  
4 Baer's video game.  Any person skilled in the art, i.e., a basic  
5 electronics technician, would have been able to develop the  
6 circuitry to implement Baer's memorandum.

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20. In early 1967, Baer gave his memorandum to Harrison and told Harrison to make some electronic circuitry to implement the memorandum. Harrison constructed this circuitry in part by using a "Heathkit" Baer had at home. Baer's Heathkit was a commercially available piece of equipment which was used to check the horizontal and vertical signals on a standard television set.

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10. In 1967, NASA purchased from General Electric equipment and programs for the NASA scene generator, which allowed for three-dimensional objects to be generated on the television screen. The NASA scene generator could then be used to simulate a lunar excursion module landing on the moon, a rendezvous in outer space in which the lunar excursion module docks with the command module, a tank game which was used for demonstrations, and an aircraft carrier landing.

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1           22.    On January 15, 1968, Baer applied for a patent  
2 entitled "Television Gaming and Training Apparatus." The Patent and  
3 Trademark Office assigned Baer's application Serial No. 697,798.  
4 The application was eventually issued as U.S. Patent No. 3,728,480.  
5 This patent (the "'480 patent" or "Baer 1 patent") purports to  
6 describe circuitry for playing games on a television display by  
7 generating dots, getting the dots to move and "hit" each other,  
8 detecting coincidence of the dots, and altering one of the dots in  
9 response to coincidence. The Michigan pool game, Higinbotham tennis  
10 game, Space War, Spiegel patent, NASA scene generator, Drumheller  
11 pool game, and the RCA pool game were not disclosed to nor  
12 considered by the Patent Office prior to the issuance of the '480  
13 patent.

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1           23. William Rusch, an engineer at Sanders Associates, was  
2 formally assigned to work for Ralph Baer on the video game effort in  
3 July of 1967. Rusch's notebooks reflect the fact that his first  
4 work on video games began toward the end of September, 1967.

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24. Prior to the time Rusch actually began work on Sanders Associates' video game, Baer had, with Harrison's help, constructed the circuitry that would generate two moveable spots and ascertain coincidence between the spots.

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1                   25. Before Rusch began any work on Sanders Associates'  
2 video game project, Rusch became thoroughly familiar with all of  
3 Baer and Harrison's ideas, designs and circuits.

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27. On or about February 2, 1968, Rusch filled out a "Patent Disclosure Sheet" (an in-house form) and sent it to Sanders Associates' patent counsel. The purpose of the form was to set out for counsel the important innovation(s) worthy of consideration for patent. In his Patent Disclosure Sheet, Rusch informed patent counsel at Sanders Associates that he wanted to patent some circuitry that would "provide[] another positioning method for spots on TV screen." He informed patent counsel that the idea for his circuitry was suggested by the "desire to have voltage control and spot shapes other than rectangular. (Round spot for example.)"

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28. By way of his patent disclosure, Rusch informed Sanders Associates that the "basic theory" of his circuits was similar to Baer's. As Rusch described the connection, Baer had "thought of generating spots and patterns" on television sets for various games, and Rusch had drawn circuits that used a different method of generating spots and patterns.

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30. William Harrison constructed the circuits for Rusch,  
as he had for Baer. Rusch's circuits were tested by Harrison, Baer  
and Rusch.

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1           31. On May 27, 1969, Rusch applied for a patent entitled  
2 "Television Gaming Apparatus." The Patent and Trademark Office  
3 assigned Rusch's application Serial No. 828,154. The application  
4 was eventually issued as U.S. Patent No. 3,659,284 ("the '284  
5 patent") and later reissued as U.S. Patent Re. No. 28,507 ("the '507  
6 patent" or "Rusch 2 patent"). This patent purports to describe  
7 circuitry for playing games on a television display by generating  
8 dots, getting the hitting dot(s) to move and "hit" the other(s),  
9 detecting coincidence of the dots, and "imparting a distinct motion"  
10 to the hit dot upon coincidence. The Michigan pool game,  
11 Higinbotham tennis game, Space War, Spiegel patent, NASA scene  
12 generator, Drumheller pool game, and the RCA pool game were not  
13 disclosed to nor considered by the Patent Office prior to the  
14 issuance of the '284 patent. Baer's pending application for what  
15 was to become the '480 or Baer 1 patent was not cited to the Patent  
16 Office as prior art, but only cross-referenced as a related  
17 application. The Patent Office examiner did not consider the impact  
18 of the '480 patent on the validity of the '284.

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1           34. Baer described the '598 patent as the culmination of  
2 Baer, Harrison and Rusch's work on video games. According to  
3 Magnavox, the '598 contains superior circuits than those described  
4 in the '507 or "Rusch 2" patent. The '598 patent disclosed and  
5 claimed Harrison's digital equivalent of Rusch's simple electronic  
6 circuits for generating spots on the screen, i.e., spot generators.  
7 The '598 patent disclosed circuitry which could generate  
8 screen-width walls off of which spots could bounce. The '507 patent  
9 neither disclosed nor claimed wall generator circuitry or digital  
10 spot generators.

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1           35.    The claims of the '598 patent alleged to be infringed  
2 in Magnavox v. Chicago Dynamics Industries, 201 U.S.P.Q. 25 (N.D.  
3 Ill. 1977) were found by the court to be invalid and obvious in  
4 light of the prior art.

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1           36.    On April 25, 1974, Rusch filed an application for  
2 reissue of the '284 patent with the U.S. Patent and Trademark  
3 Office. Pursuant to the terms of 35 U.S.C. §251, a patent holder  
4 may file an application for reissue when the patent is "deemed  
5 wholly or partly inoperative or invalid, by reason of a defective  
6 specification or drawing, or by reason of the patentee claiming more  
7 or less than he had a right to claim in the patent. . . ." The  
8 Michigan pool game, Higinbotham tennis game, Space War, Spiegel  
9 patent, NASA scene generator, Drumheller pool game, and the RCA pool  
10 game were not disclosed to nor considered by the Patent Office prior  
11 to the issuance of the '507 patent. The '480 patent was not cited  
12 to the patent office as prior art, but only cross-referenced as a  
13 related patent.

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37. The '284 reissue application was allowed by the Commissioner. Sanders Associates surrendered the '284 patent. The reissue patent was issued on August 5, 1975, and was given the number U.S. Patent Re. 28,507 (the "'507 patent" or "Rusch 2" patent). The Patent Office examiner did not consider the impact of the '480 patent on the validity of the '507 patent.

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38. The '507 or Rusch 2 patent describes a set of simple electronic analog circuits which are soldered together ("hardwired"). The '507 patent discloses a box which could be used only to play a discrete number of games whose circuits were actually built into the box.

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39. The teachings of the '507 patent would have been obvious to one skilled in the art and having knowledge of the prior art.

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40. On April 25, 1974, Baer, Harrison and Rusch filed an application for reissue of the '285 patent with the U.S. Patent and Trademark Office. Baer, Rusch and Harrison gave the same reasons for seeking reissue of the '285 patent that Rusch gave in seeking reissue of the '284 patent. The Michigan pool game, Higinbotham tennis game, Space War, Spiegel patent, NASA scene generator, Drumheller pool game, and the RCA pool game were not disclosed to nor considered by the Patent Office prior to the issuance of the '598 patent. The '480 or Baer 1 patent was not cited to the patent office as prior art, but only cross-referenced as a related patent.

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41. The '285 reissue application was allowed by the Commissioner. Sanders Associates surrendered the '285 patent. The reissue patent was issued on October 28, 1975, and was given the number U.S. Patent Re. 28,598 ("the '598 patent"). The Patent Office examiner did not consider the impact of the '480 patent on the validity of the '598 patent.

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42. On June 27, 1977, Baer filed an application for reissue of the '480 patent with the U.S. Patent and Trademark Office, stating that as the '480 read, it was "partly inoperative or invalid" because Baer had claimed more than he had a right to claim in the patent. Baer's "error" was to include claims in the '480 patent that "appear to be too broad" in light of the invention described by Fritz Spiegel in U.S. Patent 3,135,815. (See paragraph 8, supra.)

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43. The United States Patent Office sorts the patent applications it receives into subject matter groupings called "art units". Since it is impossible to compartmentalize the breadth of subjects which are potentially patentable, the Patent Office art units cross-reference related classes. The classes which are concerned with amusement games such as video games cross-reference educational claims which include flight trainers and simulators.

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44. During the more than 6½ years that the '480 reissue application has been sought, the Patent Office, on five separate occasions, has rejected various of Sanders Associates' claims, and Sanders has filed at least five amendments to its application. Baer has submitted 96 claims which purport to set out the metes and bounds of his "invention." On April 23, 1982, the Patent Office Primary Examiner finally rejected substantially all of the submitted claims. Specifically, 78 of the claims were rejected, primarily because the teachings of the Spiegel patent, combined with the teachings of the video game Space War, made the '480 patent obvious to one skilled in the art. The 18 remaining claims relate primarily to very specific circuitry and to a light detecting target shooting game unrelated to Activision's video games here in suit.

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1           45. For the four years between January, 1968 and January  
2 1972, Sanders tried without success to sell or license the circuitry  
3 described in the Baer 1 patent (the '480 patent), the Rusch 2 patent  
4 ('507) and the '598 patent held by Baer, Rusch and Harrison  
5 together. The alleged invention described in the '507 patent did  
6 not meet a long felt need.

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47. Magnavox' Odyssey game was based on the analog  
circuitry described in the '598 patent.

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1           48.   Magnavox' "Odyssey" game was initially sold for more  
2 than \$100.00. This was more than three times the price Baer  
3 believed necessary to make the product commercially successful. In  
4 the three years between 1972 and 1974, 218,000 Odyssey units were  
5 sold.

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49. The '507 patent was never embodied in a commercial product marketed by Magnavox or its sublicensees.

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1           50.    To the extent Sanders Associates developed an idea  
2 for playing video games on home television sets, that idea was  
3 developed by Baer, not Rusch, and was embodied in the '480 patent.

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51. Activision is a California corporation based in Mountain View, California, that designs and manufactures a wide variety of video game cartridges and disks. A video game cartridge is a small plastic box, the size of a tape cassette, which contains a computer program in a micro-chip.

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1           52.    Activision was founded in 1979 for the specific  
2 purpose of designing copyrighted video games which were ultimately  
3 sold to owners of master video game consoles, primarily the Atari  
4 2600.   Activision currently employs approximately 130 individuals.

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1           53.    Activision has designed and manufactured over thirty  
2 video game cartridges to be played on the user's television set in  
3 connection with a master console and a hand-held control known as a  
4 "joystick".   Activision does not manufacture master consoles or  
5 joysticks.    The master console is, in effect, a computer; the video  
6 game cartridge is the program for that computer.   The player inserts  
7 into the master console the video game cartridge which contains the  
8 program for the Activision game of his or her choice, turns on the  
9 television set, and the television set then displays the  
10 computer-generated images.   The player uses a hand-held control  
11 or "joystick" which, among other things, controls the horizontal and  
12 vertical position of the player-controlled object on the display.

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1           54.    Activision designs and manufactures cartridges and  
2 disks to be played on home or personal computers.  To date,  
3 Activision has designed and manufactured fourteen such games.  The  
4 video game cartridge or disk is the program for the computer.  The  
5 player inserts into the computer or disk drive the cartridge or disk  
6 which contains the program for the Activision game of his or her  
7 choice, and the computer then displays the computer-generated  
8 images.

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1           55.    The creative process of designing, manufacturing, and  
2 marketing an Activision video game cartridge usually takes about  
3 eight to nine months.  Thus, the end product produced at Activision  
4 is an original carefully designed product significantly different  
5 from and superior to the products of its competitors.

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1           56.    One of the guiding principles of Activision is to  
2 recognize and give credit to each game designer for the game he or  
3 she designs. Activision, for example, identifies the individual  
4 game designer on the game package and/or in the instruction booklet  
5 for each game, much the same as a book is identified by its author.

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1           57.   Video game cartridges are marketed in toy stores,  
2 department stores, video/electronics specialty stores, chain stores  
3 and catalogue showrooms. The master consoles with which these video  
4 game cartridges are compatible are generally located nearby, the one  
5 serving as advertising for the other. Joysticks for use with master  
6 consoles and video game cartridges are located nearby. Each and  
7 every Atari, Mattel and Coleco master console is manufactured,  
8 offered for sale and sold under a Magnavox patent license which  
9 includes the '507 and '480 patents. There are no warnings in the  
10 sales area nor on any products or literature which would alert a  
11 consumer or the retailer that only Atari cartridges may be used with  
12 Atari master consoles, Mattel cartridges with Mattel consoles, or  
13 Coleco cartridges with Coleco consoles. The consumer sees only that  
14 certain cartridges are compatible with certain master consoles  
15 without restrictions.

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1           58.    The consumers of master consoles reasonably believe  
2 that they may purchase Activision cartridges or compatible  
3 cartridges made by any manufacturer without violating any law or  
4 infringing any patent.  Thus by 1982 an estimated one-half of the 10  
5 million homes with an Atari master console had at least one  
6 Activision cartridge.  Magnavox has been well aware of the  
7 consumer's expectations and actions and has taken no steps whatever,  
8 either directly or through their licensees, to affect either the  
9 consumer's expectations or the consumer's resulting actions.  
10 Existence of desirable, saleable cartridges enhances the sale of  
11 master consoles.

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1           59.    The consumer of an Atari, Mattel or Coleco master  
2 console has an implied license for reasonable use of his or her  
3 master console, including the purchase and use of compatible game  
4 cartridges.

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60. The 13 Activision video game cartridges alleged to infringe the '507 patent are manufactured and sold for Atari, Coleco, and Mattel master consoles as follows:

|                 | <u>Atari</u> | <u>Coleco</u> | <u>Mattel</u> |
|-----------------|--------------|---------------|---------------|
| Boxing          | x            |               |               |
| Fishing Derby   | x            |               |               |
| Tennis          | x            |               |               |
| Stampede        | x            |               | x             |
| Ice Hockey      | x            |               |               |
| Barnstorming    | x            |               |               |
| Grand Prix      | x            |               |               |
| Sky Jinks       | x            |               |               |
| Keystone Kapers | x            | x             |               |
| Dolphin         | x            |               |               |
| Enduro          | x            |               |               |
| Decathlon       | x            | x             |               |
| Pressure Cooker | x            |               |               |

The Atari, Coleco and Mattel master consoles which play the 13 games are sublicensed by Magnavox under the '507 patent.

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1                   61.    The Activision game cartridges and disks listed  
 2 below, released between September 10, 1984 and November 3, 1984, do  
 3 not infringe the '507 patent:  
 4

| 5  | <u>Title</u>            | <u>Shipment Date</u> | <u>System</u>              |
|----|-------------------------|----------------------|----------------------------|
| 6  |                         |                      |                            |
| 7  | 1.    Zone Ranger       | 9/12/84              | Atari Home Computer ("HC") |
| 8  |                         | 9/12/84              | Commodore cartridge        |
|    |                         | 9/28/84              | Commodore disk             |
| 9  | 2.    Zenji             | 9/17/84              | Commodore cartridge        |
| 10 | 3.    Park Patrol       | 9/17/84              | Commodore disk             |
| 11 | 4.    River Raid        | 9/17/84              | Commodore disk             |
| 12 |                         | 10/22/84             | Commodore cartridge        |
| 13 | 5.    Designer's Pencil | 9/24/84              | Commodore disk             |
|    |                         | 9/28/84              | Commodore cartridge        |
| 14 | 6.    Space Shuttle     | 10/5/84              | Commodore disk             |
| 15 |                         | 10/17/84             | Atari HC                   |
|    |                         | 10/26/84             | Commodore cartridge        |
| 16 | 7.    Pitfall II        | 10/5/84              | IBM                        |
| 17 | 8.    Ghostbusters      | 10/26/84             | Commodore disk             |
| 18 | 9.    Past Finder       | 11/2/84              | Atari HC                   |
| 19 |                         | 11/2/84              | Commodore disk             |
|    |                         | 11/2/84              | Commodore cartridge        |
| 20 | //                      |                      |                            |
| 21 | //                      |                      |                            |
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62. Activision game cartridges are computer software.

The cartridge itself does not generate dots, detect coincidence, or provide a means for imparting a distinct motion. Each Activision cartridge, depending upon the theme of the video game, is itself programmed to instruct the master console to perform these functions. Each Activision game cartridge is programmed to inform the master console to generate colorful and realistic backgrounds and sound effects.

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63. The '507 patent does not describe or disclose the use of video game cartridges such as those made, designed and sold by Activision and there is nothing in any of the language of the patent to indicate that use of interchangeable cartridges was contemplated to be a part of the '507 device.

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64. The computer and video game cartridge technology that forms the basis of Activision's product is not equivalent to the '507 patent.

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65. During the prosecution of the '284 application (which, upon reissue, became the '507 patent), the Patent Office Primary Examiner required Rusch to define what he meant by "hit symbol" and "hitting symbol". In the course of his response, Rusch described the movement that would be imparted to the "hit" spot (e.g., the ball) upon being hit by the "hitting" spot (e.g., the player-controlled symbol). Either the hit spot would reverse direction, or the hit spot would "travel in a direction and with a velocity proportional to the direction and velocity of the 'hitting' spot, causing it to move toward an off-screen position, whereupon it will bounce away from the screen in the same fashion as a ball would." The terms "hit symbol", "hitting symbol," and "imparting a distinct motion" in the '284 and '507 patents are limited to situations where either the "hit" spot reverses direction and/or travels in a direction and with a velocity proportional to the direction and velocity of the "hitting" spot.

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1           66.    In at least nine of the Activision video games which  
2 Magnavox alleges infringe the '507 patent, there is no imparting of  
3 a distinct motion to the hit symbol upon coincidence with the  
4 hitting symbol.  These games include Fishing Derby, Stampede,  
5 Barnstorming, Grand Prix, Sky Jinks, Keystone Kapers, Dolphin,  
6 Enduro, and Decathlon.

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67. No software-only manufacturer of video game programs has purchased a license from Magnavox under the '507 patent. Unlicensed program manufacturers include Imagic, Parker Brothers, Broderbund, Synapse, Epyx, Sierra, Electronic Arts, Spinnaker, and CBS. Also unlicensed are most manufacturers of home computers which play video games, including IBM, Apple and Commodore.

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68. There is a substantial market for consumer joysticks of varying models, styles and features, manufactured and sold by third parties who do not also manufacture master consoles or software. No manufacturer of consumer joysticks only has purchased a license from Magnovox under the '507 patent, nor has Magnoavox sought to obtain any such license.

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NOTE: Activision maintains that the findings, decisions and outcome in Magnavox v. Chicago Dynamics Industries and Magnavox v. Mattel have no relevance whatsoever to this action, except as set forth specifically herein at Paragraph 35, supra. The following four paragraphs set forth facts which are important to this Court's determination of the weight to be accorded to the prior decisions, should the Court determine them to have any relevance at all.

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69. Magnavox v. Chicago Dynamics Industries was initiated in 1974 in the Northern District of Illinois against several defendants. One of the defendants, Atari, Inc., sued Magnavox for declaratory relief in the Northern District of California and, after a battle over venue, the Atari case was consolidated for trial in Illinois. Atari and several other defendants settled before trial. Chicago Dynamics Industries, another defendant, declared bankruptcy at the outset of the litigation leaving Seeburg Industries, Inc. as the sole defendant. Seeburg manufactured only coin-operated video arcade games. After Magnavox obtained a judgment against Seeburg, the case was settled for a \$42,500 payment to Magnavox by Seeburg.

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70. In accordance with the terms of the Atari-Magnavox settlement agreement, Atari paid Magnavox \$150,000 in June, 1976; \$150,000 in January, 1977; and \$200,000 annually in each of the six succeeding years, and received, therefore, a paid-up license under the '507 patent. Since 1976 Atari has sold at least 10 million consoles, receiving an estimated \$2 billion in revenue. In addition Atari has sold at least 100 million video game cartridges since 1976 for an estimated \$2 billion in revenue.

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71. In 1980 Magnavox initiated litigation against Mattel alleging infringement of the '507 patent. Mattel was effectively precluded from contesting the validity of the '507 patent in that lawsuit and did not do so. Mattel manufactured and sold complete units, i.e., television master console, joysticks, and educational and game cartridges for their master console.

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72. In the period between 1960 and 1982 patent holders received significantly disparate results depending on the federal judicial circuit in which patent infringement actions were brought. During the same period it was generally known to counsel who practiced patent litigation that the United States Court of Appeals for the Seventh Circuit was significantly more favorable to patent holders than the Ninth Circuit. Both Magnavox v. Chicago Dynamic Industries and Magnavox v. Mattel were tried in the Seventh Circuit. As a result of serious differences between the manner in which the various Circuits dealt with patent cases, the Court of Appeals for the Federal Circuit was created in 1982 to bring reasonable uniformity to this area of the law.

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73. In 1977 Magnavox brought suit against APF Electronics and several other entities for infringement of the '507 patent. The suit against APF was dismissed for lack of venue. In November 1980 APF acquired the Spiegel patent; in January 1981 APF intervened in litigation between Magnavox and APF customers Sears, Roebuck and Montgomery Ward and counter-claimed against Magnavox for infringement of the Spiegel patent. The case was ultimately settled; as part of the settlement, APF conveyed the Spiegel patent (which by then had expired) to Magnavox.

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74. Activision, in the conduct of its business, takes great care to avoid infringing valid patents which might affect any of its products. Activision has proceeded at all relevant times in the good faith belief that its products do not infringe any applicable patent.

DATED: December 3, 1984.

MARTIN R. GLICK  
H. JOSEPH ESCHER III  
MARLA J. MILLER  
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By M. R. Glick  
MARTIN R. GLICK

Attorneys for Defendant and  
Counterclaimant Activision, Inc.

120384/3-355900Cq-5

1 PROOF OF SERVICE

2 I, MARIE SPIEGL, declare as follows:

3 1. I am a resident of the City and County of San  
4 Francisco, over the age of eighteen years and not a party to the  
5 within action. My business address is Three Embarcadero Center,  
6 Suite 700, San Francisco, California.

7 2. On December 3, 1984 I served the following document:  
8 PRETRIAL STATEMENT OF ACTIVISION, INC. REGARDING DISPUTED FACTUAL  
9 ISSUES as follows:

10 By FEDERAL EXPRESS, a true and correct copy in a sealed  
11 envelope addressed as follows:

12 James T. Williams, Esq.  
13 NEUMAN, WILLIAMS, ANDERSON & OLSON  
14 77 W. Washington Street  
Chicago, IL 60602

15 By HAND DELIVERY, by causing a true and correct copy to  
16 be personally delivered addressed as follows:

17 Robert L. Ebe, Esq.  
18 McCUTCHEN, DOYLE, BROWN & ENERSEN  
19 3 Embarcadero Center  
Twenty-eighth Floor  
20 San Francisco, CA 94111

21 I declare under penalty of perjury that the foregoing  
22 is true and correct.

23 Executed this 3rd day of December 1984 at San Francisco,  
24 California.

25   
26 MARIE SPIEGL

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RICE  
NEMEROVSKI  
CANADY  
ROBERTSON  
& FALK  
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