

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

**ANASCAPE, LTD.,**

**Plaintiff,**

**vs.**

**MICROSOFT CORPORATION and  
NINTENDO OF AMERICA, INC.,**

**Defendants.**

**Civil Action No. 9:06-CV-158-RC**

**JURY TRIAL**

**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION  
TO EXCLUDE TESTIMONY BY ROBERT HOWE**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ARGUMENT .....	1
	A. Howe’s Report Is Entirely Consistent With the Court’s Claim Constructions. ....	2
	1. Contrary to Defendants’ Assertion, Howe Has No “plans to tell the jury that the Court’s construction . . . can be disregarded.” .....	2
	2. Howe’s Report Acknowledges and Properly Applies the Court’s Claim Constructions. ....	3
	B. Howe’s Report Properly Employs the Established and Reliable Methodology. ....	4
	C. The Claims at Issue Are Apparatus Claims. ....	6
III.	CONCLUSION.....	7

## TABLE OF AUTHORITIES

### CASES

<i>Cybor Corp. v. Fas Techs.</i> , 138 F.3d 1448 (Fed. Cir. 1998).....	1, 5
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579 (1993).....	1, 5, 6, 7
<i>Inline Connection Corp. v. AOL Time Warner Inc.</i> , 470 F. Supp. 2d 435 (D. Del. 2007).....	6
<i>Kumho Tire Co., Ltd. v. Carmichael</i> , 526 U.S. 137 (1999).....	1
<i>Pipitone v. Biomatrix, Inc.</i> , 288 F.3d 239 (5th Cir. 2002) .....	1, 5, 6
<i>State Contracting &amp; Eng’g Corp. v. Condotte Am., Inc.</i> , 346 F.3d 1057 (Fed. Cir. 2003).....	3, 4, 6
<i>Yodlee, Inc. v. Cashedge, Inc.</i> , No. 05-01550, 2006 WL 3456610 (N.D. Cal. Nov. 29, 2006) .....	7

### RULES

FED. R. EVID. 702.....	1, 6
FED. R. EVID. 705.....	6

## I. INTRODUCTION

Plaintiff Anascape, Ltd. (“Anascape”) files this response in opposition to Defendants’ motion to exclude testimony of Dr. Robert Howe. [Dkt. No. 217 (filed under seal)]. Howe, the Gordon McKay Professor of Engineering at Harvard University, has submitted an expert report examining Defendants’ infringement of the ’700 Patent. [Howe Rpt. ¶¶ 1-6 (filed with Dkt. No. 217 as Exh. 1)]. Howe’s report explicitly acknowledges the Court’s claim-construction Orders, and engages in a careful, element-by-element comparison of the claims as construed by the Court to each of the accused products. [*Id.* ¶¶ 11-12, 24-99, Exhs. C-G]. Because this report reflects testimony that is relevant to the issues in dispute, and because it applies an established and reliable methodology for determining infringement, *see Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594-95 (1993); FED. R. EVID. 702, Defendants’ motion should be denied.

## II. ARGUMENT

Rule 702 empowers trial courts “to ensure the reliability and relevancy of expert testimony” by making a “preliminary assessment” of whether the methodology employed by the expert is reliable, and whether it “properly can be applied to the facts in issue.” *See Kumho*, 526 U.S. at 152; *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 243-44 (5th Cir. 2002). The focus of the court’s Rule 702 analysis “must be solely on principles and methodology, not on the conclusions they generate.” *Daubert*, 509 U.S. at 594-95. With respect to determining patent infringement, a reliable methodology has been established by the Federal Circuit:

An infringement analysis involves two steps. First, the court determines the scope and meaning of the patent claims asserted, . . . and then the properly construed claims are compared to the allegedly infringing device.

*Cybor Corp. v. Fas Techs.*, 138 F.3d 1448, 1454 (Fed. Cir. 1998). This is precisely the methodology employed by Howe, as reflected in his expert report. [Howe Rpt. ¶¶ 11-12, 24-99].

Notwithstanding this fact—and despite their failure to include a single citation to Rule 702, *Daubert*, *Kumho*, or any related authority—Defendants argue that Howe’s testimony is

unreliable and should be excluded for two reasons. First, Defendants assert that Howe “fails to acknowledge and selectively applies” the Court’s claim constructions; second, they argue that Howe “did not analyze the correct [video] games and did not use an acceptable methodology to analyze the games he did review.” [Dkt. No. 217 at 1, 6]. Neither of these arguments has any merit.

**A. Howe’s Report Is Entirely Consistent With the Court’s Claim Constructions.**

While they cite no Rule 702 case law, Defendants do reference a very few Federal Circuit opinions, each standing for the proposition that it is the Court’s responsibility to construe disputed claims. [*Id.* at 2]. Anascape takes no issue with any of these opinions, and none of them provides any reason for excluding Howe’s testimony—for that testimony explicitly and faithfully relies upon the Court’s constructions in this case. [Howe Rpt. ¶¶ 11, 18, 84-86, 97-98]. Defendants alternately assert that Howe “ignores,” or “selectively applies,” or “fails to apply,” or “redefines,” or “twists,” or “changes,” the Court’s claim constructions. [Dkt. No. 217 at 3-5]. These assertions are simply untrue, as the Court can confirm with a brief review of the relevant sections of Howe’s report. [Howe Rpt. ¶¶ 11, 18, 84-86, 97-98]. Instead, it is Defendants who ignore, twist, and selectively apply portions of both the Court’s claim-construction Orders and Howe’s expert report.

**1. Contrary to Defendants’ Assertion, Howe Has No “plans to tell the jury that the Court’s construction . . . can be disregarded.”**

Defendants brazenly assert that Howe “plans to tell the jury that the Court’s construction of [‘3-D’ and ‘controller’] is meaningless and can be disregarded.” [Dkt. No. 217 at 4]. This is demonstrably false. To the contrary, Howe’s testimony is that the Court’s claim construction

has directed [his] analysis, and [he has] used the Order to define the terms therein, including:

- ‘Controller’ means ‘a device held in the 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.’

[Howe Rpt. ¶ 11].

Defendants focus their complaint on Howe’s comment that he “do[es] not believe” that the preambles of the claims at issue act as claim limitations. [*Id.* ¶ 84; Dkt. No. 217 at 3-4]. This complaint is misguided, however, for two reasons. First, as Howe recognizes in his report, this Court has not held that the preambles are limiting. [Howe Rpt. ¶ 11]. Second, as again Howe makes clear in his report, his “understand[ing]” on this issue makes no difference to his analysis: “even if the preambles were considered claim limitations, they are all met by the accused products.” [*Id.* ¶ 11-12]. Howe’s brief preamble-related comments thus have no substantive impact on his methodology or his conclusions, and cannot make his testimony unreliable under Rule 702. *See State Contracting & Eng’g Corp. v. Condotte America, Inc.*, 346 F.3d 1057, 1072 (Fed. Cir. 2003) (“[D]isagreement with some of the [expert’s] assumptions and analysis” is not grounds for exclusion when the movants “have not pointed to any legal flaw that fatally infected his testimony.”).

**2. Howe’s Report Acknowledges and Properly Applies the Court’s Claim Constructions.**

Defendants accuse Howe of “twist[ing]” the Court’s construction of the terms “3-D” and “controller,” [Dkt. No. 217 at 4], but instead it is Defendants who do so. As demonstrated in the above block quote, Howe cited and applied these terms just as the Court construed them. [Howe Rpt. ¶ 11]. The Court did not construe the term “six degrees of freedom” (or “6 DOF”) in its Orders, but it cited to a portion of the ’700 file history in its analysis and construction of the term “3-D,” noting that “the change in terminology from ‘6 DOF’ . . . to ‘3-D’ . . . was not intended to introduce a new or different concept: . . . *Any single three-dimensional software object moving, for example in an electronic game, is moving in six degrees of freedom.*” [Dkt. No. 182 at 7 (citation omitted)].

Defendants ignore this analysis, and instead latch onto a sentence taken from the Court’s background discussion of 6 DOF—relating generally to the specification at issue. [*Id.* at 4-5; Dkt. No. 217 at 4-5]. That discussion does not constitute a ruling on the limitation of any claim

term. But in any event, Defendants’ proposed construction of the phrase “3-D graphics controller” does not follow even from the Court’s background discussion of 6 DOF—for their proposal assumes that “3-D” has precisely the same meaning as “3-D graphics,” which cannot be correct. *See* [Dkt. No. 217 at 4]. Contrary to Defendants’ mistaken assertion, pursuant to the Court’s constructions of “3-D” and “controller,” a “3-D graphics controller” would be:

a device held in the user’s hand that allows hand or finger inputs to be converted into electrical signals for manipulation of images (graphics) capable of movement in six degrees of freedom on a display device, which are capable of being perceived by a human.

*See* [Dkt. No. 182 at 11]. And this is just the manner in which Howe has interpreted and applied the phrase. [Howe Rpt. ¶¶ 88 (“the controllers control 3-D graphics”), 89 (“the graphics produced by the consoles controlled by these controllers are capable of movement in six degrees of freedom”), 90 (“each of the controllers is capable of controlling graphics in six degrees of freedom”)].

Even if the preamble phrase “3-D graphics controller” constituted a claim limitation, therefore—which it does not—Howe’s treatment of the phrase is entirely consistent with the Court’s claim constructions. Defendants’ argument again provides no basis for excluding Howe’s testimony under Rule 702. *See State Contracting & Eng’g Corp.*, 346 F.3d at 1072.

**B. Howe’s Report Properly Employs Established and Reliable Methodology.**

In addition to their claim-construction arguments, Defendants briefly challenge the infringement-analysis methodology employed in Howe’s report. In particular, Defendants’ complain that Howe “did not analyze the correct [video] games and did not use an acceptable methodology to analyze the games he did review.” [Dkt. No. 217 at 6]. This complaint, however, misses the mark on two levels. First, it fails to appreciate that the claims at issue are apparatus claims, and that the infringements at issue are thus tied to the capabilities of the accused controllers—not to the video games played with those controllers. Second, it is factually incorrect—to the extent such analysis was relevant, Howe’s video-game review was proper and

sufficient.

As described above, Howe’s infringement-analysis methodology follows that prescribed by the Federal Circuit—he compares, on an element-by-element basis, the claims as construed by the Court to each of the accused controllers. [Howe Rpt. ¶¶ 11-12, 24-99, Exhs. A-G]; *see also Cybor Corp.*, 138 F.3d at 1454. Howe’s report details his analysis of the patented technology, [Howe Rpt. ¶¶ 13-23]; his in-depth review of the relevant features of each of the accused controllers, [*id.* ¶¶ 24-82]; his conclusions that these features infringe the patented technology based on the Court’s claim constructions, [*id.* ¶¶ 83-94]; and his responses to Defendants’ arguments regarding noninfringement, [*id.* ¶¶ 95-99].

Defendants do not challenge this basic methodology, nor do they raise any real complaint with Howe’s analysis of the relevant features of the accused controllers. Instead, they argue that Howe’s testimony should be excluded based on the following comment:

I have further reviewed small video clips of games—many of which I have personally played—that were provided to me by Anascape. Those video clips include [a dozen games used with the accused controllers]. Each of these clips shows the variety of image control provided by the accused products as used on their associated game consoles.

[Howe Rpt. ¶ 87; Dkt. No. 217 at 7]. According to Defendants, review of video clips alone may be “insufficient to determine what movements are controlled by a video game controller, and which movements might be in the software of the game itself.” [Dkt. No. 217 at 7]. Inexplicably, however, Defendants fail to acknowledge the sentence preceding the section that they quote at length: “I have personally used each of the accused products to manipulate images on a television screen, and I perceived those graphics.” [Howe Rpt. ¶ 87]. Howe’s report makes clear, therefore, that none of his infringement opinions are based solely on a review of video clips. Defendants’ argument thus does nothing to undermine the methodology actually employed in Howe’s report. *See Daubert*, 509 U.S. at 594-95; *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 250 (5th Cir. 2002).

Defendants also complain that paragraph 87 does not provide explicit detail on each of



the many video games that Howe personally played, [Dkt. No. 217 at 7], but this observation simply points to a question Defendants might ask Howe on cross-examination—it does not provide a reason to exclude his testimony under Rule 702. *See Daubert*, 509 U.S. at 596; *Inline Connection Corp. v. AOL Time Warner Inc.*, 470 F. Supp. 2d 435, 439 (D. Del. 2007); FED. R. EVID. 702, 705.

Finally, Defendants point out that paragraph 89 in Howe’s report explicitly discusses—as a “[f]or instance”—only the video game Super Mario Galaxy, which cannot be controlled with an Xbox controller. [Dkt. No. 217 at 6; Howe Rpt. ¶ 89]. True enough. But Defendants’ assertion that “review of a non-Xbox game is not a reliable method for determining whether the Xbox controllers infringe” is entirely irrelevant—for just two paragraphs above Howe lists numerous Xbox games that he reviewed in forming his opinions on Xbox controllers. [Howe Rpt. ¶ 87]. Again, to the extent that Defendants desire more detailed information about certain of the predicate facts upon which Howe bases his conclusions, they are free to pursue such information on cross-examination. *See Daubert*, 509 U.S. at 596; *Pipitone*, 288 F.3d at 250; *Inline Connection Corp.*, 470 F. Supp. 2d at 439; FED. R. EVID. 705. And in any event, given the fact that the infringement at issue relates to the capabilities of the accused controllers, and not to the video games they control, Defendants’ complaints about the nature of Howe’s video-game review can hardly be considered to “point[] to any legal flaw that fatally infect[s] his testimony.” *State Contracting & Eng’g Corp.*, 346 F.3d at 1072.<sup>1</sup>

### **C. The Claims at Issue Are Apparatus Claims.**

Defendants also take the opportunity to urge the argument—much like one offered in their summary judgment briefing—that “[a]lthough written in apparatus form, each of the

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<sup>1</sup> Ironically, three pages after arguing that Howe’s testimony should be excluded because he relied on too few video games, Defendants “object to Dr. Howe’s reliance on the use of the accused controllers with particular games, none of which were identified in the Amended Contentions and the Original Contentions.” [Dkt. No. 217 at 9]. The answer to both of these complaints, however, is that no video games are accused of infringement, and the use of video games is not necessary for the accused products to infringe the patent-in-suit.

asserted claims requires that the claimed controller be used in a particular manner.” [Dkt. No. 217 at 8]. This argument has virtually nothing to do with Howe’s qualifications and methodology, and it is not properly the subject of a Rule 702 motion. *See Daubert*, 509 U.S. at 594-95. Even so, it is without merit. Contrary to Defendants’ assertions, none of the claims at issue require both structure and use. As explained in Anascape’s summary judgment briefing, these “claims simply use active language to describe the capability of the apparatuses; they do not claim the activity itself.” *Yodlee, Inc. v. Cashedge, Inc.*, No. 05-01550, 2006 WL 3456610, at \*4 (N.D. Cal. Nov. 29, 2006). The fact that Howe used the accused controllers with certain games as part of his analysis does not demonstrate that the controllers must be in use to infringe; it simply reflects Howe’s perfectly logical assumption that using the accused controllers with certain games was one reliable means of determining some of the controllers’ capabilities.

### **III. CONCLUSION**

For the foregoing reasons, Anascape respectfully requests that the Court deny Defendants’ motion to exclude testimony of Robert Howe. [Dkt. No. 217 (filed under seal)].

DATED: March 20, 2008

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service on this the 20th day of March, 2008. Local Rule CV-5(a)(3)(A).

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