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

Anascape, Ltd., Plaintiff, v. Microsoft Corp., and Nintendo of America, Inc., Defendants.	Civil Action No. 9:06-cv-158-RC JURY TRIAL REQUESTED

PLAINTIFF ANASCAPE, LTD.'S REPLY BRIEF SUPPORTING ITS MOTION TO STRIKE PORTIONS OF THE EXPERT REPORTS OF STEPHEN BRISTOW AND ROBERT DEZMELYK

Defendants admit that their expert and supplemental expert reports change theories of invalidity as to certain combinations. *See*, *e.g.*, Defendants' Joint Response (Doc. 228) at 5-6 ("This change—using CyberMan as a primary reference . . . cannot come as a surprise to Anascape[.]"). Instead of the Armstrong '891 reference, Defendants now rely on CyberMan. Instead of the European Patent Applications to Goto, Defendants now cite to Sony's Dual Shock and Dual Shock 2 controllers. Despite the Defendants' belief to the contrary, the Patent Local Rules do not allow Defendants to just give examples of how references may be combined, *see* Ex. B to Anascape's Motion to Strike (Doc. 209) at 3 ("The references and explanations provided in the exhibits *are mere examples*, and Microsoft reserves the right to rely on any other portions or aspects of the identified prior art references[.]") & 4 ("The Exhibits contain *illustrative (but not exhaustive) examples*[.]"), and then supplement those contentions in expert reports on the eve of trial.

As to Stephen Bristow's supplemental expert report, Microsoft claims that it only found out about the two new references added in that report on or about February 18, 2008. Of course, when Microsoft found out about the two new references is only a small part of the relevant question. There is no explanation by Microsoft *why* it took them so long to obtain or discover the two new references cited in the supplemental report or why these new references were not included in the original Invalidity Contentions. *See Finisar Corp. v. The DIRECTV Group, Inc.*, 424 F.Supp.2d 896, 900 (E.D. Tex. 2006).

I. The Defendants Do Not Intend to Rely Upon the Mason Reference

Defendants' Joint Response represents that neither Microsoft nor Nintendo intend "to rely on Mason as a prior art reference for any of the remaining asserted claims of the '700 patent." Defendants' Joint Response (Doc. 228) at 1 n.1. Anascape, therefore, requests the Court to strike any reference to Mason in the Stephen Bristow's expert report (i.e., pages 128-131).

II. No Good Cause Exists for Mr. Bristow's Supplemental Expert Report

Anascape moved to strike Mr. Bristow's supplemental expert report as untimely. In a declaration attached to Defendants' Motion for Leave to Amend (Doc. 226), Defendants represent to the Court that they obtained the documents added in Bristow's supplemental report on or about February 18, 2008. There is absolutely no explanation, however, of the circumstances surrounding their acquisition.

The late disclosure of the two references cited in the supplemental expert report provided Anascape virtually no opportunity to conduct discovery on the content of the two new references. Because the accuracy and context of the articles and the dates of sale and use of the relevant devices will be important, the lack of an opportunity for discovery is highly prejudicial. There is absolutely no evidence in the record on the reason for the delay and whether the reason

for the delay was within the control of the Defendants. *See Finisar Corp.* 424 F.Supp.2d at 900. In addition, there is absolutely no explanation why these two new references could not have been found in sufficient time for disclosure in the Defendants' February 2007 Invalidity Contentions. With trial rapidly approaching, additional discovery is no longer an option.

III. The Defendants' Invalidity Contentions Do Not Support Any Combination of Prior Art References that Does Not Include the Goto Reference or the Armstrong '891 Reference

Anascape requests that the Court strike any portions of the expert reports by Stephen Bristow or Robert Dezmelyk that offer opinions on combinations of prior art references that do not include either the Goto reference or the Armstrong '891 reference.[1] In addition, Anascape requests that the Court strike combinations that include the Goto reference and/or the Armstrong '891 reference, but were not disclosed in the Defendants' Invalidity Contentions.[2] Neither Microsoft nor Nintendo contend that their invalidity contentions disclose these combinations, but instead, assert that Anascape should not be surprised by the substitution of admittedly different references.

A. The Magellan Controller and CyberMan Combinations

One category of never-before disclosed combinations is the combination of the Magellan Controller and/or CyberMan with a number of other prior art references. In response, Defendants argued two things. First, Defendants suggested that because the reexamination was based on references that *relate* to CyberMan, Anascape should not be surprised by the replacement of the Armstrong '891 reference with CyberMan. This position strains credibility. The references are unquestionably different, and Microsoft and Nintendo explicitly listed the

[1] The specific combinations to which Anascape objects are identified in Anascape's Motion to Strike on page 2 n.5.

[2] The specific combinations to which Anascape objects are identified in Anascape's Motion to Strike on page 3 n.6.

CyberMan reference as prior art along with the Armstrong '891 reference in the Invalidity Contentions. Microsoft and Nintendo have made no effort to compare the disclosures in the different references.

Defendants also argued that combinations with the Magellan Controller and/or CyberMan are supported by the Defendants' Invalidity Contentions because "[b]oth CyberMan and Magellan . . . were mapped as potential 102 or 103 references." Defendants cited to pages 254 and following from Nintendo's Invalidity Contentions to support this claim; however Nintendo's Invalidity Contentions do not discuss any combinations of the Magellan Controllers with any other reference.

B. The Flightstick, Dual Shock, and Dual Shock 2 Combinations

Another category of never-before disclosed combinations is the Flightstick, Dual Shock, and Dual Shock 2 combinations. Microsoft does not dispute that its Invalidity Contentions do not explicitly disclose the combination of prior art with Dual Shock, Dual Shock 2, or Flightstick controllers. This should end the inquiry. The Patent Local Rules require the express disclosure of the combinations of prior art that will be relied upon. Interpretation of a defendants' invalidity contentions should not be a guessing game. Nowhere did Microsoft disclose what Sony controllers it included in "Sony controllers" or how these "Sony controllers" should be combined with other prior art.

Even more concerning is Defendants' equation of the Flightstick with the Goto prior art reference and Dual Shock controllers. The Flightstick is a very different device than from the controller disclosed in the Goto prior art reference and the Dual Shock controllers. *Compare* Ex. L (Flightstick) *with* Ex. M (Dual Shock). Whereas the controller disclosed in the Goto reference is at least similar in appearance to the Dual Shock controllers, there is no overlap between the Flightstick and Dual Shock controllers. In other words, because of the difference between the

controller disclosed in the Goto reference and the Flightstick, it is not reasonable to expect Anascape to understand that a definition of "Goto" as "Goto/Sony controllers" also encompassed the Flightstick.

IV. Defendants' Substitution (and Addition) of References Prejudices Anascape

Defendants' substitution of references and addition of new evidence on the eve of trial works prejudice on Anascape. The law differentiates between prior art patent applications and prior art devices. For prior art patent applications and other printed publications, the date of the reference is typically not an issue. In addition, the subject matter and details of the reference are relatively straightforward to ascertain and analyze from the four corners of the paper. For prior art devices, on the other hand, a number of date and other fact intensive issues present themselves: (1) date of sale; (2) location of sale; (3) public use and availability in the United States; (4) functionality and operation; and (5) third party discovery. By raising new combinations at the eleventh hour, Defendants unfairly limited Anascape's options in preparing its discovery and trial strategy. There is no excuse of Defendants' delay. The Invalidity Contentions were served in Feburary of 2007. The expert reports at issue were served in February 2008. Defendants provided not a single update or supplementation of the invalidity contentions over the course of the entire year. This is not the case of discovering new prior art. Defendants were aware of the relevant prior art at the filing of their Invalidity Contentions more than one year ago. Nonetheless, Defendants chose to wait until the eve of trial and close of discovery to reveal the changes in its invalidity theories and case. Such conduct should be sanctioned by striking the new theories and combinations from Defendants' expert reports.

Dated: March 21, 2008.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF ANASCAPE, LTD.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed with the Court's ECF/PACER System on this 21st day of March, 2008, and was thereby served on all counsel using that system.

/s/ Christopher T. Bovenkamp