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	§	
NINTENDO OF AMERICA, INC.,	§	
	§	
Defendants.	§	

DEFENDANTS' JOINT SUR-REPLY TO PLAINTIFF'S MOTION TO STRIKE PORTIONS OF THE EXPERT REPORTS OF STEPHEN BRISTOW AND ROBERT DEZMELYK

I. INTRODUCTION

Anascape's Reply Brief Supporting Its Motion To Strike ("Reply", Dkt. 235) distorts both Defendants' positions and the record. Despite these distortions, Anascape's reply does not dispute that ***every 102/103 reference at issue was painstakingly mapped element-by-element in Defendants' invalidity contentions*** ("PICs"), including detailed cross-references to annotated pictures showing where each and every claimed element in the asserted claims is found in each controller reference. (Response, Dkt. 228, Exh. 1). Rather, Anascape complains of what it erroneously claims are "new" ***combinations*** of previously cited art.

II. THIS IS NOT A CASE OF NEW PRIOR ART OR NEW COMBINATIONS

A. Goto, Dual Shock And Dual Shock 2 Combinations Are Not New

Defendants' expert reports cite numerous grounds for invalidity of a number of the asserted claims, including anticipation by the Goto, Sony Dual Shock and Dual Shock 2 controllers. ***While it does not assert that they are new references,*** Anascape claims that Defendants' 103 combinations involving Goto, Dual Shock and Dual Shock 2 are improper.

Sony is a major player in the gaming industry and Anascape's licensee; Sony owns the Goto patent and has made two different related controllers that Defendants rely on in their PICs. As a review of the illustrations below illustrates, the Goto patent and the two controllers are virtually identical for purposes of this case. Indeed, Anascape does not dispute that Defendants discussed them all using the single term "Goto" in their PICs, defining this term as "Goto/Sony controllers," or that Defendants further explained this definition in the PICs themselves (*see* Dkt. 209, Exh. C (Microsoft PICs), pg. 4, fn. 1.):

> Some of the controller products may be described to a certain extent in the cited patents and publications. Thus reference to or discussion of any controller and/or publication necessarily incorporates any corresponding controller or publication.

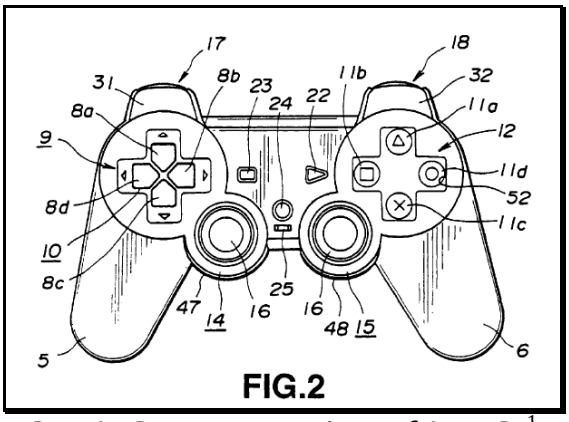
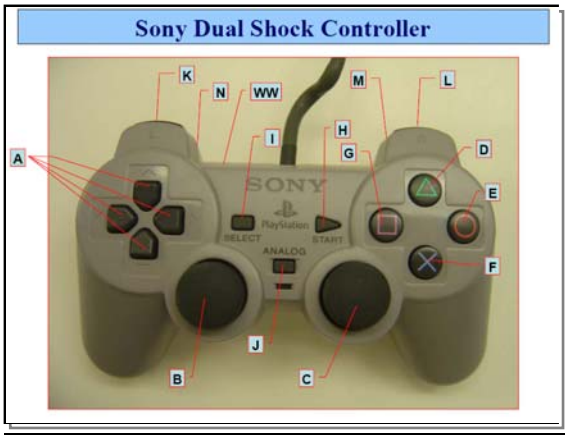


FIG.2

Sony's Goto, From Microsoft's PICs[1]



Sony's Dual Shock, From Nintendo's PICs

Sony's Dual Shock 2, From Nintendo's PICs

[1] Each of these three related Sony references was mapped element-by-element against each of the asserted claims in Defendants' original invalidity contentions.

The majority of the allegedly "new" reference combinations Anascape cites in its brief, however, are explained by Anascape's feigned ignorance of Defendants' PICs' definition of "Goto" as including the Goto patent and both Dual Shock controllers. Anascape states in its reply that "the Patent Local Rules do not allow Defendant to just give examples of how references are combined." (Reply, Dkt. 235, pg. 1).[2] Defendants, however, did not give mere "examples" of how to combine Sony controllers with other references; they actually called out the very combinations Anascape now seeks to exclude. The combination of Goto/Dual Shock/Dual Shock 2 in view of Saturn 3D, for example, was included in Microsoft's PICs. (*See* Dkt. 209, Exh. C, pgs. 6-7, 14-15). The PICs explain that it would have been obvious to replace the shoulder buttons on these Sony controllers with the triggers from Sega's Saturn 3D.

Thus, the complained of combinations of the Sony controllers with other prior art controllers are not new, and the Court should reject Anascape's request that they be stricken.

B. Flightstick Anticipation Argument Was Added In Response To Anascape's Infringement Contentions Regarding Certain Claims

As previously stated, Flightstick was painstakingly mapped element-by-element in the original PICs, including references to photographs labeling its parts, and is therefore not a new reference. Anascape complains that Flightstick was never mapped as a 102 reference, but it was so mapped in response to Anascape's contention that dome caps were within the scope of certain claims. (*see*, e.g., Dkt. 217, Exh. 1 pgs. 24-26.) Now that Anascape apparently no longer takes that position (*see* Dkt. 226, Exh. 7, pgs. 15-16), Flightstick is properly included as an obviousness reference, using the same elements that were already mapped in PICs.

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[2] To the contrary, the rules do allow parties to give "representative examples" sufficient to provide the other side with fair notice. *Orion IP, LLC v. Staples, Inc.*, 407 F.Supp.2d 815, 817 (E.D. Tex. 2006). What the rules do not allow, is for a party to "lay behind the log until late in the case and then claim it lacks notice as to the scope of the case or the [] contentions." *Id.* at 818.

C. Cyberman And Armstrong '891 Were Previously Combined

Anascape's reply regarding the CyberMan reference is also disingenuous. First, it mischaracterizes Defendants' position:

> 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.

(Reply at 3.) Nowhere did Defendants suggest replacing Armstrong '891 with CyberMan. Rather, Defendants' expert report includes obviousness combinations such as "Armstrong '891 in view of Armstrong's Admissions [relating to CyberMan]" that are based on previous combinations already asserted, such as "Cyberman in view of Armstrong Admissions in the '891 patent." (Response, Dkt. 228, pgs. 5-6.) So, Defendants are merely using CyberMan as a primary reference, in view of [Armstrong's admissions in] the '891 Patent, instead of using the '891 Patent in view of [Armstrong's admissions about] CyberMan. These combinations are based on CyberMan elements already mapped element-by-element in the invalidity contentions.

Additionally, Anascape admits that both Defendants "***explicitly listed the CyberMan reference as prior art along with the Armstrong '891 reference in the Invalidity Contentions."*** (Reply at 3-4, emphasis added.) Because Anascape admits both that the references themselves, and that combinations of these references, were previously included in Defendants' PICs, it is not clear what Anascape claims is "new", or how it is prejudiced by such contentions.[3]

[3] Anascape complains of the combination of Logitech references CyberMan and Magellan, but does not argue that either is a new reference. Because they are similar 3-D graphics controllers made by one company (Logitech), and because both were previously mapped element-by-element, Anascape is not prejudiced by Defendants combining them.

D. The GameFan And "Two-Rific" Articles Relate To Old Art

As for Microsoft's supplemental expert report, Anascape does not dispute that the two "new" printed publications therein relate only to "old" Sony Dual Shock 2 and Flightstick references previously cited and mapped element-by-element, or that Microsoft promptly notified Anascape of these articles. Further, Anascape has failed to demonstrate any discovery it needs to take regarding those two articles.[4] In fact, there is no prejudice to Anascape, because the issue of availability dates for the prior art Sony controllers was already raised during SCEA's 30(b)(6) deposition (*see* Dkt. 226, Undisputed Mat. Fact No. 23, pg. 5), and Anascape had an opportunity to take discovery or additional deposition testimony on it (*id.*), but chose not to do so.

Thus, these publications are not new "references," and cannot be treated as such. And, even if they were viewed as new references, Anascape has not demonstrated, and cannot demonstrate, any prejudice from Defendants' reliance on the GameFan and "Two-rific" articles.

III. NO SUBSTITUTION OR ADDITION, SO NO PREJUDICE

Anascape has pointed to no new references that were "substituted." Nor has it pointed to any "added references." For that reason, and for the reasons cited above, Anascape's motion to strike should be denied in its entirety.

Respectfully submitted,

Dated: March 31, 2008

By: /s/ Derrick W. Toddy
J. Christopher Carraway (admitted *pro hac vice*)

4 Anascape states that "additional discovery is no longer an option," but lists no actual discovery it would need to take regarding earlier printed publications regarding previously identified prior art controllers from Sony, Anascape's own licensee, and admits that such dates are unlikely to be challenged: "For prior art . . . printed publications, the date of reference is typically not an issue." (Reply at 5.) As to "Two-rific", Anascape has already taken the position that the Dual Shock 2 controller to which it refers is not prior art because Anascape asserts a 1996 priority date. Dual Shock 2 is also discussed in a September 1999 press release produced by SCEA shortly before its deposition. Anascape does not claim Defendants' experts' use of this press release is prejudicial.

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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 31st day of March, 2008.

By:/s/ Derrick W. Toddy_____