IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

| | | |
|---|---|---|
| ANASCAPE, LTD. | § | |
| | § | Hon. Ron Clark |
| Plaintiff, | § | |
| | § | |
| v. | § | Civil Action No. 9:06-CV-00158-RC |
| | § | |
| MICROSOFT CORPORATION, and | § | ORAL HEARING REQUESTED |
| NINTENDO OF AMERICA, INC., | § | |
| | § | |
| Defendants. | § | |

**MICROSOFT CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT – NON-INFRINGEMENT OF "3-D GRAPHICS CONTROLLER" CLAIMS**

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases** **Page**



**Statutes** **Page**

## SUMMARY

Microsoft's accused Xbox controllers and Xbox 360 controllers (collectively "Microsoft's controllers") are not "3-D graphics controllers" within the meaning of this Court's claim construction. In particular, they do not have one or more input members that, alone or in combination, capture hand motion in six degrees of freedom. Thus, Microsoft moves for summary judgment that it has not infringed claims 12-15 and 32-33 of U.S. Patent No. 6,906,700 ("the 3-D graphics controller claims") (1) literally, (2) under the doctrine of equivalents, (3) under 35 U.S.C. § 271(b) or (c) (indirect infringement), or (4) in any other manner.

## UNDISPUTED MATERIAL FACTS

(1) Microsoft's controllers do not have a single input member movable in all six degrees of freedom. (Declaration of Stephen Bristow ("Bristow Decl."), ¶¶ 6-11).

(2) Microsoft's controllers do not have a combination of input members movable in all six degrees of freedom. (*Id.*)

(3) Microsoft's controllers have no input member capable of rotation about the up/down axis (yaw), or linear movement along the front/back or left/right axes. (*Id.* ¶ 10).

## ISSUE PRESENTED

Has Microsoft infringed the 3-D graphics controller claims (1) literally, (2) under the doctrine of equivalents, (3) under Sections 271(b) or (c) (indirect infringement), or (4) in any other manner?

## ARGUMENT

### I. THE CLAIM CONSTRUCTION REQUIRES THAT A 3-D GRAPHICS CONTROLLER HAVE SIX DEGREES OF FREEDOM

The claim construction states that:

> "**Controller"** means a device held in a user's hand that allows hand or finger inputs to be converted into electrical signals for manipulation of images (graphics) on a display device, which are capable of being perceived by a human"
>
> **"3-D"** means "capable of movement in six degrees of freedom"

*Markman* Order (Docket No. 182), p.11. Although not a claim term, the Court also defined six degrees of freedom stating: "[h]aving 6 DOF means that the input member can move on three linear axes: 1) forward/backward, 2) up/down, 3) left/right, and three rotational axes: 1) yaw, 2) pitch, and 3) roll." *Id.* at 5. Thus, a "3-D graphics controller" is a device held in the user's hand having hand or finger input member(s) capable of movement in six degrees of freedom, such movement to be converted into electrical signals for manipulation of images (graphics) on a display device, which are capable of being perceived by a human.

Microsoft's controllers are not 3-D graphics controllers because they do not have one or more input members capable of movement in six degrees of freedom. As a result, Microsoft does not literally infringe the 3-D graphics controller claims. Further, Anascape has presented no case for "doctrine of equivalents" infringement, and no case for indirect infringement. Thus, the Court should grant summary judgment that Microsoft has not infringed these claims.

### II. MICROSOFT'S CONTROLLERS ARE NOT "3-D GRAPHICS CONTROLLERS"

Microsoft's controllers do not have a combination of one or more input members movable in all six degrees of freedom. Thus, they are not 3-D graphics controllers and Microsoft does not infringe the 3-D graphics controller claims.

### A. No Input Members Can Physically Move In All Six Degrees Of Freedom

No single input member on Microsoft's controllers can move in all six degrees of freedom. (Bristow Decl., ¶¶ 6-11). Each of the accused controllers has: 2 thumbsticks, 1 D-pad, and 2 triggers. (*Id.* at ¶ 6). All possible movements of each of these input members are summarized in the table below.

| Input Member | Linear Movement | | | Rotational Movement | | |
|---|---|---|---|---|---|---|
| | Front /Back | Left/ Right | Up/ Down | Roll (Front/ Back) | Pitch (Left/ Right) | Yaw (Up/ Down) |
| Left Thumbstick | | | ½ | ✓ | ✓ | |
| Right Thumbstick | | | ½ | ✓ | ✓ | |
| D Pad | | | | ✓ | ✓ | |
| Left Trigger | | | | | ½ | |
| Right Trigger | | | | | ½ | |

(*Id.* at ¶¶ 7-10). In addition, the Xbox controllers have 8 top surface buttons and the Xbox 360 controllers have 6 top surface buttons. Each top surface button is capable of the same ½ degree of freedom, i.e., movement down from its neutral position, but not up. (*Id.* at ¶ 11). The Xbox 360 controllers also have two front surface buttons. (*Id.*). Each front surface button is capable of the same ½ degree of freedom, i.e., movement back from its neutral position, but not forward.

### B. The Input Members In Combination Cannot Move In All Six Degrees Of Freedom

Even combined, the input members cannot be moved in all six degrees of freedom. (*Id.* at ¶ 10). None of the input members is capable of linear movement along the front/back or left/right axes. (*Id.*) Further, none of the members is capable of rotational movement about the yaw (up/down) axis. (*Id.*) Thus, even when their movements are combined, the input members of the accused controllers add up to only 2½ degrees of freedom—not the required 6 degrees of

freedom. If the buttons are included, only an additional ½ degree of freedom, i.e., back, but not forward, along the front/back axis is added.

## III. THE ACCUSED MICROSOFT CONTROLLERS DO NOT INFRINGE THE 3-D GRAPHICS CONTROLLER CLAIMS

A patent infringement determination is a two-step process. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1454 (Fed. Cir. 1998) (*en banc*). First the claims must be properly construed. *Id*. Second, the accused device is compared to the construed claim to determine whether each and every requirement of the claim is present in the accused device. *Id*. The absence of even a single requirement requires a finding of non-infringement. *Digital Biometrics, Inc. v. Identix, Inc.*, 149 F.3d 1335, 1349 (Fed. Cir. 1998) ("An accused device cannot infringe, as a matter of law, if even a single limitation is not satisfied."). Although this comparison is a question of fact, summary judgment is appropriate when there is no dispute as to the structure and operation of the accused device. *Desper Prods., Inc. v. QSound Labs, Inc.*, 157 F.3d 1325, 1332-33 (Fed. Cir. 1998).

### A. The Preamble Is A Limitation For The 3-D Graphics Controller Claims

The Court has ruled that the "3-D graphics controller" limitation found in the preamble is a claim requirement. Anascape unsuccessfully argued during claim construction that the "3-D graphics controller" language, because it is found *only* in the preamble of the 3-D graphics controller claims, is not a claim requirement. This Court rejected that argument and construed the term "3-D graphics controller."

Despite the Court's ruling, Anascape's expert opines that "3-D graphics controller" is not a claim limitation. (*See, e.g.,* Howe Report at ¶ 84, Exhibit C at pp. 1, 4, 8, 12, 20).[1] Thus, it is likely that Anascape will attempt to resurrect its unsuccessful claim construction argument in opposing this motion. This issue already has been briefed, argued and decided. The Court should reject Anascape's argument again for the reasons previously argued.

### B. There Is No Literal Infringement

There is no dispute that the accused controllers have no input member that rotates about the yaw (vertical) axis and no input member that moves linearly along the front/back or left/right axes (although the two front surface buttons each move back, but not forward, on the front/back axis). The controllers do not have input members that, either alone or in combination, physically move in six degrees of freedom. Thus, Microsoft's controllers are not 3-D graphics controllers.

#### 1. Anascape's Expert, Dr. Howe, Agrees That Microsoft's Input Members Do Not Move In All Six Degrees Of Freedom

In describing the accused controllers, Dr. Howe, states that "[e]ach thumbstick allows input on 2 bi-directional axes—up-down, and left-right." (Howe Report at ¶ 91.) The "directional pad [D-Pad] allows input on 2 bi-directional axis—up-down, and left-right" (*id.*), and that each trigger allows input on one axis (*id.* at ¶¶ 49-50). Dr. Howe does not describe any input member that rotates about the yaw (vertical) axis or that allows movement linearly along the front/back or left/right axes. In sum, Dr. Howe's description agrees with the movements summarized in the table above and confirms that: 1) no single input member is moveable in all

[1] The cited portions of the Howe Report, including Exhibit C to the Howe Report, are attached to the accompanying Declaration of Ashely Fogerty ("Fogarty Decl.") as Exhibit 1.

six degrees of freedom, and 2) no combination of input members allows movement in all six degrees of freedom.

### 2. Dr. Howe's Reliance On "Objects" Moving In Three Dimensions Is Contrary To The Claim Construction And The Patent

Perhaps recognizing that Microsoft's controllers do not have input members movable in each of the six degrees of freedom, either alone or in combination, Dr. Howe shifts his attention to the virtual movements of objects on a screen rather than the actual movements of the input members of the controller. (*Id.* at ¶¶ 88-89). In doing so, Dr. Howe ignores the express reference to "input member" in the Court's definition of six degrees of freedom. *Markman* Order at 5. Specifically, "[h]aving 6 DOF means that the ***input member*** can move on three linear axis: 1) forward/backward, 2) up/down, 3) left/right, and three rotational axes: 1) yaw, 2) pitch, and 3) roll." (Emphasis added). And, he ignores the fact that the claims recite a controller only, not the combination of a controller and a screen display.

Further, Dr. Howe confuses movement in a 3-D environment with movement in six degrees of freedom. One skilled in the art would recognize that these are not the same by any means. (Bristow Decl. at ¶ 12). As an illustration, a train moves along its track in 3-dimensional space when, e.g., it goes up a hill on a curve. (*Id.*) However, a train does not have six degrees of freedom of movement. That is, a train cannot drive sideways in a controlled fashion or drive directly up or down in a controlled fashion. Similarly, a train cannot, of its own accord, rotate about any axis. (*Id.*) Thus, the mere fact that an object can move about in 3-dimensional space does not mean that it can move independently in each of the six degrees of freedom: 1) forward/backward, 2) up/down, 3) left/right, and three rotational axes: 1) yaw, 2) pitch, and 3) roll. In this case, Mr. Armstrong expressly defined "3-D" to mean "six degrees of freedom." *See Markman* Order at 7 (quoting Mr. Armstrong's 10/25/2002 Preliminary Amendment). Thus,

"3-D" as used in the '700 patent does not have the meaning used by Dr. Howe. It has a more demanding meaning, as found by the Court. *Id.* at 5.

Even if the claims were rewritten to cover the combination of a controller and a display screen and its virtual objects, Anascape still would have no case. Dr. Howe fails to identify a single object in a single game that actually has been controlled by the Microsoft controllers to move in all six degrees of freedom. Rather, he combines the movements of many objects, e.g., rolling boulders, rotating coins and swirling vortexes, to illustrate objects moving in six degrees of freedom. (Howe Report at ¶ 89). First, these illustrations come from a game that is not played with the Microsoft controllers. Second, not all of these movements are controlled by a controller. Third, combining the virtual motions of several different objects on a screen is beyond the scope and description of "six degrees of freedom" in the '700 patent. Thus, Dr. Howe's example is contrary to both the patent and this Court's claim construction.

### 3. Dr. Howe's "Mapping" Argument Is Misplaced

Next, Dr. Howe concludes that Microsoft's controllers are "3-D graphics controllers" because they are "capable of controlling graphics in six degrees of freedom." (*Id*. at ¶ 90). Again, Dr. Howe ignores the fact that six degrees of freedom applies to the controller's input members—not to the objects on the screen. Thus, Dr. Howe inappropriately suggests that someone, presumably by creating special software, could map, or assign, a physical movement of an input member along or about one axis to create a different *virtual* movement of an object along or about some different axis. (*See id.*). That is, someone could theoretically create software to map a signal from the left-right movement of an input member to produce a rotation about the yaw (up/down) axis in a controlled virtual object, even though the Microsoft controllers output no actual signal corresponding to rotation about the yaw (up/down) axis.

Dr. Howe then concludes that as long as the input members can move on a *combined total* of six axes, even if they are *redundant* axes, someone could use the controller (presumably combined with the specially created mapping software) to control an object on a screen in six degrees of freedom.

If Dr. Howe's argument were accepted, it would convert an ordinary computer keyboard into a six degree of freedom controller because, for example, pressing the "a" key could be assigned to produce an up movement in a controlled object, pressing the "b" key could be assigned to produce a down movement in a controlled object, and so on, until a key had been assigned to each of the 12 movements that make up six degrees of freedom. Such a construction is contrary to the teachings of the '700 patent.

Dr. Howe further fails to identify any software that does, in fact, allow a Microsoft controller to move an object in a full six degrees of freedom. Thus, there is no infringement even under Dr. Howe's erroneous "mapping" theory, as the mere alleged possibility that someone *could* alter the outputs of the Microsoft controllers to map them to different movements is insufficient to find infringement. *High Tech Medical Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1555 (Fed Cir. 1995) ("But a device does not infringe simply because it is possible to alter it in a way that would satisfy all the limitations of a patent claim. *See Hap Corp. v. Heyman Mfg. Co.*, 311 F.2d 839, 843, 135 U.S.P.Q. 285, 288 (1st Cir. 1962) ('The question is not what [a device] might have been made to do, but what it was intended to do and did do. ... [T]hat a device could have been made to do something else does not of itself establish infringement.'), *cert. denied*, 373 U.S. 903, 10 L. Ed. 2d 198, 83 S. Ct. 1290 (1963).").

### 4. There Is No Equivalents Infringement

Subject to various legal restrictions, a patent owner unable to show literal infringement can prove equivalents infringement by proving that the differences between the accused product and the claimed subject matter are only insubstantial. *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 39 (1997). The patent owner is required to provide "particularized testimony from an expert or person skilled in the art that specifically addesse[s] equivalents 'on a limitation-by-limitation basis;' explain[s] the insubstantiality of the differences between the patented method and the accused product; or discusse[s] the function, way, result test." *Aquatex Indus., Inc. v. Techniche Solutions*, 479 F.3d 1320, 1329 (Fed. Cir. 2007) (summary judgment of no equivalents infringement where the patentee failed to meet burden). Yet, Anascape's Infringement Contentions do not provide such evidence and argument (*see* Fogerty Decl., Ex. 2 p. 3), and Dr. Howe's report does not even allege infringement under the doctrine of equivalents. *See Nike, Inc. v. Adidas America Inc.*, 479 F.Supp.2d 664, 670 (E.D. Tex. 2007) (finding waiver of doctrine of equivalents based on insufficient disclosure in preliminary infringement contentions). Accordingly, this Court should, in all events, grant partial summary judgment against Anascape on the issue of equivalents infringement.

### 5. There Is No Indirect Infringement

Anascape's Amended Complaint pleads that "Microsoft is liable for direct infringement and/or indirect infringement by way of inducement or contributory infringement of these patents pursuant to 35 U.S.C. § 271." (Amended Complaint, ¶ 22 (Fogerty Decl. Ex. 3)). But neither in its Infringement Contentions nor in Dr. Howe's report on infringement did Anascape allege or provide any support for either contributory infringement or inducement of infringement.

Anascape has failed to meet its burden of showing either contributory infringement or

induced infringement. First, Anascape cannot prove that the accused devices are unsuited for any commercial non-infringing use. *See* 35 U.S.C. § 271(c); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 40-41 (2006); *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 200 (1980). Second, Anascape has failed to identify a single individual or entity who has directly infringed the asserted claims, using Microsoft's controllers and following directions from Microsoft. *See Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 774 (Fed. Cir. 1993) ("Liability for either active inducement of infringement or for contributory infringement is dependent upon the existence of direct infringement."). Third, Anascape has made no showing that Microsoft had the required specific intent to induce infringement. *See DSU Med. Cor*p. *v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (*en banc* in relevant part).

## IV. CONCLUSION

As often is the case, the construction of these claims dictates that there is no infringement. The input members on the accused controllers, whether considered individually or collectively, are not movable in six degrees of freedom. As this Court has construed the 3-D graphics controller claims to require such movement, the Court should grant summary judgment that Microsoft has not infringed claims 12-15 and 32-33 of the '700 Patent (1) literally, (2) under the doctrine of equivalents, (3) under Sections 271 (b) or (c) (indirect infringement), or (4) in any other manner.

Respectfully submitted,

Dated: February 27, 2008

By: /s/ John D. Vandenberg

J. Christopher Carraway (admitted *pro hac vice*)
christopher.carraway@klarquist.com
Joseph T. Jakubek (admitted *pro hac vice*)
joseph.jakubek@klarquist.com
Stephen J. Joncus (admitted *pro hac vice*)
stephen.joncus@klarquist.com

Richard D. Mc Leod (Bar No. 24026836)
rick.mcleod@klarquist.com
Derrick W. Toddy (admitted *pro hac vice*)
derrick.toddy@klarquist.com
John D. Vandenberg (admitted *pro hac vice*)
john.vandenberg@klarquist.com
KLARQUIST SPARKMAN, LLP
121 S.W. Salmon Street, Suite 1600
Portland, Oregon 97204
Telephone: 503-595-5300

J. Thad Heartfield (Bar No. 09346800)
thad@jth-law.com
Law Offices of J. Thad Heartfield
2195 Dowlen Road
Beaumont, Texas 77706
Telephone: 409-866-3318
Facsimile: 409-866-5789

Clayton E Dark Jr. (Bar No. 05384500)
clay.dark@yahoo.com
Clayton E Dark Jr., Law Office
207 E Frank Ave # 100
Lufkin, TX 75901
Telephone: 936-637-1733

Stephen McGrath, Esq. (admitted *pro hac vice*)
MICROSOFT CORPORATION
One Microsoft Way, Building 8
Redmond, Washington 98052-6399
Telephone: 425-882-8080
Facsimile: 425-706-7329
*Attorneys for Defendant Microsoft Corporation*

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 27th day of February, 2008, the foregoing pleading was electronically filed with the Court. Pursuant to Local Rule CV-5(a)(3), this constitutes service on the following counsel:

By:/s/ John D. Vandenberg

John D. Vandenberg
john.vandenberg@klarquist.com
KLARQUIST SPARKMAN, LLP
121 S.W. Salmon Street, Suite 1600
Portland, Oregon 97204
Telephone: 503-595-5300
Facsimile: 503-595-5301