

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

ANASCAPE, LTD.

Plaintiff,

v.

MICROSOFT CORPORATION, and  
NINTENDO OF AMERICA, INC.,

Defendants.

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Hon. Ron Clark

Civil Action No. 9:06-CV-00158-RC

ORAL HEARING REQUESTED

**MICROSOFT CORPORATION’S REPLY IN SUPPORT  
OF ITS MOTION FOR PARTIAL SUMMARY  
JUDGMENT – NON-INFRINGEMENT OF “3-D GRAPHICS CONTROLLER” CLAIMS**

MS’S REPLY ISO MOTION FOR PARTIAL SUMMARY JUDGMENT –  
NON-INFRINGEMENT OF “3-D GRAPHICS CONTROLLER” CLAIMS

## **I. INTRODUCTION**

For the “3-D graphics controller” claims, Anascape has failed to meet its burden on any theory of infringement. Anascape does not even address indirect infringement. It fails to offer *any* of the required evidence for infringement under the doctrine of equivalents. For literal infringement, Anascape concedes that there is no infringement under Microsoft’s reading of the Court’s claim construction. It offers its own flawed construction, but even under that flawed construction Anascape still fails to meet its burden of showing infringement. Anascape’s last resort is to argue that “3-D graphics controller” is not really a claim limitation. This argument was made and lost during claim construction—because it is wrong. Microsoft’s motion should be granted in its entirety.

## **II. INDIRECT INFRINGEMENT: ANASCAPE DOES NOT RESPOND**

Anascape’s pleadings charge Microsoft with indirect infringement (*see* Moving Memo. at 9). Microsoft asked Anascape to voluntarily withdraw those charges, but Anascape did not respond. Now, after requiring Microsoft to file a motion to dispose of those charges, Anascape does not even acknowledge or attempt to support them. The Court should grant summary judgment that Microsoft has not indirectly infringed the 3-D graphics controller claims.

## **III. INFRINGEMENT UNDER THE DOCTRINE OF EQUIVALENTS: ANASCAPE FAILS TO MEET ITS BURDEN**

Anascape has made no showing of equivalents infringement either. First, Anascape fails to explain why a single sentence—“In the alternative, any asserted claim not found to be literally infringed is infringed under the doctrine of equivalents”—found in its Infringement Contentions is sufficient to preserve its case and meet its burden under the doctrine of equivalents. (*See* Moving Memo. at 9). As a result, Anascape has waived the doctrine of equivalents.

Second, neither its claim charts nor its expert have provided any of the required “particularized testimony from an expert or person skilled in the art that specifically address[es] equivalents ‘on a limitation-by-limitation basis;’ explain[s] the insubstantiality of the differences between the patented method and the accused product; or discuss[es] the function, way, result test.” *Aquatex Indus., Inc. v. Techniche Solutions*, 479 F.3d 1320, 1328-29 (Fed. Cir. 2007) (summary judgment of no equivalents infringement because patentee failed to provide required particularized evidence of equivalence). Dr. Howe’s unsworn report is not even properly considered on summary judgment. Fed. R. Civ. P. 56(e); Local Rule CV-56(d).

The Court should grant summary judgment that Microsoft has not infringed the 3-D graphics controller claims under the doctrine of equivalents.

**IV. LITERAL INFRINGEMENT: IT IS TOO LATE TO REARGUE CLAIM CONSTRUCTION TO TRY TO PRESERVE AN INFRINGEMENT CASE**

The remaining, “literal infringement” prong of this Motion turns entirely on a question of law: claim construction. Anascape concedes that Microsoft does not infringe “any claim that includes the ‘3-D graphics controller term’ under Defendants’ proposed construction.” (Opposing Memo. at 11 n. 10). Unable to meet its burden of showing infringement, Anascape challenges “Defendants’ proposed construction,” by offering its own reinterpretation of the Court’s January 11 *Markman* Order (Docket No. 182). It then seeks to reopen claim construction to eliminate the “3-D graphics controller” requirement completely. None of these tactics succeeds.

**A. Anascape’s Proposed Claim Construction Is Flawed**

The requirement that a “3-D graphics controller” be 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 flows directly from the Court's *Markman* Order.<sup>1</sup> (See Moving Memo. at 2). It is not, as Anascape suggests, Defendants' "proposed construction."

Anascape attempts to reinterpret the Court's construction by proposing that a "3-D graphics controller" is "a controller capable of controlling graphics moving in six degrees of freedom." (Opposing Memo. at 11). This proposed reinterpretation pays lip service to the Court's requirement that "3-D" means "capable of movement in six degrees of freedom" (*Markman* Order at 11), but completely ignores the Court's statement that "[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).

Anascape's proposal deviates from the *Markman* Order in at least the following respects:

- It ignores the Court's (and the claims') focus on input members and inputs to the controller. Instead it focuses on the graphics generated by computer software. The '700 Patent indisputably referred to the former, not the latter:

The present controllers sense *hand inputs on the input member* via movement or force influenced sensors, and send information describing *rotation or rotational force of the hand operable input member in either direction about three mutually perpendicular bi-directional axes* herein referred to as yaw, pitch and roll, (or first, second and third); and information describing *linear moment of the hand operable input member along the axes* to a host computer or like graphics generation device for control of graphics of a display, *thus 3D or six degrees of freedom of movement or force against the input member* are converted to input-representative signals for control of graphics images. (Summary of Invention, col. 2, lines 25-36) (emphases added).

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<sup>1</sup> The Court did not construe the phrase "3-D graphics controller." Rather, it construed the claim terms "3-D" and "controller" and defined the non-claim term "6 DOF." Microsoft believes that its opening brief was clear on this point. However, to the extent Microsoft's brief suggested to the contrary (*see* Opposing Memo. at 12 n. 3), it was incorrect and unintended.

- It has no reference to the specific six degrees of freedom enumerated in the *Markman* Order, i.e., movement along the 1) forward/backward, 2) up/down, 3) left/right axes; and rotation about the: 1) yaw, 2) pitch, and 3) roll axes.
- It does not require that the controller controls six degrees of freedom, only that it controls *graphics* moving in six degrees of freedom. This difference is critical. It is common in game software for various graphic objects to perform movements that are generated by the software and not controlled by the player (and, hence, the controller). For example, background or scenery objects may roll down a hill, blow in the wind or spin about with no input from a user (or a controller). Anascape’s proposed construction would apparently count these uncontrolled movements towards its “six degrees of freedom.”

The deviations in Anascape’s proposed construction are not surprising. Rather, they are merely the next step in its continuing efforts to retreat from what its patents actually describe.

**B. Anascape Fails To Demonstrate Infringement Even Under Its Flawed Construction**

Even under its flawed interpretation of the Court’s claim construction, Anascape has failed to provide evidence sufficient to carry its burden. As mentioned above, Dr. Howe’s report is unsworn and thus not properly considered on summary judgment. Fed. R. Civ. P. 56(e); Local Rule CV-56(d). Even if considered, Dr. Howe’s report is deficient, as pointed out in Microsoft’s moving papers. (*See* Moving Memo. at 6-7). Anascape has not even attempted to explain or correct these deficiencies. Nor has Anascape come forward with any additional evidence to compensate for these deficiencies.

**C. “3-D Graphics Controller” Always Was And Still Is A Claim Limitation**

Unable to find safety in its flawed construction of the construction, Anascape’s last resort is to argue that “3-D graphics controller” is not really a claim limitation at all. Anascape has

made, and lost, this argument before. In its opening *Markman* brief Anascape argued that the phrase “3-D graphics controller” appeared solely in the preamble of the claims, was not a claim limitation, and therefore did not require construction. (Docket No. 89 at 10-11). Microsoft disagreed and explained why the case law supported its position. (Docket No. 94 at 8). Anascape then reiterated its position in its reply. (Docket No. 103 at 14-15). Despite Anascape’s urging, the Court chose to construe the term “3-D.”

Anascape is now acting as though “3 D” was construed by mistake or as a pointless academic exercise and argues that the Court did not decide this issue in its *Markman* ruling. It urges the Court to reopen claim construction only weeks before trial and regurgitates its previous briefing. (Opposing Memo. 8-10).

Anascape was wrong during claim construction and is still wrong now—the phrase “3-D graphics controller” is a claim limitation. The law is clear:

[W]hen reciting additional ***structure or steps underscored as important by the specification***, the preamble may operate as a claim limitation. *Corning Glass*, 868 F.2d at 1257 (limiting claim scope to “optical waveguides” rather than all optical fibers in light of specification); *General Electric Co. v. Nintendo Co.*, 179 F.3d 1350, 1361-62, 50 USPQ2d 1910, 1918-19 (Fed. Cir. 1999) (limiting claim scope to a “raster scanned display device” rather than all display systems in view of specification’s focus on the prior art problem of displaying binary data on a raster scan display device); *Rowe*, 112 F.3d at 479-80; *Applied Materials*, 98 F.3d at 1573.”

*Catalina Mktg. Int’l. v. Coolsavings.com*, 289 F.3d 801, 808 (Fed. Cir. 2002) (emphasis added); *see also Poly-America, L.P. v. GSE Lining Tech., Inc.*, 383 F.3d 1303, 1310 (Fed. Cir. 2004) (holding that the phrase “blown-film” in the preamble was limiting where the specification was “replete with references to the invention as a ‘blown-film’ liner” including the patent title and “Summary of the Invention”; the preamble language “does not state a purpose or intended use, but rather discloses a fundamental characteristic of the claimed invention”).

In addition, the preambles in the asserted claims must be considered limitations because otherwise the claims would not describe a complete invention. *On Demand Mach. Corp. v. Ingram Indus.*, 442 F.3d 1331, 1343–44 (Fed. Cir. 2006) (“[w]e conclude that the preamble in this case necessarily limits the claims, in that it states the framework of the invention”).

Here, the claims recite an assortment of elements (e.g. sensors, potentiometers, and vibration) but recite no associated structure to unify them. Indeed, some claims are a mere recitation of unconnected elements. (*See, e.g.*, claim 13). Absent the preamble, many of the recited elements are not required to be in a controller at all (let alone a single controller).

Other claims require the elements to be connected to the same circuitry. (*See, e.g.*, claim 12). However, separate and independent controllers connected to the same gaming console, or separate devices connected to the same computer network are connected to the same circuitry. Even though claim 15 recites a housing, for example, many of the elements recited in the body have no claimed connection to that housing. (*See, e.g.*, independent first, second and third button sensors and the sheet). Only the preamble actually requires that they be combined in a single 3-D graphics controller. Thus, the preamble is necessary to provide a structural framework for the collection of elements recited in the claim body, i.e., the elements must be contained with a single “3-D graphics controller.”

## V. CONCLUSION

For the foregoing reasons the Court should grant partial 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: March 18, 2008

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served electronically on all counsel who have consented to electronic service in compliance with Local Rule CV-5(a)(7)(C). Pursuant to Fed. R. Civ. P. 5 (d) and Local CV-f, all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on this the 18<sup>th</sup> day of March, 2008.

By: /s/ John D. Vandenberg