

**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 SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION  
TO EXCLUDE TESTIMONY BY ROBERT HOWE**

## I. INTRODUCTION

Plaintiff Anascape, Ltd. (“Anascape”) files this sur-reply in opposition to Defendants’ motion to exclude testimony of Robert Howe under Rule 702. [Dkt. No. 217 (filed under seal)]. Defendants’ reply continues to press arguments that are misguided, misplaced, and have already been rejected by the Court. [Dkt. No. 243 at 1-5]. Because Howe’s infringement report reflects testimony that is both relevant and reliable, *see Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999); FED. R. EVID. 702, Defendants’ motion should be denied.

## II. ARGUMENT

### A. Howe’s Report Properly Leaves Claim Construction to the Court.

In their reply, Defendants again lead with the misguided assertion that Howe somehow plans to ignore the Court’s holdings. [Dkt. No. 243 at 1-2; Dkt. No. 217 at 4]. This is simply not true. [Dkt. No. 230 at 2-3]. As his report makes clear, Howe has carefully followed the Court’s claim-construction rulings, and has every intention of continuing to carefully follow the Court’s rulings. [Howe Rpt. ¶¶ 10-11, 84 (filed with Dkt. No. 217 as Exh. 1)]. When Howe notes that he “understand[s] that a preamble is often not a claim limitation,” and that he “do[es] not believe that the preamble of any of the asserted claims acts as a limitation of those claims,” it is only after acknowledging—in the same paragraph—that the Court has not held otherwise. [*Id.* ¶ 84]. Should the Court eventually hold, notwithstanding Anascape’s sound arguments to the contrary, that the preambles are limiting, [Dkt. Nos. 89, 222], then Howe most certainly will not suggest otherwise. And Howe will have no need to suggest otherwise, as his analysis already confirms that “even if the preambles were considered limiting, they are all met by the accused products.” [Howe Rpt. ¶ 85; Dkt. No. 230 at 3]. Defendants’ principal argument in reply provides no reason to exclude Howe’s testimony 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.”).

**B. Howe’s Report Properly Applies the Court’s Claim Construction.**

Defendants’ second argument in reply is simply another repackaging of a claim-construction position that has now been twice rejected by the Court. Defendants argue, that is, that Howe’s report is flawed because he does not assume that a controller’s input member must be capable of movement in six degrees of freedom. [Dkt. No. 243 at 2-3]. As the Court noted in its recent denial of Defendants’ summary judgment motion, “[t]his is a repetition of the argument rejected in the court’s claim construction order.” [Dkt. No. 242 at 2]. The Court rejected the argument again in its summary judgment order, [*id.*], and it should do so here for a third time. Howe’s report properly acknowledges and applies the Court’s construction of the terms “3-D” and “controller,” and Defendants’ argument on this ground again provides no basis for excluding his testimony under Rule 702. *See State Contracting*, 346 F.3d at 1072; [Dkt. No. 230 at 7].

**C. Howe’s Report Properly Compares the Claims to the Accused Controllers.**

Defendants also suggest in reply—the first time this argument appears—that Howe fails to compare the claims to the accused controllers, but instead “compares his construction to ‘small video clips’ of games.” [Dkt. No. 243 at 3]. There is no merit to this argument.

As an initial matter, Defendants appear to be under the misimpression that the entirety of Howe’s infringement analysis is contained in paragraphs 87 and 89 of his report. [*Id.* at 3-4]. To the contrary, 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].

More fundamentally, Defendants’ argument suffers from a failure to acknowledge that the claims at issue are apparatus claims, and that the infringement at issue thus relates to the structure and capabilities of the accused controllers, and not to the video games they control. *See Yodlee, Inc. v. Cashedge, Inc.*, No. 05-01550, 2006 WL 3456610, at \*4 (N.D. Cal. Nov. 29,

2006). This is why the majority of Howe’s report consists of his analysis of the structure of the accused controllers. [Howe Rpt. ¶¶ 24-82]. That structural analysis undergirds his conclusion that “each of the controllers is capable of controlling graphics in six degrees of freedom.” [*Id.* ¶ 90 (emphasis added)]; *id.* (“Each of the accused products allow input on 6 bi-directional axes.”); *id.* ¶¶ 91-92].

Howe’s report discusses his play and review of video games not because those games infringe, nor because the controllers must be in use to infringe, but because play and review of video games was one reliable means of confirming the conclusion—based on Howe’s extensive structural analysis—that the controllers are capable of controlling graphics in six degrees of freedom. [*Id.* ¶¶ 83-94]. There is nothing “conclusory” about the analysis of the accused controllers in Howe’s report, [*id.* ¶¶ 24-82], and there is no fatal flaw in his apparatus-based methodology. *See State Contracting*, 346 F.3d at 1072.

**D. Howe’s Report Contains No Untimely Allegations.**

Defendants’ fourth and final argument in reply is that some unspecified portion of Howe’s report should “be stricken” because Anascape did not accuse any video games in its preliminary infringement contentions. [Dkt. No. 243 at 4-5]. Any doubt that this argument is not properly the subject of a Rule 702 motion should be dispelled by the fact that the only supporting references cited are to Defendants’ own motions to amend and for summary judgment—that latter of which the Court has already denied. [Dkt. No. 243 at 4 (citing Dkt. Nos. 226 and 202); Dkt. No. 242 at 1 (denying Dkt. No. 202)]. But in any event, Defendants’ final argument is also without merit.

Anascape has not accused any video games of infringement because video games do not infringe the patent-in-suit, which describes apparatus claims covering the Defendants’ accused controllers. Contrary to Defendants’ assertion—supported only by reference to their recently denied summary judgment motion, [Dkt. No. 243 at 4]—“game play” is not necessary to infringe any claim at issue. Instead, these “claims simply use active language to describe the capability

of the apparatuses; they do not claim the activity itself.” *Yodlee*, 2006 WL 3456610, at \*4; *see also Microprocessor Enhancement Corp. v. Tex. Instruments Inc.*, No. 2007-1249, 2008 U.S. App. LEXIS 6837, at \*19-\*20 (Fed. Cir. Apr. 1, 2008). Defendants may think that Anascape should have accused some video games of infringement, but as far as Anascape is aware, preliminary infringement contentions have never been found inadequate for failure to accuse products that the plaintiff does not believe infringe the patent-in-suit.

Defendants suggest that it would be unfair to ask them to further probe Howe’s video-game play and review during deposition and on cross-examination. [Dkt. No. 243 at 5]. That is not what the case law holds: “[r]ule 705, together with rule 703, places the burden of exploring facts and assumptions underlying the testimony of an expert witness on opposing counsel during cross-examination.” *Inline Connection Corp. v. AOL Time Warner Inc.*, 470 F. Supp. 2d 435, 439 (D. Del. 2007) (citation omitted). This is especially true here, where Howe’s infringement opinions—relating to the structural capabilities of the accused controllers—are fundamentally based on his extensive analysis of the controllers’ structure, and not on his play and review of video games.<sup>1</sup> Howe’s video-game play and review is relevant and admissible, for it supports and confirms his structural analysis. *See* FED. R. EVID. 401, 402. But his infringement opinions are not principally based on “game play,” and Defendants’ complaints about the nature of Howe’s video-game play and review—misguided in any event, [Dkt. No. 230 at 7-9]—cannot be considered to “point[] to any legal flaw that fatally infect[s] his testimony.” *State Contracting*, 346 F.3d at 1072.

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<sup>1</sup> Defendants inexplicably assert that Anascape “admits that Dr. Howe’s only specific example of alleged infringement, is a game that cannot be controlled by the accused Microsoft controllers.” [Dkt. No. 243 at 5]. Anascape admits no such thing. To the contrary, Anascape has consistently maintained that “the infringement at issue relates to the capabilities of the accused controllers, and not to the video games they control.” [Dkt. No. 230 at 9]. And with respect to “6 DOF” in particular, Howe’s report explains that each of the accused controllers is structurally capable of controlling graphics in six degrees of freedom. [Howe Rpt. ¶¶ 90-92].

### III. CONCLUSION

For the foregoing reasons, Anascape respectfully requests that the Court deny Defendants' motion to exclude testimony of Robert Howe. [Dkt. Nos. 217 (filed under seal)].

DATED: April 7, 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 7th day of April, 2008. Local Rule CV-5(a)(3)(A).

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