

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

**DEFENDANT NINTENDO OF AMERICA INC.'S
MOTION FOR JUDGMENT AS A MATTER OF LAW**

I. INTRODUCTION

Plaintiff Anascape Ltd. (“Anascape”), having concluded its case-in-chief and presenting all the evidence it intends to provide to the jury concerning the issues on which it has the burden, has failed to meet its burden of production to establish that Nintendo’s accused products meet each and every limitation of the asserted claims of the patent in suit, literally or under the doctrine of equivalents. As such, pursuant to Federal Rule of Civil Procedure 50(a), Defendant Nintendo of America Inc. (“Nintendo”) moves for judgment as a matter of law of non-infringement of the patent in suit. Specifically, Anascape has failed to put forth any evidence demonstrating that: (1) the Wii Remote controller connected to the Wii Nunchuk controller infringes claim 19; and (2) the Wii Classic connected to the Wii Remote infringes claim 19 (and dependent claims 22 and 23) of the ‘700 patent. Furthermore, Anascape has failed to provide legally sufficient evidence to the jury to show that the Game Cube controller infringes claims 14, 16, or 19 of the ‘700 patent (and dependent claim 22 and 23) and that the WaveBird wireless controller infringes claim 14.. Nintendo further moves for judgment as a matter of law on Plaintiff’s failure of proof as to the effective filing date of the ‘700 application. Consequently, Nintendo offers this Motion for Judgment as a Matter of Law (“JMOL”) for the Court, to dispose of Anascape’s claims of infringement asserted against Nintendo.

II. STANDARD

The Court may render judgment as a matter of law against a party who, after being fully heard on an issue, does not present facts constituting a prima facie case and does not meet its burden of production. *See* Fed. R. Civ. P. 50(a); *Echeverria v. Chevron USA Inc.*, 391 F.3d 607, 610 (5th Cir. 2004). Pursuant to Rule 50(a),

If a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may: (A) resolve the issue against the party and (B) grant a motion for judgment as a matter of law [JMOL] against the party on a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 50(a). “In order to survive a Rule 50 motion and present a question for the jury, the party opposing the motion must at least establish a conflict in substantial evidence on each essential element of their claim. In other words, ‘the evidence must be sufficient so that a jury will not ultimately rest its verdict on mere speculation and conjecture.’” *Anthony v. Chevron United States*, 284 F.3d 578, 583 (5th Cir. 2002) (internal citations omitted). A party may move for JMOL at any time before the case is submitted to the jury. Fed. R. Civ. P. 50(a).

Based upon these standards, Nintendo moves this Court to render judgment as a matter of law on the following grounds:

- No legally sufficient evidentiary basis exists for a reasonable jury to find that any of Nintendo’s accused controllers literally infringe any of the asserted claims of the ‘700 patent;
- No legally sufficient evidentiary basis exists for a reasonable jury to find that, pursuant to the doctrine of equivalents, the differences between Nintendo’s accused and the asserted claims of the ‘700 patent are not insubstantial;
- As a matter of law, the ‘700 application was a continuation-in-part of the ‘525 patent, not a continuation, and therefore has an effective filing date of November 16, 2000;
- No legally sufficient evidentiary basis exists for a reasonable jury to find damages.

Upon the Court's judgment as a matter of law, Anascape's claims for relief will be disposed and the jury will be relieved of all duties..

III. ARGUMENT

A. As A Matter of Law, Nintendo Does Not Infringe Any Asserted Claims of the '700 Patent

1. Literal Infringement

In conducting an infringement analysis, the court engages in two steps. First, the Court determines the construction and scope of the patent claims plaintiff asserts have been infringed. *Markman v. Westview Instruments*, 52 F.3d 967, 976 (Fed. Cir. 1995) (en banc), *aff'd* 517 U.S. 370 (1996). The second step is comparing the properly construed claims to the device accused of infringing. *Id.* "Judgment as a matter of law of no literal infringement is appropriate if no reasonable fact finder could determine that the accused devices meet every limitation of the properly construed claims." *Elkay Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 980 (Fed. Cir. 1999). Thus, to establish literal infringement, Anascape must prove that every limitation of its claims is met "exactly." *Southwall Techs. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995).

a) No reasonable jury could find that the Wii Remote connected to the Wii Nunchuk literally infringes claim 19

No reasonable jury could find that the Wii Remote connected to the Wii Nunchuk infringes claim 19 of the '700 patent, because Anascape has presented no legally sufficient evidence that this combination satisfies the "third element" limitation of the claim. Claim 19 requires a "third element" "movable on two mutually perpendicular axes" and "structured to activate two bi-directional proportional sensors." Although Anascape contends that the accelerometer in the Wii Remote constitutes the "third element," that argument fails as a matter

of law.¹ The evidence adduced at trial indisputably established that the accelerometer in the Wii Remote (1) is not movable because it is fixed on a circuit board; (2) contains no structure to activate sensors; and (3) constitutes only one sensor (rather than two). (Tr. at 479:24-480:5; 480:6-16; 482:25-483:14 (Howe)). Therefore, no reasonable fact finder could conclude that the Wii Remote connected to the Wii Nunchuk satisfies the “third element” limitation of claim 19 and, as a matter of law, this combination does not infringe claim 19 of the ‘700 patent.

Nintendo is entitled to judgment as a matter of law of non-infringement of claim 19 for the independent reason that there is no legally sufficient evidence establishing that the Wii Remote controller has “tactile feedback means for providing vibration” Where a claim contains a means requirement, it should be construed under 35 U.S.C. § 112(6) and must be interpreted with regard to the structure disclosed in the specification corresponding to such language. *In re Donaldson Co.*, 16 F.3d 1189 (Fed. Cir. 1994). Claim 19 requires “tactile feedback means for providing vibration.” The only structure disclosed in the specification corresponding to the means for tactile feedback is contained in Figure 21 of the ‘700 patent, which discloses a motor, shaft, and offset weight on the shaft. Anascape has presented no evidence that the Wii Remote contains such a configuration of a motor, shaft, and offset weight on the shaft as disclosed in Figure 21, or any equivalent thereof. Therefore, the Wii Remote connected to the Wii Nunchuk does not infringe claim 19 as a matter of law. *See Medical Instrumentation and Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1222 (Fed. Cir. 2003) (party entitled to judgment as a matter of law where its accused devices did not contain structures disclosed in the patent corresponding to the means in the asserted claims).

¹ Multiple witnesses have admitted that neither the ‘525 application nor the ‘700 patent discloses an accelerometer (*see, e.g.*, Tr. at 481:8-23 (Howe)).

Nintendo is entitled to judgment as a matter of law of non-infringement of claim 19 for the additional reason that there is no evidence that the Wii Remote connected to the Wii Nunchuk can control objects and navigate a viewpoint. More specifically, there is no record evidence that what Anascape identifies as the “second element” – the joystick in the Wii Nunchuk – and the third “element” – the accelerometer in the Wii Remote – each provide can control objects and navigate a viewpoint.

b) No reasonable jury could find that the Wii Classic connected to the Wii Remote literally infringes claims 19, 22 or 23

Like with the Wii Remote connected to the Wii Nunchuk, with respect to the Wii Classic connected to the Wii Remote, Anascape has failed to establish infringement of claim 19 (and dependent claims 22 and 23) under the requirements of 35 U.S.C. § 112(6). Anascape has proffered no evidence that the Wii Remote – which Anascape points to as containing “tactile feedback means” -- contains a motor, shaft, and offset weight on a shaft as disclosed in Figure 21, or the equivalent thereof. Therefore, the Wii Classic connected to the Wii Remote does not infringe claims 19, 22, and 23 as a matter of law.

Nintendo is entitled to judgment as a matter of law of non-infringement of claim 19 for the additional reason that there is no evidence that the Wii Classic can control objects and navigate a viewpoint. More specifically, there is no record evidence that what Anascape identifies as the “second element” – the first joystick in the Wii Classic – and the third “element” – the second joystick in the Wii Classic – each can control objects and navigate a viewpoint.

c) No reasonable jury could find that the Game Cube controller literally infringes claims 14, 16, 19, 22 and 23 or that the WaveBird wireless controller infringes claim 14

Anascape has failed to present legally sufficient evidence that the GameCube controller infringe any claim of the ‘700 patent. First, Anascape presented no evidence that the Game Cube

controller infringes claims 16 or 19 of the patent, because under § 112(6), the structure described in the specification corresponding to the means requirement in those claims does not match up to the controller. Claims 16 and 19 require “tactile feedback means for providing vibration.” As described above, where a claim contains a means requirement, it should be construed under § 112(6) and must be interpreted with regard to the structure disclosed in the specification corresponding to such language. Anascape has proffered no evidence that the Game Cube controller contains a motor, shaft, and offset weight on a shaft as disclosed in Figure 21, or the equivalent thereof.

Second, Nintendo is entitled to judgment as a matter of law of non-infringement of claim 19 for the additional reason that there is no evidence that the GameCube controller can control objects and navigate a viewpoint. More specifically, there is no record evidence that what Anascape identifies as the “second element” – the first joystick in the GameCube controller – and the third “element” – the second joystick in the GameCube controller – each provide can control objects and navigate a viewpoint.

Third, no reasonable jury could conclude that the Game Cube infringes claims 16 or that the WaveBird wireless controller infringes claim 14 because neither of these controllers are capable of controlling movement of objects on a television or other display in six degrees of freedom. Claims 14 and 16 both require a “3-D graphics controller.” The Court has construed “3-D” to mean “capable of movement in six degrees of freedom.” Anascape has failed to adduce any evidence that the GameCube controller or the WaveBird wireless controller can be used to control such movement in six degrees of freedom. Therefore, no reasonable jury could find for Anascape on this issue. *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 973 (Fed. Cir. 1995) (finding non-infringement as a matter of law where “system [was] incapable” of

performing functions required by the court's claim construction). The Court should therefore grant Nintendo's motion as to non-infringement as a matter of law.

2. Doctrine of Equivalents

Anascape nominally advanced a theory of infringement based on the doctrine of equivalents, but did not carry its burden of producing legally sufficient evidence to qualify under the doctrine. Anascape offered no testimony – expert or lay – to support an argument under this doctrine. A finding of infringement under the doctrine of equivalents requires a showing that the difference between the claimed invention and the accused product was insubstantial or that the accused product performs substantially the same function in substantially the same way with substantially the same result as each claim limitation of the patented product or method.

AquaTex Indus. v. Techniche Solutions, 479 F.3d 1320, 1326 (Fed. Cir. 2007). A plaintiff may not rely on the doctrine of equivalents to expand the scope of its claims to encompass the prior art. *Hyperphrase Techs., LLC v. Google, Inc.*, 2007 WL 4509047, at *6 (Fed. Cir. Dec. 26, 2007) (unpublished); *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 900 (Fed. Cir. 1984). Judgment as a matter of law of no infringement under the doctrine of equivalents is appropriate where a reasonable jury could not find that the differences between a claim limitation and the accused product's asserted equivalent are insubstantial. *Moore U.S.A., Inc. v. Standard Register Co.*, 229 F.3d 1091, 1106 (Fed. Cir. 2000).

Anascape did not even provide *generalized* testimony to support its theory of infringement under the doctrine of equivalents, let alone particularized and linking argument. In attempting to establish the doctrine of equivalents by expert testimony, Anascape is not excused of its duty of proving each and every element of its claim. *See Texas Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1567 (Fed. Cir. 1996). Thus, “[g]eneralized testimony as to the overall similarity between the claims and the accused infringer's product or process will not

suffice.” *Id.* Rather, for a patentee to survive a motion for judgment as a matter of law, it must provide particularized testimony and linking argument as to the “insubstantiality of the differences” between the claimed invention and the accused device or process, on a limitation-by-limitation basis. *Id.* Because Anascape’s witnesses did not even attempt to provide such testimony, no reasonable jury can find infringement based under the doctrine of equivalents.

B. As A Matter of Law, Anascape Is Not Entitled to A 1996 Effective Filing Date for the ‘700 Application

The court should further grant Nintendo’s motion because there is no legally sufficient evidentiary basis for a reasonable jury to find for Anascape on the issue of priority/earlier effective filing date under 35 U.S.C §120.² Section 120 expresses two separate requirements for claiming the benefit of an earlier filing date. The first requirement is that the later application must be “filed before the patenting or abandonment of or termination of proceedings on the first application” and must include a timely-submitted “amendment containing the specific reference to the earlier filed application.” *Id.* If those requirements are met, then the claims in the later application are entitled to the benefit of the earlier filing date only if the “invention [is] disclosed

² 35 U.S.C. §120 (“Benefit of earlier filing date in the United States”) provides:

An application for patent for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in an application previously filed in the United States ... shall have the same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of or termination of proceedings on the first application ... and if it contains or is amended to contain a specific reference to the earlier filed application. No application shall be entitled to the benefit of an earlier filed application under this section unless an amendment containing the specific reference to the earlier filed application is submitted at such time during the pendency of the application as required.”

in the manner provided by the first paragraph of’ 35 U.S.C §112.³ The law is clear that these are two separate and independent requirements: “[i]n accordance with [35 USC] § 120, claims to subject matter in a later-filed application not supported by an ancestor application in terms of [35 USC] § 112 ¶ 1 are not invalidated; they simply do not receive the benefit of the earlier application’s filing date.” *Reiffin v. Microsoft Corp.*, 214 F.3d 1342, 1346 (Fed. Cir. 2000). Since the file history for the ‘700 patent does not contain any indication that the PTO needed to determine priority to overcome an intervening reference between the ‘525 filing date and the ‘700 filing date, Mr. Armstrong’s Section 120 priority claim should not be given any deference. *E.g., Poweroasis*, slip op. at 8 (“The PTO’s own procedures indicate that examiners do not make priority determinations except where necessary”).

In this case, because the 1996 patent application does not provide support for the full scope and breadth of the asserted claims of the ’700 patent, those claims cannot receive the benefit of the 1996 filing date. Rather, the effective filing date of the asserted claims is the filing date of the ’700 patent since plaintiff has not met its burden of production to come forward with evidence demonstrating that the asserted claims are entitled to the 1996 filing date and in view of Mr. Armstrong’s testimony concerning the invalidity effect of the Sony Dual Shock controller. *Poweroasis*, slip op. at 9-10 (“Once T-Mobile established by clear and convincing evidence that the MobileStar Network was §102(b) prior art to the asserted claims of the patents, the burden was on PowerOasis to come forward with evidence to the contrary. The district court therefore

³ See, e.g., *Reiffin v. Microsoft Corp.*, 214 F.3d 1342, 1346 (Fed. Cir. 2000) (“Although [35 USC] § 120 incorporates the requirements of [35 USC] §112 1, these requirements and the statutory mechanisms allowing the benefit of an earlier filing date are separate provisions with distinct consequences); *Ralston Purina Co. v. Far-Mar-Co, Inc.*, 772 F.2d 1570, 1573 (Fed. Cir. 1985).

correctly placed the burden on PowerOasis to come forward with evidence to prove entitlement to claim priority to an earlier filing date.)”⁴

C. Anascape Has Not Adduced Legally Sufficient Evidence that It Suffered Compensable Damages

Anascape bears the burden of proving damages and presenting legally sufficient evidence to establish the amount to be paid in reasonable royalty. *Oiness v. Walgreen Co.*, 88 F.3d 1025, 1029 (Fed. Cir. 1996); *Trell v. Marlee Electronics Corp.*, 912 F.2d 1443, 1447 (Fed. Cir. 1990). Damages may not be determined by “mere speculation or guess.” *Oiness*, 88 F.3d at 1030. Where the plaintiff’s damages calculation is a “vague estimation and gross extrapolation” that is “fraught with speculation,” the evidence is insufficient to support a jury award. *Id.* at 1029. “[T]he true measure of a patentee’s general damages must be the value of what was taken. For example, a free to be used in measuring damages to be paid for infringement of one patent cannot also encompass payments for permission to practice other patented inventions.” *Bandag, Inc. v. Gerrard Tire Co.*, 704 F.2d 1578, 1582 (Fed. Cir. 1983) (citations omitted); *cf. Applied Med. Res. Corp. v. United States Surgical Corp.*, 425 F.3d 1356, 1361 (Fed. Cir. 2006) (“Consistent with our precedent, reasonable royalty damages are not calculated in a vacuum without consideration of the infringement being redressed”).

Anascape failed to carry its burden of production and no legally sufficient evidentiary basis exists for an award of damages as a matter of law. Anascape does not offer and cannot establish an evidentiary basis to calculate a reasonable royalty. In particular, Anascape’s expert provided no basis grounded in evidence for his calculations of a reasonable royalty. In light of

⁴ The Court addressed this shifting of the burden of production during the Pretrial Conference in connection with a motion *in limine*, and ruled that the ultimate burden of persuasion with respect to lack of written description under 35 USC 112, first paragraph remains with Nintendo under the “clear and convincing” standard for patent invalidity..

Anascape's "mere speculation" and unsupported statements regarding damages in this case (*see Oiness*, 88 F.3d at 1030), the Court should grant Nintendo's JMOL as to damages.

CONCLUSION

For the foregoing reasons, the Court should grant Nintendo's Motion for Judgment as a Matter of Law and render judgment in favor of Nintendo.

Dated: May 8, 2008

Respectfully submitted,

/s/ James S. Blank

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record were served by hand on the 8th day of May, 2008, and all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this 9th day of May, 2008.

/s/ James S. Blank _____
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