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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

ANASCAPE, LTD.		DOCKET 9:06CV158
		MAY 7, 2008
VS.		8:43 A.M.
MICROSOFT CORP., ET AL		LUFKIN, TEXAS

VOLUME 3 OF __, PAGES 495 THROUGH 831

REPORTER'S TRANSCRIPT OF JURY TRIAL

BEFORE THE HON. RON CLARK
UNITED STATES DISTRICT JUDGE, AND A JURY

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PROCEEDINGS REPORTED USING COMPUTERIZED STENOTYPE;
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1 (REPORTER'S NOTES ANASCAPE VS. MICROSOFT,
2 JURY TRIAL VOLUME 3, 8:43 A.M., WEDNESDAY, 05/07/2008,
3 LUFKIN, TEXAS, HON. RON CLARK PRESIDING)

4 (OPEN COURT, ALL PARTIES PRESENT, JURY NOT
5 PRESENT)

6 THE COURT: All right. We've had some prior
7 questions. One of them dealt with -- I thought I had it
8 here -- six different patents, three out of the '700 and
9 three others that the defendant was going to introduce.
10 If that's what they're going to try to bring in, I don't
11 see any problem with that, with those six, which are
12 probably sitting on my desk somewhere, the exact
13 numbers. If there is an objection to a particular one,
14 go ahead and make it at the time.

15 Then we also had some questions about the
16 deposition extracts of Sanchez, Russell and -- I guess
17 I'm wondering why -- there's a couple of the comments
18 that he makes that I'm not sure why they're relevant to
19 anything. I'm looking at Sanchez, Russell's deposition
20 and this looks like it starts at page 21, line 22 and
21 it's talking about optical sensing products and how good
22 they are. Who cares? I don't see how that's got
23 anything to do with -- I mean, why plaintiff wants that
24 in.

25 MR. BOVENKAMP: Your Honor, if you look at

1 the reference a little further down -- or actually, it's
2 in the question. There's optical sensing as opposed to
3 a potentiometer. The issue is it relates to the
4 question of nonobviousness. That's a secondary indicia
5 that relates to a teaching away from the use of
6 potentiometers in the use of optical sensors.

7 THE COURT: All right.

8 And then what about on page 27, starting at
9 line 25? I think he said they use D-pads and joysticks.

10 MR. BOVENKAMP: Your Honor, we have taken
11 that out.

12 THE COURT: Okay. All right. Then I will
13 overrule the objections to the Sanchez, Russell
14 deposition.

15 And then we have Penello, Jr., Albert.

16 MR. BLANK: Your Honor?

17 THE COURT: Yes.

18 MR. BLANK: May I please say something about
19 Mr. Sanchez's deposition?

20 THE COURT: Sure, go ahead. I mean, I've got
21 what you've got in writing. You've got very few
22 minutes. Go.

23 MR. BLANK: Okay. I mean, all this prior art
24 that we seem to be -- that he seems to be talking about
25 at pages 48, 49, 50, 54, I have no idea how that is

1 relevant to anything, particularly with respect to our
2 affirmative case. He's talking about...

3 THE COURT: Well, just for clarity, again
4 looking at nonobviousness, that finally gets tied up on
5 page 53, starting at line 8.

6 I will grant you they take a long time to get
7 to the point of that one, but the point seems to be
8 where he finally says: The inventors are aware of any
9 joystick-type input device that provides
10 three-dimensional position signals. I had that same
11 question when I finally got to that last sentence. But
12 they want to use their time on all that previous stuff;
13 I'm not going to hold it against them.

14 MR. BLANK: Your Honor, thank you.

15 THE COURT: And then on the -- let's see,
16 Penello.

17 MR. CASSADY: I think I can save the court a
18 little bit of time. We have no problem withdrawing
19 page 46 to page 48, the designations that are included
20 there. They are referring specifically to the Xbox. We
21 decided those aren't necessary, and we're willing to
22 withdraw those.

23 THE COURT: That's probably good because my
24 note there is "makes no sense."

25 And then the same thing on -- let me ask

1 about page 130 where they're talking about force
2 feedback and its image on Sony. What is that about?

3 MR. CASSADY: As you may know, your Honor,
4 Sony removed rumble feature from one of its systems and
5 was received negatively in the industry; and Mr. Penello
6 is a member of the market and discussed the --

7 THE COURT: Okay.

8 MR. CASSADY: -- aspects of the market.

9 THE COURT: I'll overrule that objection,
10 then.

11 Okay. Then we seem to have had, as I
12 understand it, some agreement on the slides to be used
13 with Mr. Bratic. And given that, what's left out of
14 this page of objections?

15 MR. GERMER: Your Honor, there's still a good
16 bit left actually. We still have objections to
17 Slide 11 --

18 THE COURT: I thought they said --

19 MR. GERMER: They took out the bottom three
20 lines of Slide 11. That was the -- that's what Judge
21 Parker indicated to me. They took out page 12 and 17.
22 They've also taken out the last line which refers to
23 Dr. Ugone, our witness, because we told them we're not
24 going to call Dr. Ugone. So, those are the agreements;
25 but we still had some very significant issues.

1 THE COURT: Okay. Well, let me ask
2 plaintiffs: On this Slide 11, when you say you take out
3 the bottom three, are you talking about the three Sony
4 items or two Sony items and the standard industry
5 licensing rates?

6 MR. PARKER: All three, your Honor. Robert
7 Parker.

8 THE COURT: Right. But I guess what I'm --
9 the three from the bottom or --

10 MR. PARKER: Yes, sir.

11 THE COURT: All right. So, you -- okay. I
12 think their objection to the Sony peripherals agreement
13 reference was that it had not been discussed previously
14 in any kind of a report, if I'm understanding it.

15 MR. PARKER: Your Honor, that was included as
16 a portion of the Wagner report referred to by Mr. Bratic
17 in his report, paragraph 32, Footnote 57.

18 THE COURT: All right. Any contest to that
19 one?

20 MR. GERMER: Your Honor, they don't really
21 discuss that in the Wagner report; but that brings up --
22 we have the same issue with 15, 16, and 17.

23 THE COURT: Well, wait, wait, wait. Let's go
24 through one thing at a time.

25 MR. GERMER: Okay.

1 THE COURT: We've got a precise reference.
2 It's either there, or it's not. I don't think an expert
3 has -- I mean, once he refers to something or -- there's
4 no way in an expert report, in all fairness, that an
5 expert can give a complete and total discussion of every
6 single piece of information he's going to discuss. He's
7 got to put it out fairly enough so that he could be
8 cross-examined without a deposition, I think, is one
9 rough view of it according to the notes -- the committee
10 notes to the Federal Rules. And I've used that same
11 analogy or example in prior opinions I've written. If
12 you're on a fair notice and you can deal with it, that's
13 what it's about. We're trying to avoid unfair surprise
14 here.

15 MR. PARKER: May I try to save the court a
16 little time?

17 THE COURT: Sure.

18 MR. PARKER: The reference, your Honor, is to
19 chart or Slide 16, which is a list of the various Sony
20 peripheral license agreements. Part of those are
21 controllers, which is a peripheral. But some of the
22 peripherals are not controllers. We are willing to
23 restructure that chart to list only controllers.

24 THE COURT: Okay. Well, again -- tell me
25 again, Mr. Parker, the footnote reference you gave me.

1 MR. PARKER: Paragraph 32, as I recall,
2 Footnote 57, references the Wagner report. This is a
3 portion of the Wagner report.

4 THE COURT: Okay. We've got all the jurors
5 here. I'm going to go ahead and call them in.

6 On that one point it does appear there's a
7 fair enough reference to that report to allow that in.
8 At the next break we can take up the additional
9 objections.

10 Go ahead and bring in the jury, please.

11 MR. PARKER: Thank you, your Honor.

12 THE COURT: Along that line, though, that
13 first item about Armstrong and Tyler's licensing
14 experience, we went through that yesterday. I don't
15 think an expert can get in something that -- I mean, he
16 may be able to rely on it; but he can't get it out in
17 front of the jury saying that they have some kind of
18 hearsay general nonexpert knowledge of something. I
19 don't think that's appropriate.

20 MR. PARKER: Do you want me to take that out,
21 judge?

22 THE COURT: The top one, yes.

23 (The jury enters the courtroom, 8:45 a.m.)

24 THE COURT: Good morning, ladies and
25 gentlemen. Glad to have you all back again, and we are

1 now continuing on with Dr. Howe.

2 You remember, of course, that you are still
3 under oath, sir.

4 THE WITNESS: Yes, sir.

5 CONTINUED CROSS-EXAMINATION OF ROBERT HOWE

6 BY MR. PRESTA:

7 Q. Good morning, Dr. Howe. How are you?

8 A. Good morning. I'm fine. And you?

9 Q. Very good, thanks.

10 We were speaking yesterday, and I had
11 mentioned to you at one point whether you were familiar
12 with a feature of the Wii system that was known as the
13 "light bar." Do you remember that?

14 A. I do.

15 Q. Okay. And I -- have you actually seen one of those
16 light bars before?

17 A. I have.

18 Q. Okay. And I have one here in my hand. Do you
19 recognize that?

20 A. I do.

21 Q. Okay. Are you familiar with the fact that -- well,
22 actually, before yesterday did you actually know what
23 this looked like?

24 A. I did.

25 Q. Okay. Did you do some research on it last night,

1 by any chance?

2 A. No.

3 Q. Okay. Did you talk to counsel about it?

4 A. Perhaps briefly in passing.

5 Q. Okay. Did you discuss what this actually does with
6 Anascape's counsel?

7 A. No.

8 Q. Okay. Are you familiar with what it does?

9 A. Vaguely.

10 Q. Okay. Are you aware that, in fact, it sits -- if
11 this was the television set that you were going to play
12 the Wii on, that it actually sits on top of the
13 television set?

14 A. I believe I've seen it there, yes.

15 Q. Okay. And it has some light sources on each
16 side --

17 A. Okay.

18 Q. -- that are used by the Wii. Do you agree with me
19 on that?

20 A. That's my rough understanding. Again, I didn't pay
21 much attention to this because it wasn't relevant to the
22 patent.

23 Q. Okay. Well, it does have to do with the overall
24 motion capability of the Wii. You realize that, right?

25 A. But not the part that's relevant to the patent.

1 Q. Okay. Now, I'd like to actually start, just to
2 make sure that as we proceed and I'm asking you what
3 your opinions are, that we have some understanding about
4 these various features. All right?

5 A. Okay.

6 Q. So, I'm going to initially --

7 MR. PRESTA: If I could get the system turned
8 on, please.

9 And by the way, for the record, this light
10 bar is Defendant's Exhibit 170.

11 Sorry, your Honor. We seem to be having a
12 little difficulty getting fired up today.

13 Okay, thank you.

14 BY MR. PRESTA:

15 Q. Now, again, Professor Howe, this is just -- this is
16 the Wii Remote. You remember, right?

17 A. Yeah.

18 Q. And, in fact, that's not a product by itself that's
19 accused of infringement.

20 A. Right.

21 Q. Right. It doesn't infringe any of the claims of
22 Mr. Armstrong's patent, right?

23 A. By itself, no.

24 Q. Okay. I would just -- as we proceed, I want to
25 make sure we have a clear understanding of how this

1 thing actually works. Okay? Now, the Wii Remote, as we
2 discussed, has this accelerometer in it, right, that you
3 say that you've studied, right?

4 A. Yep.

5 Q. Okay. It also has this camera that I mentioned to
6 you yesterday. You realize that now, right?

7 A. Yep.

8 Q. And on top of the television, there is this light
9 bar.

10 A. Yes.

11 Q. Okay. And there's actually inside -- I showed it
12 yesterday; I won't waste time doing it again. But there
13 is actually a microcomputer inside here, a large chip
14 that's actually in the form of a microcomputer that's
15 inside the Wii Remote, too. You agree with me on that?

16 A. Sure.

17 Q. Okay. Now, what actually happens -- I want to see
18 if you will agree with me on this -- is that when the
19 Wii Remote is moved, the accelerometer sends signals to
20 the motion processing microcomputer that processes those
21 signals and sends them to the Wii console that
22 communicates with the TV. You realize that, right?

23 A. Yep.

24 Q. Okay. And at the same time, this camera that's
25 pointing out the front is always taking pictures of this

1 light bar. Are you aware of that?

2 A. Sure.

3 Q. Is your answer that you know that that's the case?

4 A. Well, my answer is that -- yes, basically I know
5 that in general that's the case. Yes.

6 Q. Okay. Let me just make sure I understand. Do you
7 know that the camera constantly takes images of that
8 light bar when you're holding it?

9 A. Well, as I said yesterday, I'm familiar with the
10 fact there is an optical sensor in the front and it
11 could be configured as a camera, yes.

12 Q. Okay. So, you didn't actually read the
13 publicly-available information that's on the Wii to
14 learn how this controller works?

15 A. No. It wasn't relevant to the patent; so, I didn't
16 do that.

17 Q. Okay. So, understanding how the thing worked and
18 how the motion sensor worked, in your view, is
19 irrelevant to the patent?

20 A. No. That's not true.

21 Q. Okay. Now, when you move the Wii Remote up and
22 down, it constantly takes images of this light bar
23 and -- you don't dispute that?

24 A. No.

25 Q. Okay. And those images that it takes are sent to

1 this motion processing microcomputer just like the
2 signals from the accelerometer. Do you dispute that?

3 A. Yes.

4 Q. You agree with --

5 A. No. I agree with you.

6 Q. Thank you.

7 A. I agree with you.

8 Q. I'm sorry. I misphrased that question probably.

9 So, the motion sensing or processing computer
10 takes these pictures on a repeated basis and does image
11 processing on them. Do you understand that?

12 A. I understand the idea, yes.

13 Q. Okay. But you didn't know that the Wii Remote
14 actually does that before I just told you that?

15 A. Let's see. Again, I knew that there was an optical
16 sensor that measured the position of that light bar.

17 Q. Okay. Well, my question is: You didn't realize
18 that it takes images and it sends them to this computer
19 that's inside the Wii Remote and that processes those
20 images using image processing techniques?

21 A. No.

22 Q. Okay. And what it actually does is it processes
23 those images, and it can tell when it moves that those
24 lights are in a different place in the picture; so, it
25 can tell that it's moving. Do you understand that

1 concept?

2 A. Yes.

3 Q. Okay. Now -- so, what we have inside the Wii
4 Remote, just to summarize, you have a camera. You'll
5 agree with me on that, right?

6 A. Yes.

7 Q. The accelerometer, which you say that you've taken
8 a look at, right?

9 A. Yes.

10 Q. You have this microcomputer. Now, what happens is
11 the signals from the camera come in. The signals from
12 the microcomputer come into this -- signals from the
13 accelerometer -- I'm sorry. Then the microcomputer
14 processes all those signals, and it sends signals over
15 to the Wii console. And then that is what's used to
16 change images on the display. Do you agree with me on
17 that or have any reason -- or let me just rephrase that.

18 Do you have any reason to disagree with me
19 that that's how it operates?

20 A. No.

21 Q. Okay. Now, you had spoken yesterday to the jury
22 and you had showed them the Wii Remote and you had
23 talked about a feature where you were pointing and you
24 would pick items on the screen. And when you got to a
25 button, you could actually feel that the button -- you

1 were doing something on the button because of the
2 vibration. Do you remember that?

3 A. I do.

4 Q. Now, are you aware that, in fact, when you're doing
5 that and you're picking and pointing at things on the
6 screen, that, in fact, it's a camera, not the
7 accelerometer, that is telling the Wii to do the
8 vibration?

9 A. Yes.

10 Q. You realize it's the camera?

11 A. Yes.

12 Q. Okay.

13 A. The accelerometer is not accurate enough.

14 Q. It's not accurate enough?

15 A. Yes.

16 Q. Okay. And it's -- but, also, instead of the
17 accelerometer, it uses the camera, right?

18 A. Yes.

19 Q. You don't know that Nintendo didn't use the
20 accelerometer because it's not accurate enough.

21 A. Well, because of my knowledge of accelerometers, I
22 know it's not accurate enough.

23 Q. Okay. But you have no idea what the designers at
24 Nintendo were thinking when they put that in there.

25 A. No.

1 Q. Okay. Now, you also told me that you were playing
2 a -- you had played some games, some Wii games, right?

3 A. Yes.

4 Q. And, in fact, you told me you had played -- the
5 only Wii games you had played -- that you had only
6 played having both because, in your view, this is the
7 infringing device, having both, right?

8 A. I believe that's true.

9 Q. Okay. And one of the first games that you told me
10 you had played was Tiger Woods golf, right?

11 A. I believe that's true, yes.

12 Q. Okay. Now, are you aware -- are you a golfer?

13 A. No.

14 Q. Okay. Do you realize that you play golf with both
15 hands usually on the club?

16 A. Yes.

17 Q. Okay. Do you realize that the Nunchuk doesn't work
18 at all with the Tiger Woods golf game and the game is
19 completely played with the Wii Remote by itself?

20 A. Hum, it's been awhile. Forgive me if my memory is
21 imperfect. But I do seem to recall you could use the
22 thumbstick on the Nunchuk in the golf game. It was a
23 different mode. There are different modes one can use,
24 and one was to use the thumbstick.

25 Q. Okay. But when you were actually playing the golf

1 game, you play it by simulating that this is a golf
2 club, right?

3 A. Well, my understanding is that that's one way to do
4 it. Alternatively, you can use the thumbstick to swing
5 the club.

6 Q. And you remember specifically doing that?

7 A. I believe so. Again, it's been some months; and I
8 played quite a few games. But that was my recollection.

9 Q. Okay. Now, yesterday -- now that we've sort of
10 established this understanding between us of how the Wii
11 Remote works, I'd like to go back to where we were
12 yesterday. We were sort of in the middle of a line of
13 questioning, if you recall; and we were comparing the
14 third element that you said is on the GameCube
15 controller, which is a joystick -- we were comparing
16 that with the accelerometer that's on the Wii. Do you
17 recall?

18 A. Yes.

19 Q. Okay. And, in fact, we went through in detail
20 about how the joystick works. And just to summarize
21 briefly, tell me if you agree with me that this yellow
22 piece you touch with your thumb and you can move it back
23 and forth in two directions and when you move that third
24 element, it activates -- it has -- it's structured to
25 activate these two different sensors that are on the

1 underneath side, right?

2 A. Yes.

3 Q. And that's exactly what the claim element in 19
4 requires, right?

5 A. In part, yeah.

6 Q. Okay. It requires that you have an element -- the
7 third element is something that's movable on two
8 mutually perpendicular axes and that the third element
9 is structured to activate two bi-directional
10 proportional sensors, right?

11 A. Yes.

12 Q. And that's why we have the third element, which is
13 the structure that activates these two sensors, right?

14 A. Yes.

15 Q. Okay. Now, let me ask you: If we hypothetically
16 removed that third element from the joystick, we remove
17 the part that you can touch with your finger, would your
18 opinion on infringement of the GameCube change?

19 A. No.

20 Q. Okay.

21 A. And --

22 Q. So -- so, your opinion -- if we remove the
23 structure that activates these two sensors, in your view
24 the GameCube would still infringe?

25 A. No. Let me clarify. So, beneath that plastic cap

1 there is a metal shaft. That metal shaft, if you take
2 the plastic cap off, you can put your finger on the
3 metal shaft and do the same thing.

4 Q. Okay.

5 A. So, either of those would qualify as the third
6 element.

7 Q. Okay. But, of course, in your report that you had
8 given us in this case, you only pointed to the outside
9 thing, right?

10 A. That's -- yes, that's sufficient.

11 Q. Okay.

12 A. Yeah.

13 Q. So, let me ask my question again. If you take
14 off -- if you were to take off not only the yellow thing
15 but the shaft that goes down and all of the other parts
16 of it, the actual parts that are structured to activate
17 the sensors, if we removed all that stuff, including the
18 shaft you just talked about, would your opinion change
19 on whether the GameCube infringes?

20 A. Yes, it would.

21 Q. Okay. And why is that?

22 A. Because it no longer matches the language in the
23 claim term.

24 Q. Okay. Because it wouldn't have structure to
25 activate. It wouldn't have a third element that's

1 structured to activate, right?

2 A. That's right.

3 Q. And the claim language requires that third element
4 that's movable and that activates these two sensors.

5 That's why it wouldn't infringe, right?

6 A. Correct.

7 Q. Okay. So, let me take it one step further. If,
8 for example, we still had this on but we removed one of
9 these sensors, hypothetically, we took out one of these
10 bi-directional sensors so that there's only one sensor,
11 would your opinion change with respect to whether the
12 GameCube infringes?

13 A. Yes.

14 Q. Okay. And your opinion would be that it does not
15 infringe, right?

16 A. Correct.

17 Q. Okay. And that's because the claim language
18 requires two bi-directional proportional sensors, right?

19 A. Yes.

20 Q. And if I remove one, I only have one sensor, right?

21 A. That's right.

22 Q. Okay. So -- and the reason, just so the jury can
23 understand your opinion, is you don't infringe a claim
24 unless you do everything that's in it, right? You
25 understand that.

1 A. You bet, right.

2 Q. Okay. So, if one element is missing, then there
3 would be no infringement.

4 A. Right.

5 Q. Okay. And, in fact, this says two bi-directional
6 sensors. If you only have one sensor and the claim says
7 two, then you would have no infringement, right?

8 A. Right.

9 Q. Okay. Thank you.

10 Okay. So, now I'm putting the GameCube
11 joystick aside. Okay? And I want to focus on the Wii
12 because that yellow joystick, that was from the
13 GameCube. That was showing our two different systems
14 and contrasting them, right?

15 A. Right.

16 Q. Okay. Now, this slide is just focusing on the Wii
17 itself. And you have identified the accelerometer,
18 saying that it basically corresponded to the joystick on
19 the GameCube and had all the same features that are
20 required by this part of claim 19, right?

21 A. Right.

22 Q. And just so the jury understands, I only have a
23 part of claim 19 up here. It's a really long claim.
24 You showed it on the board the other day to the jury,
25 right?

1 A. That's right.

2 Q. But I'm just asking you to focus on this very
3 important part, that we believe is an important part.
4 That's only part of the claim, right?

5 A. Right.

6 Q. Okay. And it's the part of the claim that starts
7 with "a third element" in about the middle of claim 19,
8 right?

9 A. Right.

10 Q. Okay. So, this accelerometer, again, we talked
11 about yesterday, it is mounted on the circuit board,
12 right? You said it was soldered yesterday. Is that
13 true?

14 A. Yep.

15 Q. Okay. So, it's fixed on the circuit board, right?

16 A. Right.

17 Q. You also confirmed that there's no way you can get
18 your finger inside to touch it in any way, right?

19 A. Right, with the case closed, right.

20 Q. If you open the case, you could, of course.

21 A. Yes.

22 Q. Okay. But you can't actually -- with your hand or
23 finger, like you can with that yellow part of the
24 joystick, you can't move it, right?

25 A. No. You move the whole controller.

1 Q. Okay. But you can't move the actual chip.

2 A. Nope.

3 Q. It doesn't do any good to try and touch the chip
4 because it's not going to do anything, right?

5 A. Right.

6 Q. Okay. Now, you also told me -- and you agreed with
7 me that this is just a single chip. There's only one
8 chip there, right?

9 A. Yes.

10 Q. Okay. Now, you'll agree with me, of course, that
11 there is -- strike that.

12 Now, it's still your opinion, of course,
13 though -- you've told this jury that this claim language
14 is met just like the joystick is, just by this little
15 chip. That's your opinion?

16 A. Yes.

17 Q. Now, you put up in front of the jury -- well, let
18 me just back up.

19 So, it's your position that this chip
20 satisfies the third element being movable on two
21 mutually perpendicular axes and it is structured to
22 activate two bi-directional proportional sensors. Your
23 testimony is all that is represented by this chip,
24 right?

25 A. Yes.

1 Q. Okay. Now, you put up in front of the jury
2 yesterday this image, right?

3 A. Yes.

4 Q. And you moved it around; and you explained that, in
5 fact, that was your opinion as to what was going on
6 inside the accelerometer, right?

7 A. Right.

8 Q. Okay. Now, isn't it true, Professor Howe, that in
9 your expert report, you told us that, in fact, there's
10 three of those in the Wii Remote and now -- let me just
11 clarify it. I'll take back that question.

12 I'm only talking about the Wii Remote. You
13 understand?

14 A. Yes.

15 Q. Okay. And on your direct testimony, you only
16 testified about the Wii Remote, right?

17 A. (Pausing.)

18 Q. I'm sorry. With respect to the accelerometer.
19 That was an unfair question.

20 It's your opinion that you're pointing to the
21 accelerometer in the Wii Remote, right, as the third
22 element?

23 A. That's right.

24 Q. Okay. So, I now am limiting my questions to that
25 scope of your opinion which has to do with the

1 accelerometer in the Wii Remote. Do you understand
2 that?

3 A. Yes.

4 Q. Okay. Now, you'll agree with me, right, in your
5 expert report you told us that, in fact, there were
6 three of these what you called "proof masses" in the Wii
7 Remote, right?

8 A. Okay. So, are you referring to the corrected
9 report?

10 Q. Now, you're telling me that you have a corrected
11 report?

12 A. We submitted a -- realized I had made a mistake and
13 switched the accelerometers; and, so, I submitted a
14 corrected report some time back.

15 Q. And when was that?

16 A. Not long after we submitted the original report.

17 Q. Okay. Do you happen to have that report with you?

18 A. Let me ask the rest of the team if they might have
19 a copy of that.

20 MR. PRESTA: Could I take a look at it,
21 please?

22 BY MR. PRESTA:

23 Q. Now, in your original report where you concluded
24 there was infringement -- in the supplemental report you
25 didn't change your opinion, did you, regarding

1 infringement?

2 A. No. No.

3 Q. Okay. Now, in the original report you'll agree
4 with me that you told us that there were three of these
5 proof masses, right?

6 A. Yes.

7 Q. And, in fact, this was your original report. And,
8 in fact, you said: The accelerometer in the Wii Remote
9 is comprised of an X-Y proof mass and two Z proof
10 masses, right?

11 A. Okay. So, let's --

12 Q. That -- just answer my question, please.

13 A. Sure. That's what the incorrect report says, yes.

14 Q. Okay. Now, how did you first determine that, in
15 fact, there were -- let me ask you this: Who noticed
16 the mistake in your report?

17 A. I don't recall. One member of the team. I don't
18 recall.

19 Q. One member of the legal team?

20 A. Yes.

21 Q. Okay. Now, who sent you the information that you
22 used to form your opinions?

23 MR. CAWLEY: Objection, your Honor. May we
24 approach?

25 THE COURT: Yes.

1 (The following proceedings were conducted at
2 sidebar with both parties represented.)

3 MR. CAWLEY: Maybe we don't really have a
4 dispute here, judge.

5 MR. PRESTA: I think I was overstepping a
6 little bit. We have an agreement that I can't pry into
7 communications between the expert and the lawyer; so,
8 I'll withdraw the question.

9 THE COURT: All right.

10 MR. PRESTA: I apologize for the hassle.

11 (Sidebar conference concluded. The following
12 proceedings were heard in open court.)

13 THE COURT: Go ahead, counsel.

14 MR. PRESTA: Thank you.

15 BY MR. PRESTA:

16 Q. Okay. So, you'll agree with me when you originally
17 gave your opinion on infringement, you were actually
18 under the impression that the Wii Remote had three proof
19 masses, right?

20 A. Wait a second. No. The way the report, you know,
21 got assembled, things got scrambled. But it was clear
22 that the accelerometer that was crucial here had one
23 proof mass.

24 Q. Okay. Now, where did you get the -- what did you
25 rely on for your opinion that you've just said that, in

1 fact, the Wii Remote accelerometer has one proof mass?

2 A. Let's see. There's some information from the
3 manufacturer of that accelerometer, Analog Devices, and
4 also a report from a company that specializes in
5 analyzing computer chips.

6 Q. Okay. And you relied on a report that that --
7 that -- allegedly a specialist in analyzing these chips,
8 right?

9 A. That's one piece.

10 Q. You had an actual report where, in your view,
11 they -- this company -- a third-party company analyzed
12 the chip in Nintendo's product?

13 A. Let's see. They analyzed the chip; and Nintendo
14 decided to use the accelerometer in their product, would
15 be my understanding.

16 Q. Okay. Well, I'd like to take a look at --

17 MR. PRESTA: Could I move to Slide 34,
18 please?

19 BY MR. PRESTA:

20 Q. Okay. Do you recognize that report?

21 A. Yes, I do.

22 Q. Okay. It's not actually an exhibit; but it is
23 something that you reference in your expert report,
24 right?

25 A. I believe so, yeah.

1 Q. Okay. And, in fact, it is -- you can't really see
2 the date, but I'll represent to you -- and this isn't an
3 eyesight test. So --

4 A. Good. I would fail for sure.

5 Q. What I will tell you is that the report was
6 actually February 14th of 2006.

7 A. Okay.

8 Q. Do you have any reason to disbelieve that?

9 A. I don't.

10 Q. Okay. Now, just so we can go back -- and this
11 report actually says right on its face that it's
12 analyzing the analog devices ADXL330 three-axis +/-2g
13 device, right?

14 A. That's right.

15 Q. Okay. Now, I'm going to go to a timeline. This is
16 the same timeline we've been showing except I added -- I
17 might have added this the other day.

18 But in November, 2006, is when the Wii Remote
19 came out on the market. I think you'll agree with me on
20 that, or you don't have any reason to dispute it.

21 A. I don't.

22 Q. Okay. And I don't know exactly what day it was. I
23 just know it was in November.

24 Now, this Chipworks report that you're
25 relying on and I'm adding to the timeline now, February

1 of 2006 is when this report was done.

2 A. Okay.

3 Q. Okay. We just saw that on the front of the report.

4 Now, you realize, of course, that that was a
5 report that was done on a chip before -- about six
6 months before the product actually came out on the
7 market. You'll agree with me on that, right?

8 A. Okay.

9 Q. "Okay" means "yes," right?

10 A. As far as I know, yeah.

11 Q. Okay. Now, looking at this report again, it
12 actually talks about a +/-2g device. Do you see that?

13 A. I do.

14 Q. Now, are you aware that the chip in Nintendo's Wii
15 Remote is not a +/-2g device?

16 A. I am.

17 Q. Okay. So, you are actually aware, then,
18 apparently, that this report that you relied on isn't
19 actually a report that analyzes the accelerometer in the
20 Wii Remote. You'll agree with me on that, right?

21 A. Well, no. I can't agree.

22 Q. Okay. Well, it is a -- you agree with me that it's
23 a -- the one in the Remote is a +/-3g, right?

24 A. I will agree that the manufacturer changed the
25 product spec, but it is the same part number from the

1 manufacturer.

2 Q. Okay. We'll take a look at that.

3 Now, this report in 2006 actually refers
4 to -- and you referred to it in your expert report. It
5 refers to what's called a "Preliminary Technical Data"
6 sheet. That's also referenced in your expert report,
7 right?

8 A. That's right.

9 Q. Okay. Now, this preliminary data sheet that it's
10 relying on is dated 2004. Do you see that?

11 A. I do.

12 Q. And, of course, Nintendo's product wasn't released
13 until two years later, in November of 2006.

14 A. That's right.

15 Q. Okay. And it's entitled "Preliminary Technical
16 Data." Do you see that?

17 A. I do.

18 Q. And it specifically again says that it's a +/-2g
19 chip.

20 A. I see that.

21 Q. Okay. Now, did you purchase this report from this
22 company?

23 A. I did not personally; the team did.

24 Q. Okay. And you haven't gone inside the chip and
25 looked at what's in there in any way, have you?

1 A. No.

2 Q. Okay. And you didn't send it out to any lab that
3 you knew or any company that you knew to analyze the
4 actual chip that's in Nintendo's product, did you?

5 A. No.

6 Q. Did you do anything to verify independently of the
7 trial team for Anascope that, in fact, you -- to verify
8 how the inner workings of that chip functioned?

9 A. No. No need.

10 Q. Okay. You just relied on the report that came from
11 this third-party?

12 A. Well, and the manufacturer's data.

13 Q. Okay. We'll take a look at the manufacturer's
14 data.

15 Now, you didn't have the manufacturer's data
16 of this chip, the specific one that's in the Nintendo
17 Wii, when you gave your opinion, did you?

18 A. I had that data sheet right there.

19 Q. Okay. Now, this says "Preliminary Technical Data";
20 and it's for a +/-2g chip, right?

21 A. That's right.

22 Q. Okay. Now -- and it was years before Nintendo's
23 product came out.

24 A. Right.

25 Q. Two years before.

1 Now, you'll understand in this area of
2 technology, computer chips and related technology, two
3 years is like a lifetime, isn't it?

4 A. Well, not for a single product number, no. It
5 stays constant because, otherwise, people wouldn't be
6 able to use it in designs. They would be confused if
7 the product number referred to different parts.

8 Q. Okay. So, it's your view, then, that this product
9 number matches the product number in the chip in the Wii
10 Remote.

11 A. The ones I've looked at, yes.

12 Q. Okay. Now, how closely did you look at them?

13 A. I looked at a couple of them, and I noticed the
14 number.

15 Q. Okay. Now, you also got a -- because you would
16 agree with me that the most reliable source of
17 information for how these chips work would be from the
18 company who manufactures them.

19 A. Well, what little they tell you, yes.

20 Q. Okay.

21 A. The things they tell you are very reliable, yes.
22 They don't tell you everything, but what they tell you
23 is reliable.

24 Q. So, if you read something that the manufacturer
25 told you, it would be something that would give you a

1 lot of weight about how the thing operates, right?

2 A. Yes.

3 Q. Now, you would give more weight to that, wouldn't
4 you, than some third-party company that allegedly takes
5 it apart and analyzes it and just sends you a report?

6 A. Well, they tell you different things.

7 Q. Okay. Well, which one would be more reliable?

8 A. Well, they tell you different things. It isn't a
9 question is one more reliable than the other.

10 Q. Okay. Have you ever worked with this company
11 called "Chipworks" that makes those reports you are
12 referring to?

13 A. I've heard of them, but I've never worked with
14 them.

15 Q. Okay. Have you ever ordered a report from them?

16 A. Personally, no.

17 Q. Okay. Do you know what process they go through to
18 make such reports?

19 A. Generally, yes.

20 Q. Okay. Did you talk to anybody at the Chipworks
21 place that allegedly generated this report?

22 A. No.

23 Q. Again, you verified that you did no independent
24 investigation; you just relied on the reports and the
25 data sheets, right?

1 A. And my knowledge in how accelerometers work, yes.

2 Q. Okay. Now, there is an actual data sheet for the
3 actual chip that's in Nintendo's product, right?

4 A. This is a data sheet for the part that's in
5 Nintendo's product.

6 Q. Okay. So, you think the +/-2g in the preliminary
7 specification from 2004 is accurate for the chip that's
8 in Nintendo's product?

9 A. It describes in general the same product, but the
10 specifications change. When a manufacturer first comes
11 out with a part, they issue a preliminary data sheet.
12 And the goal there is to get designers to start using
13 their part. Then -- and that's usually at the point
14 when they've done their design and they've done some
15 prototyping and they basically understand how it's going
16 to work.

17 But then when they issue the final data
18 sheet, they've ramped up production. They are now
19 producing thousands of these; and they're able to give
20 more accurate, more detailed information. But it's the
21 same part. The design usually changes not at all
22 between the preliminary data sheet and the final data
23 sheet.

24 Q. Okay. So, do you have personal knowledge that, in
25 fact, nothing changed between the preliminary data sheet

1 and the final data sheet?

2 A. For this particular part, no.

3 Q. Okay. So, that's my point. You don't know that,
4 in fact, this data sheet provides any accurate
5 information with respect to the part that's in the
6 product that you allege infringes, right?

7 A. Well, except, again, manufacturers -- it's not in
8 their interest to change things between a preliminary
9 data sheet and a final data sheet because that would
10 discourage people from using their parts.

11 Q. And that's just your general opinion, right?

12 A. That's right.

13 Q. You don't know specifically in this case, do you?

14 A. No.

15 Q. Now, the actual data sheet for the actual product
16 is available. You know that, right?

17 A. I do.

18 Q. Okay. And you didn't rely on that when you came to
19 your opinion on infringement, did you?

20 A. No.

21 Q. It's on the exhibit list in this case, now, isn't
22 it?

23 A. I'll take your word for that.

24 Q. I'm sorry. You may not actually know that. That's
25 an unfair question.

1 MR. PRESTA: If I could go to Slide 38.

2 BY MR. PRESTA:

3 Q. Now, on 38, which is Plaintiff's Exhibit 192, I'm
4 going to ask you about that because this is actually the
5 data sheet that is in -- for the product that's actually
6 in the Wii Remote. You agree with me on that?

7 A. Appears to be, yes.

8 Q. Okay. I'm sorry. It's very small. I'll blow it
9 up for you.

10 What there actually is is years later, in
11 2006 -- that other chip you were looking at was from
12 2004, other data sheet. In September, '06, very shortly
13 before Nintendo's product came out -- and it explains
14 that it's actually a +/-3g. And you agree with me that
15 the chip in the Wii Remote is a +/-3g.

16 A. Yeah. They tuned up the specifications. That's
17 right.

18 Q. Okay. Now, do you know personally that they tuned
19 up the specifications?

20 A. That's the standard procedure in going from a
21 preliminary to a final data sheet.

22 Q. Have you ever worked at a place that makes
23 accelerometers?

24 A. I've known people who have done that.

25 Q. I'm asking you if you've ever worked at a place

1 that makes --

2 A. No. No, I have not. No.

3 Q. Did you call anybody to verify, in fact, if
4 anything changed?

5 A. No.

6 Q. You don't think that would have been a wise thing
7 to do in view of the importance of your opinion here?

8 A. I don't think it was necessary, no.

9 Q. Because you just wanted -- you're just going to
10 take the assumption that nothing changed.

11 A. Yes.

12 Q. Okay. And you're going to rely on that assumption
13 to come into court and tell the jury that Nintendo's
14 infringing and owes tens of millions of dollars to
15 Anascape.

16 A. Yes.

17 Q. Okay. Now, again, you told me -- this, you'll
18 agree with me, is the most accurate information that we
19 have on the chip that's in the Wii Remote, right?

20 A. What it contains is accurate. It doesn't contain
21 all the needed information.

22 Q. Okay. But what it contains is accurate. At least
23 we can agree on that.

24 A. Yeah, generally.

25 Q. Okay.

1 A. People make mistakes; but, sure, generally it's
2 accurate.

3 Q. Okay. Have you reviewed it to see if there's any
4 mistakes?

5 A. I reviewed it to determine that the data in there
6 is consistent with my opinion that it infringes -- or
7 that the Nintendo system that uses it infringes.

8 Q. Okay. Now, we talked about, in fact, that -- let's
9 go back to the joystick for a moment.

10 We talked about in that joystick, if we had
11 removed one of the two sensors, your opinion a minute
12 ago, you told me, was that it would not infringe, right?

13 A. That's right.

14 Q. So, you'll agree with me, then, that in order for
15 the accelerometer to infringe, it needs -- in order for
16 the Wii Remote to infringe, it needs to have two
17 bi-directional proportional sensors, right?

18 A. That element of the claim says that, yes.

19 Q. Well, then in -- a simple answer, then, is that you
20 need to have two sensors in that accelerometer for it to
21 infringe, right?

22 A. That's right.

23 Q. Okay. And you agree with me, as we just
24 established, that Analog Devices' information that they
25 put on this data sheet is accurate as far as you know,

1 right?

2 A. Yes.

3 Q. Okay. Now let's take a look at the data sheet.

4 Again, this is something that you did not have when you
5 issued your opinion, right?

6 A. I had the preliminary version of the sheet.

7 Q. Okay. Now -- and, again, the final version was
8 available; but you didn't have it.

9 A. That's right.

10 Q. Did you look for the final version?

11 A. I did not.

12 Q. Okay. Let's take a look at what the final version
13 says.

14 MR. PRESTA: And this is Plaintiff's
15 Exhibit 192.

16 BY MR. PRESTA:

17 Q. Now, this is the people who make the chip; and it
18 tells us right here that: The ADXL330 is a small, thin,
19 low power, complete three-axis accelerometer with signal
20 conditioned voltage outputs, all on a single monolithic
21 IC.

22 You see that, right?

23 A. Yes.

24 Q. Okay. Now, a single monolithic IC, could you
25 explain to the jury what that is, please?

1 A. Sure. Let's see. You take a single piece of
2 semiconductor material -- usually it's silicon -- and
3 you write tiny structures onto it using a combination of
4 optical processes and chemical etching. And with that,
5 you can produce circuit elements; so, that's how they
6 make the computer chips that run your computers. They
7 can also put a variety of sensors onto a single chip in
8 this case.

9 So, they start with one sort of baseplate;
10 and on it they can make lots of different things in one
11 place.

12 Q. Okay. So, it's basically an electrical circuit,
13 right?

14 A. Well, it's also a mechanical sensor -- or "sensors"
15 in this case.

16 Q. Okay. So, you've already now admitted to the jury
17 that it's "sensors" plural, right?

18 A. That's right.

19 Q. That the accelerometer has -- it has multiple
20 sensors, right?

21 A. Yeah. As it says up there, it's a three-axis
22 accelerometer. So, it's three accelerometers.

23 Q. Okay. It's actually one accelerometer, isn't it,
24 Professor Howe?

25 A. I guess you, you know, could say it's an

1 accelerometer; but it really senses three separate
2 measurements, three uncoupled measurements.

3 Q. Okay. Well, it outputs three signals, right?

4 A. That's right.

5 Q. Okay. Now, the manufacturer -- you told me that
6 the manufacturer's information is accurate and reliable,
7 right?

8 A. Yep.

9 Q. And you wouldn't mind it if the jury relied on the
10 information that this sheet provides, would you?

11 A. Nope.

12 Q. In forming their opinion as to whether this thing
13 infringes or not, this would be a good place to look,
14 right?

15 A. Sure.

16 Q. Now, the company that makes this tells us
17 specifically that it's a three-axis sensor, singular.

18 Now, you realize, Professor Howe, that, in
19 fact, the accelerometer is a single sensor that puts out
20 three signals. You understand that, right?

21 A. Well, that's one way to describe it. Another way
22 to describe it is three sensors in one package.

23 Q. Now, that's the way you describe it for purposes --
24 do you have a data sheet on the accelerometer that
25 you've created that we should look at to explain how it

1 works?

2 A. I'm sorry. The accelerometer I created?

3 Q. Well, you've said that, in fact, that's one way to
4 describe it, the way the manufacturer describes it.

5 You're saying that's just one way to describe it?

6 A. Yeah.

7 Q. Okay. So, you don't agree with the manufacturer's
8 representation that it's a single sensor, do you?

9 A. That's a fine way to describe it.

10 Q. Okay. Good. Thank you.

11 Now, in fact, this thing goes on on further
12 pages of this same exhibit, which is also Defendant's
13 Exhibit 200.

14 MR. PRESTA: So, it's on both of our exhibit
15 lists, I do want to mention, just in case -- Defendant's
16 Exhibit 200 is also this exhibit.

17 BY MR. PRESTA:

18 Q. Now, it also tells us on the theory of operation --
19 it tells us that, in fact, this three-axis accelerometer
20 measurement system on a single monolithic IC, it
21 contains a polysilicon surface micromachined sensor.

22 Do you see that word "sensor"?

23 A. I do.

24 Q. Do you see that that's singular?

25 A. I do.

1 Q. Do you see that the manufacturer is telling us that
2 it's one sensor? Do you see that?

3 A. I do.

4 Q. And you already agreed with me that the
5 manufacturer is in the best position to tell us what
6 this is, right?

7 A. Sure.

8 Q. And, in fact, you have never even had -- you have
9 never looked inside of this chip to say anything other
10 than the fact that it's -- strike that.

11 You have not opened up this accelerometer to
12 look inside it yourself, have you?

13 A. No. I've just relied on the pictures of the inside
14 of the chip.

15 Q. Okay. And those pictures of the inside, we already
16 established, in fact, related to a different chip,
17 didn't it?

18 A. No.

19 Q. It related to a chip that came out in 2004 that was
20 called a 2 -- +/-2g, right?

21 A. No, no. It's the same chip. The specifications
22 have changed.

23 Q. Okay. Now, you don't know that it's the same chip.
24 You have no personal knowledge on that, do you?

25 A. No. That's just the standard practice in the

1 industry.

2 Q. Okay. So, you want the jury to award tens of
3 millions of dollars from Nintendo to Mr. Armstrong based
4 on the general way people do business out in the
5 industry, right?

6 A. There are a number of reasons why I think that's
7 the right decision.

8 Q. Well --

9 A. That's part of it, yes.

10 Q. That's one of the reasons, right?

11 MR. CAWLEY: Your Honor, I'm going to object.
12 Could the witness finish his answer without being
13 interrupted, please?

14 THE COURT: And, again, I'll warn counsel.
15 We need to be careful, for the court reporter's sake, to
16 not talk over each other.

17 MR. PRESTA: Understood, your Honor. Thank
18 you.

19 And I apologize to the court reporter.

20 BY MR. PRESTA:

21 Q. Now, this is a very important point in this case,
22 Professor Howe. That's why I may be talking a little
23 quickly, and if we could try not to talk over each
24 other. It's very important, I think, that the jury
25 understands this aspect of the case.

1 Okay. Now -- because this is the basis for
2 your opinion that the Wii is infringing, is that there's
3 more than one sensor in that accelerometer, right?

4 A. Yes.

5 Q. And you don't have any personal knowledge of that,
6 right?

7 A. Well, again, I'm familiar with the way that chip
8 was designed; and it does contain multiple sensors.

9 Q. Now, the familiarity you have with the way that
10 chip's designed came from some third-party company that
11 analyzed a different chip, right?

12 A. Again, it's the same chip.

13 Q. But you don't have any personal knowledge that it's
14 the same chip, do you?

15 A. No. I have to admit that each one of those
16 accelerometers I did not open up in every Wii ever made.

17 Q. Okay. So, my question is --

18 THE COURT: Wait. Be sure you speak up
19 loudly so everyone can hear you because if you drone off
20 at the end, we won't get the full comment.

21 THE WITNESS: Very good, sir.

22 BY MR. PRESTA:

23 Q. Okay. So, again, let's take another look at what
24 you said was the best evidence to look at, was the
25 information from the manufacturer. Let's take a further

1 look at that. Okay?

2 Here we go. They're explaining their chip
3 further. It says: The sensor is polysilicon surface
4 micromachined structure built on top of a silicon wafer.

5 You have no reason to dispute that, do you?

6 A. No.

7 Q. Now, there are things in the world that can be one
8 sensor that gives out more than one signal, isn't there?

9 A. I'm not sure. Can you give me an example?

10 Q. Well, you're the professor. Are there those, or
11 are there not?

12 A. Let me think about that.

13 Well, there are certainly sensors that give
14 out more than one signal; but they are not independent
15 of each other. For instance, a six-axis force torque
16 sensor has a couple set of outputs. And in that case
17 you might describe it as a single sensor with multiple
18 outputs.

19 Q. Okay. So, there are things that you can envision,
20 as a professor at Harvard, where a single sensor could
21 output multiple signals, right?

22 A. Right. But, of course, what you simply do then is
23 you take those signals; and using some signal
24 processing, you deconvolve them. So, you extract each
25 of those separate force and torque signals.

1 Q. Okay. So, the single sensor could, in fact, output
2 three signals; and it would not make it something other
3 than a single sensor, right, in that example?

4 A. Right. Well, this goes back to what I explained
5 earlier, that you can refer to something that's a sensor
6 that is actually a combination of sensors; or you can
7 talk about the sensors together.

8 Q. Okay.

9 A. It's really a matter of semantics here.

10 Q. Okay. So, it's a matter of semantics as to whether
11 Nintendo infringes. Is that what you're telling me?

12 A. No. It's a matter of semantics that you're picking
13 apart the words in the data sheet.

14 Q. Well, I'm not picking apart the words, professor.
15 I'm asking you to look at the most accurate information
16 we have on the product that you are sitting on the stand
17 in Federal court saying infringes. You understand that,
18 right?

19 A. Yes.

20 Q. Okay. Let's look at the report a little bit
21 further. It says right here that: The ADXL330 uses a
22 single structure -- a single structure for sensing X, Y,
23 and Z axes.

24 You see that, right?

25 A. Yes.

1 Q. So, there the manufacturer is telling us, you and
2 the jury and everybody else that reads this, that, in
3 fact, this is an example of a sensor -- a single sensor
4 that outputs three signals, just like the example that
5 you were telling me; isn't that right?

6 A. Yes. That single structure is the third element.

7 Q. Thank you.

8 Now -- and you agree with me that if there's
9 only one sensor associated with that accelerometer, that
10 there's no infringement of the Wii Remote and Nunchuk,
11 right?

12 A. I'm sorry. Could you repeat that?

13 Q. Yes. It's a very important question. Let me make
14 sure you understand it.

15 If, in fact, there's only a single sensor
16 associated with the accelerometer -- it's a hypothetical
17 question, okay -- that there's a single sensor
18 associated with that accelerometer, then, in fact, the
19 Nintendo Wii Remote and Nunchuk that's accused of
20 infringement in this case would, in fact, not infringe,
21 right?

22 A. Okay. Now, let me confirm. You used this word
23 "hypothetical" and that means you've made up this
24 situation; it's not describing the situation here?

25 Q. No. I'm asking you a hypothetical.

1 A. Okay. Hypothetical means made up.

2 Q. Whether --

3 A. I'm sorry.

4 Q. I'm sorry.

5 THE COURT: Go ahead, doctor.

6 A. Okay. Well, in response to this hypothetical
7 question, I guess the answer is "yes."

8 Q. Okay. And just so we understand -- I'm sorry. It
9 was my fault for interrupting you.

10 The answer is yes, it would not -- the Wii
11 Remote and the Wii Nunchuk would not infringe
12 Mr. Armstrong's claims that are accused in this case in
13 that hypothetical, right?

14 A. That's right, in that made-up, hypothetical
15 situation.

16 Q. Okay. And that made-up, hypothetical situation is
17 that, in fact, this chip that we're looking at is one
18 sensor that outputs three signals.

19 A. Yes.

20 Q. Okay.

21 A. I think I understood that.

22 Q. Okay. So, if, in fact, this information is
23 accurate and it's one sensor that outputs three signals,
24 then there's no infringement of the Wii Remote and Wii
25 Nunchuk in this case; isn't that true?

1 A. Well, again, this is one description. The words
2 "the sensor" could be just as accurately described as a
3 set of three sensors.

4 Q. Okay. You would like to describe it as three
5 because in your original expert report, you actually
6 told us it was three, right?

7 A. Yes.

8 Q. And in your original expert report, you concluded
9 there was infringement when you had information that
10 there was actually three of them in there; isn't that
11 right?

12 A. Well, wait a second. Again, we corrected that soon
13 after the report came out. I believe you have that
14 information. And the situation using this particular
15 chip is the one that describes why the Wii Remote
16 infringes.

17 Q. Okay. But my question was a little bit different.
18 When you concluded there was infringement in your
19 original report, you were under the impression that, in
20 fact -- in fact, you told us in your report that there
21 were three of these sensors, right?

22 A. I was describing a different part, if that's what
23 you mean.

24 Q. Okay. And when you sent the updated report, when
25 somebody realized that your report was wrong, you didn't

1 change your opinion, did you?

2 A. No. My opinion about this chip remains the same.

3 Q. Well, because if you actually change your opinion
4 and recognize that it was only a single sensor, the
5 whole case would, in fact -- it would be a problem for
6 the plaintiff's case, wouldn't it?

7 A. I'm not sure I understand that question.

8 Q. Well, no infringement would be a problem for the
9 plaintiff's case, wouldn't it?

10 A. I suppose, yes.

11 Q. You're pretty sure of that, aren't you?

12 A. I'm not an attorney. That's not my job.

13 Q. Now, do you understand that, in fact, a majority of
14 the damages in this case, the vast majority, relate to
15 this Wii Remote and the Wii Nunchuk?

16 A. Again, I haven't paid any attention to damages.
17 I've concentrated on the technical issues.

18 Q. Okay.

19 A. I can't help you.

20 Q. You haven't heard -- I'm sorry. Are you finished?

21 You haven't heard at all how much money the
22 plaintiff's asking for in this case?

23 A. No, I don't believe I have.

24 Q. Okay. Would it surprise you to know that it's tens
25 of millions of dollars for the item that your testimony

1 relates to on the accelerometer?

2 A. No.

3 Q. It wouldn't surprise you?

4 A. No.

5 Q. So, you realize the importance of your testimony
6 here today, right?

7 A. Sure.

8 Q. Now -- and we all are -- you are in agreement with
9 me that the manufacturer's information is perfectly fine
10 for the jury to rely on, right?

11 A. Yes.

12 Q. Okay. Now, in fact, the manufacturer's information
13 says that it's a three-axis sensor; and you have told
14 me, in fact, that there are such things as a
15 three-output sensors -- a three-output device that is
16 only one sensor, right? There are such things.

17 A. There can be.

18 Q. Okay. And the claim language -- you also told me
19 that in order to infringe, you must have everything
20 that's in the claim, right? And the claim 19, the only
21 claim that the Wii is accused of infringing, says that
22 you have to have two. Do you see that?

23 A. Yes.

24 Q. And you had advised me earlier that if it turns out
25 that there is only one, that there would be no

1 infringement. Do you agree with me on that?

2 A. Yes.

3 Q. Okay. And, in fact, the manufacturer tells us that
4 there's only one; isn't that true?

5 A. Well, again, the manufacturer describes it one way.
6 One might also describe that as a
7 "three-sensor-in-one-package chip."

8 Q. Okay. The manufacturer describes it one way; and
9 you, Professor Howe, describe it another way, right?

10 A. I think many people describe it that way.

11 Q. Okay. But I'm asking you.

12 A. Yes, I describe it that way.

13 Q. Okay. But we've also confirmed that, in fact,
14 you've done no independent investigation on the chip
15 that you're accusing in this case, right?

16 A. No.

17 Q. Okay. Now, in fact, we saw the manufacturer's
18 actual specification that you didn't even have when you
19 gave your opinion and that you didn't have when you gave
20 your supplemental opinion that, in fact, it says it's a
21 single structure and installed it and -- right?

22 A. Yes.

23 Q. And, in fact, again in that same information from
24 the maker of the chip, not the information that you
25 relied on in your report that was all related to

1 different chips, the information you relied on for --
2 the information that's available for the actual chip
3 that's in the product, again, from the manufacturer, it
4 says it is a single monolithic IC, right?

5 A. That's right.

6 Q. Now -- so, let's get back to your overall opinion.
7 I don't have too many more questions for you.

8 Your overall opinion, then, is that this chip
9 that we were just talking about -- and, in fact, you can
10 see the lettering on it, right? It's an XL330K. You
11 see that?

12 A. Yes.

13 MR. PRESTA: Now, if I could just go back to
14 Slide 37 for a minute, please.

15 BY MR. PRESTA:

16 Q. The XL330K, do you see that?

17 A. I do.

18 MR. PRESTA: Can I go to Slide 37?

19 BY MR. PRESTA:

20 Q. In fact, this preliminary data sheet -- and you had
21 actually told me that the chip numbers matched.

22 Remember that?

23 A. Yes.

24 Q. Now, this is just talking about the ADXL330; and
25 it's a 2g one, right?

1 A. Yep.

2 Q. Do you know what the "K" means?

3 A. It's usually a package code.

4 Q. Now, it's usually a package code. My question to
5 you is: Do you know what the "K" means on this chip?

6 A. Well, if you go back a slide, I can explain.

7 Q. Which slide is that?

8 A. That showed the actual photograph of the chip.

9 Q. Okay.

10 A. Okay. So, the way these kinds of computer chips
11 are labeled, the first digits are the part number. So,
12 the XL330 is the generic term; and that's the integrated
13 circuit. That describes the functionality.

14 The letters after that have different
15 meaning. The "K" is typically the package code; that
16 is, it refers to how big the package is; whether it's
17 designed for military use, which means it's in a
18 specially rugged package; that kind of thing.

19 The following line, the "0646," is typically
20 the date code; so, that would be the -- the "06" is 2006
21 and the "46" would be the 46th week, so they know when
22 they made it. And then the bottom letters and numbers
23 there are usually the fab code, so they can figure out
24 if there is a problem with these, where the problem was
25 in manufacturing.

1 So, the key part is the XL330. That's what
2 describes the guts of this thing, what's inside. The
3 rest of it is kind of the accessories and helping them
4 figure out how their production is doing.

5 Q. And this is your general opinion of how these types
6 of things work out in industry, right?

7 A. I believe in just about every computer chip I've
8 ever seen this is how it works.

9 Q. Again, you didn't call anybody at Analog Devices,
10 the people who made it, did you?

11 A. No. It would certainly not be in Analog Devices'
12 interest to use some funny scheme which goes against all
13 of the practices that everybody in the industry
14 understands.

15 Q. Now, you could have verified that with some phone
16 calls and research, couldn't you?

17 A. I could have, yes.

18 Q. Okay. And you didn't, did you?

19 A. Nope.

20 MR. PRESTA: Okay. Could I go back to
21 Slide 43, please? Oh, I'm sorry. I'm on 43. Thank
22 you.

23 BY MR. PRESTA:

24 Q. So, again, it's your position, then, Dr. Howe, as
25 you sit there, that, in fact, the third element, the

1 "structured to activate," and the two bi-directional
2 sensors, all of that is the same as the single chip that
3 the manufacturer tells us is just one sensor, right?

4 A. Yes.

5 Q. Okay. And, in fact, even though there's nothing
6 that you can touch, nothing -- no third element that you
7 can touch with your finger that activates the chip,
8 that's still your opinion, isn't it?

9 A. Yes.

10 Q. Okay. Now, you also already told me, in fact, that
11 on the joystick, if we took off all the sensors down to
12 just one sensor, the GameCube wouldn't even infringe,
13 would it?

14 A. That's right.

15 Q. And, in fact, the GameCube with one sensor matches
16 very closely to the fact that the Wii only has one
17 sensor, doesn't it?

18 A. No.

19 Q. Okay. Now, just to summarize, Professor Howe, the
20 GameCube, in fact, has a cross-switch; and so does the
21 Remote, right?

22 A. That's right.

23 Q. And you call that the first element in the claims,
24 right, with the four unidirectional sensors?

25 A. Yes, that's right.

1 Q. And, in fact, there is a joystick on the Wii
2 Nunchuk, right, that matches up with the joystick on the
3 GameCube?

4 A. That's right.

5 Q. Right. And you explained to the jury that, in
6 fact, what the invention related to was two joysticks
7 and a cross-switch. We heard lots of testimony about
8 this magical thing with two joysticks and a
9 cross-switch. You remember that, right?

10 A. I don't recall it phrased that way, but that
11 generally is right.

12 Q. Yeah. You remember when Mr. Armstrong was
13 describing his dream and, in fact, it all broke apart
14 and it came down into three. Do you remember that?

15 A. I don't believe I was in the courtyard for that --
16 or courtroom for that lovely --

17 Q. Did you happen to read that --

18 A. I did not.

19 Q. -- section of testimony?

20 A. I did not.

21 Q. All right. Now, in fact, there is no third
22 element, is there, Dr. Howe, in the Wii Remote?

23 A. Yes, there is. It's the accelerometer.

24 Q. Okay. So, it's your position that it's the
25 accelerometer?

1 A. Yes.

2 Q. Okay. Now, Dr. Howe, you're a professor, right?

3 A. Yes, I am.

4 Q. And, in fact, you're a professor at one of the most
5 prestigious universities in the entire world; isn't that
6 true?

7 A. If you say so.

8 Q. Well, it certainly is one of the best ones, isn't
9 it?

10 A. I will let you say that, not me.

11 Q. Okay. I understand. Sorry to put you on the spot
12 about that. There's probably a lot of debate on that
13 issue.

14 It's important when you undertake a study, as
15 a professor you understand -- like if you tell your
16 students to undertake a study, that, in fact, it's
17 important that the student goes out and finds accurate
18 information -- particularly if you told them to go out
19 and analyze a particular product, it's important that
20 they go out and they get accurate and complete
21 information, isn't it?

22 A. Yes, of course.

23 Q. And you wouldn't expect anything less of your
24 students, would you?

25 A. Certainly not.

1 Q. And in this particular case, though, you as the
2 professor were given an assignment by the plaintiff's
3 attorneys; isn't that true?

4 A. Yes.

5 Q. And, in fact, when you did the assignment, you
6 didn't investigate the underlying facts; you didn't
7 actually look at the actual chip that's in the product;
8 and you're sitting in here telling the jury today that
9 Nintendo's guilty of infringement and should pay tens of
10 millions of dollars based on your just general
11 understanding of how the industry works; isn't that
12 true, Professor Howe?

13 A. I took the steps that I believe are necessary, in
14 my professional opinion, to get accurate knowledge about
15 the way the product works.

16 Q. Well, Professor Howe, I appreciate your time and --
17 THE COURT: Okay. At this time we're going
18 to take a break.

19 Ladies and gentlemen, I'll ask you to be back
20 at 10:00. Please remember my instructions. Don't
21 discuss the case among yourselves.

22 (The jury exits the courtroom, 9:43 a.m.)

23 THE COURT: All right. As I understand it,
24 on Slide 11 we're taking out the top line dealing
25 with -- here what I'm saying is Slide 11, Slide 11, the

1 demonstratives to Mr. Bratic's opinion. Top line and
2 the bottom three lines. And the -- so, that takes care
3 of a number of the objections.

4 Then we have objections to Slide 12. So, I
5 would gather, then, you would take out the same thing
6 about Armstrong and Tyler's licensing experience. And
7 then at the far right, standard game software publishing
8 agreements.

9 MR. GERMER: Your Honor, I believe they
10 withdrew Slide 12.

11 MR. PARKER: We withdrew Slide 12, your
12 Honor.

13 THE COURT: Oh, Slide 12 is out entirely.
14 That makes that one real easy.

15 And then on 16 I think you said you would
16 take out the items that didn't relate to --

17 MR. PARKER: Controllers.

18 THE COURT: Controllers?

19 MR. PARKER: That's correct. I think, judge,
20 we're down to Objection Number 5, Slide 22.

21 THE COURT: Okay.

22 MR. PARKER: I think that's the only loose
23 end.

24 THE COURT: An expert can rely on testimony
25 that is not admissible; but I think it is a proper

1 objection that he can't say, you know, "Mr. Smith" or
2 "Mark Baldwin told me." He can say, in my opinion,
3 based on my research, these things are important. I
4 think we've already had plenty of testimony that they're
5 important already; so, he can say that. I don't think
6 he can say that Mark Baldwin told him that.

7 Obviously, if defendants say where did you
8 get that information, then he could respond, "Mark
9 Baldwin told me." But I think the rule is pretty clear
10 that an expert can rely upon evidence that might not be
11 admissible in and of itself such as "Mark Baldwin told
12 me."

13 MR. PARKER: Your Honor, to give you a little
14 background, part of his testimony is going to be that he
15 interviewed several people.

16 THE COURT: Sure.

17 MR. PARKER: And one of those people was
18 Mr. Baldwin. And I redesigned this slide one time to
19 remove quotes from it; and what I was trying to do is
20 just give a general sense of information he got from the
21 interview.

22 I don't mind changing it again to remove the
23 "told me" part. Maybe we --

24 THE COURT: Or "to a game designer the
25 following is important" or something like that.

1 MR. PARKER: I think the substance of it is
2 probably uncontroverted in the case.

3 THE COURT: Well, that's what I say. There's
4 been plenty of information. But technically speaking,
5 if they're upset about "Mark Baldwin told me," it's, I
6 think, a proper objection. And, so, if it says "to a
7 game designer the following are important" or something
8 like that, if that's his opinion based on what he's
9 done, I think he can do that.

10 Obviously if defendants say, "What do you
11 mean it's important? Where did you get that," then he's
12 liable to spout off with, "Oh, well, Bob, John, and Mark
13 Baldwin told me this." That depends on your skill in
14 not opening the door -- or defendant's skill in not
15 opening the door. And I'm sure they're skilled.

16 Okay. There was one other -- or was there
17 one other?

18 MR. PARKER: I thought that covered them,
19 your Honor.

20 THE COURT: Is there one left, Mr. Germer?

21 MR. GERMER: Your Honor, there are several
22 left; and they're the most important ones. Eleven, but
23 primarily 15, 16, and 17. What they are doing --

24 THE COURT: All right.

25 MR. GERMER: I have two points. But the

1 first point is they are using a footnote reference to a
2 Wagner report, no detail in it but just a footnote
3 reference. But Mr. Wagner's report was a report given
4 by Mr. Wagner, whoever he is, in another case. And, so,
5 what we have here is Mr. Bratic pulling from an expert's
6 report in another case some information that he now
7 wants to rely upon. He will testify that he didn't
8 personally verify that.

9 We have given the court -- and I have a copy,
10 if the court would like to look at it.

11 THE COURT: And I've looked at that case, and
12 you're correct. Mr. Bratic cannot talk about
13 Mr. Wagner's prior analysis or opinions, but the pure
14 facts of this was the license and this was the
15 percentage -- those are facts; and if he wants to use
16 those facts, he may do so.

17 I will -- I mean, you need to be sure that
18 Mr. Bratic does not try to say something like, "Well,
19 Mr. Wagner analyzed this as such-and-such" or
20 "Mr. Wagner gave an opinion as thus-and-so." I think
21 the prior AlphaMed case, that's pretty standard law.
22 One expert can't just start spouting off with what some
23 other expert said that he hasn't verified himself.

24 But the actual rate, unless there is -- I
25 mean, I think he can come in and say, "Yes, there's

1 these other licenses" and he giving an indication --
2 keeping in mind these Georgia-Pacific factors, all of
3 these are just factors that give ranges.

4 MR. GERMER: Your Honor, I would respectfully
5 urge the court that that's not the import of this case.
6 And if we're to the point where -- what he's doing -- he
7 hasn't checked these at all. He's saying he found in
8 some expert's testimony in another case a listing of
9 some licenses. He likes what that expert said about
10 those licenses. That's not appropriate for him to rely
11 upon. The net effect of that would be I guess we
12 wouldn't have to use experts. We would just have to
13 have them stand up and say "I read over in" -- this is
14 just like me coming in and saying, "My fellow read in a
15 case that was tried up in Judge Ward's court that there
16 were such-and-such licenses or such-and-such."

17 That's, I would urge the court, way beyond
18 any appropriate bounds of an expert testimony. And as
19 the case we showed you points out, it's not just a minor
20 thing. The court in that case granted a new trial
21 because it obviously is going to impact the jury to hear
22 this listing. And, again, I think an expert, if he can
23 back it up, if he can say, "I went and checked on it" --
24 but he says -- and I presume will say at the trial -- he
25 hasn't checked it at all.

1 So, this notion that they get to come in and
2 pull lists -- pure lists, nothing else -- pure lists of
3 licenses that may or may not be accurate that are in a
4 testifying expert's report in another case is
5 problematic. I've just never seen it. I respectfully
6 would urge that that's -- that's going to open up an
7 entire new avenue for us, and I think that the Florida
8 court got it right and that should absolutely be
9 prohibited, not to mention the fact that if you want to
10 look at the footnote -- all of these slides come out of
11 one small footnote where he cites this report, but he
12 doesn't discuss these peripherals. In that footnote the
13 only thing he mentions is something else. He doesn't
14 even have in the footnote a reference to these
15 peripherals that he's talking about. So, under your
16 prior rulings, he absolutely has not disclosed anywhere
17 near enough of this to give us a shot at it. But more
18 importantly, I think, or more interesting, is the legal
19 point.

20 THE COURT: Overruled.

21 MR. PARKER: I choose not to respond, your
22 Honor.

23 THE COURT: You could talk me out of it if
24 you want.

25 All right. Does that cover all the

1 objections, then?

2 MR. PARKER: Yes, sir.

3 THE COURT: I think -- does it?

4 MR. GERMER: Yes, sir.

5 THE COURT: Okay.

6 MR. PARKER: Thank you, your Honor.

7 THE COURT: All right. We'll be in recess,
8 then, until 10:00.

9 (Recess, 9:52 a.m. to 10:01 a.m.)

10 (Open court, all parties present, jury
11 present.)

12 THE COURT: Okay. I understand you've passed
13 the witness?

14 MR. PRESTA: Yes, your Honor.

15 THE COURT: Okay. Mr. Cawley.

16 MR. CAWLEY: Thank you, your Honor.

17 REDIRECT EXAMINATION OF ROBERT HOWE

18 BY MR. CAWLEY:

19 Q. Professor Howe, are you familiar with the word
20 "semantics"?

21 A. Yes, I am.

22 Q. Are you familiar with the expression you hear
23 occasionally where somebody says, "Well, it's just a
24 matter of semantics"?

25 A. Yes, of course.

1 Q. Does that make you nervous?

2 A. Yes. It suggests that we're going to be splitting
3 hairs; we're going to be arguing about the precise
4 definition of things that really are pretty much the
5 same.

6 Q. Let's talk about some semantics that we just heard
7 in your questioning this morning. Do you still have any
8 of the controllers up there with you?

9 A. I do not.

10 MR. CAWLEY: May I approach, your Honor --

11 THE COURT: You may.

12 MR. CAWLEY: -- and give the witness a
13 controller?

14 BY MR. CAWLEY:

15 Q. Professor Howe, which controller is that that I've
16 just handed you?

17 A. Well, this is the Wii Remote with the Wii Nunchuk.

18 Q. All right. We just heard a lot of semantic talk
19 about a sensor and whether there is one sensor or two.
20 Do you remember that?

21 A. I do.

22 Q. If you'd hold up the Remote. And just so we're all
23 oriented, that's the thing that has the accelerometer
24 inside of it, right?

25 A. That's right, right about here (indicating).

1 Q. Okay. Could that entire thing in your hand be
2 referred to as "a sensor"?

3 A. Well, sure. I move it around in various
4 directions, and that signal is sent back to the console.
5 So, yes, the whole thing could be called "a sensor."

6 Q. And, likewise, if we take that apart and take out
7 the chip, just the chip that's called the
8 "accelerometer," could that be referred to as "a
9 sensor"?

10 A. Well, sure. Again, you can wiggle that around and
11 that could send out signals which could be used by a
12 computer. So, that could be a sensor, too.

13 Q. But if we keep going and actually get inside that
14 chip, the accelerometer itself, are there sensors inside
15 the accelerometer?

16 A. Yes, there are. So, you might recall my animation
17 from yesterday where there was a mass and as you move
18 this up and down, that little mass on springs lagged a
19 little bit and that difference we could measure. There
20 were sensors in there. They are actually capacitive
21 sensors that measure the compression and extension of
22 those springs -- ah, very good. Here is the
23 illustration.

24 So, you can see as this moves up and down,
25 that little bit of lag from the mass moving, that's

1 sensed by these little capacitive sensors that are built
2 next to the mass. And there's one --

3 Q. And there are one or more -- excuse me, not one or
4 more. Are there two or more of those sensors inside
5 that accelerometer chip?

6 A. Yes, there are. So, there's one set that senses
7 the vertical direction there, up and down; and it senses
8 bi-directional. So, the same capacitive sensors sense
9 motion up and sense motion down.

10 Q. And yesterday when you explained to the jury how
11 this third sensor element is present in the Wii Nunchuk
12 or the Wii controller with Nunchuk and Remote that you
13 have in front of you there, which of the sensors were
14 you referring to?

15 A. I was referring to those capacitive sensors. And I
16 should finish and note that we have sensors I mentioned
17 that sense the up and down direction. There is another
18 set that sense the right/left direction. And, again,
19 there are bi-directional sensors. There's one set of
20 those capacitive sensors that measures the right and the
21 left. You know, it goes both directions; so, it's
22 bi-directional.

23 There's also a set in a third direction, in
24 and out of the plane with little springs and all. We're
25 not concerned with those here. The patent just talks

1 about two directions; and, so, we're just talking about
2 the two directions that apply to the language in the
3 patent here.

4 Q. Okay. Let's -- to finish off this semantic issue
5 about which sensors you were talking about --

6 A. Uh-huh.

7 Q. -- you also told us about this controller, the
8 GameCube controller, right?

9 A. That's right.

10 Q. And you spent quite a bit of time talking about the
11 thumbsticks, right?

12 A. Yep.

13 Q. And if we can see one of the pictures that you
14 showed the jury yesterday, you showed them how there's a
15 rubber cap on the thumbstick and under it are these two
16 rectangular or square things that you told us were the
17 sensors; is that right?

18 A. That's right.

19 Q. But if we wanted to play a game of semantics, would
20 it be accurate to say that the whole thumbstick by
21 itself is a sensor?

22 A. Sure. It would be perfectly reasonable to say it
23 senses thumb motion. You put your thumb on top of it.
24 You move it around. That senses thumb motion; so, it's
25 a sensor for thumb motion.

1 Q. But even though the thumbstick could be, by
2 someone, called "a sensor" --

3 And you wouldn't disagree with that.

4 A. No.

5 Q. -- are there still two bi-directional sensors under
6 the thumbstick?

7 A. Yes, there are.

8 So, the two square potentiometers there are
9 actually separate; and, so, on a closer, more detailed
10 analysis, you would say there are two sensors there.

11 Q. Just to wrap up the comparison, in exactly the same
12 way, is it true that while people could call and maybe
13 do call the accelerometer "a sensor," that it's still
14 the fact that there are two bi-directional sensors
15 inside the accelerometer?

16 A. That's right. If you look inside that chip, you
17 find there a set of capacitive sensors, one
18 bi-directional set for up and down and one
19 bi-directional set for right and left.

20 Q. Now, Professor Howe, how long have you been using
21 accelerometers like this in your studies and your work?

22 A. Ooh, I certainly used them back in my PhD research
23 at Stanford; so, that's 20-something years ago.

24 Q. Have you been using them basically consistently
25 since then?

1 A. Oh, yeah. All the time. Yes.

2 Q. Not this particular one but others?

3 A. That's right. But we use a number of different
4 kinds. We've used a number of different kinds. We, for
5 instance, use an Analog Devices ADXL -- I believe it's a
6 220. This is an ADXL330 in this. It's essentially the
7 same idea. It's a computer chip accelerometer.

8 Q. Is it part of your career, your professional work,
9 your educational work, at least a part of it, to be
10 familiar with how things like this work?

11 A. Yes, certainly. It's a very common sensing
12 modality for mechanical engineering.

13 Q. Now, you know, all of this went by so fast. There
14 was kind of a surprise that I think may have been buried
15 in here that I hope we haven't glossed over, but I just
16 want to make sure that it's entirely clear.

17 In the opening statement in this case,
18 Nintendo's lawyer talked a lot about their being the
19 ones who invented this. Did Nintendo invent the
20 accelerometer?

21 A. No. They certainly didn't. They've been around
22 for many decades. And, furthermore, they buy this part
23 from Analog Devices, a big computer chip manufacturer.

24 Q. So, they don't even make the accelerometer; is that
25 right?

1 A. That's right.

2 Q. Can you buy one?

3 A. Certainly.

4 Q. How much does it cost?

5 A. You can go on the Internet and buy one for a few
6 dollars, 5, \$7. Of course, I'm sure Nintendo gets a
7 good deal because they're buying thousands and thousands
8 at a time. So, they're probably paying quite a bit
9 less.

10 Q. And were you here when Nintendo asked Mr. Armstrong
11 if Nintendo was the first to use or suggest the use of
12 accelerometers in video games?

13 A. No. I recall from back in the mid 1990s people had
14 invented the idea of a video game with a handle you hold
15 that has acceleration sensors in it that you can use,
16 for instance, to play virtual games on a video game
17 machine.

18 Q. So, even that idea wasn't invented by Nintendo; is
19 that correct?

20 A. That is correct.

21 Q. Now, I want to make sure that we're thorough here;
22 so, I'm going to put up this board that we went through
23 on claim 19. But we're not going to be so thorough as
24 to go through the whole thing.

25 A. That's a relief.

1 Q. Is it fair to say that in all the time you were
2 just asked questions by Nintendo lawyers, they really
3 only asked you -- of all these boxes and all these words
4 and all these check marks, they really only asked you
5 questions about one of them?

6 A. I believe that's right, yes.

7 Q. Let's limit, then, our discussion not to all the
8 things on that list that you said were there that they
9 didn't ask you about but to the one they did, "a third
10 element movable on two mutually perpendicular axes."
11 And let's go back to the GameCube controller. That's
12 the one that uses thumbsticks, this one.

13 A. Very good.

14 Q. And we won't go through the whole thing; but tell
15 us, again, to satisfy this piece of the claim, to find
16 this thing in the box of all the parts that you ordered
17 from Sears, what do you have to have?

18 A. Okay. Well, there are several parts there. And,
19 again, just so I can see clearly, I'm going to read off
20 my copy here in the binder. It says: A third element
21 movable on two mutually perpendicular axes, said third
22 element structured to activate two bi-directional
23 proportional sensors providing outputs at least in part
24 controlling objects and navigating a viewpoint.

25 So, we might say there are three things

1 there. There is an element that can move on two axes,
2 perpendicular axes.

3 Q. Okay. That's Thing Number 1.

4 A. The second is it's -- the element structured to
5 activate two bi-directional proportional sensors.

6 Q. Okay. That's -- I don't want to -- now, I don't
7 want to confuse semantics. That's Thing Number 2,
8 although Thing Number 2 does include two sensors within
9 it, right?

10 A. That's right, yes.

11 Q. Okay. What's Part Number 3?

12 A. The third one is what the output signals do. They,
13 at least in part, control objects and navigate
14 viewpoints.

15 Q. Okay. Now, how is it that you told us yesterday
16 that this third element with the three pieces that you
17 just described is in the GameCube controller?

18 A. Well, that language in this case describes the
19 thumbstick with its two rotary potentiometers.

20 Q. Okay. And is that --

21 MR. CAWLEY: If we can see that picture
22 again.

23 A. Here we go.

24 BY MR. CAWLEY:

25 Q. This is what you just showed us here.

1 A. Okay. So, should we step through those three
2 parts?

3 Q. Well, I don't know if we -- yeah, if you can do it
4 quickly.

5 A. I'll do it fast. So, the cap there and the metal
6 shaft under it as well can be the first part about the
7 element movable on two axes. So, it goes up and down,
8 goes left/right.

9 The second one is it has to activate two
10 bi-directional proportional sensors. And down there at
11 the bottom we see the two potentiometers. Those are
12 bi-directional. They go right, and they go left. They
13 go up, and they go down. And they're proportional.
14 They're like a dimmer switch. They give you all the
15 values in between, not just on and off.

16 And then, finally, we know that they can be
17 used to control objects and change viewpoints in a video
18 game. Again, it's clear to somebody who works in this
19 area that that can be done; and, furthermore, we've seen
20 video games that do it. So, it's clear that this
21 satisfies all the parts there.

22 Q. Okay. Now, just straighten out one last bit of
23 questioning here. You say that it satisfies it. But
24 the word "thumbstick" isn't in here anywhere. How can
25 that be?

1 A. That's right. Well, the point is that it -- let me
2 use an analogy because that's a good way to do it.

3 For instance, if we had a patent claim, not
4 this one but another patent claim, that said something
5 about a piece of sporting equipment that you swing and
6 somebody showed you a baseball bat and said, "Does that
7 match what's in the patent?" And you'd say, "Yeah, it's
8 a piece of sporting equipment and you swing a baseball
9 bat." So, yeah, you would check that off.

10 Now, there's nothing in the claim about
11 baseball bats; and, in fact, we know it's more general
12 than that. So, if somebody shows you a tennis racket or
13 a golf club, those are pieces of sporting equipment that
14 you swing, as well. So, the patent -- and this is often
15 a good idea when you write a patent is you want to
16 describe things in a general way so that they cover a
17 number of different things; and that's just what's
18 happening here.

19 We have a description about the way you put
20 sensors together, about the way people can interact with
21 them. A thumbstick is one way to do it; an
22 accelerometer is another way to do it. What matters is
23 that the language matches the product, not that there is
24 a specific mention of that product's configuration in
25 the patent.

1 Q. So, are you saying that if a thumbstick is like a
2 baseball bat in your example, the accelerometer is like
3 a golf club?

4 A. That's right.

5 Q. Let's see how that fits into what was your analysis
6 of the same claim 19 but this time for the Wii Nunchuk
7 with Remote. And, once again, in connection with that
8 controller, Nintendo's lawyers didn't ask you any
9 questions about almost all of the things that you said
10 were present from the patent in their Nunchuk/Remote
11 controller, right?

12 A. I believe that's right, yep.

13 Q. So, let's talk about the one they did talk about,
14 the same one you just discussed, right?

15 A. That's right.

16 Q. Okay.

17 MR. CAWLEY: So, let's see the picture again
18 of the accelerometer in the device. Actually, the
19 photograph of what is inside the Remote, please.

20 BY MR. CAWLEY:

21 Q. Tell us again what this is.

22 A. Okay. This is the accelerometer, this computer
23 chip accelerometer we've been talking so much about.
24 And inside it --

25 Q. Okay.

1 MR. CAWLEY: Now let's go to the next
2 picture.

3 BY MR. CAWLEY:

4 Q. Can you tell us, then, what actually is inside that
5 chip?

6 A. Yeah. So, what's inside is a mass called a "proof
7 mass." That's standard terminology by accelerometers.
8 And it's attached by little springs to the frame, and
9 that frame is basically the black case you saw that's
10 soldered down to the circuit board. And inside, as part
11 of this computer chip, they've built little tiny
12 springs -- and I mean tiny -- that suspend that mass.
13 So, as the Wii Remote is moved around in the hand, those
14 springs compress and extend as the mass lags behind; and
15 then there are the sensors that measure how much that
16 spring is stretched or compressed. Now --

17 Q. So, let me interrupt you with a question. Take us
18 through now what you've just explained about the sensors
19 in the accelerometer and the three parts that you told
20 us are in this third element piece.

21 A. You bet. So, the -- we said there are three parts
22 here that have to be present. If they aren't present,
23 we don't have infringement. And the first one is this
24 element movable on two perpendicular axes. In this case
25 it's the mass. It moves side to side, and it moves up

1 and down. So, those are two perpendicular axes.

2 The second part is that it has to activate
3 two bi-directional proportional sensors. Well, we see
4 that the sensors are configured to measure the spring
5 compression in each direction. And, furthermore, each
6 one of those sensors, those capacitive sensors, works
7 both ways. So, the one for the vertical direction
8 measures motion up and down -- it's bi-directional --
9 and it measures the total motion. So, if you move a
10 little bit, it gives you a small signal. If it moves a
11 lot, you get a big signal. So, it's bi-directional,
12 it's proportional, and there are two of them.

13 Then our last element there is that it's
14 useful for controlling objects and navigating a
15 viewpoint. And, again, it's obvious if you work in this
16 area that they can be used that way; and, furthermore, I
17 believe you saw a demonstration of the Wii in which that
18 was true. We saw somebody waving this around and
19 producing the changing viewpoints and changing motion on
20 the screen of the computer game.

21 Q. Okay. Is it your conclusion, then, that even based
22 on all of the things you've seen about being able, as a
23 matter of semantics, to refer to the whole controller as
24 a sensor or the chip as a sensor or the pieces inside
25 the chip that make it work as sensors -- is it your

1 opinion that the Wii Remote and Nunchuk infringes claim
2 19 of the '700 patent?

3 A. Yes. It does infringe.

4 Q. Now let me ask you about a few other things quickly
5 that you were asked about in your cross-examination.
6 Can you hold up the Wii Remote again?

7 A. (Complying.)

8 Q. Are there a lot of features to that Remote that you
9 can readily point out without even having to take it
10 together [sic]?

11 A. Sure. Well, we know about the cross pad up here,
12 various buttons. There are some lights down here on the
13 bottom that come on. We've heard about the camera on
14 the front that looks at the light bar on the TV or the
15 computer screen. So, there are a lot of different
16 features here.

17 Q. Did those additional features that you haven't
18 testified about in connection with your opinion about
19 why there is infringement -- do they have anything to do
20 with whether there is infringement or not?

21 A. No. What we have to --

22 Q. I'm thinking about the camera in particular because
23 you were asked a bunch of features [sic] about that.
24 So, let me ask you specifically about the camera.

25 A. Right.

1 Q. Does the camera have anything to do with
2 infringement?

3 A. No. As we've seen, we've checked that the features
4 that are listed in the patent are present in the device.
5 There can be extra features. That doesn't concern the
6 patent, and it doesn't concern infringement.

7 So, before I used the analogy, the idea of
8 checking for infringement, like getting a box of
9 something from Sears. So, suppose you order some tools
10 from Sears. The box comes. You get out the list of
11 your order. You check is my power drill in there?
12 Check. Is the wrench I ordered in there? Check. Is
13 the pliers I ordered in there? Check. So, your order
14 is complete. But then you look in there and they've
15 thrown in a free screwdriver and that's a bonus. It
16 turns out if you ordered more than \$50 worth of tools
17 this week or something like that, they throw in the
18 bonus. Well, the bonus is great. What matters is that
19 they gave you what you ordered.

20 And it's the same here. What matters is that
21 all the elements described in the claim are present in
22 the device. There can be extra features, but that
23 doesn't get you out of infringing the patent. And the
24 camera is one of those. The camera doesn't have
25 anything to do with the elements we just went over. You

1 saw us go over in tedious detail all those elements;
2 and, in fact, they are all present here. The camera is
3 a nice little thing. It probably makes the device work
4 better. Doesn't have anything to do with the patent.

5 Q. All right, sir. In some instances does that
6 camera, or optical sensor, help with the sensation of
7 motion?

8 A. Well, I'm sure you can use it that way. I'm sure a
9 game designer can think of nice things to do. But it's
10 clear a lot of game designers don't. So, for instance,
11 you have to have the thing pointed at the TV set in
12 order to see those light bars. And from what I
13 understand, that gives you better accuracy in doing
14 small motions. The accelerometer is better at picking
15 up large motions.

16 But in a lot of these games, you're swinging
17 this Remote all over the place. It's not even pointing
18 towards the TV set; it's pointing off in other
19 directions. And, so, that's when the accelerometer is
20 used. And it's clear from them that the accelerometer
21 does great motion sensing all by itself. You don't need
22 the camera and the light bar to sense motion in the
23 sense that's in the meaning of the patent.

24 Q. I'm not sure how easily we'll be able to see this
25 because I only have a small version of this picture.

1 THE COURT: There's a focus button on there,
2 also.

3 BY MR. CAWLEY:

4 Q. You remember -- where this arrow is pointing --
5 Professor Howe, you were asked a bunch of questions
6 about the numbers and letters that are printed on this
7 accelerometer?

8 A. Yes, sure.

9 Q. Does it make any difference to your opinion of
10 infringement?

11 A. Not at all. The key part are those first letters,
12 the XL330. That describes the basic part configuration.
13 All those extra letters are details and information
14 about when and where it was made and all. It does not
15 affect the basic functioning of the device, the basic
16 structure of the device; and, thus, it does not change
17 whether it infringes the patent -- use of it infringes
18 the patent.

19 Q. Likewise, you were shown on a spec sheet produced
20 by the company that actually makes Nintendo's
21 accelerometer, that in 2006 it was described as "2g" and
22 then later it may have been described as "3g." Does
23 that make a difference to your opinion of infringement?

24 MR. PRESTA: Objection, your Honor. This is
25 not the spec sheet that's made by the company that

1 produces the accelerometer.

2 BY MR. CAWLEY:

3 Q. Is this the Chipworks report? What is this? Do
4 you recognize --

5 A. It's Chipworks, yes.

6 Q. Okay. Then let me correct the question. I
7 misspoke.

8 Do you remember that this report described
9 the accelerometer as 2g, and later there is a spec sheet
10 that shows it was 3g?

11 A. I do.

12 Q. Okay. Does that make a difference to your opinion?

13 A. No. The way this usually works is, again, you
14 release the preliminary data sheet. You put out samples
15 of the parts just after you first got it designed and
16 working, again so people start using it, so engineers
17 start buying it and putting it in their products.

18 Then when you ramp up for the big production,
19 suddenly you're making hundreds, thousands, millions of
20 them. You test those and you get the true
21 specifications for the part you're selling and that's
22 when you put out the final data sheet.

23 Now, in this case they started out making a
24 2g accelerometer; and they realized that "Wow, you know,
25 it matches our best design hopes. We actually can get a

1 larger range out of it, and we can do it reliably in
2 manufacture. We didn't want to say we could do that
3 initially because we weren't sure we could manufacture
4 them that way. But, hey, we can. So, now we'll call it
5 a +/-3g accelerometer; and maybe we'll get some more
6 sales that way. People will use them for applications
7 that need that extra range." Very common in the chip
8 world.

9 Q. Professor Howe, has your opinion and your statement
10 to the jury that Nintendo's accelerometers, or at least
11 the ones that they buy, have at least two sensors inside
12 of them that satisfy the claim -- is that based on your
13 more than 20 years of experience with accelerometers?

14 A. Yes, it is.

15 Q. Is it based on your examination of the spec sheets
16 from a company that actually produced the accelerometer?

17 A. Yes, it is.

18 Q. Is it based on the report from this company
19 called --

20 MR. PRESTA: Objection, leading, your Honor.

21 THE COURT: Sustained.

22 BY MR. CAWLEY:

23 Q. What's the last thing it's based on?

24 A. Well, it's based on reports describing how the
25 device works provided by companies that are in that

1 business.

2 Q. Okay. Professor Howe, last question: Is there
3 anything about the work you did in this case, the
4 reports you prepared or the testimony that you've given,
5 that you'd be embarrassed for your students at Harvard
6 to know about?

7 A. Not at all.

8 MR. CAWLEY: Pass the witness, your Honor.

9 RE-CROSS-EXAMINATION OF ROBERT HOWE

10 BY MR. PRESTA:

11 Q. Professor Howe, just a couple quick questions.

12 Again, you testified that, in fact, you
13 didn't actually have the accurate data sheet when you
14 made your opinion, right?

15 A. I wouldn't characterize a preliminary data sheet as
16 inaccurate.

17 Q. You didn't have the data sheet that actually
18 corresponded to the chip that is in Nintendo's product
19 that is accused of infringement, right?

20 A. Well, again, the way you phrased the question is
21 problematic because, in fact, that preliminary data
22 sheet does describe the part that's produced.

23 Q. And you talked about different kinds of
24 accelerometers on your redirect. There are types of
25 accelerometers that don't have any moving mass, isn't

1 there?

2 A. I guess that's true. There are now optical
3 accelerometers, yep.

4 Q. Well, there's also things called "closed-loop
5 accelerometers," servo-based, right?

6 A. They have to move a little bit. You have to
7 produce an air signal in order for those to generate a
8 feedback signal to null out that displacement. So, in
9 fact, those do have a tiny movement.

10 Q. And just to confirm, you haven't opened up -- the
11 springs that you showed on the screen and the mass
12 moving around, that's actually not what it looks like
13 when you open up that accelerometer, is it?

14 A. Oh, it's more complicated, of course. They have to
15 go through a lot of trouble to give it good stability in
16 the face of rotations and to make it work well for the
17 manufacturing process and so on. But the way it works,
18 the operating principle, is just what was shown on the
19 screen.

20 Q. Okay. And in your redirect, it was suggested that
21 there was more than one of those spring mechanisms
22 within the accelerometer that's in the Wii Remote. Do
23 you recall that?

24 A. That's right.

25 Q. And there isn't more than one of those masses on

1 the springs in the Wii Remote, is there?

2 A. Well, there's one mass; and there's a set --
3 actually, it's a set of four springs in the
4 acceleromometer that's used in the Wii Remote.

5 Q. And, again, just to confirm, you have done no
6 independent investigation to confirm that, in fact, that
7 drawing that you showed the jury with those springs on
8 it in any way actually corresponds to the structure
9 that's in Nintendo's product, have you?

10 A. No. I relied on the very reliable reports of the
11 companies that analyzed these parts and that
12 manufacturers them for Nintendo.

13 Q. And, in fact, you say they are very reliable
14 reports. Have you -- you've never actually ordered a
15 report from them, have you?

16 A. Personally, no.

17 Q. And you've actually never done a study that's based
18 on those reports, have you?

19 A. Let me think about that. I don't believe so, no.

20 Q. Do you know where the company is even located that
21 makes that report?

22 A. I think it's in Canada.

23 Q. In Canada?

24 A. I believe so.

25 Q. Okay. Do you have any idea how many people they

1 have working there?

2 A. No.

3 Q. Or who the people are that work there?

4 A. No.

5 Q. Would it surprise you to learn that, in fact, in
6 one of those -- in one of the data sheets that you
7 relied on, it referred to the chip as being taken out of
8 a PlayStation?

9 A. PlayStation? No, I guess it wouldn't surprise me.

10 Q. It wouldn't surprise you that one of the chips
11 that's supposed to be a Nintendo product, the company
12 actually indicated it came out of a PlayStation?

13 A. Well, again, let's be clear. Nintendo doesn't make
14 those chips. They didn't invent them. They just buy
15 them. Lots of people buy those chips.

16 Q. Thank you. Now, in fact, you testified on your
17 redirect that, in fact, Nintendo didn't invent
18 accelerometers; and you didn't actually hear anybody
19 from Nintendo say that they invented accelerometers in
20 this case, did you?

21 A. Nope.

22 Q. Okay. So, Mr. Cawley suggested that Nintendo was
23 trying to take credit for accelerometers. That's not
24 true, is it?

25 A. I believe what he said was Nintendo is taking

1 credit for using accelerometers in video games.

2 Q. Okay. Now, you said that accelerometers were used
3 in controllers way back. How far back, do you think?

4 A. I believe it was the mid 1990s.

5 Q. Okay. The mid nineteen -- do you have a year on
6 that approximately?

7 A. I think I recall there was a patent that was filed
8 in 1994 and issued in 1996 --

9 Q. Okay.

10 A. -- which describes the system.

11 Q. So, that's technology that was out in the field
12 when Mr. Armstrong filed his supposedly warehouse
13 application, right?

14 A. That's right.

15 Q. And, in fact --

16 A. Wait. I'm sorry. I have to hold there. I don't
17 know the exact date in 1996 when it was filed; so, I
18 don't have that information.

19 Q. Okay. But accelerometer --

20 A. Or when it issued. I'm sorry. When it issued, I
21 don't know.

22 Q. Okay. But accelerometers were certainly something
23 that was known at the time Mr. Armstrong filed what he
24 calls his "warehouse application" in 1996, right?

25 A. That's right.

1 Q. And people actually knew that you potentially could
2 use these types of things in controllers at that time,
3 right?

4 A. Potentially, yeah.

5 Q. But nobody was doing it at that time on the market,
6 as far as you know, were they?

7 A. No. At that point accelerometers were pretty
8 pricey; so, it would require, you know, an application
9 that was worth the investment at that point.
10 Accelerometers have gotten wonderfully cheap because of
11 this computer chip production approach that's now being
12 used.

13 Q. Okay. Now, the accelerometers -- well,
14 Mr. Armstrong identifies all kinds of sensors in his
15 warehouse application, doesn't he?

16 A. Quite a few, yeah.

17 Q. Yeah, all different kinds -- proportional,
18 unidirectional, pressure-sensitive. There is a whole
19 list of different kinds, right?

20 A. That's right.

21 Q. And he calls it his "warehouse application" that he
22 wants to draw out of, he says, over time to get more
23 claims. You've heard him describe that, right?

24 A. I have not heard him, but I've picked up on that
25 from the discussion in the court.

1 Q. Okay. Now, accelerometers were in existence at the
2 time he filed that warehouse application; but there is
3 no mention anywhere in Mr. Armstrong's warehouse
4 application of an accelerometer being an option that
5 somebody could use for a controller, is there?

6 A. No, not that I know of.

7 Q. Now -- so, isn't it fair to say that Mr. Armstrong
8 had no idea or no indication in his mind in 1996 when he
9 was trying to put all of his ideas in an application --
10 he actually testified he was trying to put all of his
11 ideas in that warehouse application that he had in his
12 head. So, it's fair to assume, though, that in 1996 he
13 hadn't even contemplated putting an accelerometer inside
14 a game controller, had he?

15 A. Well, let's be careful here because I think we have
16 to note that Mr. Armstrong's patent says -- and this
17 goes back to the original '96 application -- that one of
18 the goals is to be able to make these economically. You
19 know, if you want millions of people to buy it for a
20 recreational purpose like video games, it can't be real
21 expensive.

22 Now, as I just mentioned, in the mid
23 Nineties, accelerometers weren't so cheap. They weren't
24 nearly as cheap as they've become recently because of
25 this new ability to make them using computer chip

1 technology.

2 Q. So, that's --

3 A. And, so, it's perhaps not surprising that he didn't
4 look to expensive sensor technology. I mean, there's a
5 million kinds of sensors. You could conceivably use a
6 laser gyroscope that they use for missile guidance in a
7 video game. You're not going to buy a
8 10-thousand-dollar laser gyro to put in a video game.
9 So, it's not surprising nobody patented that idea.

10 Q. Okay.

11 A. And the same is true for accelerometers in the mid
12 Nineties.

13 Q. So, you're telling me Mr. Armstrong only wanted to
14 put things in his application in 1996 that he thought
15 would be cheap and that would satisfy his goal of having
16 inexpensive controllers. That's your testimony, right?

17 A. No. I'm not saying that that's the only thing he
18 did. I'm saying that's one of the goals, and it relates
19 to this idea of whether accelerometers might be
20 something he would include or not.

21 Q. Now, prior to the Wii Remote that we've seen here
22 today that has turned out to be one of the most
23 successful controllers of all time in the gaming
24 industry --

25 MR. CAWLEY: Your Honor, I would object to

1 the argumentative --

2 MR. PRESTA: Strike that.

3 THE COURT: Sustained.

4 Remember, ladies and gentlemen, that comments
5 and phrases from the lawyers are not evidence of any
6 kind.

7 BY MR. PRESTA:

8 Q. Had anybody -- will you first agree with me that
9 Mr. Armstrong didn't mention an accelerometer anywhere
10 within his 1996 application?

11 A. That's right.

12 Q. Or his 2000 application?

13 A. That's right.

14 Q. Or in his 2002 amendment to the application, right?

15 A. That's right.

16 Q. Okay. So, isn't it fair to say that Mr. Armstrong
17 didn't even contemplate in any of those applications
18 that, in fact, an accelerometer could be used?

19 A. Well, I agree they are not mentioned there.

20 Q. Okay. And do you know of any mass-marketed video
21 game system before Nintendo's Wii that used an
22 accelerometer?

23 A. Mass-marketed, no. But as I mentioned, I'm aware
24 of a patent which includes many of the same ideas. It
25 talks about things like swinging a baseball bat with

1 acceleration sensors on the handle and using that for
2 things like encouraging exercise and for rehabilitation
3 and those sorts of things.

4 Q. Okay. Now, that's not my question. My question
5 is: Were there any on the mass market that somebody
6 took the time and energy to develop and bring to
7 market --

8 A. I know of --

9 Q. -- that you know of?

10 A. No.

11 Q. Now, let's just confirm. In fact, you will agree
12 with me, don't you, that the reports that -- your
13 initial report actually included misinformation about
14 the structure of the accelerometer inside the Wii
15 Remote, right?

16 A. Yeah. We caught that error and we told you about
17 it.

18 Q. Okay. And you told us about it.

19 And then you gave us a report based -- then
20 you gave us your opinion based on another report, and
21 that report came out on a chip that wasn't the chip
22 that's in the product. That's right, isn't it?

23 A. I'm not sure I followed that.

24 Q. The second report that you said you relied on was
25 based on a chip that had a spec sheet in 2004. You

1 agree with me there, right?

2 A. I don't remember the date on that report. I'll
3 take your word for it.

4 Q. The spec sheet and the -- the study that was done
5 was done before Nintendo's product even came onto the
6 market, right?

7 A. But -- you're saying the report on the ADXL330? Is
8 that the report you're referring to?

9 Q. The Chipworks report on the ADXL330 --

10 A. Yeah.

11 Q. -- that was dated prior to Nintendo even releasing
12 their product. You agree with me that that report was
13 done on a chip that Chipworks apparently got before
14 Nintendo even introduced their product to the market,
15 right?

16 A. Right, but it's the same chip.

17 Q. You don't have any actual personal knowledge -- you
18 testified to this earlier -- that it's the same chip, do
19 you, Professor Howe?

20 A. It's the same part number. But is it physically
21 the same chip? No, of course not.

22 Q. Okay. And it's not even the same part number, is
23 it? Didn't you see the "K" at the end?

24 A. Right. And as I've explained, that "K" refers to
25 some sort of accessory pieces, the packaging, the lead

1 arrangement, temperature ranges. It doesn't refer to
2 the actual design of the monolithic silicon computer
3 chip that's inside that computer case.

4 Q. Now, you don't know that for a fact, do you?

5 A. It's standard industry practice. I'm not aware of
6 any exceptions to that.

7 Q. Okay. You didn't bother investigating it, did you?

8 A. Standard industry practice. I don't think there is
9 a need to investigate that.

10 Q. You didn't even open up the Wii Remote controller
11 yourself, find out what chip was in there, or contact
12 the people who make the chip and get the information on
13 that chip, did you?

14 A. No.

15 Q. You didn't even call anybody that makes the chip to
16 find out any information on the chip, did you?

17 A. Well, for these standard building block chips, it's
18 not necessary. The data sheets describe the chips, and
19 that's not in question.

20 Q. And the data sheet describes the chips as a single
21 sensor, doesn't it?

22 A. Semantically, yes.

23 Q. Now, why do you think it's just semantic? You
24 don't have any information about what's inside the chip,
25 do you?

1 A. Well, yes, I do.

2 Q. You don't know what's inside the particular chip
3 that's in Nintendo's Wii Remote. You've already
4 testified to that, right?

5 A. Well, let's see. That's not right. I have
6 information about that part number, about the way that
7 chip is built.

8 If you're asking me do I know what's in this
9 here Wii controller, no. I haven't taken that one
10 apart. But the ones I have taken apart all use the same
11 part number, and I believe we have deposition
12 information that's true. And I know about the chip from
13 these various reports and data sheets that seems pretty
14 good to me.

15 Q. That seems good enough for you, huh, to look at
16 data sheets that don't correspond to the chip in the
17 actual product? That's good enough for you, isn't it,
18 Professor Howe?

19 A. I think we've been down that road, and I have
20 explained that the preliminary data sheet, in fact,
21 covers the chip.

22 Q. Now, Professor Howe, if you asked a student to do a
23 report on a product and the student went out and
24 actually didn't do it on the exact product, they did it
25 on a different product and they came and handed that

1 report back in to you, how --

2 A. I'm glad you asked that because, in fact, if the
3 student used a preliminary data sheet in designing or
4 describing a system, that would be just fine with me
5 because, again, not much changes between the preliminary
6 data sheets and the final data sheets.

7 Q. Now, that's the key. Your position is that --
8 well, let me ask you: What if the actual data sheet was
9 available and the student could have just simply gone
10 out and gotten the accurate information as in this case?

11 A. Wouldn't matter. I mean, as far as the function of
12 this chip and the language in the claim, preliminary
13 data sheet, final data sheet, they agree. They contain
14 the same pertinent information.

15 Q. So, your general philosophy on things like this is
16 you don't really need to go out and get the actual
17 accurate information; you can just get preliminary
18 information that may not be accurate and then just
19 assume that it's right. That's your position, right?

20 A. I'm afraid you're mischaracterizing me.

21 Q. Well, that's what you just told me. You said it
22 doesn't matter if you go out and get the most accurate
23 information that's available. You're actually a
24 professor at Harvard and you were asked to go out and do
25 a study that involves tens of millions of dollars from

1 my client and you're telling me it's okay to go out and
2 get second-class information from years earlier on a
3 different chip and then come in here in Federal court
4 and tell us that that's a basis for infringement.
5 You're telling us that that's okay, aren't you,
6 Professor Howe?

7 A. No.

8 Q. Could you have done a better job in this task that
9 you were given by the plaintiff in this case?

10 A. I think I got all of the necessary information with
11 the right level of reliability in order to draw the
12 right conclusion. I'm proud of what I've done here.

13 Q. And you drew the conclusion; and your initial
14 report was about that thick (indicating), right? Is
15 that correct?

16 A. Sure.

17 Q. And then you noticed that your report was wrong,
18 right; and you did a supplemental report?

19 A. Right. We swapped two sections of the report, had
20 to swap them out.

21 Q. And now when we're really close to trial, you, in
22 fact, realize that your report is still wrong because
23 it's on the wrong chip; isn't that so?

24 A. No.

25 Q. It's not on the 3g chip, is it? And you have no

1 idea if, in fact, that chip changed between the
2 preliminary and the final, do you?

3 A. I'm sure that the preliminary data sheet describes
4 the chip that was used in the micro -- in the Nintendo
5 products.

6 Q. You're sure -- you're telling me now that you're
7 sure it describes it?

8 A. Yes.

9 Q. So, you're changing your testimony from before
10 saying that you don't know? Now you're saying you're
11 sure.

12 A. I'm saying that it would be a huge and unlikely
13 occurrence for a manufacturer to swap chips between the
14 preliminary data sheet and the final data sheet.

15 Q. But it is possible, isn't it?

16 A. Lots of things are possible; and that one is, too,
17 yes.

18 Q. Thank you, professor.

19 MR. PRESTA: I have no further questions.

20 THE COURT: Are you ready for your next
21 witness?

22 MR. CAWLEY: Yes, your Honor.

23 THE COURT: Let me ask just one question for
24 the record. In the term "2g" and "3g", what does "g"
25 mean?

1 THE WITNESS: It's the acceleration of
2 gravity, 9.8 meters per second squared. It's a
3 convenient unit of acceleration.

4 THE COURT: Thank you.

5 You may step down, sir. Next witness?

6 MR. CAWLEY: Yes, your Honor. We call to the
7 stand Mr. Mark Newman.

8 (The oath is administered.)

9 DIRECT EXAMINATION OF MARK NEWMAN

10 CALLED ON BEHALF OF THE PLAINTIFF

11 BY MR. CAWLEY:

12 Q. Good morning, Mr. Newman. Would you introduce
13 yourself to the jury?

14 A. Yes. My name is Mark Newman. I live in
15 Washington, DC.

16 Q. Why are you here, Mr. Newman?

17 A. I'm here to explain to the jury hopefully how
18 people get patents.

19 Q. How old a man are you, sir?

20 A. I beg your pardon?

21 Q. How old a man are you?

22 A. I'm 72.

23 Q. Let me ask you a few questions about yourself first
24 so the jury can kind of understand who you are and what
25 your background in life has been like. Where were you

1 born?

2 A. I was born in Washington, DC, 1935, a good year.

3 Q. What did your dad do for a living?

4 A. My dad was a patent examiner.

5 Q. Okay. And does your mother work?

6 A. My mother is dead, but she did work.

7 Q. I'm sorry. I --

8 A. That's all right.

9 Q. I meant to ask you -- I guess I didn't articulate
10 clearly enough. What was your mother's job that she
11 worked?

12 A. My mother worked in a lot of places. I guess --
13 after we kids were born, World War II started and my
14 mother is a Phi Beta Kappa in chemistry and she became a
15 patent examiner during the war. So, she and my dad both
16 were patent examiners during the war.

17 After the war, she decided that she should be
18 a home mother.

19 Q. Okay. Yes, sir. So, with a mother and a father
20 who were patent examiners, what did you do with
21 yourself?

22 A. I went to school. I decided to become an engineer.
23 I started off in Westin University, and then I
24 transferred to Antioch College. Antioch College is a
25 school that has a co-op plan. You go to school

1 part-time for a quarter and then you work for a quarter
2 and -- and I was supposed to go to Alaska. I had a
3 co-op job in Alaska. That's what we called a work
4 study, co-op. And they had a strike; so, I couldn't go
5 to Alaska. And at that time -- that was the summer of
6 1955 -- the Patent Office was going to try a new program
7 to hire engineering students to help patent examiners.
8 So, they hired ten. I was one of those ten. That
9 was -- my co-op job was in the Patent and Trademark
10 Office. That's where I started work.

11 Q. All right, sir. Did you get a degree from Antioch
12 College?

13 A. I got a bachelor of science and major in mechanical
14 engineering and a minor in business administration.

15 Q. So, when you got out of college with your degree,
16 what did you do?

17 A. Well, throughout the time I was at Antioch, I came
18 and worked in the Patent Office in all my co-op jobs, on
19 the work side. I started off as an engineering aide
20 helping examiners search patents. I then became an
21 examiner. And when I finished college and graduated
22 from Antioch, I continued to work at the Patent Office
23 as a patent examiner; and I went to law school at night.

24 Q. Okay. When did you get a law degree?

25 A. I got my law degree in 1962.

1 Q. How long were you a patent examiner?

2 A. I retired in December of 1984, almost 30 years.

3 Q. Okay. Did you become a supervisor when you were
4 with the Patent Office, of other people who were
5 examiners?

6 A. My career in the Patent Office was first an
7 engineering aide, then a patent examiner. I worked my
8 way up as a patent examiner. And in '65 I became a
9 supervisor. And then in '71 I became a director.

10 Q. Okay. What kinds of technology did you work with
11 when you were at the United States Patent Office?

12 A. Unlike most patent examiners -- the Patent and
13 Trademark Office tries to keep an examiner working in
14 the same area all the time. But since I was going back
15 to school and coming back to the Patent Office and then
16 going back to school, I moved around a lot. So, I can
17 tell you some of the things I worked on. The first
18 things I worked on were suspension systems for motor
19 vehicles. I think the second thing I worked on were
20 steering by driving. That's like a tank. You have
21 these tracks that go around and you stop one track and
22 you move the other and it turns.

23 Q. Excuse me for interrupting. I don't mean to be
24 rude, but I want to make sure we use our time well here.
25 Did you work in a lot of different technologies at the

1 Patent Office?

2 A. Yes, I did.

3 Q. Okay. And how many patents have you, yourself,
4 examined at the Patent Office?

5 A. Over 400.

6 Q. And how many have the people that you've supervised
7 examined while you were supervising them?

8 A. Excuse me. I examined over 600. I had over 400
9 examiners working for me, and they probably did tens of
10 thousands of patents.

11 Q. And after you retired from the Patent Office, what
12 have you been doing since then?

13 A. I work in private practice as a patent attorney.

14 Q. And how many patent applications have you helped
15 people apply for since you've been a private attorney?

16 A. Over 800.

17 Q. Do you still continue to do that today?

18 A. On a very reduced basis.

19 Q. Okay. I want to ask you just a few questions, sir,
20 about some of the ways that people get patents and some
21 of the things about it that we've already heard in this
22 lawsuit.

23 What is a continuation application?

24 A. A continuation application is an application that
25 derives from a previous application. Continuation

1 applications are quite common in the Patent and
2 Trademark Office. As a matter of fact, nowadays they're
3 even becoming more common. I think when I was there, it
4 was probably 15 to 20 percent. I saw Patent Office
5 statistics that said it was 18.9 percent in the year
6 1990. It was 21.9 percent in the year 2000. In 2005 it
7 had jumped up to 29.4 percent. So, this is a vehicle
8 that is used quite often.

9 When you decide whether or not inventions
10 that are defined in claims of patents are valid or
11 invalid, you have to look to what we call the prior art
12 or the technology that's out in the public. And when
13 you look at that technology, you must use technology
14 that occurred before the examiner -- before the
15 applicant invented his device. So, you have continuing
16 applications.

17 The reason you have continuing applications
18 is the inventor can go back to his earlier date; and,
19 therefore, that eliminates significant numbers of pieces
20 of prior art that can be used to invalidate his patent.

21 Q. Mr. Newman, are you saying that when the
22 continuation application is filed, the inventor claims a
23 priority date of the earlier patent application?

24 A. Yes.

25 Q. And is that earlier patent application sometimes

1 referred to as a "parent application"?

2 A. The earlier application is called the "parent," and
3 we sometimes call the second one a "daughter" or "son."

4 Q. Okay. And is this common practice by people who
5 apply for patents?

6 A. Very common. And you do it for lots of reasons.
7 One of the reasons they do it is the various features
8 and they want to emphasize one feature or another
9 feature. Or they may have various species, you know,
10 alternative operations. And, so, they have some claims
11 to one alternative; and then they'll put claims to
12 another alternative.

13 They may have an infringer out there; so,
14 they want to get some claims out real quick. So, they
15 get some claims out real quick; but they want to keep
16 other claims that they think are going to take a little
17 bit longer. So, they file another continuation and work
18 on those other claims while that first patent issues and
19 then go out and get the infringer. And they want to see
20 what the competition is doing and they see what the
21 competition is doing and then they can redraft their
22 claims to encompass what the competition is doing. And
23 those are the major reasons, but it happens all the
24 time. It's standard, good practice.

25 Q. So, let me ask you this question: In your 50 years

1 of patent practice, either with the Patent Office or in
2 private practice, have you ever heard that practice of
3 getting a continuation and sending the priority date
4 back to the earlier application -- have you ever heard
5 that called "backdating"?

6 A. No.

7 Q. Is there anything wrong with doing what you just
8 described?

9 A. To claim priority is -- there's nothing wrong.
10 It's a standard, normal practice. Backdating to me, you
11 imply something is wrong.

12 Q. In fact, do you know if Nintendo does it?

13 A. Yes, they do.

14 Q. How do you know that?

15 A. You can look up under -- on the Web and you can get
16 Nintendo patents and those patents will show you that
17 they do.

18 Q. Have you done that?

19 A. I have found one.

20 Q. You did it?

21 A. Yeah.

22 Q. Have you reviewed this thing that we've heard
23 called the "prosecution history" for the '700 patent?

24 A. Yes, I have.

25 Q. And remind us. What's a prosecution history?

1 A. When a patent applicant files his application, it's
2 that thick (indicating); or it could be thinner
3 (indicating). The examiner reads it, decides what he
4 needs to do, and he writes back a correspondence with
5 the inventor. Then the inventor can come back and have
6 correspondence, and the inventor could send material for
7 the examiner to consider. And it can be a long, arduous
8 practice back and forth. All those papers are put
9 together in a file, and that file becomes the file
10 history. Some can be thick; some can be thin. But
11 that's the file history, and that's a record that
12 anybody can get from the Patent and Trademark Office.

13 Q. And you've read that history for this patent, the
14 '700?

15 A. Yes, I have.

16 Q. Was the '700 application amended to be a
17 continuation application?

18 A. Yes, it was.

19 Q. And did the '700 patent issue from the Patent
20 Office as a continuation?

21 A. Yes, it did.

22 Q. Did the '700 patent application claim priority back
23 to the parent 1996 application?

24 A. Yes, it did.

25 Q. Is that consistent with the common practice as

1 you've known it in the patent world?

2 A. Quite normal, common practice.

3 MR. CAWLEY: I'll pass the witness, your
4 Honor.

5 THE COURT: Any questions?

6 MR. PRESTA: Yes, your Honor. Thank you.

7 CROSS-EXAMINATION OF MARK NEWMAN

8 BY MR. PRESTA:

9 Q. Good morning, Mr. Newman. How are you?

10 A. Good morning. I'm fine. Thank you.

11 Q. It's always a pleasure to get to meet a retired
12 patent examiner. I'm a patent attorney myself, and I
13 always find it interesting how people end up at the
14 Patent Office.

15 So, you were there -- when did you start at
16 the Patent Office again?

17 A. July, 1955.

18 Q. Okay. Where was the Patent Office located back
19 then?

20 A. Department of Commerce in Washington, DC.

21 Q. Okay.

22 A. On 14th Street between Constitution and E.

23 Q. Okay. Now, you mentioned that, in fact, there is
24 this thing called a "continuation application," right?

25 A. Yes.

1 Q. And it's very common. In fact, patent examiners --
2 patent attorneys like you and myself, we often file
3 those for our clients, right?

4 A. Correct.

5 Q. And there's also something called a
6 "continuation-in-part application," right?

7 A. Yes.

8 Q. Okay. Now, a continuation application, you
9 actually said that it's -- you defined it as something
10 that derives from a previous application, if I got your
11 testimony right.

12 A. (Pausing.)

13 Q. Did you say --

14 A. I don't know whether I used the word "derives."
15 You'll have to give me a little more help.

16 Q. Okay. I'm sorry. What is your understanding of a
17 continuation application?

18 A. If an original application has various features and
19 various alternatives in it, an applicant for a patent
20 can file the original application and claim, say, one
21 set of features. Then he can file a second application
22 asking to be given a priority date of the first
23 application and claim some other alternate features or
24 some aspect of the invention that he thinks is
25 important. That's basically the process. He has to be

1 the same applicant, same inventor -- or at least one of
2 the inventors must be the same; and it must be filed
3 before the first patent issues. Which you could have a
4 string. You could have one, two, three; two filed
5 before one died, three filed before two died, three can
6 go all the way back to one.

7 Q. Thank you. Now --

8 THE COURT: Okay. Counsel, at this time
9 we're going to take a break.

10 Ladies and gentlemen, I'll ask you to be back
11 at quarter past. Again, remember my instructions.
12 Don't discuss the case among yourselves.

13 (The jury exits the courtroom, 10:58 a.m.)

14 THE COURT: We'll be in recess until quarter
15 past.

16 (Recess, 10:59 a.m. to 11:13 a.m.)

17 (Open court, all parties present, jury not
18 present.)

19 THE COURT: I understand there has been an
20 agreement on Mr. Bratic's or Dr. Bratic's slides --
21 another agreement or a new agreement or --

22 MR. GERMER: Your Honor, I think so. It
23 turns out in at least one of the slides, 15, I
24 believe -- he was kind of quoting an opinion from
25 Dr. Wagner. And I think, your Honor, we all agreed

1 you're not allowing that in. So, I think Judge Parker's
2 agreeing that they would --

3 THE COURT: Well, if there is an agreement,
4 that's fine.

5 Let me just mention, to make clear for the
6 record, because there was a -- I'm required to be sure,
7 of course, under 702 that an opinion is based on
8 sufficient facts; and, of course, those facts are
9 reasonably -- you also have principles, and then the
10 facts are applied with the principles. I mean, we all
11 know the general outline there.

12 But, of course, part of this depends on the
13 technology or field involved; and economic- and
14 damages-type testimony is, by its very nature, almost a
15 guess, slash, prediction. It's not quite the same as
16 the engineers who can talk about numbers or computer
17 scientists that's ones and zeros and so forth.

18 So, there is, in my view, a different review
19 of, well, I've looked at these various elements. And I
20 think Mr. Germer brought this up. Licenses are hard to
21 find; and the fact that these are kind of vague factors
22 that are put together in an opinion I don't think takes
23 away, necessarily. It's grounds for cross-examination
24 of an economist or a damages expert, but it's the kind
25 of information that's -- although this is not the test

1 anymore, it is one of the factors. It's the kind of
2 information that economists and damages people look at.

3 So, just to be clear for the record that -- I
4 am familiar with those factors, but I do think they have
5 to be applied. I think the Kumho Tire case mentions
6 this. You have to apply the factors dependent somewhat
7 on the field of technology or area of expertise you're
8 dealing with.

9 But if the counsel have agreed on what's
10 going to be up there, then that's fine. If there's
11 still a dispute needed -- or left, I'll deal with it.

12 MR. GERMER: Well, just to be clear, of
13 course, I'm not waiving the objections. I'm --

14 THE COURT: Sure.

15 MR. GERMER: -- going to tell you about the
16 other. But my problem is on Slide 15. And I think --
17 or do we have an agreement on --

18 MR. PARKER: Mr. Germer pointed me to some
19 language that he says is a quote. It was not my
20 intention to put a quote in there from Mr. Wagner. It's
21 my intention to show the factual data that we had
22 discussed earlier, and that's in 16. And the rest of it
23 is Mr. Bratic's characterization of that data.

24 THE COURT: And he can do that.

25 MR. PARKER: I'm going to remove anything

1 that's a quote.

2 THE COURT: Okay.

3 MR. PARKER: I had no intention of putting
4 the quote in.

5 MR. GERMER: And, your Honor, just to be
6 clear, in 15, this nice little statement about: Since
7 SCE's hypothetical license agreement would be specific
8 to PlayStation, the 27 license agreements, et cetera --
9 that is a direct -- he lifted that out of this other
10 report. And that's what I was pointing out, and that's
11 why I don't think it should come in.

12 And this 5 percent, the statement about a
13 5 percent standard, that's lifted from the other report.
14 And consistent with the court's rulings, I think it's
15 agreed they should come out.

16 MR. PARKER: I just tried to assure the court
17 that over the noon hour this is yet another slide we'll
18 work over.

19 THE COURT: Well, take a look at it. I think
20 an economist, slash, damages expert can bring in the
21 factual information. Of course, one of the factors that
22 is going to have to be looked at, obviously, under
23 cross-examination is how sure are you of it. For
24 example, in real estate sometimes the real estate
25 appraiser or expert may have to go based on what is

1 shown in the records which, as we know, when a house is
2 sold, is not always the complete price. People try to
3 hide those prices and factors.

4 MR. PARKER: But not in East Texas, of
5 course.

6 THE COURT: I won't comment on that.

7 That doesn't mean they can't testify about
8 it. It just means that may be a factor someone needs to
9 bring out as to that may not be completely accurate
10 information. But it is inherent in predictions or
11 estimates of what a hypothetical negotiation would have
12 been that it is not always going to be based completely
13 on the kind of -- or with the kind of scientific rigor
14 that would be required in, say, a chemistry problem or a
15 mechanical engineering problem. And that, I think, is
16 set out in the various cases and is encompassed in
17 Rule 702.

18 Okay. Let's bring in the jury, please.

19 (The jury enters the courtroom, 11:18 a.m.)

20 THE COURT: Counsel, go ahead.

21 MR. PRESTA: Thank you.

22 BY MR. PRESTA:

23 Q. Mr. Newman, I just have a couple quick questions
24 for you.

25 The first one is: Are you familiar with the

1 Manual of Patent Examining Procedure?

2 A. The MPEP, yes, I am.

3 Q. Okay. Could you tell me what that is briefly?

4 A. Manual of Patent Examining Procedure is a --
5 currently it's a two-volume piece of work about that
6 thick (indicating). It's about 4 inches thick. And it
7 purports to give advice to applicants for patents and
8 for patent attorneys and for patent examiners on how to
9 handle the examination process.

10 Q. Thank you.

11 MR. PRESTA: If I could pull up Slide 7,
12 please.

13 BY MR. PRESTA:

14 Q. Mr. Newman, is your screen on in front of you?

15 A. Yes, it is.

16 Q. Thank you. Do you recognize what that is?

17 A. That's the cover sheet for the manual.

18 Q. Okay. Are you aware that there is, in fact, a
19 definition of what a continuation application is inside
20 the Patent Office's Manual of Patent Examining
21 Procedure?

22 A. Chapter 200.

23 Q. Okay. You still remember that, huh?

24 Okay. If I could turn to Slide 17, please.

25 A. I think it's 201.06, as a matter of fact; but I'm

1 not sure.

2 BY MR. PRESTA:

3 Q. Okay. Well, you're --

4 A. No. It's 201.07. Sorry.

5 Q. I think -- if I could just get you to take a look
6 at that for a minute. And if you could just tell the
7 jury what that section is. And I'm sorry. I put yellow
8 on it and red on it. That's not the way it originally
9 came.

10 A. The manual has different sections and they are in
11 hundred-number series and Chapter 200 happens to do with
12 different types of applications. And to break it down
13 so that you don't have to read a hundred pages, they
14 have a little index for all the different topics they
15 cover because there's lots of types of applications.
16 There's utility applications; there's design
17 applications; and that, of course, is in still another
18 section of the manual. But there's continuations.
19 There's continuations-in-part and different types of --
20 and, so, they have an index that starts in the first
21 part of Chapter 200. And then they break it down. So,
22 according to what feature you want --

23 Q. Mr. Newman?

24 A. -- you can go right to that section. And that's
25 what 201.07 is. It's one of the breakdown sections of

1 that manual.

2 Q. Okay. And in that 201.07, it defines what a
3 continuation application is, right?

4 A. Yes, sir.

5 Q. Okay. And, in fact, doesn't it read: A
6 continuation is a second application for the same
7 invention claimed in a prior nonprovisional application
8 and filed before the original prior application becomes
9 abandoned or patented?

10 Did I read that right?

11 A. You read that right.

12 Q. And you agree with that, right?

13 A. I agree with that.

14 Q. Okay. And further down there is another section
15 that I'm highlighting where it says: The disclosure
16 presented in the continuation must be the same as that
17 of the original application.

18 Do you agree with that?

19 A. Yes, I agree with that.

20 Q. Okay. Now I want to show you some testimony that
21 happened in trial. I don't know if you've had an
22 opportunity to review any of the testimony, but I'm
23 going to show you some testimony from Mr. Armstrong on
24 the screen.

25 MR. PRESTA: If I could go to the first day's

1 transcript, at page 157 beginning at line 15 through 19.

2 BY MR. PRESTA:

3 Q. And this is an answer. It might be separated
4 somewhat from the question. But I want to ask you -- it
5 says here, from Mr. Armstrong testifying -- at the end
6 of the first sentence it says: My understanding is that
7 the Patent Office allows you to write claims at a later
8 date so long as they are the original invention that you
9 filed in that original patent application.

10 Do you see that?

11 A. Yes, sir.

12 Q. And that's Mr. Armstrong, the plaintiff in this
13 case, his testimony. Do you agree with that?

14 MR. CAWLEY: Your Honor, objection. That's a
15 legal conclusion.

16 THE COURT: Overruled.

17 BY MR. PRESTA:

18 Q. Do you agree with that statement?

19 A. (Pausing.)

20 Q. In particular, do you agree that the Patent Office
21 allows you to write claims at a later date so long as
22 they are the original invention that you filed in that
23 original patent application?

24 A. No, I don't agree with that.

25 Q. Okay. And what is wrong with that?

1 A. That's not the only reason, as long as they are the
2 original invention.

3 You can file all the cases you want. You can
4 bring all the claims that you want as long as it's
5 supported by the disclosure of the original application.
6 The claims don't have to be drawn to the same invention.
7 As a matter of fact, if claims in an application are
8 drawn to the same invention -- that is, they don't
9 distinguish from one another -- a patent examiner would
10 reject one claim over the other claim. All claims are
11 different in scope; and each claim, as the judge has
12 indicated, is to a different invention. So, I don't
13 agree with that statement. That may be his
14 understanding of it, and I guess you'd have to ask him
15 what he meant by it. But to me, I don't agree with it
16 because that's not how I understand things go.

17 Q. Okay, Mr. Newman. Thank you very much. It would
18 be much more accurate, of course --

19 MR. PRESTA: Could we go back to Slide 17.

20 BY MR. PRESTA:

21 Q. So, if one was to have an accurate definition of
22 what a continuation is, you would look to this 201.07
23 section of the MPEP, right?

24 A. To see what the rules are for a continuation?

25 Q. Yes.

1 A. You would have to look at all of Section 200 --

2 Q. Okay.

3 A. -- that concerns to continuations.

4 Q. Okay. And you agree with the statements that are
5 in the part I have in yellow. You indicated that
6 already, right?

7 A. That that's what it says? Yes, I agree that you
8 read it right.

9 Q. And you agree with the substance of it, don't you?

10 A. That a continuation is a second application for the
11 same invention claimed in a prior -- I think that's a
12 correct statement.

13 Q. Okay. And, also, the second statement is correct,
14 where (reading) the disclosure presented in the
15 continuation must be the same as that of the original
16 application. You already said you agreed with that,
17 right?

18 A. If it's a continuation application as opposed to a
19 continuation-in-part, that is correct.

20 Q. So, it's important for a continuation, then, that
21 the disclosure presented is the same as the original
22 application, right?

23 A. That there can be no -- when they say "the same,"
24 you have to understand what that means. That means you
25 can't enter and put in new matter into a continuing

1 application and claim that new matter.

2 Q. I understand.

3 A. That's prohibited. When they say "must be the
4 same," that means that the disclosure can't take and put
5 something into the application that wasn't in the
6 original.

7 Q. Thank you.

8 A. That's what they mean.

9 Q. Okay. I appreciate that clarification, Mr. Newman.
10 I thank you for coming down here from Washington and
11 helping us out here at this trial.

12 MR. PRESTA: No further questions.

13 MR. CAWLEY: No further questions, your
14 Honor.

15 THE COURT: You may step down, sir.

16 Next witness?

17 MR. CAWLEY: Thank you, your Honor. First,
18 may we make a brief interim statement?

19 THE COURT: You may.

20 MR. CAWLEY: Ladies and gentlemen, Judge
21 Clark gives us the opportunity between witnesses to make
22 what's called an "interim statement." It just means
23 that I have an opportunity just to say a few words to
24 you to kind of help everyone be oriented about what
25 we're doing and about what's getting ready to come up.

1 I haven't done that so far because I knew
2 that you could meet Mr. Armstrong without my needing to
3 introduce him and then we went right away to Professor
4 Howe and I knew that you would understand his testimony
5 and, of course, the testimony you've just heard from
6 Mr. Newman was very short.

7 I just want to take this opportunity, though,
8 since it's been a couple of days since you've heard his
9 name, to remind you that Kelly Tyler --

10 Kelly, you might as well stand up because
11 you're about to be on the stand.

12 Kelly Tyler is the man who Brad Armstrong
13 identified as his friend and his business partner, who
14 is one of the co-owners of Anascape. And we're calling
15 Mr. Tyler to the stand now so that he can tell you what
16 happened in connection with this lawsuit from his
17 perspective.

18 Thank you, your Honor.

19 THE COURT: Step forward, sir.

20 (The oath is administered.)

21 DIRECT EXAMINATION OF KELLY TYLER

22 CALLED ON BEHALF OF THE PLAINTIFF

23 BY MR. CAWLEY:

24 Q. Would you introduce yourself to the jury, please.

25 A. Yes. My name is Kelly Tyler, and I'm 46 years old.

1 I live in the San Diego area in a little town about 25
2 minutes east of San Diego called "Jamul."

3 Q. Are you one of the co-owners of Anascape?

4 A. Yes. I am about a 36 percent owner, yes.

5 Q. Tell us a little bit about yourself, Mr. Tyler.
6 Where did you grow up?

7 A. I grew up in Provo, Utah.

8 Q. Where did you graduate from college?

9 A. I graduated from the University of Utah.

10 Q. And when was that?

11 A. That was in 1985.

12 Q. And what kind of degree did you get from the
13 University of Utah?

14 A. I graduated with a degree in international business
15 design and manufacturing.

16 Q. Are you married?

17 A. Yes. I've been -- I got married on tax day 22
18 years ago to my lovely wife, Kim.

19 Q. Okay. And do you have children?

20 A. Yes. I've got five children. My oldest is a girl.
21 She's 18, just went off to college last year. And then
22 I have four boys. My youngest is Sam. He's 10 years
23 old.

24 Q. Thank you. Could you briefly tell the jury what
25 you did after you graduated from college?

1 A. Well, after graduating from the University of Utah,
2 I got married; and then shortly thereafter, Kim and I,
3 we decided we wanted to travel around a little bit
4 before we settled down. And, so, we decided to go to
5 Asia and travel around. We went to Taiwan; and we ended
6 up working there a little bit, teaching English, a
7 couple of little odds-and-ends jobs just to earn enough
8 money so we could, you know, travel to a few countries
9 and then we were going to go home. But it ended up that
10 we saw some opportunities there and decided to stick
11 around for a while.

12 Q. How long were you in Taiwan?

13 A. Probably there for about three and a half years.

14 Q. Where did you go then?

15 A. Moved to Hong Kong.

16 Q. And did there come a time when you got involved in
17 the video game business when you were in Hong Kong?

18 A. Yes. We were trying a lot of different things, a
19 lot of different businesses, you know, everything from
20 brine shrimp eggs to latex gloves. We were just trying
21 to get a business going. And when I was in Hong Kong,
22 we got an inquiry from a company called "DOCX." They
23 were interested --

24 Q. Sorry. Is that D-O-C-X, DOCX?

25 A. Yes, uh-huh.

1 Q. Okay.

2 A. They were interested in an AC adapter that would
3 power a Gameboy so they could play the Gameboy without
4 using battery power. They would plug the AC adapter
5 into the wall and plug the other end into the Gameboy
6 and be able to power that. And, so, I was able to
7 source that product for them and ship it to them.

8 Q. Okay. You said a couple things there I want to
9 slow down on a little bit. First of all, what's an AC
10 adapter?

11 A. Again, it's a device that you would plug into the
12 wall and you would be able to -- you know, just like an
13 extension cord or anything like that -- be able to plug
14 that into the wall and the other end would plug into
15 something else. In this case it was a Gameboy.

16 Q. Okay. Now, that's the second question I have.
17 What's a Gameboy?

18 A. The Gameboy is a handheld device manufactured by
19 Nintendo. It has a video screen and some buttons, and
20 you use it to play video games. It's just handheld.

21 Q. Okay. So, someone asked you -- DOCX asked you to
22 see if you could look around where you were living in
23 Hong Kong and find this AC adapter so that they could
24 sell them to people who wanted to be able to use their
25 Gameboy without batteries; is that fair?

1 A. Yeah, that's correct.

2 Q. And you say that you sourced it. What do you mean
3 by that?

4 A. Well, I didn't make this product all by myself. I
5 went -- there's a lot of manufacturing companies and I
6 went to, you know, a few different manufacturing
7 companies and found the one that I thought would be the
8 best that was already manufacturing these AC adapters
9 and I contracted with them to make the AC adapter.

10 Q. Okay. And then, in turn, you sold those to DOCX?

11 A. Yes, repackaged it in their packaging and then --

12 Q. Did that give you any ideas?

13 A. Yeah. I was interested at that time to be involved
14 in the video game industry. I was really trying to get
15 a business going; and, you know, I thought, you know,
16 the video game industry -- you know, that's big business
17 and I was interested in technology and I thought that
18 might be a good fit. So, I came up with some ideas on
19 products that might go well. And I took these products;
20 and I said, "Hey, DOCX, you know, I've got these
21 products here. What do you think?" And they weren't
22 really interested.

23 Q. What did you do then?

24 A. I said, "Well, I think these are good ideas; so,
25 maybe I can sell them myself." And I was looking in --

1 you know, how do I start doing this? And I said, "Well,
2 the biggest company in the United States right now
3 selling toys and video-game-type products is Toys-R-Us;
4 so, why not start at the top?"

5 So, I picked up the telephone. I had to call
6 at night because of the time difference. And I called
7 Toys-R-Us at night, my time; and the buyer for the video
8 game category answered, which never happens. I mean,
9 that was just a stroke of luck.

10 Q. So, what did you do then?

11 A. I talked to him for a while and then he -- he
12 suggested that I contact three manufacturer
13 representatives and he gave me the names of these
14 representatives. And I contacted them, and one of them
15 was named "Phil Rosenberg." And he set up appointments
16 for me at different stores and I went with him -- I flew
17 to the United States. I had a little duffel bag, and I
18 was carrying this little duffel bag that had about ten
19 products in it that I had come up with. I had either
20 sourced them or come up with them myself.

21 Q. Now, what do you mean by that? How did you get the
22 products that you carried in the duffel bag to the U.S.?

23 A. Well, I carried them in the duffel bag.

24 Q. Oh, I'm sorry. What I meant was: Where did you
25 get that stuff that you put in the duffel bag?

1 A. Well, some of it I made. There was a battery pack
2 that I made from scratch. I designed, you know, the
3 carrying case for the batteries and how it would hook up
4 to the power and all that. There was one that I made
5 that would actually clip into a video game machine.
6 There was one -- an RF switch that you could connect the
7 game consoles that were out available at that time to
8 TVs. There was a repair kit for a control pad that we
9 had in there. I think there were some bags that would
10 carry consoles or some of the -- like the Gameboy-type
11 product. There was, you know, about ten items.

12 Q. Okay. So, you took those ten items in your duffel
13 bag back to the U.S.; and what happened?

14 A. Well, we met with different stores. I think there
15 was Meyers that we met with. I think Toys-R-Us was --
16 well, Toys-R-Us was one of them. I think KB Toys.
17 There were about three or four stores that we had
18 appointments with.

19 Q. And what happened?

20 A. Well, we -- the one that I remember the most is
21 Toys-R-Us because we went there, and they actually
22 ordered three products out of our duffel bag. They
23 ordered an RF switch, they ordered a control pad that
24 was a replacement control pad for the Nintendo
25 entertainment system, and they ordered a battery pack

1 that I had made up.

2 Q. Okay. So, is that how you found yourself in the
3 video game business?

4 A. Yeah. I had some orders, and I was in business.

5 Q. Okay. Did you decide to form a company to do your
6 business through?

7 A. Yes. We formed a company. It was called "Mad
8 Catz."

9 Q. And how do you spell "Catz"?

10 A. That's M-A-D, obviously, and C-A-T-Z.

11 Q. How did you get that name?

12 A. Well, I lived on a little island that was outside
13 of Hong Kong. We couldn't really afford to live in town
14 because we didn't have enough money. And I was on this
15 little island with my wife and we were walking around
16 and we were talking about, "Well, what can we name our
17 company?" And we were talking about it and said, "Well,
18 how about this? How about that?" And "Maybe we can use
19 an animal name." And we were saying, "Well, how about
20 dogs or maybe something fierce like a Mad Dog?"

21 And Kim, she really likes cats and she, you
22 know, had some of these little cat figurines that were
23 kind of crazy and she said, "How about Mad Catz?"

24 I said, "Yeah. That would be cool if instead
25 of the S at the end, we put a Z." And it stuck.

1 Q. When was this that you founded Mad Catz?

2 A. That was about 1990.

3 Q. And were you the president of the company?

4 A. Yes, I was, president and all the employees all
5 wrapped up into one.

6 Q. So, when you formed the company, it had just you as
7 the employee; is that right?

8 A. Yes, uh-huh.

9 Q. Did Mad Catz's business grow?

10 A. Yes. It started growing. I had to -- I hired a
11 young woman from Hong Kong. She helped me with
12 packaging, artwork, and helped me with translation at
13 the factories. And, you know, when it started
14 growing -- we had this order from Toys-R-Us that we were
15 able to make, and we shipped it out. And then, you
16 know, a month or so later Toys-R-Us is saying, "Well,
17 this stuff's selling; so, we want another order." And
18 they hadn't paid us for the first order yet because they
19 have these terms that it's, like, 90, 120 days or so
20 before you ever get paid.

21 And, so, we have this problem -- I guess it's
22 a good problem -- that we have orders; but we don't have
23 the money to make the orders. And, so, we're talking to
24 the factories and saying, "Well, we'll pay you. Just,
25 you know, can you make this stuff for us?"

1 And, you know, eventually it just started
2 working out; and every penny we got we just plowed back
3 into the business and started growing. I think by the
4 time I sold it, we had about 70 employees and -- and one
5 thing we were -- at Toys-R-Us we got vendor of the year.
6 That was a good thing. And when I sold it, we were the
7 Number 2 video game accessory company in the world --
8 well, in the United States and probably in the world.

9 And then shortly after I sold it, the company
10 went to Number 1, Number 1 third-party manufacturing
11 company.

12 Q. Was Toys-R-Us your main customer?

13 A. Yes, uh-huh.

14 Q. What kind of things is it that you were selling at
15 Toys-R-Us?

16 A. Well, video game accessories. And that covered a
17 lot of different things. There were cigarette lighter
18 adapters where you could plug your cigarette lighter in
19 and you could power a console.

20 There were AC adapters, RF switches. There
21 were some bags, light magnifiers so you could put the
22 magnifier on a Gameboy-type product and be able to see
23 it better and light up the screen. But our main
24 business was controllers. I think probably about 70 --
25 75 percent of our business was controllers.

1 Q. Did you get any patents when you were with Mad
2 Catz?

3 A. Yes. I applied for and received, I think, 17
4 patents.

5 Q. When did you sell your company, Mad Catz?

6 A. It was, I think, 1999.

7 Q. And tell us again how many employees you had when
8 you sold the company.

9 A. I think it was right around 70.

10 Q. And did any of them lose their jobs as a result of
11 your selling the company?

12 A. Yeah. That was -- that was me. I sold the
13 company, and I was the only one that lost their job.

14 Q. All the other employees kept their jobs?

15 A. Yes, uh-huh.

16 Q. Who did you sell to?

17 A. It was a company from Canada. It was called "Game
18 Trader."

19 Q. And why did you decide to sell this company that
20 you had started and built up?

21 A. Well, when you first start out in a business, it's
22 pretty exciting. You know, I'm able to design products.
23 I'm able to learn how to do the artwork, how to package
24 the products, learn how to ship the products to the
25 stores, you know, go on sales calls and able to get the

1 orders from the stores. And, you know, it's pretty
2 exciting.

3 But as the company grows, things change; and
4 things that used to be fun are still fun for the people
5 doing them but -- but, you know, I'm more in a -- you
6 know, we're getting these employees and there are some
7 employee squabbles and you have to handle those and then
8 there's tax issues and then there's, you know, pamphlets
9 and booklets you have to write for, you know, the rights
10 to the employees and you have to deal with, you know,
11 getting insurance for everybody. You know, you've got
12 70 employees. That's a lot of responsibility; and
13 you've got to take care of all of these people.

14 So, you know, it got to a point where it
15 wasn't as fun. And the main thing, I think, was I was
16 working sometimes 18-hour days; and I had a family. I
17 wanted to spend more time with my family.

18 Q. And what have you done after selling Mad Catz?

19 A. Well, I've been able to spend more time with my
20 family. Every year we go on a nice trip. Like this
21 last year we went to the Galapagos down in Ecuador with
22 my family, real nice trip.

23 I'm able to do a lot of different things,
24 like my daughter plays basketball and she went to
25 college and, you know, was on a team there and I was

1 able to, you know, fly up and watch her basketball
2 games.

3 You know, this summer my son's playing
4 volleyball. He's going to be in junior Olympics, and
5 I'm going to be able to go. I don't have to worry
6 about, you know, "Am I going to have this order I've got
7 to get out and not be able to go?"

8 Q. What kind of businesses have you been involved with
9 since you sold Mad Catz?

10 A. I had a couple of things. I have some real
11 estate -- or I managed some real estate and, you know,
12 rent it out to people.

13 Q. What kind of real estate?

14 A. Most of it's warehouses, small warehouses where,
15 you know, small companies like a woodworking shop and
16 stuff like that will rent a space; and we'll, you know,
17 rent it and manage the real estate.

18 Q. What else?

19 A. I've gotten involved with Brad Armstrong, who is
20 sitting here, in the Anascape business.

21 Q. How did you meet Brad Armstrong?

22 A. Well, I met Brad probably in 1996, 1997. We met at
23 an E3 show. That's Electronic Entertainment Expo.
24 Every year in this industry, there is a big show for
25 video games; and that's the big show, the E3 show.

1 Q. Did you have a booth at that show?

2 A. Yeah, we had a booth. There was --

3 Q. Is that you?

4 A. Yeah. That's it. That's me with hair. But, yeah,
5 that's the booth we had at one of the E3 shows.

6 Q. Okay. So, how did you meet Brad Armstrong at that
7 show?

8 A. I was working at a booth like I am here in this
9 picture, and Brad Armstrong came around and -- and he
10 had -- I had never met him before that point and he came
11 around and we struck up a conversation and he had a
12 little paper that said something about 6 DOF and he had
13 some pictures of controllers. I don't remember exactly
14 what they were but we struck up a conversation at that
15 time and we were interested to, you know, talk again
16 after the show.

17 Q. Now, remind us. I know we've heard it, but remind
18 us what "DOF" stands for.

19 A. "DOF" stands for "degree of freedom."

20 Q. So, were you interested in talking to Mr. Armstrong
21 further?

22 A. Yeah. We actually started corresponding, and we
23 met a couple of times.

24 Q. And did you become interested -- when you still had
25 Mad Catz, before you sold the company and you're still

1 making and selling controllers, did you become
2 interested in getting a license for Mr. Armstrong's
3 controller technology including the 6-degree-of-freedom
4 controller?

5 A. Yes, very interested. I really believed in his
6 products, thought they were great. He had patents on
7 them, and we decided to enter into an agreement.

8 Q. This is an agreement between Mad Catz and
9 Mr. Armstrong?

10 A. Yes. Yeah. I didn't know -- I mean, I'd just met
11 Brad and thought his stuff was great; and we entered
12 into a contract.

13 Q. Take a look at the binder in front of you, or on
14 the screen; and I'm going to show you Plaintiff's
15 Exhibit 43 and ask you to tell us what it is.

16 A. Okay. This is a license agreement between 6-DOF
17 Trust -- that's a trust that Brad owned at the time --
18 and myself, Kelly Tyler, a businessman.

19 Q. What are the main terms of this agreement that you
20 entered into with Mr. Armstrong to license his
21 technology?

22 A. There's some payments. There's a payment of
23 \$75,000; and then there's two additional payments of
24 \$25,000 each. So, that would be a total of \$125,000.

25 Plus, there is a running royalty rate of

1 5 percent.

2 Q. What does that mean, "a running royalty rate"?

3 A. For every controller that we make or would have
4 made under this contract, we would have paid Brad
5 Armstrong 5 percent of the wholesale price, I believe.

6 Q. And is there a certain type of product for which
7 instead of paying 5 percent you would have paid
8 4 percent?

9 A. Yeah. I think initially it was 5 percent across
10 the board and after it got to, it looks like, \$300,000
11 in -- it would change where some of the products would
12 be 5 percent royalty rate and some of them would be
13 4 percent royalty rate.

14 Q. And for what patent was this agreement to apply?

15 A. This covered -- I just will recognize it by the
16 last three digits of the patent, but it covered the '828
17 patent and the '891 patent.

18 Q. Are those patents that are similar to the '700
19 patent that's involved in this lawsuit?

20 A. Yes. In fact, these patents, I believe, are
21 parents to the '700 patent.

22 Q. Why did you agree to pay a royalty rate to
23 Mr. Armstrong of between 4 and 5 percent?

24 A. That was the industry standard as far as I knew.

25 5 percent was pretty much the industry standard --

1 MR. GUNTHER: Objection, your Honor. Move to
2 strike. Expert testimony.

3 THE WITNESS: Do I keep talking or --

4 THE COURT: Hold on, no.

5 THE WITNESS: Okay.

6 THE COURT: I'll sustain as to that. You can
7 obviously go into what was actually paid but not as to
8 the other unless there is a better foundation laid.

9 MR. GUNTHER: Your Honor, can I --

10 THE COURT: And I think we've already
11 discussed this particular issue.

12 MR. GUNTHER: Your Honor, can I just request
13 that the jury know what's going on with respect to this?

14 THE COURT: Well, ladies and gentlemen,
15 you're going to hear various damage testimony about a
16 reasonable royalty from various experts. Persons who
17 have not been properly disclosed as experts earlier on,
18 according to the rules, can't state opinions as to what
19 the reasonable amounts are in general. They can talk
20 about what they, themselves, paid; but the rules
21 require -- otherwise, we would have experts come in with
22 all kinds of things and we would never get over a trial.
23 Both sides are required to provide expert reports early
24 on under the rules and Scheduling Order that I set, and
25 then that's what they are limited to. It's not like on

1 TV where there is these dramatic surprises and someone
2 jumps up from the back and confesses like in a movie.

3 In reality, I've seen -- we have these expert
4 reports, and I limit them to that. Otherwise, as I say,
5 in a complicated case like this, it would go on for
6 months; and I'm not going to have that. So, it's not an
7 effort to hide anything from you; it's just an effort to
8 make sure the lawyers on both sides get their work done
9 in advance so you're not wasting lots of time on that.

10 So, again, you can ask what was paid; but the
11 reasons and so forth --

12 MR. CAWLEY: Sure.

13 THE COURT: -- we'll have expert testimony on
14 that.

15 Go ahead.

16 MR. CAWLEY: Thank you, your Honor.

17 BY MR. CAWLEY:

18 Q. So, just to make sure we're all on the same page,
19 you agreed to pay a running royalty of between 4 and 5
20 percent to Mr. Armstrong; is that right?

21 A. That's correct.

22 Q. And just so we're clear here, because I know the
23 story evolved later on, how long had you known
24 Mr. Armstrong at that point in time?

25 A. Well, maybe a month, maybe two months.

1 Q. Okay. So, you hadn't really struck up a friendship
2 with him yet, had you?

3 A. Not at that point. I mean, I had admiration for
4 him for, you know, an inventor; but there was no -- it
5 was just a business deal.

6 Q. Okay. It was a business -- you weren't trying to
7 do him a favor. You were --

8 A. Right.

9 Q. -- doing a business deal; is that accurate?

10 A. Yeah.

11 Q. And you certainly weren't in business with him yet
12 at that point, correct?

13 A. No. Before the contract, there was nothing. And
14 this contract was the first business deal that we had
15 ever had together.

16 Q. Okay. Did you make any -- did Mad Catz end up
17 making any products that were covered by these two
18 patents?

19 A. No, we didn't.

20 Q. And why not?

21 A. Well, at the time we had a growing business. We
22 talked to Brad, you know, and he had come down and
23 showed us how to do different things and we were
24 interested in getting the controllers going, but, you
25 know, like I said, you know, my time was just -- you

1 know, sometimes working 18-hour days and I just didn't
2 have enough time to get it done.

3 Q. And did you enter into some other license
4 agreements with Mr. Armstrong at other points in time?

5 A. Yes, uh-huh.

6 Q. Now, what happened to your rights in connection
7 with these early agreements that you had with
8 Mr. Armstrong?

9 A. All rights that I had I contributed to Anascape
10 when we formed Anascape.

11 Q. Okay. So, let's jump forward to that point in
12 time.

13 A. Okay.

14 Q. When did you form Anascape?

15 A. I think that was December of 1999.

16 Q. So, is that after you sold Mad Catz?

17 A. Yes, uh-huh.

18 Q. Why did you form Anascape?

19 A. Well, I was interested in staying involved in the
20 video game industry. I didn't want to spend all the
21 time that I had before, but I was still interested in
22 it. I believed in Brad who was, you know, I thought, a
23 great inventor; and I had some money. He needed money;
24 and, you know, we kind of got together and made the
25 company.

1 Q. What kind of company did you form?

2 A. It was called "a limited partnership," and we
3 formed that in Nevada.

4 Q. All right. And tell us -- by this time, had your
5 early relationship with Mr. Armstrong grown into a
6 friendship?

7 A. Yeah. We got to be quite good friends. You know,
8 he would come down to San Diego. You know, he's come
9 down quite a few times. I've been up to, you know,
10 where he's lived. We've gone up to San Francisco
11 together. We've traveled to meet different companies
12 together. He's come to my house; we've had dinner.
13 He's talked to my kids. He talks to them about
14 inventions and -- you know, it's kind of inspiring for
15 them to hear his stories.

16 One time my son -- he was in sixth grade, and
17 they had this contest at school to see who could sell
18 the most magazines. And if you sold the most magazines,
19 you could get different things. Like, he wanted a
20 scooter, this motorized scooter, and he had to sell a
21 couple more magazines and he had already sold them to
22 everybody, you know, around and he said, "Who can I
23 call? Who can I call?" And he said "Hey, I can call
24 your partner." And, so, he called up Brad; and Brad
25 bought some magazines for him to put him over the top so

1 he could get his little scooter that he wanted.

2 At one time I was up at -- I had a friend
3 that got really sick. He was up skiing and --
4 snowboarding, actually, and he had to be Life-Flighted
5 from Lake Tahoe to Reno, Nevada, and he was there in the
6 hospital and I flew up to see my friend and he had all
7 these tubes and stuff in him and -- anyway, he was in
8 ICU. So, I couldn't stay there the whole time. Brad
9 lived in the area and I went and saw him and I made a
10 little video presentation and Brad was really concerned
11 about my friend and he wanted to be part of that video
12 and when I showed it to my friend, it cheered him up
13 later on when he was getting better.

14 Anyway, we just got to be friends.

15 Q. Okay. Why did you call your business "Anascape"?

16 A. Anascape was kind of a combination of a couple
17 words. We had a tag line that was "Anascape, the analog
18 landscape of the future."

19 And, so, "Anascape" was kind of a combination
20 of "analog" and "landscape." So, "Ana" from "analog"
21 and "scape" from "landscape."

22 Q. And what did Mr. Armstrong put into this company
23 Anascape?

24 A. He put his -- all of his patent portfolio, his
25 technology, his know-how.

1 Q. Okay. What did you put into the company?

2 A. I put in any rights that I had to the patent
3 portfolio and money. I had just sold my company, Mad
4 Catz, and had some money; and we decided to go from
5 there.

6 Q. How much money did you invest in Anascape over the
7 years?

8 A. It ended up being more than a million, probably
9 around a million and a half.

10 Q. Now, I'm going to ask you about some documents here
11 that have to do with the transfer of Mr. Armstrong and
12 others' rights to the patents into this company,
13 Anascape. And I apologize that this is probably not the
14 most exciting part of the trial, but it's something
15 important and something we need to do.

16 So, I'd like you to take the binder in front
17 of you and look at these exhibits and tell us what they
18 are. They are Plaintiff's Exhibit 46, 47, and 265. If
19 you would just run through those and tell us what they
20 are, please.

21 A. 46 is a certificate of limited partnership for
22 Anascape, showing that it was formed in Nevada.

23 And there's the limited partnership agreement
24 for Anascape that Anascape would operate under in
25 Nevada.

1 47?

2 Q. Yes, sir.

3 A. 47 is an Assignment Agreement between Brad
4 Armstrong and Anascape, where Anascape assigned his
5 patents to Anascape.

6 Q. Could you say that again? I think you said
7 Anascape assigned its patents to Anascape.

8 A. Oh, I'm sorry. Where Brad Armstrong assigns his
9 patents to Anascape.

10 Q. Okay. And 265?

11 A. 265 is a letter from Brad Armstrong to the
12 commissioner of patents, and he is letting them know
13 that he has assigned his rights in an application -- a
14 patent application to Anascape.

15 Q. Now, the patent that was to become the '700 patent
16 in this lawsuit was still an application in the Patent
17 Office at this time, right?

18 A. That's correct.

19 Q. Do these documents assign -- did Mr. Armstrong
20 assign to Anascape in these documents not only the
21 patents he already had but the applications and any
22 patents he might get from those applications in the
23 future?

24 A. That's correct.

25 Q. So, is this how Anascape ended up owning the '700

1 patent?

2 A. That's correct.

3 Q. Now, did Anascape that you eventually started as a
4 Nevada partnership eventually become a Texas company?

5 A. Yeah. Brad was living in Texas shortly after or, I
6 guess, right before we sold -- well, not sold. We had a
7 license agreement with Sony. But, anyway, right when we
8 came to this -- right before we licensed to Sony, I had
9 been the general partner up until that point. Brad
10 became the general partner. He was living here in Texas
11 and decided that he wanted to have the company here in
12 Texas instead of in Nevada, and I had no problem with
13 that.

14 Q. Okay. Now, there's three more exhibits that I'm
15 going to need to show you that I'd once again like to
16 ask you to go through quickly and tell us what they are.
17 They're Plaintiff's Exhibit 249, 246, and 263.

18 A. This is a conversion document filed with the State
19 of Texas just saying that we're converting Anascape
20 Nevada to Anascape Texas.

21 The next one is a similar document filed with
22 the State of Nevada saying we're converting Anascape
23 Nevada to Anascape Texas.

24 And 263?

25 Q. Yes, sir.

1 A. This is the Agreement of Limited Partnership that
2 Anascape Texas operates under.

3 Q. Okay. And were there also some people who owned
4 very small interests in Anascape?

5 A. Yes. There's Steve Bowman and Brian Carlson that
6 also are owners of Anascape.

7 Q. And who are they?

8 A. These are people that were influential with Brad,
9 helping him early on. I think Steve Bowman was part
10 owner or involved with Global Devices, which was a
11 company that Brad had; and Brian Carlson was someone who
12 helped Brad quite a bit with his patent filings.

13 Q. All right. And did those people also sign some
14 assignment agreements of any interest they might have in
15 the patents into Anascape?

16 A. I don't think Brian Carlson did because I don't
17 think there was any ownership that he could possibly
18 have. But I think Steve Bowman did and myself, Brad,
19 and any of those entities that were --

20 Q. I've got a list of documents here now; and instead
21 of asking you to go through each one like you just did,
22 I'm just going to ask you this general question because
23 I know you're familiar with these documents.

24 Are the following exhibits also assignment
25 agreements? And they are: Plaintiff's Exhibit 49, 117,

1 118, 309, 310, and 311.

2 A. Yes. These are assignment agreements that assign
3 basically anything, if any, rights that we have, to make
4 sure that all the rights were in Anascape.

5 Q. Okay. In 2002 did you have discussions with a
6 company called "Intec" on behalf of your partnership
7 Anascape?

8 A. Yes. We were at that time contacting many
9 companies trying to get people interested in licensing
10 our technology and had entered into discussions with
11 Intec about them licensing our patents and technology.

12 Q. And who is Intec?

13 A. Intec was a Florida company. They had -- I think
14 were involved in car part manufacturing or accessories
15 and then they got involved in video game accessories and
16 they were becoming, you know, someone that was, you
17 know, doing quite well in the industry.

18 Q. And what kind of discussions did you have with
19 them?

20 A. Well, we started talking about licenses. We got to
21 a point where we were actually talking terms.

22 Q. Did you make a proposal to them?

23 A. Yeah. We -- yeah, there was a proposal or a term
24 sheet. I can't remember exactly what it was, but it was
25 for a million dollars they would pay us plus they would

1 pay us a running royalty and --

2 Q. How much?

3 MR. GERMER: Your Honor, I'm sorry. I think
4 that's been excluded by the court.

5 THE COURT: All right. Ladies and gentlemen,
6 rather than having sidebar and have you wait around,
7 it's just about lunchtime anyway. So, what we're going
8 to do is break for lunch. I will ask you to be back at
9 20 past 1:00 and we'll start again.

10 Please remember my instructions. Don't
11 discuss the case with each other and don't let anybody
12 else discuss it with you. You're excused at this time
13 until 20 past 1:00.

14 (The jury exits the courtroom, 12:04 p.m.)

15 THE COURT: All right. What's the exhibit
16 number again, and what's --

17 MR. CAWLEY: Well, it's not an exhibit, your
18 Honor. There was an exhibit, but an objection was made
19 to it. The court sustained the objection to the
20 exhibit, but I haven't asked him about the exhibit.
21 I've just asked him if he made a proposal and what his
22 proposal was.

23 THE COURT: All right. Then what's the
24 objection?

25 MR. GERMER: Your Honor, you sustained the

1 objection because this was an offer; and that was the
2 basis of our objection. And, of course --

3 THE COURT: Is that the objection --

4 MR. GERMER: It would not come in as an
5 exhibit, but we would have the same objection to the
6 testimony as the same reason as offered.

7 THE COURT: That's what I'm waiting for. Is
8 that the objection?

9 MR. GERMER: Yes, sir. It is an offer and
10 offer only and for the same reason we're excluding the
11 exhibit should be excluded from his testimony.

12 THE COURT: So, technically, I guess, it's
13 unaccepted offers are not proof of value? Is that the
14 objection?

15 MR. GERMER: Yes.

16 MR. CAWLEY: Well, your Honor --

17 THE COURT: That's, I think, a correct
18 statement of the law.

19 MR. CAWLEY: Well, your Honor, I don't think
20 that that is a universal or a categorical statement of
21 law. There are circumstances in which they may not be
22 and viewed with skepticism, but I think that's a
23 question of weighing the evidence.

24 MR. GERMER: Your Honor, this is, of
25 course --

1 THE COURT: Wait, wait, wait, wait. Okay.
2 So, you're offering it so that it can be considered
3 later, I guess, as some evidence of the proper royalty
4 to be paid?

5 MR. CAWLEY: Yes. That's relevant to several
6 of the Georgia-Pacific factors, even if not accepted.

7 Now, of course, I'm going to bring out -- I'm
8 not going to wait for cross-examination to bring out the
9 fact that it wasn't accepted. The jury is going to hear
10 that immediately. And I'm sure if the defendants think
11 I haven't done a good enough job beating Mr. Tyler up
12 about it, they'll do it themselves. But it's a piece of
13 evidence that they don't want to get out there, and it's
14 not without probative value.

15 THE COURT: Other than the -- all right.
16 Which factors individually?

17 MR. CAWLEY: License --

18 THE COURT: Other than amount -- in other
19 words, obviously whatever percentage it is -- you know,
20 5 percent, 15 percent -- that might be some indication
21 of a reasonable royalty rate. What other factors are
22 you looking at?

23 MR. CAWLEY: Licensing practices and the
24 hypothetical negotiation that establishes definitively
25 an amount that Anascape would have accepted in the

1 hypothetical negotiation.

2 THE COURT: I will allow testimony that they
3 were trying to market and that they were making offers.

4 I am going to exclude the amounts of the
5 offers unless they were accepted, on the basis that in
6 the hypothetical negotiation and under the
7 Georgia-Pacific factors -- and I think it's specifically
8 mentioned, I believe, in the Georgia-Pacific case and
9 also in some of the later cases that an unaccepted offer
10 is not admissible evidence to prove value. And, so, if
11 you're trying to prove practices in terms of were they
12 trying to license, would they be willing to license for
13 a running royalty of some kind as opposed to just simply
14 a lump sum, I will allow that evidence. But I will not
15 allow in the actual amounts or the actual percentages on
16 that.

17 Any question, then, about what range or what
18 kind of answers need to be given?

19 MR. CAWLEY: I think I understand.

20 THE COURT: I mean, I'm not saying you agree
21 with me necessarily.

22 MR. CAWLEY: Thank you, your Honor.

23 THE WITNESS: So, you're just saying I can't
24 say "5 percent" or a dollar amount --

25 THE COURT: Right. For example, don't say

1 "Well, in this offer we got \$2 million plus 5 percent or
2 \$3 million plus 5 percent." You can say, "We offered it
3 for a lump sum plus a running royalty" or "We offered it
4 for a running royalty" or "We offered it for a lump
5 sum." But -- and I guess you're going to also say it
6 wasn't accepted, or they will. Somebody will.

7 THE WITNESS: Your Honor?

8 THE COURT: Yes.

9 THE WITNESS: What about deals that we have
10 done? I can say the amounts on those?

11 THE COURT: Oh, if it was accepted, then
12 that's a different matter. No, that -- if it was
13 accepted, then -- unless there is some other objection
14 to it. I don't know why that wouldn't come in.

15 MR. CAWLEY: Thank you, Judge.

16 THE COURT: I don't think Mr. Germer has
17 objected to things that -- I mean, if it was accepted,
18 then that shows what a willing buyer and a willing
19 seller supposedly would have gone for.

20 Any question on that?

21 MR. CAWLEY: No, your Honor.

22 THE COURT: Okay. Anything else that needs
23 to be taken up outside the presence of the jury from
24 plaintiff's point of view?

25 MR. CAWLEY: Well, there is a matter, your

1 Honor. This morning your Honor ruled, if I understood
2 your Honor correctly, on two slides that apparently are
3 going to be used with a Nintendo witness on showing six
4 Nintendo patents. And if --

5 THE COURT: Okay. I guess originally the way
6 this came up to me was there was going to be an
7 introduction of -- originally they had listed lots and
8 lots of patents that they wanted in. And this may have
9 been on the first day of trial. I now have that list.
10 It was DX 128, 133, 135, and then also 136, 142, and
11 143.

12 Now, the last three of them -- Defendant's
13 Exhibit 136, 142, and 143 -- are actually in the '700
14 file history. Can't see where that wouldn't be
15 admissible. And if Nintendo's purpose is to show
16 generally that they have patents to the other three -- I
17 think they are allowed to try to present that they
18 actually have a going concern, they are a company, they
19 do work, they have patents, they do research. That's
20 not the final question, but I think they can bring that
21 out.

22 MR. CAWLEY: Your Honor --

23 THE COURT: The slide -- are you talking
24 about this "97 patents" slide or --

25 MR. CAWLEY: Yes, your Honor. Actually,

1 there's two slides that show patents.

2 THE COURT: Okay. I guess on -- you
3 mentioned there's two slides I ruled on. I guess I've
4 forgotten those.

5 MR. CAWLEY: Isn't that right, or is it just
6 one slide?

7 THE COURT: Did I miss -- this is a
8 different --

9 MR. CAWLEY: One of them is headed "Nintendo
10 has 97 patents on the GameCube" and the other is headed
11 "Nintendo has 137 patents and applications on the Wii."
12 And, then, actually, isn't there a third one for the
13 Nintendo 64? I misspoke. There's a third slide that's
14 headed "Nintendo has 103 patents on the N64."

15 THE COURT: I may be getting forgetful in my
16 old age. I don't recall ruling on these yet.

17 MR. CAWLEY: Okay.

18 THE COURT: If I've ruled, tell me what I
19 said.

20 MR. CAWLEY: I wouldn't presume to tell the
21 court what it said because I'm probably older than you
22 are. But -- and maybe I misunderstood.

23 THE COURT: Okay. I --

24 MR. CAWLEY: I don't want to try the court's
25 patience here but --

1 THE COURT: No.

2 MR. CAWLEY: First of all, our concern, as
3 we've been expressing over the last several days, is
4 that this raises a grave threat that the jury will
5 misunderstand the principle of law that merely a company
6 having a patent on its own product does not mean it
7 cannot infringe someone else's patent in the same
8 product. And we believe the reason this is being
9 offered ostensibly as a pretext to show, "Oh, we're a
10 going business and we have a lot of good things," is to
11 raise the inference before the jury, "Oh, well, if
12 Nintendo has patented its products, I guess it must not
13 infringe." That's the reason we believe this should be
14 excluded.

15 At a minimum, your Honor, if the court has
16 already crossed that bridge -- and let me say, just in
17 passing, if the Nintendo patents disclosed as prior arts
18 are not properly identified as prior art in the
19 preliminary infringement contentions in this case, that,
20 too, is irrelevant. But if the court believes, for
21 whatever reason, that the jury is going to be shown
22 these patents, then we request an accompanying
23 instruction to inform the jury that as a matter of law
24 anything about Nintendo patents does not mean that
25 Nintendo does not infringe the Armstrong patent.

1 THE COURT: Okay. I guess I'm concerned
2 as -- do defendants think I've already ruled on this? I
3 mean, it was handed to Ms. Chen; and I saw it early this
4 morning. I don't remember ruling on these three slides
5 yet.

6 MR. GERMER: Your Honor, I don't think you
7 have specifically.

8 THE COURT: Okay. Then let me ask you a
9 question. And maybe someone on your side will have to
10 answer this, but the heading is "Nintendo has 97 patents
11 on the GameCube" and then 137 patents and applications
12 on the Wii.

13 Do any of these patents say it's on the
14 GameCube, or are they on aspects of -- in other words,
15 are certain claims incorporated into the GameCube or
16 incorporated into the Wii? I've never -- I guess I've
17 not seen before a patent that says, "This is a patent
18 on, say, the Xbox device." I mean, technically
19 speaking, aren't these patents on aspects of these
20 various commercial products?

21 MR. GERMER: Yes, sir. Yes, sir.

22 And just if I could clarify the issue to be
23 sure that the court is not concerned. We are not going
24 to talk about this. We're not going to try to do
25 anything with it. We've heard repeatedly that

1 Mr. Armstrong and Mr. Tyler had all these patents.
2 They've put up screens about having all the patents.
3 All we want to do -- I could reveal my questions if I
4 need to. But it's, you know, does Nintendo have
5 patents, does Nintendo have patents that relate to the
6 GameCube, does it have patents relating to the Wii,
7 period, end of story.

8 THE COURT: Well, if that's the question, it
9 would seem to me that the slide headings ought to be
10 "Nintendo has 97 patents relating to the GameCube,"
11 "Nintendo has 137 patents and applications relating to
12 the Wii," and "Nintendo has 103 patents" that -- you
13 know, "relating to the N64."

14 And I will give an instruction that just
15 because a commercial product is patented -- some aspects
16 of a commercial product are patented does not mean that
17 it does not infringe another patent.

18 MR. CAWLEY: We have a proposed instruction,
19 your Honor.

20 THE COURT: Do you? Okay. I've been working
21 on a couple of them.

22 MR. CAWLEY: For some reason this has a
23 little bit highlighted, your Honor; and we think that
24 should be part of the instruction. I don't know why it
25 got printed off like that, but that's the quote.

1 THE COURT: Where did this come from? Do you
2 know? Was it out of one of the standard --

3 MR. CAWLEY: Oh, I forgot to mention -- yes,
4 your Honor. We have some cases that we would submit to
5 the court, and basically we derived that instruction
6 from the language of these cases.

7 THE COURT: I was just wondering if it was
8 out of one of the standard forms, ALPI or the Fed
9 Circuit or one of them.

10 MR. CAWLEY: No, your Honor. But if I could
11 approach --

12 THE COURT: Certainly.

13 MR. CAWLEY: -- I will submit the case to the
14 court.

15 THE COURT: To make it a little simpler for
16 the jury, I think the instruction I'm going to give --
17 which I've been working on before, is the fact that
18 Nintendo has patents that may describe some aspects of
19 its products does not mean that those products do not
20 infringe the '700 patent. There's a double negative
21 there if I can figure out a way... I guess you'd like me
22 to say still means that they infringe but...

23 MR. CAWLEY: That would be acceptable to
24 plaintiff, your Honor.

25 THE COURT: Okay, Mr. Germer?

1 MR. GERMER: Two requests, your Honor.
2 Whatever you do, I would request that it come at the end
3 after the entire case with the other jury instructions.

4 And, secondly, make it whatever one of these
5 fancy words is, bilateral or bi- -- I'd like something
6 in that the fact that the plaintiff -- both plaintiffs
7 have talked a good bit about all their patents. That
8 has nothing to do with anything, either.

9 MR. CAWLEY: Well, your Honor, first of all,
10 on the timing --

11 THE COURT: Well, I'm not sure the other
12 patents -- the jury's going to be focused in on the '700
13 patent. The other ones don't matter. And if we're
14 going to have slides about hundreds and hundreds of
15 patents, I'm going to give them that instruction; and
16 then it will probably be in the final. I'm not going to
17 make it long. It's not going to -- it's just going to
18 be that one sentence that I read.

19 These cases are difficult enough for the jury
20 to deal with and it is the court's opinion that in
21 keeping with the suggestions made by the manual for
22 complex litigation and the manual for patent litigation
23 put out by the Federal Judicial Center, extra effort has
24 to be made by the court to keep them advised of what's
25 going on, which is why I have more complete jury

1 notebooks than I would in almost any other kind of
2 trial. So, I'm going to go ahead when this comes up --
3 I'll give them that one sentence, and they will get that
4 or almost the same in the final written instructions.

5 Anything else to be taken up outside the
6 presence of the jury from the plaintiff's point of view?

7 MR. CAWLEY: No, your Honor.

8 THE COURT: From defendant's point of view?

9 MR. GERMER: No, sir.

10 THE COURT: Okay. And I guess just to be
11 clear, I had thought that originally the ones that were
12 actually going to come in would be these 128 --
13 Defendant's Exhibits 128, 133, 135, 136, 142, and 143,
14 which I'll allow that. We're not going to actually
15 submit in evidence the 97 or the 103 or the other 137
16 patents to have the jury pouring through.

17 All right. We're in recess, then, until 20
18 past, I believe it is.

19 (Recess, 12:22 p.m. to 1:21 p.m.)

20 (Open court, all parties present, jury
21 present.)

22 THE COURT: Counsel.

23 MR. CAWLEY: Thank you, your Honor.

24 BY MR. CAWLEY:

25 Q. Mr. Tyler, back when you had your company Mad Catz,

1 which products were your best sellers?

2 A. We sold mostly video game controllers. That was
3 probably 70, 75 percent of our business.

4 Q. Did you ever design video game controllers
5 yourself?

6 A. Yes.

7 Q. And at Mad Catz did you sell some controllers that
8 controlled 3-D graphics?

9 A. Yes, uh-huh.

10 Q. Why are controllers that control 3-D graphics
11 important?

12 A. Well, when I started out, you know, I designed --
13 my first controller that I designed, you know, was a 2-D
14 controller. I mean, I went in and did the -- I did the
15 circuit board. I had to source all the little parts
16 that were inside, the rubber contacts; and I had to make
17 sure the buttons felt just right. And at the end of the
18 day, after it was done, you know, it just controlled
19 2-D. You could go right; you could go left. You could
20 go up; you could go down. And that was about it. And
21 you had the fire buttons.

22 But with the 3-D you can actually go into 3-D
23 worlds. You're still looking at the screen but the
24 screen appears that it goes back inside and it's more
25 like a real world.

1 Q. Is that important to players?

2 A. Yeah, I think so. It makes the game more, you
3 know -- you know, people like that more, I believe.

4 Q. Okay. Are you familiar with a feature called
5 "rumble"?

6 A. Yes. Rumble or vibration.

7 Q. Why -- is that important in controllers?

8 A. Yeah. Initially the controllers -- you know, you
9 just played the controller. The controller talked to
10 the video game machine; and, you know, it was all
11 visual. But now you have a two-way communication. If
12 something happens in the game, if you run into a wall,
13 if you run into something, you feel that vibration. It
14 kind of immerses you into the game.

15 There was a time -- like Sony, I think they
16 had vibration in their controllers. There came a time
17 when they pulled it out for some reason. They got a lot
18 of complaints, and they put it back in.

19 Q. Have you heard of a company called "Immersion"?

20 A. Yes, uh-huh.

21 Q. Who is Immersion?

22 A. Immersion is a company that does technology. They
23 provide -- it's called a "haptic," I believe; and it's
24 technology that's used in video game controllers.

25 Q. All right. Are they a well-known supplier of

1 technology to the video game controller industry,
2 Immersion?

3 A. Yes, uh-huh.

4 Q. As time went on -- you told us you sold your
5 company Mad Catz. You got into business with
6 Mr. Armstrong and formed Anascape. Did you have
7 discussions with him from time to time about the work he
8 was doing on his patent applications?

9 A. Yes.

10 Q. From time to time, did you read through some of the
11 applications he was filing and try to give him comments
12 that might help him?

13 A. Yes, uh-huh.

14 Q. Let's take a look at Defendant's Exhibit 216. Do
15 you have that in the binder in front of you?

16 A. Yes, I do.

17 Q. What is this?

18 A. This is an email from myself to Brad Armstrong back
19 in 2000.

20 Q. Okay. And you say in the email -- if we can go
21 down a little bit -- (reading) I believe we can get some
22 additional valuable claims out of this application. Do
23 you see that?

24 A. Let's see. Yes, I see that.

25 Q. What did you mean by that?

1 A. Well, from my understanding, you can write a
2 specification and there can be a gazillion inventions in
3 that one specification. But in order to get those
4 inventions out and have them protected, you have to
5 write claims on those.

6 Q. Okay. And if we could also go to another piece of
7 this email -- I don't want to take the time to read it
8 all. You say here that: Page 28, lines 31 through 35
9 broadens definition of 6 DOF controllers to 3-D graphic
10 image controllers (probably a better definition of
11 controllers on the market today) and combines tactile
12 break-over devices with proportional or variable
13 sensors.

14 What did you mean when you said this in your
15 email to Mr. Armstrong?

16 A. Well, I talk about broadening; and what I'm talking
17 about is -- you know, on the street if you talk to
18 anybody -- I don't know of anybody, any of my friends or
19 anything, that really know what 6 D-0-F is or 6 DOF. If
20 I went out on the street and said, "I have a 6 DOF
21 controller," they'd just look at me like "What's that?"
22 But if I went out on the street and said, "I have a 3-D
23 controller," you know, people have heard about 3-D.
24 They've learned that in school. They've made art
25 projects that are three-dimensional. So, they kind of

1 understand that. So, it's, you know, more understood.

2 Q. So, do you think that it would be a definition that
3 would be understood by a broader number of users?

4 A. Yes, uh-huh.

5 Q. As far as you're concerned, do these two terms "3-D
6 graphic image controllers" and "6 DOF controllers" mean
7 the same thing?

8 A. In my mind, they do.

9 Q. Now, in 1999 did Mr. Armstrong also send you some
10 emails that was sort of a to-do priority list that is
11 Defendant's Exhibit 215?

12 A. Yes, uh-huh.

13 Q. And do you see under the "First Order of Business"
14 there, it says: Strengthen Sony claims?

15 A. Yes, uh-huh.

16 Q. What did that mean?

17 A. Well, this is before we actually set up the
18 company; and Brad was telling me what his first order of
19 business is, what he wanted to do. And if you look
20 through this document, there's -- you know, it mentions
21 six inventions up here and then there's four inventions
22 there and you turn over to the next page; there's three
23 or four inventions. So, probably over 12 inventions
24 that he wants to get claims for that are already
25 probably in the specifications.

1 Q. Okay. So, was he telling you some of his plans for
2 future applications to the Patent Office?

3 A. Yeah, that's my understanding.

4 Q. And did he tell you that one of the things that he
5 wanted to accomplish was to write patents that would
6 have better claims that might protect his inventions
7 against Sony products?

8 A. Yeah, that and just get inventions out of the
9 specification that are already there.

10 Q. Did you think there was anything wrong with that
11 suggestion?

12 A. No.

13 Q. Now, has Anascape tried to license its patents --
14 actually, let me clarify something when I say
15 "Anascape's patents." Does Anascape have any patents
16 other than the ones that were invented by Mr. Armstrong?

17 A. I think at one time we had one that was assigned to
18 us by a Mr. Crowell (Phonetic spelling). I don't think
19 it was a patent; I think it was an application. But
20 other than that, they are all Brad Armstrong's patents.

21 Q. All right. Have you tried to license Anascape's
22 patents?

23 A. Yes, uh-huh.

24 Q. And has your licensing been all related to
25 Mr. Armstrong's patents?

1 A. Yes, uh-huh.

2 Q. I mean, I know that's a little confusing; but I
3 hope it's clear by now that Mr. Armstrong has given all
4 of his patents to Anascape, correct?

5 A. Yes.

6 Q. So, when I say "Anascape's patents" or
7 "Mr. Armstrong's game controller patents," it's really
8 all the same thing, right?

9 A. Correct.

10 Q. Did you -- you already told us before the lunch
11 break that you approached a company called "Intec." Did
12 you have negotiations with them?

13 A. Yes, uh-huh.

14 Q. Did you offer to give them a license?

15 A. Yes.

16 Q. What patents did you offer to license to them?

17 A. All of the patents that were in our portfolio.

18 Q. Okay. And were you able to make a deal with them?

19 A. We worked on it back and forth; and it ended up
20 with no, we didn't --

21 Q. Why not?

22 A. -- end up making a deal.

23 For whatever reason, they just didn't take
24 the license at that time.

25 Q. What did you do to try and license Anascape's

1 patents after that?

2 A. Well -- can I talk a little bit before that or --

3 Q. Sure.

4 A. Okay.

5 Q. What did you do before that?

6 A. Before that, we had contacted a person named
7 "Bernard Stolar." Bernard Stolar was somebody that was
8 high up in the video game industry. Anyway, he knew a
9 lot of the key players in the United States that are in
10 the big companies. In fact, he was higher up in some of
11 the companies. I think he was high up in Sega of
12 America at one time, and he was high up in Sony. And we
13 contacted him and asked him if he would take our patents
14 to different companies like, you know, Sony, Nintendo,
15 and others.

16 And he agreed to do that; and we agreed to --
17 if he was successful in obtaining the license, that we
18 would pay him some money.

19 Q. Okay. And did he do that?

20 A. Yes. He took our patents to different companies
21 and presented them to those companies.

22 Q. Did he take them to Sony?

23 A. Yes, he did.

24 Q. Did he take them to Nintendo?

25 A. Yes, uh-huh.

1 Q. And did you, yourself, send letters to some
2 companies that you wanted to propose licensing with?

3 A. Yes. I sent out a lot of letters, a lot of
4 different companies.

5 Q. What happened as a result of the contact that
6 Mr. Stolar made with Sony about the possibility of
7 licensing Anascape's patents?

8 A. Well, I'd actually got the ball rolling. We
9 started having some talks with Sony. Sony introduced us
10 to -- or Mr. Stolar introduced us to some lawyers and we
11 started going with those lawyers and talking with Sony
12 and going back and forth and, you know, over time it
13 just didn't seem like it was working out and the
14 agreement we had with Mr. Stolar had lapsed and, so, we
15 parted ways. And I didn't really want to litigate or
16 anything anyway; so, Brad and I just decided to, you
17 know, meet with Sony ourselves from then on.

18 Q. Did you have meetings with Sony and Sony
19 representatives in the negotiation?

20 A. Yes. We had meetings with them, a lot of telephone
21 calls.

22 Q. How many meetings?

23 A. Oh, I don't know. In person, four, five, six.

24 Q. Okay. And how long did these negotiations with
25 Sony last?

1 A. Well, some of them went on a long time. We had one
2 negotiation session where it went on a couple of days.

3 Q. How long total from your first contact with them
4 until you made a deal?

5 A. Whew, that was probably about four years.

6 Q. Let me show you Plaintiff's Exhibit 54. I think
7 we've already seen it before, but tell us again. What
8 is this document?

9 A. Let me turn to it real quick. This is a Patent
10 License Agreement between Sony and Anascape.

11 Q. This is the deal you entered into with Sony; is
12 that right?

13 A. Yes, it is.

14 Q. What were the terms of the deal that you finally
15 agreed to with Sony?

16 A. With Sony, there are a few components to it. They
17 would pay us \$10 million. They would give us a
18 cross-license of some of their patents, and they would
19 give us additional technology. And on our side, we
20 would give them a nonexclusive license to our whole
21 patent portfolio; and there was one patent that we had
22 that we licensed to them exclusively.

23 Q. And was that the '606 patent?

24 A. Yes.

25 Q. Okay. So, let's make sure that we understand what

1 you just said because there were several pieces to it.

2 Sony gave Anascape \$10 million, right?

3 A. Yes. Uh-huh.

4 Q. That's fairly easy. And for that \$10 million, the
5 deal was structured so that Anascape gave Sony the
6 exclusive rights to the '606 patent; is that right?

7 A. Yes.

8 Q. And then Sony also gave Anascape the right to use
9 certain Sony patents, correct?

10 A. Yes.

11 Q. And then Anascape gave Sony the right to use all of
12 Anascape's patents, correct?

13 A. That's correct.

14 Q. Including pending patent applications, correct?

15 A. Yes, that's right.

16 Q. And one of those pending applications was the
17 application that was soon to become the '700 patent,
18 correct?

19 A. That's correct.

20 Q. On that patent that you agreed to give to Sony
21 exclusive rights to, the '606, what was the technology
22 involved in that patent?

23 A. That was a child of the '525 patent, similar to the
24 '700 patent. It involved technology with game
25 controllers.

1 Q. So, the '606 was another continuation from that
2 same 1996 application; is that right?

3 A. That's correct.

4 Q. And it involved controller technology?

5 A. Yes.

6 Q. Why did you agree to do this deal with Sony for \$10
7 million?

8 A. Well, at the time I thought it was low. I didn't
9 think it represented a fair royalty. But I'd put in a
10 lot of money, and I wanted to get my money out. Brad
11 didn't have any money, and I wanted to get some for him.
12 I mean, he was -- I mean, one of his dreams was to give
13 his mom a car of her choice; and, you know, if he got
14 some money, he was going to be able to do that.

15 Q. Did he do that?

16 A. Yeah, he did. It just seemed right to be able to
17 sign up, you know, a big company and get some money off
18 the table.

19 Q. Did you think that signing a license like this to
20 Sony might have some effect on your ability to negotiate
21 license agreements with other companies?

22 A. Yeah. When you sign up, you know, the biggest
23 company in the industry, or one of the biggest companies
24 in the industry, it sends a message that, yes, it is
25 something that others should do, also.

1 Q. And is that another reason why you were willing to
2 take less from Sony than what you thought was really a
3 reasonable royalty?

4 A. Yeah. I considered it a sweetheart deal because
5 they were one of the first ones to sign up.

6 Q. Is Sony using Anascape's technology?

7 A. Yes.

8 Q. Now, if Nintendo had come to you in 2005 when you
9 did the Sony deal or after you did the Sony deal, would
10 you accept \$10,000 from Nintendo for a license to the
11 '700 patent?

12 MR. GUNTHER: Objection, your Honor.

13 A. \$10,000?

14 MR. GUNTHER: Objection, your Honor. Calls
15 for speculation.

16 THE COURT: Sustained.

17 MR. CAWLEY: I don't guess it would make any
18 difference if I correct myself and say "\$10 million."

19 THE COURT: The objection is still sustained.

20 MR. CAWLEY: That's what I thought, judge.

21 BY MR. CAWLEY:

22 Q. Well, let me turn, then, to Nintendo. Did you have
23 some communications with Nintendo in an effort to get
24 them to negotiate with you to get a license for using
25 Mr. Armstrong's patents and invention?

1 A. Yes. We had -- initially Bernard Stolar, you know,
2 gave them patents; and then later on I had written a
3 letter to them.

4 Q. Okay. Let's look at Plaintiff's Exhibit 39.
5 What's this?

6 A. This is a letter that I wrote to the vice-president
7 of licensing at Nintendo of network, Ms. Juana Tingdale.
8 It talked about the visit that Bernard Stolar, you know,
9 had with her and the patents that he gave on our behalf.

10 It references that we had ten new patents
11 that were issued, for a total of 14 patents, and they
12 were asked to consider these patents in regards to
13 GameCube console, controllers, and software and
14 basically we said we wanted to do business with them.

15 Q. Specifically at the end of the letter, you said:
16 We would like to discuss our intellectual property with
17 you. Please get in touch with me and let us show you
18 how our intellectual property can be to Nintendo's great
19 benefit.

20 Is that right?

21 A. That's correct.

22 Q. And did they get back to you?

23 A. No, they did not.

24 Q. Did they send you --

25 A. Well, actually, they did.

1 Q. Okay. Let's look at their response.

2 A. They got back to me one time.

3 Q. Plaintiff's Exhibit 52.

4 A. Okay.

5 Q. Is this the letter you got back from Nintendo about
6 three months after that letter you sent them?

7 A. Yes. This was written by Ms. Ford. She was
8 counsel, I believe, for Nintendo. In here, basically
9 they say, "Don't call us; we'll call you." And this
10 line here says: We will contact you if we have any
11 interest in discussing any of these patents with you.
12 Please feel free to pursue your other business
13 opportunities.

14 Q. All right, sir. And did they ever contact you to
15 discuss your patents?

16 A. No.

17 Q. Now, this letter that you got back from Nintendo
18 saying we'll let you know if we have an interest in
19 discussing any of your patents, please feel free to
20 pursue your other opportunities, was in 2002.

21 Had the '700 patent been issued yet in 2002?

22 A. No, it had not.

23 Q. Okay. So, it was issued in 2005; is that right?

24 A. That's correct.

25 In the letter that I wrote earlier, it

1 references a few patents that relate to the '700 or
2 reference the '525 patent, the '828, and the '891, all
3 of which would be parents of the '700 patent.

4 Q. And just so we're clear, you couldn't sue Nintendo
5 on the '700 patent before it issued from the Patent
6 Office, could you?

7 A. That's correct. I think the '700 patent issued
8 sometime in 2005.

9 Q. And did you file this lawsuit -- or did Anascape
10 file this lawsuit sometime in 2006?

11 A. That's correct.

12 Q. Okay. Thank you, Mr. Tyler.

13 MR. CAWLEY: I pass the witness, your Honor.

14 THE WITNESS: Do I do anything with this
15 binder or --

16 THE COURT: No.

17 MR. CAWLEY: Just hang on to it.

18 MR. GUNTHER: Your Honor, may I approach and
19 hand up some binders?

20 THE COURT: You may.

21 CROSS-EXAMINATION OF KELLY TYLER

22 BY MR. GUNTHER:

23 Q. Mr. Tyler, my name is Bob Gunther. How are you
24 doing?

25 A. I'm doing good. Well, I'd be doing better if I

1 wasn't here but --

2 Q. I hear you. I hear you.

3 Hey, let me ask you a question. I think I
4 met you. I didn't take your deposition, but I think I
5 met you a couple of days ago.

6 A. Yes, uh-huh.

7 Q. We're staying in the same hotel, aren't we?

8 A. That's correct.

9 Q. Kind of an interesting situation, wouldn't you say?

10 A. Yes, yes.

11 Q. Let me ask you a couple of questions, Mr. Tyler.

12 Let me go to the Sony agreement, Plaintiff's
13 Exhibit 54. If you could put that back in front of you.

14 A. 54?

15 Q. You can -- probably either binder has one in it.

16 Now, sir, you testified, in response to
17 questions from Anascape's lawyer, that there were
18 basically four parts to the deal. \$10 million was paid,
19 right?

20 A. Right.

21 Q. Then you talked about a cross-license of additional
22 technology, right?

23 A. Correct.

24 Q. And then you talked about a nonexclusive license to
25 Mr. Armstrong's patent portfolio, the rest of the patent

1 portfolio, right?

2 A. Correct.

3 Q. And, then, you said the '606 patent, right?

4 A. An exclusive license to the '606 patent.

5 Q. Right. Now, the '606 patent is not in the --

6 A. There's also one other component, I believe, in
7 here. It talks about related technology required to
8 implement controllers and other devices.

9 Q. Okay. Thank you. Thank you.

10 Now let's focus on the four components. I
11 might come back to that fifth one, but let's focus on
12 the four.

13 A. Okay.

14 Q. The '606 patent, the 10-million-dollar payment as
15 structured in the license agreement that you signed on
16 behalf of Anascape -- that 10-million-dollar payment was
17 for the '606 patent, correct?

18 A. It was part of the deal.

19 MR. GUNTHER: Well, let's put up, if we can,
20 paragraph 2.2.

21 BY MR. GUNTHER:

22 Q. Now, this is the exclusive license portion of the
23 agreement, correct?

24 A. 2.2 -- yes, titled, "Exclusive Patent Rights."

25 Q. And, sir, what that does is it says that Sony is

1 getting an exclusive license to Mr. Armstrong's, or
2 Anascape's, '606 patent, correct?

3 A. Yes. As far as I understand, yes.

4 Q. Okay. And, sir, that was a transfer of -- to Sony
5 of all rights held by each of the Anascape parties in
6 that patent, correct?

7 A. I believe so, yes.

8 Q. Now, sir --

9 MR. GUNTHER: Kam, can you put up 3.1 from
10 the agreement, under the "Payment" section? Can you do
11 it side-by-side or blow it up, either way?

12 BY MR. GUNTHER:

13 Q. Just give us a second.

14 Okay. So, now we have 2.2, which is the
15 exclusive license for the '606 patent; and then we have
16 3.1, which is the first paragraph of the "Payment"
17 section. The \$10 million that was paid, as this license
18 was structured, was for all substantial rights described
19 in 2.2 above. That's the '606 patent, right?

20 A. I believe so.

21 Q. So, what the agreement says, the agreement that was
22 negotiated by you and which you signed, is that
23 \$10 million was paid for the '606 patent, correct?

24 A. The agreement we signed included all of these
25 components. I can assure you that none of it --

1 Q. Can you answer my question?

2 A. Oh. Please restate it.

3 Q. I will.

4 The agreement as structured -- does the
5 agreement provide that under paragraph 3.1, the
6 10-million-dollar payment that is made under this
7 agreement is for the exclusive license to the '606
8 patent set forth in 2.2?

9 Can you answer that question "yes" or "no"?
10 It's right up here on the screen.

11 A. Appears to be.

12 Q. Okay. Do you have any doubt about that?

13 A. That's what it says right here.

14 Q. Okay. That's what it says. That's what the words
15 say, right?

16 A. I believe so, yes.

17 Q. Okay. Now, sir, let's look at paragraph 2.1, if we
18 can. 2.1 is another part of the agreement that talks
19 about a nonexclusive license for other patent rights,
20 not the '606 patent but other patent rights, including
21 all of the rest of Mr. Armstrong's patents and patent
22 applications, correct?

23 A. That's my understanding, yes.

24 Q. That's what 2.1 says, right?

25 A. I believe so.

1 Q. And then the payment section for 2.1 is paragraph
2 3.2.

3 MR. GUNTHER: If we could put that up.

4 A. Okay.

5 BY MR. GUNTHER:

6 Q. I'm just getting it up on the screen. Just give me
7 a second, Mr. Tyler.

8 Now, 3.2 is the payment paragraph for 2.1.
9 That is the nonexclusive license for all of the rest of
10 Mr. Armstrong's patents; and that included what was then
11 the '700 patent application, correct?

12 A. That's my understanding.

13 Q. And, sir, what it says there is that: Due to the
14 uncertainty as to the value of any of these patents --
15 that includes Mr. Armstrong's '700 application, doesn't
16 it?

17 A. I'm sorry. Where are you reading again, sir?

18 Q. I'm reading, sir, from the sentence -- if you
19 actually look at the screen -- and it should be there in
20 front of you, also -- I've highlighted it.

21 (Reading) Due to the uncertainty as to the
22 value of any of these patents. Do you see that?

23 A. Yes.

24 Q. And, sir, "any of these patents" includes
25 Mr. Armstrong's '700 application that was pending at

1 that time but which you've testified and Mr. Armstrong
2 has testified was very soon to issue as a patent,
3 correct?

4 A. I believe it issued in 2005.

5 Q. And, so, that's included in this paragraph, right?

6 A. Yes.

7 Q. Okay. And it says: Due to the uncertainty as to
8 the value of any of these patents that are the subject
9 of the cross-license provisions of the agreement, the
10 parties agree and acknowledge that they are unable to
11 arrive at appropriate royalties for these licenses.

12 That's what it says, right?

13 A. Yes.

14 Q. And that includes the '700 patent, doesn't it, or
15 the '700 patent application which was soon to issue --

16 A. Yes.

17 Q. -- according to your testimony?

18 And, sir, if you look to the last sentence,
19 it says, again: Accordingly, the parties have agreed to
20 forego any royalties or other payment of any kind for
21 those patents subject to the cross-licenses.

22 Do you see that?

23 A. Yes.

24 Q. And, sir, "those patents" includes the patent --
25 the application that was to become the '700 that was

1 shortly to issue, correct?

2 A. Correct.

3 Q. So, as this license was structured -- and let me
4 just ask you, sir, if you can take a look at page 10 of
5 the license.

6 Do you see that? We've got it up on the
7 screen now, sir.

8 A. Yes.

9 Q. You signed this, sir, on behalf of -- as one of
10 the -- as individually -- you were one of the
11 signatories to this agreement, right?

12 A. Yes.

13 Q. So, you read every word of this agreement before
14 you signed it, didn't you?

15 A. Either myself or my lawyer, yes.

16 Q. Okay. So, this was an important document.
17 \$10 million was changing hands, right?

18 A. Correct.

19 Q. And, so, you understood, sir, when you signed this
20 agreement, that that was the structure of this license
21 agreement, right?

22 A. Yes.

23 Q. Now, when you got on the stand on direct
24 examination to explain the license to the jury, you
25 didn't explain the structure that I just walked through

1 with you, did you?

2 A. I believe I did.

3 Q. You did? You believe that you testified that the
4 \$10 million was for the '606 and that there was no money
5 changing hands for the '700 application? Is that your
6 testimony?

7 A. I believe my testimony was there are several
8 components to this agreement, and I explained those
9 components.

10 Q. Okay. Now, sir, do you believe that the agreement
11 was structured in any way that we shouldn't really look
12 at the words of the agreement, that we should actually
13 treat it differently?

14 A. I think you should look at the words.

15 Q. You should look -- you think we should look at the
16 words.

17 Just like in terms of this case, when we're
18 thinking about Mr. Armstrong's 1996 application and what
19 it shows, we should look at the words, right?

20 A. Yes.

21 Q. Because the words are probably the best evidence of
22 what happened and what was said then, right?

23 A. I believe so. I believe the specification is
24 important.

25 Q. And when you look at the 2000 application that was

1 filed that led to the '700 patent, that's words, too,
2 written by Mr. Armstrong that we can all read and
3 understand, right?

4 A. I believe so. I don't know if we can all
5 understand them but --

6 Q. All right.

7 A. Sometimes I have some trouble with that.

8 Q. Maybe with the help of some technical experts, at
9 least. But there are words there that the jury and that
10 you and I can read that were written at a point in time
11 when -- for example, in 1996 -- there was no Nintendo
12 lawsuit being thought of, correct?

13 A. I don't know.

14 Q. When you, sir, in 1996 -- did you have any idea
15 that Nintendo was going to be sued on a patent that
16 issued from the 1996 application?

17 A. I had no knowledge of that.

18 Q. Right. Okay.

19 Now, sir, let me ask you this. You talked a
20 little bit about meeting Mr. Armstrong -- and what year
21 was that?

22 A. I'm not sure if it was '96 or '97.

23 Q. Okay. And it was at a trade show, you think?

24 A. Yes.

25 Q. Now, sir --

1 MR. GUNTHER: Your Honor, may I approach?

2 THE COURT: You may.

3 MR. GUNTHER: And, Mr. Cawley, may I borrow
4 your controllers?

5 MR. CAWLEY: Sure.

6 BY MR. GUNTHER:

7 Q. I don't know if you've been in the courtroom, but
8 I'm going to put in front of you some -- it's a box; and
9 there's a bunch of prototypes, some of which
10 Mr. Armstrong has shown to the jury.

11 Now, here is my question, Mr. --

12 A. Can I put it down here or --

13 Q. Yeah, sure, you can put it down.

14 Here is my question, Mr. Tyler: When you met
15 Mr. Armstrong at that trade show, he was showing a
16 controller device; is that correct?

17 A. No.

18 Q. Now, sir, what was he showing at that trade show?

19 A. He had a paper.

20 Q. A paper? Okay.

21 A. Yeah.

22 Q. Was it paper that described a controller?

23 A. I can't remember exactly what was on it. I believe
24 there were some pictures.

25 Q. Okay. Do you remember, sir, any pictures that

1 might look like a prototype that's in that box?

2 A. I don't recall what the pictures were. I'm sorry.

3 Q. Did there come a point in time, even after that
4 show, where you got an idea of what Mr. Armstrong's idea
5 was with respect to a controller for a video game?

6 A. Yes.

7 Q. And, sir, let's focus on before you signed the
8 license agreement with Mr. Armstrong, which you signed
9 in 1997 -- there was some testimony about that on direct
10 examination. It's DX 249.

11 A. Yeah. I don't recall the date, but it was that
12 '97?

13 Q. '97, yeah.

14 A. Okay.

15 Q. In fact, we'll put the first page up on the screen,
16 if we can.

17 Now, that license you signed with
18 Mr. Armstrong in June of 1997, right?

19 A. Yeah, June 20th, 1997.

20 Q. Now, at the time you signed that license had you
21 seen any prototypes from Mr. Armstrong?

22 A. Yes.

23 Q. Now, do any of the prototypes in the box remind you
24 of anything that you had seen in terms of what you had
25 thought you were licensing?

1 Can you just hold that up?

2 A. Yes.

3 Q. Okay. What is that, sir?

4 A. This is the Nintendo Wii.

5 Q. I'm sorry?

6 A. This is the console, I believe.

7 Q. For the Nintendo Wii?

8 A. For the Nintendo Wii.

9 Q. Oh, okay. I'm talking about controllers. My
10 question was controllers.

11 A. Okay.

12 Q. And, so, sir --

13 A. I'm just pulling this out --

14 Q. I understand. I'm asking this question; so, bear
15 with me for a second. Okay?

16 A. Okay.

17 Q. Mr. Armstrong's prototypes. That's what I'm
18 focusing on, prototypes he made. Okay? Are there any
19 in that box that look like the kind of technology that
20 you believed you were licensing in 1997, Mr. Armstrong's
21 prototypes?

22 A. There's two or three in there that look familiar.

23 Q. Can you pick them out for us? Are you able to do
24 that?

25 A. Well, there's cords on them; so, hold on.

1 There's cords that are all tangled up in
2 there.

3 Q. Could I approach and help you?

4 MR. GUNTHER: Is that okay, your Honor?

5 A. I think I've got it. Hold on. I don't want to
6 break anything.

7 Okay. Here's one.

8 Q. Is that one? Thank you very much. Can you hold
9 that up, please?

10 A. (Complying.)

11 Q. Now, when you signed -- that's a single input
12 member 6-degree-of-freedom controller, isn't it?

13 A. That's correct.

14 Q. And, sir, when you signed the license in 1997, is
15 that what you understood that you were licensing?

16 A. Well, I don't think we would make anything that
17 would look exactly like that, but yes.

18 Q. That was the concept as something that had a --

19 A. That was a concept. We would probably tweak it
20 quite a bit if we actually produced a product.

21 Q. Right. But it was a single handle that could be
22 moved in all 6 degrees of freedom -- forward/back,
23 up/down, side to side, and rotation -- correct?

24 A. Correct.

25 Q. Okay. Now, sir, you're a successful guy, aren't

1 you?

2 A. That depends on who you talk to.

3 Q. All right. If you're talking to me, what would you
4 say?

5 A. I don't know. You seem pretty successful.

6 Q. Well, let me ask you this: You've had a business
7 that you started and you built it up and you built it up
8 into a very -- into the second largest third-party video
9 controller company; is that correct?

10 A. Yeah. It was, I think, Number 2 when I left the
11 company, yes.

12 Q. And when you left, it went to Number 1, as a matter
13 of fact, didn't it?

14 A. Yes, uh-huh.

15 Q. And, sir, you have patents on video game
16 controllers, correct?

17 A. Yes.

18 Q. And you -- is it fair to say, sir, that you
19 understand or have a good understanding of the market in
20 terms of what people who play video games like in terms
21 of controllers?

22 A. At one time I think I did.

23 Q. Okay. Do you think it -- and certainly at the time
24 of 1997 when you signed the license that's Defendant's
25 Exhibit 249 with Mr. Armstrong in 1997, you had your ear

1 to the ground in terms of that type of information,
2 correct?

3 A. I was involved in it, yeah.

4 Q. Right. Now, sir, I believe you've held up that
5 single input member prototype. Mad Catz -- after you
6 took that license, Mad Catz never built a product like
7 that, did it?

8 A. No.

9 Q. And Mad Catz never built any products at all that
10 practiced the patents that you had licensed from
11 Mr. Armstrong in 1997, did it?

12 A. 1997. I think it just covered two patents at that
13 time. I don't -- no, I don't believe we did.

14 Q. I'm sorry. I missed the last part of your answer.

15 A. I said I believe it just covered two patents.
16 That's the contract we're talking about and the
17 continuation. So, I think those two patents, we didn't
18 make a controller that covered those two patents.

19 Q. Okay. So -- and, sir, is it your understanding
20 that the prototype that you held up with the single
21 handle -- that that was also something that practiced
22 one or both of those patents?

23 A. That was my understanding, yes.

24 Q. Okay. Now, sir, let me ask you to take a look at
25 the second page of the 1997 license, Defendant's Exhibit

1 249.

2 MR. GUNTHER: And, Kam, I'd like to do two
3 things. Can we blow up the "Joystick-Type Products,"
4 "Trackball-Type Products," and "Patent Applications"?

5 BY MR. GUNTHER:

6 Q. Now, sir, do you see on page 2 there's three, I
7 guess, definitions?

8 A. I'd really like to find it here. 249?

9 Q. Yes, Defendant's Exhibit 249. It should be in the
10 book that has -- that says "Tyler Exhibits" on it.

11 A. Exhibit binder? Is that one?

12 Q. It's a binder, yes, sir.

13 A. Okay.

14 Q. So, there were two -- if you look there, we're
15 talking about --

16 A. What page are you on?

17 Q. I'm sorry. I'm on page 2 of the Defendant's
18 Exhibit 249.

19 A. Okay.

20 Q. Are you with me?

21 A. Yeah.

22 Q. Thank you.

23 If you look, there's first "Joystick-Type
24 Products"; and it talks about a patent which is the '828
25 patent. Do you see that?

1 A. Yes.

2 Q. That's one of Mr. Armstrong's patents that you
3 licensed in 1997, right?

4 A. Correct.

5 Q. And then it talks about a trackball-type product,
6 and it -- or "Trackball-Type Products" and it has a
7 patent that ends in '891 and that's another patent that
8 you licensed from Mr. Armstrong in 1997, correct?

9 A. That's correct.

10 Q. Now, sir, there's also something that says "Patent
11 Applications." It says: Two applications for U.S.
12 patent covering 3-D image controller-related inventions
13 which have been created by Brad Armstrong and are
14 pending before the U.S. Patent and Trademark Office.

15 Do you see that?

16 A. Yes.

17 Q. Was it your understanding, sir, that this license
18 included -- it also included a license to what we are
19 now calling the "1996 application"?

20 A. Which eventually became the '700 patent?

21 Q. Yes, sir.

22 A. Yeah, I believe it did.

23 Q. Okay. So, it's the '828, the '891, and the 1996
24 application.

25 You, in 1997, had all of those rights; and if

1 you paid a royalty to Mr. Armstrong, you would be
2 entitled to make a controller that practiced any of
3 those inventions, correct?

4 A. Yeah, I think so.

5 Q. And, sir, you didn't do that, did you?

6 A. At that time we didn't produce one that was covered
7 by these patents.

8 Q. And, sir, are you aware of any company at that
9 time -- and let's take it up to 2000 -- that had ever
10 introduced a video game controller that had a single
11 input member that the input member itself, like that one
12 with the blue ball, was movable in 6 degrees of freedom?

13 A. I think there's one in the box.

14 Q. Other than that, other than the one in the box.
15 Are you aware of any company putting anything like that
16 out on the market that folks could buy?

17 A. I'm not aware of one.

18 Q. Okay. At the time, sir, that you entered into the
19 agreement with Mr. Armstrong to form Anascape in 1999,
20 had Mr. Armstrong, to your knowledge, been successful in
21 licensing or marketing any video game controller that
22 had a single handle or single input member that was
23 manipulable or operable in 6 degrees of freedom?

24 A. Could you restate that, please?

25 Q. Sure.

1 At the time that you entered into the
2 agreement with Mr. Armstrong in 1999 to form Anascape,
3 Mr. Armstrong was out trying to market his invention,
4 that blue ball invention, for example, that you showed
5 us, right?

6 A. I believe so, yes.

7 Q. Was he ever successful, at any time before you and
8 he became partners in 1999 in Anascape, in either
9 marketing that invention or licensing that invention, to
10 your knowledge, where someone actually put the product
11 out on the market?

12 A. Yeah, I believe there is; and I'm not sure if --
13 that's something that the court said not to talk about,
14 I believe.

15 Q. Something with a single input member, that single
16 input member that's manipulatable in 6 degrees of
17 freedom?

18 A. I believe, yeah.

19 MR. CAWLEY: Your Honor, the witness has
20 responded to the question. If we can approach --

21 THE COURT: He can answer the question.

22 A. Yes. There's -- as far as I know, there is a
23 product at one point called "the Cyberman." I don't
24 know that much about it.

25 BY MR. GUNTHER:

1 Q. Okay. All right. But that was before the 1996
2 application, correct?

3 A. I'm not sure the timeline on that.

4 Q. Okay. All right, sir. Do you know whether or
5 not -- other than that product, do you know of any other
6 product where Mr. Armstrong was able to actually obtain
7 money, whether by selling the product himself or by
8 obtaining licensing fees, where anyone had a single
9 input member controller operable in 6 degrees of freedom
10 prior to the time that you entered into a license
11 agreement with him in 1999?

12 A. Again, I believe with Logitech, he did.

13 Q. Okay. All right. Did Logitech pay Mr. Armstrong
14 royalties?

15 A. I'm not aware of -- I mean, I think he got some
16 money; but I'm not -- I can't talk --

17 Q. Okay. But that was for a single handle?

18 A. I believe so, yeah.

19 Q. Okay. Was it for a video game product?

20 A. I'm not sure.

21 Q. Okay.

22 A. That was before my time.

23 Q. Was the Cyberman product for a video game product?

24 A. Again, I don't know.

25 Q. Okay. All right.

1 Now, sir, when you -- now, sir, I want to
2 actually ask you about a couple of the emails that
3 Mr. Cawley showed you. One of them is an email -- let
4 me just get the exhibit in front of me. It is
5 Exhibit 216. It's an email from you to Mr. Armstrong in
6 June of 2000.

7 Do you see that, sir? It's 216 in your
8 binder.

9 A. Yes.

10 Q. Sir, if you --

11 MR. GUNTHER: Actually, let's, if we can,
12 Kam, blow up the (Reading) RE: zero application and I
13 believe that we can get some additional valuable claims
14 out of this application.

15 And let's also put up Item 3.

16 A. Item 3?

17 MR. GUNTHER: The third paragraph underneath
18 that.

19 A. Okay.

20 BY MR. GUNTHER:

21 Q. Sir, do you remember sending this email at this
22 point in time?

23 A. It looks familiar, and I believe I sent it. It has
24 my name on it and --

25 Q. Okay.

1 A. -- references a telephone conversation.

2 Q. And you have a recollection of it, of actually
3 sitting down and writing it at this point?

4 A. Not really writing it, but it looks familiar. So,
5 I'm -- yeah.

6 Q. Are you today -- in the testimony that you gave
7 today, were you really just reading the words as opposed
8 to remembering why you wrote them at the time?

9 A. You know, this was a long time ago; and I believe I
10 said what I thought.

11 Q. Okay. And, sir, what you said, you said in words,
12 right? Just like we talked about the Sony agreement.
13 There's words on the page that the jury and everyone can
14 read. In the 1996 application there's words on the page
15 that everyone can read. You wrote words that everyone
16 can read, correct?

17 A. At least I hope they can.

18 Q. Okay. And you said in terms of writing additional
19 claims -- this was for the 1996 application, right?
20 Correct?

21 A. Where are you reading again?

22 Q. The zero application. That's the 1996 application,
23 right?

24 A. Where it says "RE: 0 app"?

25 Q. Yes.

1 A. Okay, yes.

2 Q. And, sir, you said: We can get some additional
3 valuable claims.

4 And then below you talk about a portion of
5 that application broadening the definition of
6 6-degree-of-freedom controllers to 3-D graphic image
7 controllers.

8 You used the word "broadening," right?

9 A. "Broadens."

10 Q. "Broadens," excuse me.

11 A. Yeah.

12 Q. You used the word "broadens," right?

13 A. Correct.

14 Q. That was your word then, right?

15 A. Correct.

16 Q. Okay. And that's what you wrote; and that's what
17 everyone can read, correct?

18 A. I hope they can.

19 Q. And, sir, what you said when you broadened -- when
20 you said it broadens from 6-degree-of-freedom
21 controllers to 3-D graphic image controllers, you said
22 that's probably a better definition of controllers on
23 the market today. So, what you were focusing on was
24 controllers that were on the market today when you made
25 that comment, correct, in terms of how he should write

1 the claims?

2 A. I believe I already answered that. I believe that
3 on the street, you know, if you talk to somebody that's
4 on the street today and there's a 3-D product, they
5 would understand that better than 6 D0F.

6 Q. So, is the answer to my question "yes"?

7 A. If you can restate it.

8 Q. Sure.

9 A. Sorry.

10 Q. My question was what you were telling Mr. Armstrong
11 in terms of how he might be able to get some additional
12 valuable claims out of the 1996 application is that by
13 broadening the definition of 6 degree of freedom to 3-D
14 graphics, that that was probably a better definition of
15 controllers on the market today. Write claims -- this
16 is what you were saying -- write claims that are
17 probably a better definition of controllers on the
18 market today. Isn't that what that means?

19 A. I already told you what I thought it meant.

20 Q. Can you answer my question?

21 A. Well, if your question is if that's what it says,
22 that's what it says. Those are the words right there.

23 Q. That's what I --

24 A. If you're inferring meaning in there, I've told you
25 what I thought it meant.

1 Q. So, you can't do any better than that?

2 A. (Pausing.)

3 Q. That's the best you can do?

4 A. As far as I know, yes.

5 Q. Okay. All right.

6 Now, sir, let me show you another email. And
7 I'm not sure if you actually were shown this one. It's
8 Defendant's Exhibit 214. And, sir, it's a
9 September 10th, 2000, email from you to Mr. Armstrong.
10 And it's entitled "6 dof." Do you see that?

11 A. Yes.

12 Q. And that means 6 degrees of freedom, right?

13 A. Correct.

14 MR. GUNTHER: Now can we bring out the text
15 from this, Kam?

16 BY MR. GUNTHER:

17 Q. Now, sir, in this email you talk about a PCT
18 application; and I think Mr. Armstrong talked about that
19 being some kind of foreign Patent Office application.
20 Is that correct?

21 A. I believe that's what a PCT application is.

22 Q. But then it's relating to a 6 degree of freedom --
23 6-degree-of-freedom application. That's the title of
24 the document, right?

25 A. The subject is "6 dof," yes.

1 Q. Okay. And, sir, what you say is: I wonder if we
2 can change the claims to reflect our new direction.

3 That's what you said in September of 2000,
4 correct?

5 A. It appears so.

6 Q. That's what you wrote. Do you have any doubt that
7 you wrote that to Mr. Armstrong in September of 2000?

8 A. Well, I don't recall it. It has my name on it, has
9 his name on it; so, I guess so.

10 Q. Okay. You're not contesting the fact that you, in
11 fact, sent this to Mr. Armstrong, are you?

12 A. No. I just don't recall it.

13 Q. Okay. You don't recall this email at all?

14 A. No.

15 Q. All right. But you do -- the words we can all
16 read, even though you don't recall it at this point,
17 say: I wonder if we can change the claims to reflect
18 our new direction.

19 Right?

20 A. Yes.

21 Q. Do you remember as you sit here today, sir, what
22 the new direction was?

23 A. No. I don't recall this email.

24 Q. Sir, have you ever -- you said you hold -- what --
25 seven or eight patents. Or I may be understating.

1 A. I believe 17.

2 Q. Seventeen patents?

3 A. Yes.

4 Q. And, sir, have you ever filed a continuation
5 application?

6 A. No.

7 Q. Okay. Do you know the rules of continuation
8 applications?

9 A. I'm a little bit familiar.

10 Q. Do you understand, sir, that when you file -- if
11 you file a continuation application and file later
12 claims, that those later-filed claims must be the same
13 invention as what was disclosed in the original
14 application?

15 A. The application can't be broadened, but you can
16 claim out of the specification patents -- say, you know,
17 like the '525, you know -- I don't know how many
18 inventions there are in there, but you can take that
19 invention that was invented back in '96 and claim it at
20 a later date if you follow the rules.

21 Q. You can't claim a new invention in 2002 and then
22 try to get it back to a different old invention in 1996,
23 can you?

24 A. It's my understanding that you cannot.

25 Q. You cannot do that. Thank you.

1 Now, sir --

2 THE COURT: Now, excuse me. Ladies and
3 gentlemen, let me just be very clear on the law here
4 because once again we're getting into invention.

5 Every claim in a patent is an invention. The
6 early application and the early specification is not an
7 invention. It must disclose and it must completely
8 disclose every element of the claim in the continuation
9 patent, but we need to be very careful about this so
10 there is no confusion. And there's enough confusing
11 elements in this case for you already.

12 The claim -- each claim is a separate
13 invention. The specification, the application, and the
14 patent itself are not inventions.

15 Go ahead, counsel.

16 MR. GUNTHER: Thank you, your Honor.

17 BY MR. GUNTHER:

18 Q. Now, Mr. Tyler, you're a friend of Mr. Armstrong's.
19 You've testified to that, right?

20 A. Yes.

21 Q. But you're also a businessman, aren't you?

22 A. Yes.

23 Q. And, in fact, the license that we put up, the first
24 one, it actually refers to you as "Kelly Tyler,
25 businessman," right?

1 A. Yes.

2 Q. Now, sir, when you entered into the agreement with
3 Anascape, sir, you put -- you testified you put over a
4 million dollars into that partnership, correct?

5 A. Yes.

6 Q. And, sir, you were looking for a return on your
7 investment. You were friends with Mr. Armstrong. You
8 probably weren't going to push him for repayment. But
9 ultimately you were looking for a return on that
10 investment, right?

11 A. Yeah. I mean, I wasn't expecting Brad to pay me;
12 but I was hoping -- I believed in his inventions and
13 thought it was a great idea to invest in it.

14 Q. And that's one of the reasons, sir, that you were
15 looking at the '96 application and why you were giving
16 him suggestions on the claims, right?

17 A. Yes.

18 MR. GUNTHER: Pass the witness.

19 Thank you, Mr. Tyler.

20 MR. CAWLEY: Your Honor, I have no further
21 witnesses -- no further questions of this witness.

22 THE COURT: All right. You may step down,
23 sir.

24 Next witness?

25 MR. CAWLEY: Your Honor, we're going to call

1 Mr. Walt Bratic to the stand.

2 THE COURT: Do you want Mr. Tyler to be
3 excused?

4 MR. CAWLEY: We would like him to be, your
5 Honor.

6 THE COURT: Any objection to excusing him?

7 MR. GUNTHER: No, your Honor.

8 THE COURT: All right. Sir, you are excused.
9 That means that you may either leave or you can stay in
10 the court now and watch if you wish. It's your choice
11 either way. The only requirement is that you do not
12 discuss the case with any other witness until the trial
13 is over. You can talk with the lawyers but not with any
14 other witness until the trial is over. But it is your
15 choice to either stay or leave or leave and come back if
16 you wish.

17 THE WITNESS: Can I ask my counsel something?

18 THE COURT: Sure.

19 THE WITNESS: I just want to get back to my
20 family. So, I just want to see what...

21 THE COURT: Where is the next witness?

22 Step on up.

23 MR. PARKER: Your Honor, the corrected slides
24 that we sent out over the noon hour just arrived. If I
25 could have five --

1 THE COURT: All right. Ladies and gentlemen,
2 we're going to go ahead and take our break. I'll ask
3 you to be back at half past. Please remember my
4 instructions. Don't discuss the case among yourselves.

5 (The jury exits the courtroom, 2:15 p.m.)

6 THE COURT: All right. We'll be in recess
7 until half past. And one thing during the break, if we
8 could go ahead and clear those books off, the old books,
9 and get the new books off and all that.

10 (Recess, 2:15 p.m. to 2:28 p.m.)

11 (Open court, all parties present, jury
12 present.)

13 (The oath is administered.)

14 THE COURT: Go ahead, counsel.

15 MR. PARKER: Your Honor, Robert Parker for
16 plaintiff. We call Mr. Walter Bratic.

17 DIRECT EXAMINATION OF WALT BRATIC

18 CALLED ON BEHALF OF THE PLAINTIFF

19 BY MR. PARKER:

20 Q. Mr. Bratic, will you introduce yourself to the
21 jury, please?

22 A. Sure. My name is Walt Bratic. My last name is
23 spelled B-R-A-T-I-C.

24 Q. And you live where, sir?

25 A. In Houston.

1 Q. And your business?

2 A. I'm a financial consultant.

3 Q. Okay. Are you associated with any particular
4 company?

5 A. Yes. I'm an employee and a vice-president and a
6 member of the executive committee of a publicly-traded
7 company called "CRE International."

8 Q. Before we get into that, give us a brief
9 description of your educational background, please.

10 A. Sure. I have an undergraduate degree in business
11 from the University of Pennsylvania in Philadelphia,
12 Pennsylvania; and I also have a MBA, a master of
13 business administration, from the Wharton School of
14 Business, which is the University of Pennsylvania.

15 MR. PARKER: Your Honor, so I don't need to
16 go through it in any detail, Mr. Bratic's resumé has
17 been marked as Plaintiff's Exhibit 448 and could,
18 therefore, be available to the jury.

19 THE COURT: 448 is admitted.

20 BY MR. PARKER:

21 Q. Are you a CPA?

22 A. Yes. I'm a certified public accountant. I've been
23 licensed here in Texas since 1981.

24 Q. What year?

25 A. 1981.

1 Q. Now, before you went to work in your present
2 employment with CRA, who were you with?

3 A. I was with a company -- well, a big accounting firm
4 called "Pricewaterhouse" and "PricewaterhouseCoopers"
5 for 17 years.

6 Q. You've been with CRA since 1999; is that right?

7 A. Right, CRA or the company CRA acquired four years
8 ago.

9 Q. As part of your activities, have you had occasion
10 to lecture or speak in conferences, professional events
11 regarding intellectual property?

12 A. Yes. On a routine basis I've been doing that for
13 years. I've been invited to speak at conferences all
14 over the world and here in the United States.

15 Q. What about outside of the United States?

16 A. Yeah. I was just in Australia two weeks ago where
17 I was invited to speak in an intellectual property
18 conference on subjects dealing with patent and patent
19 licensing. That's just the most recent example. Last
20 year I was speaking in South Africa, and I've been in
21 India last summer speaking at a 3-day conference I was
22 invited to by the government of India.

23 Q. Is it fair to say that you frequently deliver
24 lectures or speeches to professional organizations
25 regarding intellectual property?

1 A. Yes. I've done so for many years.

2 Q. Have you had any involvement with the United
3 Nations?

4 A. Yes. About 15 years or so ago, the United Nations
5 formed what was called a "Committee of Independent
6 Experts"; and I was invited to be on that committee.

7 When the Soviet Union collapsed, they had all
8 these countries like Poland, Hungary and East Europe.
9 Their economies were a wreck and, so, they were trying
10 to lift up their living standards and part of the
11 problem they had is they needed to attract companies to
12 build factories and sell products in those countries.
13 So, this committee of experts that I was part of went
14 around meeting government ministries and government
15 officials to talk about the importance of intellectual
16 property laws, to pass intellectual property laws,
17 because they really weren't used to that over in the old
18 Soviet Union, and then to enforce those intellectual
19 property laws so that they would encourage economic
20 development.

21 Q. You've published articles?

22 A. Yes. I've published a number of articles, mostly
23 on intellectual property.

24 Q. Are those all set out in your resumé?

25 A. Yes.

1 Q. What is the publication Managing Intellectual
2 Property?

3 A. Well, it's a leading and very popular and widely
4 distributed publication around the world. It's
5 published out of London. I've written several articles
6 for them; and I serve on their editorial board, which
7 means that I end up getting articles that people want to
8 publish. They get sent to me as a referee, and I have
9 comment on them and make -- suggest changes before they
10 get published.

11 Q. Can we legitimately refer to you as a "professor"?
12 Do you do any teaching?

13 A. I do. I actually taught classes even when I was in
14 grad school. I've taught at the University of Houston
15 both in the MBA program and I teach at the University of
16 Houston Law School, where I'm a lecturer and I teach a
17 class in the fall and in the spring on intellectual
18 property matters.

19 Q. But teaching is a bit of a sideline, correct?

20 A. Yeah. I do that for free. I don't get paid.

21 Q. What about membership in intellectual property
22 organizations?

23 A. I'm a member of several well-known intellectual
24 property organizations, one being the Licensing
25 Executives Society (U.S., Canada); and then there is the

1 international body called "Licensing Executives Society
2 International." And I'm a member of both of those
3 organizations, and I've been on various committees for
4 those organizations.

5 Q. Have you actually engaged in the licensing of
6 intellectual property?

7 A. Yes. The first time I negotiated a license was in
8 1975, right out of college. And then I was a chief
9 financial officer of a company for about two years; and
10 during that period of time as a chief financial officer,
11 I actually had to negotiate licenses for inbound
12 technology, stuff we wanted to license in. And then we
13 had technology that other people wanted; and I had to
14 negotiate those licenses, those what we call "outbound
15 licenses." So, I saw both sides of the door, swinging
16 door.

17 And then when I joined Pricewaterhouse, the
18 accounting firm that I was with for 17 years, I did a
19 lot of licensing work as part of my regular work; and I
20 still continue to represent clients today in licensing.

21 Q. So, you're still involved in the actual licensing
22 negotiation and execution?

23 A. Yes. I was hired last week by an Australian
24 company to negotiate a license for them with a European
25 company involving some U.S. and European patents.

1 Q. Have you been qualified in various courts to
2 testify on licensing practices?

3 A. Yes. I've actually served as an expert not just on
4 damages but on how people do licensing in given
5 industries.

6 Q. And have you been hired by judges and courts to
7 serve as an expert for the court as opposed to for the
8 parties, such as in a dispute like this?

9 A. Yes. On several occasions I've been hired by
10 courts, not this judge and not this court but courts
11 like this, as a court-appointed expert.

12 Q. So, that brings us to this case. What have you
13 been asked to do in this case?

14 A. Well, in this case I was asked to determine the
15 amount of reasonable royalties that would be due and
16 owing Anascape assuming the '700 patent is a valid
17 patent and has been infringed by Nintendo of America.

18 Q. So, you're here to testify as an expert and give
19 opinions regarding damages, correct?

20 A. That's correct.

21 Q. Okay. What do you mean by the phrase "reasonable
22 royalty"?

23 A. Well, the patent law allows for compensation for an
24 inventor if -- somebody who owns a patent, if there is
25 an infringer; and it allows for collection of lost

1 profits and no less than a reasonable royalty. And what
2 I mean by reasonable royalties is an amount of money
3 that would be paid, for example, for rent. Think of,
4 let's say, McDonald's down the street. If you had a
5 McDonald's franchise and you wanted to use the
6 McDonald's logo, use the McDonald's sauce, make their
7 hamburgers and sell them as a McDonald's product, you as
8 a franchisee would have to write a check every month for
9 the total sales of burgers and fries and Coca-Cola and,
10 so, you pay a royalty or rent for the rights to that
11 access to their -- to those rights.

12 And, so, that's kind of what I'm doing here.
13 I'm assessing the amount of royalties or the amount of
14 rent that would be due and owing Anascape from Nintendo
15 assuming the '700 patent is a valid patent and has been
16 infringed.

17 Q. In preparation for your testimony here today, tell
18 the jury what work you did and what analysis you
19 conducted in preparation.

20 A. Sure. I had a team of folks assisting me on this
21 project, working under my direction and supervision.
22 One of them is a PhD economist, Mike Sadler in the back
23 of the room. We received a number of documents in this
24 case that we looked at. Obviously, we looked at various
25 legal pleadings to have a little understanding of what

1 the dispute was about. I reviewed the '700 patent back
2 when I did my work. We reviewed a lot of business
3 records from Nintendo. Anascape produced business
4 records, some of which I've seen during trial flashed up
5 on the screen. We've received, as I mentioned, a lot of
6 business records. We did industry research on royalty
7 rates in the industry. "In the industry" meaning the
8 gaming industry and particularly with respect to
9 controllers that are part of a console system.

10 And then I conducted interviews. I
11 interviewed some of the people who have already
12 testified today. I interviewed Brad Armstrong, the
13 inventor of the '700 patent. I interviewed Kelly Tyler,
14 his partner in Anascape. I interviewed Dr. Howe, and I
15 interviewed a gaming designer. And I reviewed a number
16 of other documents. So -- I might mention I also read a
17 number of depositions that were taken of various people
18 in this case and considered that information.

19 Q. And did you review some of the expert reports in
20 this case?

21 A. Yes. I reviewed Dr. Howe's expert report, and I
22 reviewed Dr. Keith Ugone's report. Dr. Ugone is the
23 damages expert for Nintendo.

24 Q. After you did all that work and conducted that
25 analysis, were you able to reach a conclusion regarding

1 the amount of damages in the form of reasonable
2 royalties that are owed to Anascape assuming the '700
3 patent is valid and has been infringed by Nintendo?

4 A. Yes, I have.

5 Q. Did you prepare a chart --

6 A. Yes.

7 Q. -- that demonstrates that?

8 MR. PARKER: That would be Number 2,
9 Mr. Martin.

10 A. Yes. So, my opinion is that Nintendo of America
11 from the date of the filing of the lawsuit in July,
12 2006, through the start of trial this past Monday would
13 owe \$50.3 million.

14 BY MR. PARKER:

15 Q. Now, as part of your analysis, did you consider any
16 accepted formulas in this case?

17 A. Yes, I did.

18 Q. Did you prepare a chart that demonstrates that, and
19 can you explain it?

20 A. Yes.

21 MR. PARKER: That's Number 3, please.

22 A. Well, here's a well-regarded and well-known formula
23 for determining royalties. You start out with -- I'm
24 going to use my laser pointer here, if I can.

25 You start out with what's called a "royalty

1 base." And I'll talk a little bit more about that
2 later. But a royalty base is basically all the
3 products, the infringing products that the jury has been
4 handed during trial. So, I went and figured out how
5 much has been sold of that.

6 And then you apply that by what's called a
7 "royalty rate." That's the rent, a monthly rent or the
8 franchise fee that we gave you in the McDonald's
9 example. And that's based on a well-known court case
10 that I'll be talking about called the "Georgia-Pacific
11 case," which instructs you on how to do an analysis to
12 come up with the royalty rate.

13 And once you multiply the royalty base by the
14 royalty rate, you get the amount of the reasonable
15 royalty.

16 BY MR. PARKER:

17 Q. And did you prepare a chart that shows how you
18 applied the formula to this case?

19 A. I did.

20 MR. PARKER: That would be Number 4.

21 A. So, what I've done here is I've just taken the
22 royalty base, which is just over a billion in sales
23 through the start of trial, times a 5 percent royalty.
24 And if you multiply those two numbers out, you get
25 \$50.3 million.

1 BY MR. PARKER:

2 Q. All right, sir. Let's break it down and start with
3 the first of the two components.

4 A. All right.

5 Q. Chart 5 addresses royalty rates?

6 A. Correct. And as you see, it says "Sales of Accused
7 Products"; so, I'll be talking about the accused
8 products and sales.

9 Q. And Slide 6, then, is -- reflects your
10 calculations, correct?

11 A. Yes. And what Slide 6 is, it shows from again, as
12 I said, July 31st, 2006, which is the date the
13 infringement lawsuit was filed by Anascape, through the
14 start of trial, May 4th, this Monday. I went through --
15 Nintendo produced records over time, and they updated it
16 very recently through March 31st. And then I estimated
17 based on their sales. I just estimated roughly an
18 additional month of sales for the month of April.

19 And, so, for the GameCube controller, I was
20 able to determine that they'd sold \$16.5 million -- I'm
21 rounding -- 16.5 or \$16.6 million in GameCube
22 controllers.

23 For the Wavebird wireless controller, they
24 sold about 1.1 [sic], \$1.2 [sic] million worth of
25 product.

1 For the Nunchuk, they sold 296 -- or almost
2 \$297 million worth of Nunchuk product, which are used in
3 connection with a Wii controller.

4 And then the Wii Classic Controller, there
5 was about \$32.8 million worth of sales there.

6 And for the Wii Remote, the value of those
7 sales or number of units sold was about \$655 million.

8 And when you add that all up, that gets to
9 that billion dollars we're talking about, just over a
10 billion in sales.

11 Then again, if you multiply it by the
12 5 percent royalty, or the rent we talked about, that
13 gets you to \$50.3 million.

14 MR. PARKER: Your Honor, this also is
15 Plaintiff's Exhibit 364.

16 THE COURT: Okay.

17 BY MR. PARKER:

18 Q. Now let's move to the second of the two components,
19 please, sir --

20 A. Okay.

21 Q. -- which is set out on Slide 7. It's the royalty
22 rate.

23 A. Yes.

24 Q. Were there some well-known methodologies you used
25 in arriving at your opinion regarding a reasonable

1 royalty rate of 5 percent?

2 A. Yes, there are. As I mentioned earlier, there is a
3 well-known court case from the 1970s, which I have a
4 chart going through all 15 factors. That case is called
5 "Georgia-Pacific versus United States Plywood" -- sorry.
6 I was --

7 Q. I think we can go ahead and move to Number 8. This
8 represents the 15 factors in the Georgia-Pacific case?

9 A. Right. Now, that case laid out -- for determining
10 a reasonable royalty rate, it said, "Go look at these 15
11 factors. Consider them all. They may not all apply in
12 every single instance in a patent infringement case, but
13 you need to consider them and evaluate them."

14 Q. And you did, in fact, consider each one of these
15 factors in reaching your opinion, correct?

16 A. Yes. I addressed each one of them and discussed
17 them at length in my report that I filed in this case.

18 Q. Now, for organizational purposes and for your
19 presentation to the jury, did you break these down and
20 organize them in any particular way?

21 A. Yes. I broke them down in what I call "buckets."
22 And I have a chart that shows that.

23 Q. Okay. Why did you do that?

24 A. Well, when you look at the 15 factors, some of them
25 cluster together because they relate with the same

1 subject matter. So, what I did is I took the 15 factors
2 and looked at the first group, licensing
3 characteristics. See, there's G-P Factor 1, 2, 3, 7,
4 and 12. So, I put them all together.

5 The same thing I did with another bucket
6 called "Commercial Success" because it had several
7 factors that relate to each other, and I put that in a
8 separate bucket.

9 Then I had another bucket dealing with the
10 nature and use of the invention.

11 Then I had another one dealing with market --
12 the marketplace competition and things of that nature.

13 And, finally, there was a last bucket that
14 dealt with relying on experts and dealing with a
15 hypothetical negotiation, which the concept to a
16 hypothetical negotiation -- the Georgia-Pacific case not
17 only gave you the 15 factors --

18 If you could go back to the previous chart.

19 It not only gave you those 15 factors, but it
20 assumed -- the court asked you to assume in a case like
21 this that Anascape and Nintendo would have sat down at
22 the time of first infringement, which would have been
23 when the patent issued, in June, 2005, and they would
24 have gone to a hypothetical negotiation and negotiated a
25 hypothetical license and the terms and conditions of

1 which would be, obviously, the amount of royalty that
2 would be owed.

3 Q. Well, I'll use your terminology of "buckets." So,
4 we'll go to the first bucket, which is "Licensing
5 Characteristics," on Slide 10.

6 A. Right.

7 Q. How did you consider these factors relating to
8 licenses?

9 A. Well, what I did is I considered various
10 documentation in this case. I conducted several
11 interviews of some of the people we talked about. And I
12 looked and did research; and I found additional
13 information on royalty rates for controller-related
14 technology in the marketplace, which would shed a lot of
15 light to me as part of my analysis on what an
16 appropriate royalty rate would be in this case.

17 Q. And you reviewed some actual license agreements?

18 A. Yes.

19 Q. Okay.

20 MR. PARKER: If we can go to 11.

21 A. Okay.

22 BY MR. PARKER:

23 Q. Are these some you reviewed?

24 A. Yes. In fact, the first one, the 6-DOF Trust,
25 slash, Mr. Tyler, that was one that was shown to

1 Mr. Tyler during his examination, which he executed
2 shortly after he met Mr. Armstrong; and they signed up a
3 license agreement with royalty rates of 4 to 5 percent,
4 in that range.

5 Q. Does this chart support your opinion of a minimum
6 5 percent royalty rate in this case?

7 A. It does, but it's only part of the support for my
8 opinion. But it clearly does support my view of a
9 royalty rate of 5 percent. But there's a lot more, in
10 my view, that supports the 5 percent, as well.

11 Q. Okay.

12 A. Do you want me to explain the others?

13 Q. Well, let's go to Slide 13.

14 A. All right.

15 Q. This is one.

16 A. This is the 6 DOF license agreement that was shown
17 to Mr. Tyler and that he testified to. And this was
18 between Mr. Tyler when he was at Mad Catz and with
19 Mr. Armstrong -- or his trust that he set up for running
20 royalty rates, as you can see, of 5 percent and
21 4 percent for controller products.

22 Q. Are you familiar with a company by the name of
23 "Immersion"?

24 A. Yes.

25 Q. Have you heard of the phrase "Immersion standard

1 royalty rate"?

2 A. Yes, I have.

3 Q. And what is that?

4 A. Well, first of all, Immersion is a company that, as
5 I did my research investigation, I kept coming across
6 over and over again. They are a leader in controller
7 technology for the gaming industry. They design a lot
8 of controller products. And they have a lot of patents
9 out there, and they have widely licensed those patents.
10 And that's how I came across Immersion.

11 And because Immersion has been so active in
12 licensing their patents, they view that a royalty for
13 their controller technology -- to command a 5 percent
14 royalty rate.

15 MR. PARKER: Can we go to 14, please?

16 BY MR. PARKER:

17 Q. What is this, Mr. Bratic?

18 A. Now, this is a quote from Mr. Viegas, Vic Viegas,
19 who is the president and CEO of the Immersion
20 Corporation. And his statement to the public was that:
21 Our typical license is approximately 5 percent of the
22 wholesale selling price.

23 And I've seen other documents in this case
24 that support that statement made by Mr. Viegas.

25 MR. PARKER: And if we can now go to 15,

1 please.

2 A. Okay.

3 BY MR. PARKER:

4 Q. As I understand it, one of the things you examined
5 in this case was a data compilation by a gentleman by
6 the name of Mr. Wagner that was prepared in another
7 matter.

8 A. Correct.

9 Q. Is that correct?

10 And the compilation dealt with a number of
11 licenses, correct?

12 A. Yes.

13 Q. Okay. What's the significance of your statement
14 regarding the Wagner report?

15 A. Well, in the Wagner report he went through and he
16 analyzed and looked at a number of Immersion license
17 agreements; and these 17 agreements were agreements that
18 were in his report that were Immersion's licenses. So,
19 Immersion had 17 licenses for joystick or controller
20 technology that were all at a minimum royalty rate of
21 5 percent.

22 Q. Now, the data in this report, is it the type data
23 that's reasonably and typically relied upon by experts
24 in your field?

25 A. Yes.

1 Q. Even though you didn't conduct the study?

2 A. That's correct.

3 Q. You mentioned -- do you have the information
4 regarding the companies that executed these agreements?

5 A. Yes.

6 Q. Can you tell the jury about that?

7 A. Well, some of the companies that licensed this
8 technology included, you know, some of Nintendo's
9 competitors, such as Sony.

10 Q. Okay. You have a chart relative to Sony; is that
11 correct?

12 A. Yes.

13 Q. Okay. What's the significance of that chart?

14 A. Well, from the review of the Wagner report that
15 had -- Mr. Wagner had access to a variety of Sony
16 license agreements. And if you look at the Wagner
17 report and the Sony licenses for controllers, if you
18 look in the far right-hand column, this talks about the
19 device. And if you look at the royalty rates, the
20 royalty rate that Sony was getting for its controller
21 technology when it licensed its controller technology to
22 other companies, it was generally getting 5 percent.

23 Q. Now, I assume, Mr. Bratic, that you haven't
24 personally read or examined the contents of all these
25 various licensing agreements that have been -- that are

1 on this chart and have been involved in the Wagner
2 report; is that correct?

3 A. That's correct.

4 Q. Is it your experience that individuals in your
5 business or individuals in the licensing business can
6 rely on reports like this?

7 A. Oh, sure. I've been doing licensing work for 30
8 years, and you don't always have perfect information and
9 lots of times companies may report a license, but they
10 don't publish the license agreement. And I do research
11 all the time for clients -- and I did research in this
12 case -- helping me to identify data points as far as
13 what royalty rates are in different industries, and in
14 this case there's no difference.

15 And an example would be that a client I'm now
16 representing in Australia, I, in fact, started doing
17 research with them; and it has to do with food
18 processing technology. And I have subscriptions to
19 databases that I pay \$200 and I get a report on known
20 information on food processing licenses and then I have
21 to do a little drilling and a little analysis, but the
22 point is that information is available. And I've
23 certainly used it for the last 30 years in guiding
24 clients in their negotiations.

25 Q. Does the fact that you didn't personally prepare

1 these reports, this data, influence your conclusions
2 regarding reasonable royalty rate in this case?

3 A. No, because I came across a lot of different
4 independent sources of this information which still
5 corroborated that 5 percent royalty. For example, I had
6 the statements by Mr. Viegas that their standard royalty
7 rate is 5 percent. I went and found two Immersion
8 licenses on my own in my research that showed royalty
9 rates of 3 to 7 percent. The 5 percent is a midpoint,
10 and I discussed them in my report. I have the Sony
11 licenses where Sony licenses its controller technologies
12 for 5 percent, and I have a whole series of summaries of
13 Immersion licenses that Mr. Wagner analyzed where the
14 average royalty rate was 5 percent. So, these are all
15 consistent. They all corroborate each other.

16 Q. Before we move to the next bucket --

17 A. Yes.

18 Q. -- what did you learn from the licenses you
19 examined?

20 A. Well, what I learned was a typical licensing
21 arrangement for controller technology were running
22 royalty rates, meaning you pay as you go. As you sell
23 product, you pay royalties, rents. And that typical
24 royalty rate was in the 5 percent range.

25 Q. All right. The next bucket is "Commercial

1 Success. "

2 A. Yes.

3 Q. Did you consider the Georgia-Pacific factors
4 relating to commercial success?

5 A. I did.

6 Q. Okay. Could you tell the jury about it?

7 A. Well, sure. The fact is that -- can you go back to
8 chart -- let me find it. I think it's Chart 6.

9 Q. I can't, but perhaps Mr. Martin can.

10 A. So, these are the dollar sales. As you can see,
11 they've sold a billion -- Nintendo has sold in the
12 United States -- well, these are U.S., Canada, and Latin
13 America sales because they're all sold from the United
14 States. That's why they're all here. But they've sold
15 over a billion dollars of product in less than two years
16 when they introduced the Wii system.

17 The important thing is here, behind that
18 billion dollars in sales, is -- I'm going to give you a
19 number -- about 43 million individual units. In other
20 words, if I had the Nunchuk, you know, here in my hand
21 and I had the Wii Remote and I had the Wii Classic and
22 the Wavebird and Wavebird wireless -- I mean, the
23 GameCube and the Wavebird wireless, there's about 45
24 million individual articles, parts that were sold that
25 are these accused products supporting a billion dollars

1 in sales.

2 Now, I haven't factored in any of my analysis
3 the significant money that Sony generates on its games
4 that are sold with these systems or to have systems that
5 can use these controllers.

6 Q. This is restricted to controllers?

7 A. Strictly controllers. There's three components to
8 a system, console system. There's the console which I
9 think the jury saw. In fact, I think Mr. Tyler held one
10 up. There's the games that you play on your screen, and
11 there's the controllers. And I've only considered the
12 sales of the controllers.

13 Q. Well, this bucket is titled "Commercial Success."

14 A. Yes.

15 Q. That raises the issue of whether Nintendo's accused
16 products are profitable.

17 A. Well, they are successful; and they are profitable.
18 Nintendo does make profits on selling these --

19 Q. How do you --

20 A. -- products.

21 Q. I'm sorry. I spoke at the same time as you did.

22 Were you through?

23 A. Yes.

24 Q. Okay. Do you define success separate from
25 profitability, or are the two interconnected?

1 A. Well, success can be measured in different ways.
2 And one way to measure success is how much product did
3 you sell. Now, they've sold a billion dollars of
4 product. They've sold about 45 million units. So,
5 those are different ways to measure success. And when
6 they've sold those products, they've been widely touted
7 in the, you know, gaming community and in the
8 marketplace as highly successful products. So, it's put
9 Nintendo back in the game, so to speak. And they are
10 also profitable products. They make money on them. So,
11 those are all measures, in my view, of commercial
12 success.

13 Q. All right. The next slide deals with the nature
14 and use of the invention.

15 A. Yes.

16 Q. Did you consider these Georgia-Pacific factors --

17 A. Yes, sir.

18 Q. How did you consider them?

19 A. Well, I considered them in the context of how the
20 controller functions and what its relationship is to the
21 console system. And, for example, I've prepared a chart
22 to kind of explain the nature and use of the invention.

23 Q. And that's 20.

24 A. Right.

25 Q. Would you explain it?

1 A. Sure. What I've tried to do here is deal with the
2 issue of nature and use of these controllers and what
3 drives demand in this industry. And as mentioned, there
4 is an interrelationship --

5 Q. May I interrupt you, please --

6 A. Sure.

7 Q. -- before you get to that?

8 And I admit this is my subjective
9 interpretation. It sounds to me as though Nintendo
10 takes the position that rumble and six axes of control
11 are not really very important technologies for
12 developing games and, therefore, not important to the
13 sale of consoles.

14 First of all, do you agree with that
15 statement?

16 A. No, I don't agree with that at all.

17 Q. All right. And does this chart provide any
18 guidance on that question?

19 A. Yes, it does.

20 Q. Okay. I apologize for the interruption. Proceed.

21 A. Not at all.

22 Well, let's stop at the top -- start at the
23 top. So, here what I'm saying is in this box:

24 Controllers define the active interaction and form the
25 bond between the gamer and the game.

1 You have to have a controller to play these
2 games. You can't play these games without a controller.
3 It's integral to the experience. And that's why, for
4 example -- I heard the testimony about the rumble. It's
5 the tactile feedback. Having a controller with the
6 rumble feature is what lets you interact with the game
7 and enjoy that experience. For example, in the Madden
8 NFL game, when somebody gets tackled or blocked, they
9 make contact on the screen, well, you feel it on your
10 hands. The controller is an integral part of that
11 experience. If you didn't have a controller with the
12 rumble, you would never feel the impact or experience
13 the impact that's on the screen, for example, in a
14 sporting event.

15 Systems are not sold without controllers.
16 Every time Nintendo packages up and shrink-wraps and
17 sells a system at Best Buy or Wal-Mart or somewhere, you
18 go in and you buy it, you've got the controllers and the
19 console and you've got some built-in games to get you
20 started. But the point is the controller is always
21 there. There's always a controller that's sold with a
22 console system; and then, of course, you can later buy
23 more controllers if it breaks or if you want more to
24 have more players. But it's an integral part of the
25 entire system.

1 Finally, games need to have features that are
2 provided by new technologies and innovations. These --
3 this whole industry is driven by what I called in my
4 report the "razor and blade concept." The fact is that
5 companies like Nintendo, Sony, Microsoft, the big three
6 console makers, they want to get as many consoles out
7 because if they can get a lot of consoles out, they can
8 then attract the game developers who then want to make
9 games that will work on their systems and then they can
10 collect lots of royalties and income from allowing
11 gamers to develop games. But it's important then for
12 the gamers to compete with each other to have to be able
13 to provide new and next generation features, such as six
14 axes of control, such as rumble and the like.

15 And, so, the gamers compete with each other.
16 The console companies like Sony and Nintendo compete
17 with each other. They're all competing with each other
18 to get the best technology in the hands of the customer
19 so that they have a truly enjoyable experience. And,
20 so, this is all intertwined; and you really can't
21 separate them out. That's why controllers are very
22 important to this entire concept.

23 Q. Well, on this issue of whether games are really all
24 that matters --

25 A. Right.

1 Q. -- from your interviews, from your research, have
2 you developed information about that?

3 A. Yes, I did. In fact, I found a chapter in the
4 book --

5 MR. PARKER: I believe that's Slide 21,
6 Mr. Martin.

7 A. All right. Now -- I'm sorry.

8 BY MR. PARKER:

9 Q. Tell the jury what they're looking at.

10 A. What this is, this is a chapter from a book. And
11 at the very bottom of the slide, which you probably
12 can't see because it's really hazy. But it says "User
13 Centered Design in Games."

14 This is a chapter being published by a number
15 of Microsoft think tank people. In fact, the first name
16 in this list of authors is Mr. Pagulayan. He is the
17 head of Microsoft's gaming think tank. He's the top guy
18 there at Microsoft on developing the Xbox, the Xbox 360,
19 and other generations that may come. So, he's a pretty
20 high guy up in the Microsoft organization.

21 And he and his other colleagues wrote this
22 chapter dealing with the issues about is games all that
23 really matter, is there more to it. And what he said
24 here is: Stating that great games are the only thing
25 required to sell the console system on which they are

1 played would be a dubious claim. The success of a
2 console system depends entirely on whether the games
3 that are played on a particular console are noticeably
4 different from alternative technologies.

5 So, he's recognizing -- these authors are
6 recognizing -- the people behind Xbox and Xbox 360
7 recognize there is a lot more to it than just games.
8 And, in fact, that -- well, there's more. I have
9 another part of that same chapter that deals with that
10 subject.

11 Q. All right, sir. Did you review any customer
12 surveys?

13 A. Yes, I did.

14 Q. On this subject and --

15 A. Yes.

16 Q. -- what they talked about regarding rumble and
17 regarding vibration?

18 A. Yes, I did.

19 Q. Is that 23?

20 A. Yes -- well, 22 deals with rumble, also; so, we
21 might as well talk about that.

22 Q. All right. Let's do that.

23 A. All right. Well, from my research and
24 investigation, I learned that -- both from interviewing,
25 of course, Mr. Armstrong, Mr. Tyler, articles I reviewed

1 and documents I came across in the lawsuit, but also I
2 interviewed a game developer with 25-plus years
3 experience designing games and doing simulation at NASA
4 on the space shuttle, for example. And I learned that
5 six axes of control and rumble are important game
6 control features.

7 I also learned that game controller features
8 add to the ability to create popular and effective
9 entertainment, which is what goes back to -- you know,
10 the chart I showed with the three boxes and how
11 everything is interrelated? Well, this deals with that
12 same subject matter. There is an interrelationship
13 between having advanced techniques on a controller and
14 what goes into games.

15 Q. And what you learned from the interviews, was it
16 consistent with consumer -- or customer surveys?

17 A. Yes.

18 MR. PARKER: We'll now go to 23, please.

19 BY MR. PARKER:

20 Q. What's the significance of this slide?

21 A. Well, this is from a survey that was done about
22 consumers and what their preference is regarding, in
23 this case, the issue about rumble. And what I
24 highlighted was there was a survey done by this company,
25 Ars Technica; and what they did is they asked people

1 about rumble and said -- I'm highlighting some things.
2 They say: Some people reported that rumble was an
3 integral part of the game play.

4 And then down below it says: If there was no
5 rumble, Madden would just be an ordinary game.

6 That's a quote from a person who was actually
7 surveyed.

8 So, this talks about the integral nature and
9 how important rumble is to the gaming experience and why
10 it needs to be in a controller.

11 Q. Have you seen any other evidence that console
12 manufacturers recognize the importance of controllers to
13 the commercial success of the gaming system?

14 A. Yes.

15 Q. And that games aren't the only thing that matter?

16 A. Correct.

17 MR. PARKER: Slide 24, please.

18 A. All right. This is the same article -- chapter in
19 the book that we talked about from the Microsoft
20 executives, and I've highlighted some things here on
21 that very subject because it says here: The ease of use
22 of a game's controls and interface is closely related to
23 fun ratings for that game. Think of this factor as a
24 gatekeeper on the fun of the game. If the user must
25 struggle or cannot adequately translate their intentions

1 into in-game behaviors, they will become frustrated.
2 This frustration can lead the user to perceive the game
3 as being unfair or simply inaccessible, or simply not
4 fun.

5 Now, it goes on to say: Dissatisfaction with
6 controller design can also be a central factor that
7 limits enjoyment of all games on a system. For example,
8 the results of one whole set of studies on the games for
9 a particular console system were heavily influenced by
10 complaints about the system's controller.

11 And, so, this clearly talks about how
12 important controllers are to developing the game
13 experience.

14 BY MR. PARKER:

15 Q. All right. We've heard what Microsoft people had
16 to say about it.

17 A. Right.

18 Q. Do you have any information about the importance
19 that Nintendo employees place on controllers?

20 A. Yes.

21 MR. PARKER: And that would be 25, please.

22 A. Yes.

23 BY MR. PARKER:

24 Q. Tell the jury what this is.

25 A. Well, this is testimony from Mr. Takeda; and you

1 see it shows what page it's from. It's from page 97 of
2 his deposition.

3 And the question and answer is: Mr. Takeda,
4 both the Wii Remote and the GameCube controller both
5 have built-in vibration features; is that correct?

6 Answer: Well, they are not exactly the same;
7 but both of them do have a vibration feature.

8 Question: Why did you -- I'm sorry. Why did
9 Nintendo include vibration in the Wii Remote?

10 Answer: Well, for a player, not only input
11 but feedback, output function is, I believe, very
12 important. Therefore, in the Nintendo 64, the GameCube,
13 and the Wii, vibration feature was included as output.
14 So, a decision was made to include an output as a
15 necessary feature.

16 Q. Is Mr. Takeda, one of the witnesses that
17 Microsoft -- I'm sorry -- that Nintendo designated as
18 being able to speak for the company?

19 A. Yes. That's my understanding.

20 Q. Now, what about additional employees --

21 A. There was --

22 Q. -- who talked about the importance of a controller
23 feature?

24 A. Yeah. There was other testimony. I've got another
25 slide coming up.

1 MR. PARKER: It's 26, please.

2 A. Right.

3 BY MR. PARKER:

4 Q. This is a -- I'm sure I'm going to botch this
5 pronunciation, Koshiishi (pronouncing)?

6 A. Koshiishi (pronouncing), I think; but I'm hoping
7 I'm close.

8 Q. I'll go with your pronunciation.

9 A. Well, Mr. Koshiishi was deposed in January of this
10 year; and he was asked about six axes of control.

11 Do you want me to read the whole thing or
12 just paraphrase?

13 Q. Well, you're the witness.

14 A. Well --

15 Q. Can you paraphrase it or --

16 A. Sure.

17 Q. -- or do you need to read it?

18 A. Well, I think the bottom line is -- he was asked
19 about Super Mario Sunshine, which was a two-dimensional
20 game. Then he was asked about three-dimensional games
21 which -- excuse me -- Super Mario Brothers, which was
22 two-dimensional. Then he was asked about the 3-D being
23 Super Mario Sunshine, and he said that Super Mario
24 Sunshine was better than Super Mario Brothers because it
25 had this extra feature; it had the six axes of control.

1 Q. What about other Nintendo employees?

2 MR. PARKER: Slide 27, please.

3 A. This is testimony from Mr. Ikeda in January of this
4 year. And this is pretty short so, I'll read it to you.

5 The question is: Why did you see a problem
6 in providing a game controller with a high degree of
7 freedom using two or more controller units?

8 Answer: Well, this was to realize, enable
9 new game control. So, using this new game controller,
10 this would enable new ways of expressing games.

11 So, again, this is the point that this is the
12 interlink between a controller and a game experience.
13 You get to experience and express yourself through the
14 controller and the game.

15 Q. So, were you able to reach any conclusions
16 regarding the contribution of the teachings of the '700
17 patent to the commercial success of the gaming systems?

18 A. Yes. In my view, from the documents I've seen and
19 the testimony I've seen, that the claimed features of
20 the '700 patent were very important features to put into
21 a controller and add to the success that Nintendo has
22 experienced with the Wii system.

23 Q. The next bucket is market/competitive position.

24 A. Yes.

25 Q. And you considered these factors?

1 A. Yes.

2 Q. How many companies compete really, are major
3 players, competitors, in the video game console
4 industry?

5 A. Well, today there's only three. There's Nintendo,
6 there's Sony, and there's Microsoft with its Xbox and
7 Xbox 360. There used to be some other companies, but
8 they basically went out of the console business. Sega,
9 Atari are two well-known names that were very popular in
10 the 1990s; but they are gone. They don't make consoles
11 anymore.

12 Q. So, I gather you consider this to be a highly
13 competitive industry.

14 A. It's intensely competitive. These companies are
15 climbing over each other trying to fight to introduce
16 the next generation game controller. They're trying to
17 change the dynamics in the marketplace and their
18 relative competitive position.

19 For example, the GameCube was a major product
20 for Nintendo when it came out in the early part of this
21 decade. But it started kind of getting long in the
22 tooth, so to speak, as Nintendo came out with a
23 PlayStation 2 and as Xbox came out with Xbox 360 and,
24 so, Nintendo knew that it needed to bring a next
25 generation product out, the Wii system. So, they did.

1 So, these companies are always jockeying to get the best
2 technology out there to protect their competitive
3 position.

4 Q. So, why is this important to the hypothetical
5 negotiation?

6 A. Well, if you have a company like Sony that's
7 licensed to have the '700 patent and can practice the
8 rumble feature and Sony can practice the 6 degrees of
9 freedom and put it in the games that are used on its
10 console system, that gives it a big competitive
11 advantage over a company like Nintendo if they didn't
12 have a license and would have to remove their products
13 from the marketplace that had those features.

14 Q. We used this phrase "hypothetical negotiation."

15 A. Yes.

16 Q. You're going to address that a little later, but
17 that's focused at the time of the first alleged
18 infringement, correct?

19 A. Yes.

20 Q. And there are rules that govern it, simply a
21 methodology that's tied to the Georgia-Pacific factors
22 as well as other factors that give the jury some
23 guidelines on how they could determine what might be a
24 reasonable royalty in a particular case, correct?

25 A. That's correct.

1 Q. Okay. Regarding Sony --

2 A. Yes.

3 Q. -- is the dominant presence of Sony in the
4 market -- in this market also important, or is it
5 important to the hypothetical negotiation?

6 A. Well, it's very important because at the
7 hypothetical negotiation, the parties would have known
8 that Sony had a license because Sony took out a license
9 in 2004. We've seen that license on the screen several
10 times.

11 The patent issued in June, 2005 and that's
12 the time of first alleged infringement and that's when
13 the hypothetical negotiation would have occurred between
14 Anascape and Nintendo. So, they would have known at
15 this hypothetical negotiation that Sony, the company
16 with the biggest market share for console systems, for
17 gaming systems, had a license for this technology.

18 Q. We're now to the last bucket --

19 A. Okay.

20 Q. -- Mr. Bratic, "Experts & Negotiation."

21 MR. PARKER: Slide 30, please.

22 A. All right.

23 BY MR. PARKER:

24 Q. How do you consider these Georgia-Pacific factors?

25 A. Well, I did rely and read Dr. Howe's report. I did

1 rely on him, and I interviewed other people in
2 connection with my work in this case; so, that relates
3 to opinions.

4 G-P Factor 15 is what I've called the
5 "catchall." It takes all the other 14 factors and rolls
6 them up into this hypothetical negotiation that would
7 have occurred between Anascape on one hand and Nintendo
8 on the other hand back in June, 2005, when the '700
9 patent issued.

10 And, so, you had mentioned earlier there's
11 various rules that govern the negotiation; and I've got
12 a slide that goes through some of the factors and some
13 of the positions of -- the bargaining position on how
14 the parties would have approached negotiation.

15 Q. Well, why don't we move to Slide 31?

16 A. Okay.

17 Q. And what does Slide 31 address?

18 A. Well, this is dealing with Georgia-Pacific Factor
19 15, which is setting up that hypothetical negotiation
20 for a hypothetical license. So, coming to this
21 hypothetical negotiation, Anascape would have come into
22 that negotiation with a certain perspective and Nintendo
23 would have come with a certain perspective. So, I've
24 kind of tried to summarize what the key points of those
25 parties were --

1 Q. Are those perspectives -- are those positions
2 typically referred to as their "bargaining position"?

3 A. Yeah, their bargaining position or their bargaining
4 point. It's no different than what happens in the real
5 world of licensing where two parties come together to
6 negotiate and do some horse trading and everybody's got
7 their view of what they think is important and they
8 bring it to the negotiation.

9 Q. Do you want to go through Anascape's bargaining
10 position?

11 A. Sure. Well, at the hypothetical negotiation in
12 this case, Anascape would have known that the '700
13 patent was assumed to be valid and infringed. They also
14 would have been aware -- Anascape's personnel, that
15 being Mr. Armstrong and Mr. Tyler, based on their work
16 in the industry and the research I've done that would be
17 attributed to everybody, they would have been aware of
18 royalty rates in the industry for controller technology.

19 Both Mr. Armstrong and Mr. Tyler had
20 negotiated licenses before for controller technology;
21 so, they were experienced negotiators. They would have
22 been aware of the industry demand for innovative
23 features, including the rumble and six axes of control.
24 And they would have been aware that the '700 patent
25 offered important technology that Microsoft -- I'm

1 sorry -- that Nintendo would be at a competitive
2 disadvantage, without a license, to Sony because they
3 would have known at this hypothetical negotiation that
4 Sony, the biggest company in this industry, had a
5 license to the '700 patent.

6 And then Anascape would have insisted on or
7 asked for a royalty rate, in my view, of at least
8 5 percent.

9 Q. What about Nintendo?

10 A. Well, from Nintendo's perspective, Nintendo would
11 have walked into that negotiation also recognizing that
12 the '700 patent was assumed to be valid and had been
13 infringed. They would be seeking to get a competitive
14 advantage, and they would be aware of the importance of
15 controller features in offering that competitive
16 advantage. And I'm meaning specifically the six axes of
17 control and the rumble.

18 And this would have been very important to
19 Nintendo because they were about to roll out a new video
20 system. The Wii system hadn't been introduced yet.
21 That was to be introduced in November, 2006. But they
22 were working on it then because they knew they needed to
23 replace the GameCube system back in 2005.

24 And they would have known that the gaming
25 industry is a highly profitable industry. Nintendo, of

1 course, was a large manufacture market of video game
2 systems with a large distribution network and a strong
3 customer base.

4 They would have been aware of the importance
5 of, and dedicated to, technological innovation and
6 controller design. And what I mean by that is Nintendo
7 certainly would have made known the fact that Nintendo
8 also contributed technology to the controller. So, I
9 don't want to suggest that Anascape is the only one
10 going to the table with technology.

11 And then they would have recognized that
12 Nintendo didn't have any alternatives. They didn't have
13 any design-around. They couldn't go back and put the
14 genie in the bottle and reconfigure the Wii and bring it
15 back out as something else.

16 Q. Were you able to reach any conclusion --

17 MR. GERMER: Your Honor, I would have to
18 object to that last comment and ask that it be stricken
19 from the record, the comment about the design-around.
20 That's not in his report. It's never been discussed.
21 It was not supposed to be presented to the jury.

22 THE COURT: All right. Well, ladies and
23 gentlemen, whether there are or are not any
24 design-around needs to be determined from the
25 technological experts. Of course, this witness is a

1 damages expert. All he can do is try to rely on what
2 the technologists have said.

3 So, I will instruct you to disregard his
4 opinion as to whether there are or are not
5 design-arounds. You'll have to determine that from
6 whether or not there is any testimony from other
7 technological engineering-type experts.

8 And for purposes of the damages expert, he
9 has got to assume that what he's been told is correct on
10 that. But that's just an assumption in terms of are
11 there or aren't there based on -- you'll have to
12 determine that -- whether you believe that from
13 testimony from the technological experts. So, I'll
14 instruct you to disregard it as an opinion that he has.

15 MR. PARKER: May I inquire of the witness,
16 your Honor, whether he is aware of any design-around
17 capabilities on the part of Nintendo?

18 MR. GERMER: Your Honor, my objection is
19 there is just nothing in his report about that.

20 THE COURT: Okay. Why don't we wait until we
21 get the other experts about -- into that, whether there
22 are or are not.

23 MR. PARKER: Thank you.

24 BY MR. PARKER:

25 Q. So, did you reach any conclusions regarding

1 respective bargaining positions?

2 A. Yes.

3 Q. And what were those conclusions?

4 A. Well, at the end of the hypothetical negotiation,
5 it is my view that the parties would have come to an
6 agreement on a hypothetical license. And the license
7 terms would be based on the sale of the licensed
8 products, the various accused products.

9 If you go back to Table 6 -- I think it's
10 Chart 6.

11 Q. That's correct.

12 A. Could you put that up?

13 MR. PARKER: Mr. Martin?

14 BY MR. PARKER:

15 Q. And while we're doing that, you understand, do you
16 not, that the Wii Remote does not -- it is not alleged
17 to infringe alone and the Wii Remotes sold are only the
18 ones -- that you've reflected here, as I understand it,
19 are only the ones sold with the Nunchuk, correct?

20 A. Yeah. I just need to clarify that to make it very
21 clear.

22 Q. All right.

23 A. What I've done here is I've capped the number of
24 Wii Remotes. There were 20.7 million Nunchuks that were
25 sold. I counted up 20.7 million Wii Remotes because you

1 have to have a Wii Remote and a Nunchuk. The Nunchuk
2 can't work by itself.

3 There were another 5 million -- approximately
4 5 million -- in other words, there was about 26 million
5 total Wii Remote controllers that have been sold. I
6 didn't count in all the Wii Remotes into my analysis. I
7 strictly limited it to the number of Nunchuks that were
8 sold. So, there's another 5 million Wii Remote
9 controllers out there that I did not consider in my
10 analysis.

11 Q. Before we do our wrap-up --

12 A. Yes.

13 Q. -- I neglected to ask you something about your
14 background earlier. And now that I have remembered it,
15 let me ask: You've testified in other cases?

16 A. Yes, sir.

17 Q. Many cases or few cases?

18 A. Many cases, over the years.

19 Q. Pardon?

20 A. Over the years.

21 Q. Have you testified and given opinions only for one
22 side, such as the plaintiff; or have you been employed
23 by parties on both sides?

24 A. No. I've represented both parties in dispute,
25 whether plaintiff or defendant.

1 Q. Can you give the jury a rough estimate of the
2 percentages, how many, what percentage plaintiff side,
3 what percentage defense side?

4 A. Well, interesting enough, over 30 years, it's kind
5 of shaken out that it's about 50/50.

6 Q. All right. We're now ready for the final recap,
7 Mr. Bratic.

8 A. Okay.

9 Q. Did you prepare charts -- yes, sir?

10 A. Well, this is the formula we talked about at the
11 very beginning. We figure out the royalty base, the
12 billion dollars in product; you figure out what the
13 royalty rate is, the 5 percent; and you multiply them
14 both. And I think that's the last chart I have, just
15 shows how I got the \$50 million.

16 Q. No. We have another.

17 A. Oh. Well, this is --

18 Q. This relates to the hypothetical negotiation.

19 A. Correct. They agree on the base; they agree on the
20 rate.

21 Q. Do you have an opinion regarding the reasonable
22 royalty rate and what that royalty rate would reflect,
23 if the jury agreed, would be damages in this case?

24 A. Yes, I do.

25 Q. What is it?

1 A. Well, you'd have a billion dollars of product that
2 has been sold -- and, again, we're talking about the
3 combination of usage -- and at a 5 percent royalty rate
4 would give you -- through the beginning of trial this
5 week, it would be \$50.3 million.

6 Q. Thank you, Mr. Bratic.

7 MR. PARKER: Your Honor, I tender the witness
8 for cross-examination.

9 THE COURT: All right.

10 Go ahead, counsel.

11 MR. GERMER: Thank you.

12 CROSS-EXAMINATION OF WALT BRATIC

13 BY MR. GERMER:

14 Q. Mr. Bratic.

15 A. Good afternoon.

16 Q. I think we met a few days ago, I believe.

17 A. In the parking lot of the same hotel everybody
18 seems to be staying at.

19 Q. Exactly.

20 I want to start by making it clear to the
21 jury what you are an expert in and what you're not an
22 expert in. You, of course, are a CPA. You have that
23 type of background; is that correct?

24 A. I have a business background.

25 Q. You don't have a degree in engineering or design?

1 A. That is correct.

2 Q. You don't proclaim to have engineering or
3 scientific ability to independently determine the value
4 of patents?

5 A. That's correct. From a technical or scientific
6 standpoint, I don't have any expertise in that area.

7 Q. You don't have any background in valuing different
8 controllers or different parts of controllers?

9 A. I'm sorry?

10 Q. You don't have any background, do you, in valuing
11 controllers or evaluating controllers or different parts
12 of controllers in game systems?

13 A. You mean from a technical perspective?

14 Q. Yes, sir.

15 A. Correct.

16 Q. Did you personally compare this particular
17 controller -- let's say from the Wii -- with other
18 controllers to try to make your own decision about what
19 the value was or was not as to the controller?

20 A. You mean from a technical perspective?

21 Q. Yes, sir.

22 A. Not from a technical perspective, no.

23 Q. Okay. Do you know -- or have you done any research
24 yourself about whether or why consumers like the six
25 axes of control that you talked about?

1 A. I did not personally do any surveys.

2 Q. Have you done any surveys about whether consumers
3 like or don't like or how much they like the rumble or
4 vibration?

5 A. No. As I said, I haven't done any surveys
6 associated with this case. I haven't done any -- I'm
7 sorry. I mean consumer surveys, talking to customers,
8 gamers.

9 Q. You're not an expert in 6 degrees of freedom, this
10 type of issue, are you?

11 A. No. From a technical standpoint, no.

12 Q. And you're not an expert in vibration?

13 A. No. That's correct.

14 Q. You're not an expert in consumer expectations
15 concerning either games or controllers?

16 A. Well, I don't know what you mean by "not an expert
17 in." I mean, I've certainly seen a lot of documentation
18 in this case about consumer expectations.

19 Q. Yes, sir. Other than reading about it in this
20 case, you would not consider yourself an expert in
21 consumer expectations about controllers or games?

22 A. Well, not as to controllers or games, no.

23 Q. Or in how games are developed?

24 A. No. I haven't done that.

25 Q. Or in the game market?

1 A. Correct.

2 Q. Is that correct?

3 A. I'm sorry. You mean from what kind of a
4 perspective?

5 Q. Do you consider that you're an expert in the game
6 market, the video game market?

7 A. Well, I don't live and breathe that market; but I'm
8 familiar with that market as --

9 Q. Okay.

10 A. -- both as a consumer for a number of years.

11 Q. Okay. I believe you've already told me that you've
12 not performed any surveys yourself --

13 A. Correct.

14 Q. -- to see what people might like or why they might
15 like it or how significant games are, et cetera; is that
16 correct?

17 A. That is true.

18 Q. Just -- for example, you, of course, have, as you
19 made clear, relied upon many other things, other things
20 done by other people, to come to your conclusions, have
21 you not?

22 A. Well, I'm relying on the totality of the
23 circumstances of this case.

24 Q. Right. Could you refer back to your Plaintiff's
25 Exhibit 400?

- 1 A. If you give me a copy, sure.
- 2 Q. You don't have a copy of the plaintiff's exhibits?
- 3 A. 400?
- 4 Q. Yes.
- 5 A. No, sir.
- 6 Q. I will give you some information.
- 7 A. Thank you very much.
- 8 I'm sorry. 400?
- 9 Q. It's not in there.
- 10 A. Oh.
- 11 Q. Do you see up on the screen the survey that you
- 12 referred to earlier about -- I think the next page of
- 13 that survey talks about the consumer likes and dislikes
- 14 about the rumble.
- 15 A. Bear with me one second.
- 16 Q. I believe you quoted from page 2. It's up on the
- 17 screen, I believe.
- 18 A. Yeah. I'm just -- yeah. I just didn't know
- 19 what -- you keep talking about an exhibit number, and I
- 20 don't refer to them by exhibit number. I refer by
- 21 document. If this is the document from September 25th,
- 22 2006, then yes, this is one I've seen.
- 23 Q. And that's what you spoke about earlier, is it not?
- 24 A. It is.
- 25 Q. Now, if we go back to the page -- well, let me ask

1 you this --

2 A. Yes.

3 Q. -- you told the jury that you relied upon this
4 document?

5 A. In part.

6 Q. In part.

7 You didn't do any independent investigation
8 to see if it was accurate?

9 A. That's correct.

10 Q. Did you have any reason, just from the document
11 itself, to suspect the document?

12 A. No.

13 MR. GERMER: Let's go to page 1. This is
14 page 2. Can we go back to page 1? And go to the middle
15 paragraph.

16 BY MR. GERMER:

17 Q. Now, surely you read this paragraph when you looked
18 at this document.

19 A. Yes, I did.

20 Q. And this paragraph tells us, does it not, that this
21 very study you're talking about was commissioned by
22 Immersion who, according to this same article, had a
23 very significant reason to make the survey come out a
24 certain way, partly because they wanted to get back at
25 Sony.

1 A. Well, that -- it's just saying that that's a
2 caveat, but it doesn't change the fact of what the
3 results were from the people who answered the questions
4 about what they did and didn't like about rumble.

5 Q. Doesn't this language say that -- be careful.
6 Maybe this survey can't be trusted fully because the
7 company that's doing it has a major financial reason to
8 do what they're doing and it's known that you can word
9 questions in a manner to get the desired result and
10 Immersion wants to get back at Sony?

11 A. Well, it certainly says at the end --

12 Q. So -- and this is not a big point. I want to see
13 if we can help the jury understand that when you throw
14 out all these things --

15 A. Right.

16 Q. -- it may turn out there's a lot of other
17 information that would make those statements that you're
18 reading perhaps not be so trustworthy.

19 A. Well --

20 Q. Do you agree with that?

21 A. No, I don't because I don't have anything to
22 dispute the results of this survey. I mean, if you want
23 me to speculate, I will.

24 Q. Okay. So, if I tell you about a survey and I say,
25 "Now, be careful. The people doing the survey were

1 biased," that would not affect you?

2 A. Well, no, because I do surveys for a living; and I
3 do -- and consumer surveys. And every single survey
4 ever done known to man is biased by the very nature of
5 the fact that somebody has to propound the question.
6 So, the question is the degree of reliance on the
7 outcome of the information.

8 Q. I believe you're assuming, are you not, that the
9 Wii Remote by itself doesn't infringe?

10 A. The Wii Remote by itself, I understand, does not
11 infringe the '700 patent.

12 Q. Yes, sir --

13 THE COURT: Okay. Excuse me a minute,
14 counsel.

15 Ladies and gentlemen, we're going to go ahead
16 and take a break. I'll ask you to be back at ten of.

17 (The jury exits the courtroom, 3:33 p.m.)

18 THE COURT: Rather than get involved in a
19 comment on the weight of the evidence through
20 Mr. Germer's objection and Judge Parker's question, the
21 report didn't talk about the precise words
22 "design-around"; but it did talk about the benefits
23 enjoyed by the use of the patent invention over
24 alternative means of achieving similar results.

25 So, on one hand, technically it's correct

1 that it was a design-around; but on the other hand,
2 technically he did have in his report about alternative
3 means of achieving similar results. Rather than try to
4 explain that to the jury and make them think I was going
5 with one side or the other -- and I guess there are six
6 other ways five other judges could have done this. I
7 think that is -- I mean, some questions can be asked of
8 him on that; but it would be best -- it's true he didn't
9 talk about design-around. I don't think I've heard any
10 testimony in those terms from Dr. Howe, either. But in
11 terms of talking about alternative means and so forth,
12 he's obviously talked about that in his report and could
13 be asked about that if anybody wants to do it.

14 All right. We're in recess and -- yes?

15 MR. PARKER: Which report were you referring
16 to?

17 THE COURT: I'm looking at Walter Bratic's
18 report at page 42, paragraph --

19 MR. PARKER: I misunderstood. Thank you.

20 THE COURT: Yeah. It's his report all right.
21 It's just the precise term wasn't used and rather than
22 get into that discussion in front of the jury, I thought
23 we would wait for the break and if you want to clear
24 that up on redirect, go ahead. If you want to --
25 however you want to deal with it. I mean, it's one of

1 those bizarre, yes, the objection is technically correct
2 but --

3 MR. GERMER: Well, your Honor, it's not just
4 technically. I don't particularly want to deal with him
5 about design-around when not one technical person in the
6 case has talked about it and when he didn't describe any
7 design-around, per se, in court.

8 THE COURT: Well, he talked about it in terms
9 of alternative means and you're correct no technical
10 person has talked about it and that's why I told them
11 about that. But in all fairness, there was this other.
12 That's why I'm bringing it up. And how the lawyers
13 handle it will have to be handled. But I'm trying to be
14 fair on what's in the report and trying to apply that to
15 both sides and that was there.

16 All right. We're in recess, then, until ten
17 of.

18 MR. GERMER: Your Honor, I'm sorry. I've got
19 one other nit.

20 THE COURT: Okay.

21 MR. GERMER: Before this started, I told the
22 other side that we were not going to call our damage
23 expert Keith Ugone and because of that they took out
24 some slides so that issue I thought was taken care of.
25 Nevertheless, the witness started referring to our

1 damage expert. Since he's not going to be testifying, I
2 can't imagine why he would be talking about our damage
3 expert; and I would -- unfortunately, I can't cure it
4 because the instruction would be worse than where we
5 are; but I would at least ask that we don't get into
6 that again.

7 MR. PARKER: I think all he said, judge, was
8 he reviewed the expert's report and might have mentioned
9 his name and when he reviewed the report he was an
10 expert on the case. I didn't purposely -- I purposely
11 took the slide out. I purposely didn't ask a question
12 about Keith Ugone no longer being in the case.

13 MR. GERMER: That's true. The witness
14 volunteered it. Judge Parker certainly didn't do it. I
15 agree with that.

16 THE COURT: I understand. And how you want
17 to deal with that -- if you're now going to call
18 Dr. Ugone or not call him -- if you've got a suggestion
19 on how to deal with it -- I mean --

20 MR. GERMER: For beginners, I'd like to just
21 have it not discussed anymore but --

22 THE COURT: Okay. Perhaps we could mention
23 to Mr. Bratic don't mention Dr. Ugone again, one way or
24 the other; and -- I didn't have a yardstick to reach
25 over and tap him so I couldn't stop it myself right

1 then.

2 All right. We're in recess until ten of.

3 (Recess, 3:38 p.m. to 3:49 p.m.)

4 (Open court, all parties present, jury

5 present.)

6 BY MR. GERMER:

7 Q. Mr. Bratic, I think you'd finished your testimony
8 on direct. That is where I would like to start. You
9 said something about this -- in the context of the
10 hypothetical negotiation, that this controller, the Wii
11 controller, has lots of other stuff in it besides the
12 Armstrong patents which you are assuming are valid and
13 infringed.

14 A. Correct.

15 Q. And you certainly agree with that, do you not?

16 A. Sure. I understand there is other technology that
17 Nintendo contributed.

18 Q. Yes, sir. And you understand -- or do you believe
19 that the Wii Remote is really a revolutionary,
20 significant advance in the game industry?

21 A. I'm not a technical expert. So -- you've
22 established that; so, I really can't comment on
23 "revolutionary."

24 Q. What about your market expertise? Could you tell
25 from --

1 A. Well, I'm sorry. What I do understand is it's the
2 first mass-marketed game controller with an
3 accelerometer in it. That, I understand. And it's been
4 a very successful product. There's no question about
5 that.

6 Q. All right. So, what you're trying to do is say --
7 you're not trying to say it's a 5 percent or whatever
8 the royalty is on the entire Wii controller. You're
9 trying to say it's 5 percent or whatever the jury might
10 say for the contribution or the involvement of this
11 Armstrong patent.

12 A. Not quite.

13 Q. Okay. What I -- could I try again?

14 A. Be my guest.

15 Q. I'm now referring to your deposition, which maybe I
16 should have done in the first place. You said at one
17 point that you were not seeking a royalty on anything
18 else that's in the controller other than the accused
19 features.

20 A. I'm sorry. Where are you reading from?

21 Q. From your deposition, page 48.

22 A. Let me find that.

23 Q. But I -- just -- first, can you agree with me
24 that's true?

25 A. Is what true? I'd like --

1 Q. Is it true that you're really only trying to
2 evaluate not everything else that's in the Wii
3 controller but only the accused features? Is that
4 correct or not?

5 A. Well, all I'm trying to do is evaluate and
6 attribute the value proposition with respect to the
7 patented features as they relate to the accused
8 products. That's all. Nothing more.

9 Q. All right. Would you say that you're trying to
10 evaluate the 5 percent with the benefit that's brought
11 by the patented features?

12 A. I would say that 5 percent is reflective of all the
13 G-P factors, including the use and benefit of the use of
14 the patented feature.

15 Q. Would you say that it's all a matter of degree and
16 you have to figure out how much of an improvement over
17 the prior circumstances was actually made by the patent
18 technology?

19 A. No, not necessarily because when I'm assuming a
20 patent is valid and infringed, I'm assuming it is an
21 improvement over the prior art. Otherwise, the Patent
22 Office wouldn't have granted a patent to Mr. Armstrong.
23 So, then -- once you know and assume the patent is valid
24 and infringed, then you go around doing analysis and
25 look at what benefit and the different buckets we were

1 talking about, the five different silos or buckets --

2 Q. Yes, sir.

3 A. -- that are part of the G-P analysis.

4 Q. Would you agree that you still have to figure out
5 how much of an improvement -- even though you're -- I
6 understand and the jury, I hope, understands that you're
7 assuming the patent is valid; it's infringed. But don't
8 you still have to figure out how much of an improvement
9 that patented technology brought?

10 A. Sure, that's part of the analysis; but it's not
11 limited to that.

12 Q. I didn't suggest that. That's what you're trying
13 to get at, though, isn't it, what is the benefit?

14 A. I'm trying to get to the totality of the
15 circumstances of the hypothetical negotiation, which
16 includes, in part, the benefit.

17 Q. Thank you.

18 Basically the way you're evaluating it,
19 you're seeking royalties for the accused features of
20 vibration and 6 degrees of freedom, are you not?

21 A. That's what I understand are the patent features
22 that are being asserted.

23 Q. Okay. So, when you're coming up with your
24 royalty --

25 A. Yes.

1 Q. -- whatever that may be, you're assuming that
2 Mr. Armstrong, through his patent, brought to the table
3 vibration and six axes of control.

4 A. As taught by the patent.

5 Q. Yes, sir. And what you mean by that is he really
6 didn't invent the rumble or the vibration, did he?

7 A. I don't know if he invented it or not. All I know
8 is I've been asked to assume that it's the metes and
9 bounds, meaning that property description in the claims
10 of the patent that are assumed to be valid and
11 infringed.

12 Q. And he didn't assume -- he didn't invent -- or do
13 you know whether he did or not -- the six axes of
14 control or six axes of freedom?

15 A. I don't know whether he invented them or not.
16 That's kind of irrelevant to my analysis.

17 Q. Actually, I thought for purposes of your case you
18 were assuming that he did.

19 A. No. I assumed that the '700 patent was valid and
20 infringed, and whatever is taught by the '700 patent is
21 what the invention is that I'm trying to give an
22 economic -- assign an economic value to.

23 Q. Yes, sir. And that would be -- I thought I heard
24 you say, but maybe I didn't -- the six axes of control.

25 A. The way it's taught in the '700 patent, the claims

1 of the '700 patent that are being asserted.

2 Q. So, you don't assume that he invented it?

3 A. No.

4 Q. Okay.

5 A. I don't assume that he invented six axes of control
6 or --

7 Q. Thank you.

8 A. -- any of them.

9 Q. Could we look at page 23 of your testimony?

10 A. Sure.

11 Q. You've got the deposition there, and it may --

12 A. If I can get here.

13 Q. It may appear on the screen, too.

14 A. Page 23?

15 Q. Yes, sir.

16 A. Okay. I've got it.

17 Q. You can be reading the page. You notice --

18 THE COURT: You need to give control over to
19 defendants.

20 Go ahead, counsel.

21 MR. GERMER: Thank you.

22 BY MR. GERMER:

23 Q. Mr. Bratic, you've had time to read page 23, have
24 you not?

25 A. Well, I started looking at it.

1 Q. I don't know if we can pull it up, but do you agree
2 with me that you said in there towards the -- oh, about
3 ten lines from the bottom, that: I'm assuming that the
4 patent is valid and infringed.

5 And right before that, you say: Well, I'm
6 going to tell you that it's my assumption that he is,
7 because I'm assuming that the patent is valid and
8 infringed.

9 You see that, do you not?

10 A. I do.

11 Q. Now, if we back up --

12 MR. GERMER: Let's go back up toward the top
13 of the page.

14 BY MR. GERMER:

15 Q. And do you see at line 7 that the question was:
16 Well, is it your opinion that Brad Armstrong invented
17 six axes of control controllers?

18 There was an objection, so forth.

19 And then your answer was: I'm going to tell
20 you it's my assumption that he is because -- et cetera.

21 A. Well, that's not my -- no. That's -- you're not
22 reading my testimony on that subject. You're skipping
23 the lines 10 through 16, and then you're skipping the
24 lines on page 24 from line 3 to 13 on that very subject.

25 Q. Yes, sir. Well, let's look at line 14.

1 Question: Is it your opinion that Brad
2 Armstrong invented six -- I'm sorry. That's 7.

3 Number 14: Is it your understanding that he
4 was the first person to invent such a controller?

5 Answer: I'm going to tell you he is.

6 Are you with me yet or not?

7 A. Yes.

8 Q. Do you want me to start over?

9 A. Right. But I go on to talk in paragraph -- lines
10 17 to 23 and then he asked the same question at line 24
11 and I give him an answer on the next page on that very
12 subject.

13 Q. Do you stand by your testimony that Mr. Armstrong,
14 you are assuming, invented the six-axis controller, as
15 this says in plain English?

16 A. Well, that's what I'm telling you. If you read
17 what I said to that question on page 24, my answer is:
18 I really don't know how to answer that question other
19 than the answer I gave you because my understanding is
20 I've been asked to assume that he has a valid patent
21 with respect to the '700 patent and what it teaches with
22 respect to a controller having six axes of control as
23 well as a rumble feature. That's what I understand.
24 Whether somebody else may have invented some other type
25 of controller with some other features, I don't know

1 because you're asking me about prior art and that seems
2 to me to be a legal question.

3 Q. Yes, sir. And I don't know that that has much to
4 do with my question. But if we go back to the other
5 page, aren't you assuming -- because it's part of your
6 assumption that the patent is valid and infringed --
7 that, in fact, Mr. Armstrong invented the six axes of
8 degree controller. That's what you say right here.

9 A. No. That's not what I say here because you're
10 completely ignoring what's on page 24 --

11 Q. All right.

12 A. -- about the very same question.

13 Q. Okay. So, do you now believe -- setting aside what
14 you've said here, do you now believe or is it your
15 understanding that Mr. Armstrong did not invent the six
16 axes of degree and control?

17 A. Well, it's not a question of what I believe. I
18 don't have an opinion on that one way or the other.

19 Q. Are you making an assumption in this case one way
20 or the other?

21 A. No. I'm -- the only assumption I'm making is
22 that --

23 Q. I think that calls for a "yes" or "no" answer --

24 A. Okay. Reask your question, please.

25 Q. Are you making an assumption one way or the other

1 as to whether Mr. Armstrong invented the six degree of
2 control controller?

3 A. No, I'm not.

4 Q. Okay. So, whether he invented that controller or
5 not doesn't affect your evaluation in this case? I
6 think that calls for a "yes" or "no."

7 A. No, it doesn't because that's not my opinion at
8 all. I didn't ever say he invented a controller.

9 Q. You mentioned earlier the accelerometer. Did
10 Mr. Armstrong invent the accelerometer?

11 A. Not according to Dr. Howe. It's been out there for
12 many, many years.

13 Q. All right. So, you don't -- in terms of --

14 THE COURT: Sir, could you either slide
15 forward or pull the microphone toward you so we can be
16 sure to hear?

17 THE WITNESS: Oh, I'm sorry. I didn't know
18 it was movable. That helps. Sorry.

19 BY MR. GERMER:

20 Q. So, you understand --

21 A. One second.

22 Q. I'm sorry.

23 A. Sorry. There we go.

24 Q. You understand, do you not, that the accelerometer
25 is not the accused feature?

1 A. Well, listening to Dr. Howe's testimony this
2 morning, I'm not sure how to answer your question. I
3 understand the Wii Remote by itself, which has an
4 accelerometer in it --

5 Q. Okay.

6 A. -- isn't accused of infringing the '700 patent.

7 Q. Could you look, please, at page 156 of your
8 deposition?

9 A. Okay.

10 Q. Let's see if we can find anything to help us on
11 that.

12 A. I'm sorry. 156?

13 Q. Page 156.

14 A. All right. Bear with me. Okay. There we go. I'm
15 there.

16 Q. And if you look at -- it looks to me like line 5 is
17 your answer: So far as I know, no accelerometer is in
18 any of the -- in any of the remote controllers is
19 accused of infringing in and of itself.

20 Is that your testimony?

21 A. That was my testimony then, yes.

22 Q. Okay.

23 A. If it's true or not, I don't know.

24 Q. All right.

25 A. I'm not a technical expert.

1 Q. And I think -- or do you admit that Mr. Armstrong's
2 patent doesn't talk about accelerometers?

3 A. Oh, I'd have to look at the patent.

4 Q. You have looked at it, though, haven't you?

5 A. Oh, yeah. But I haven't looked at it in a while.

6 Q. Do you credit Mr. Armstrong's patent with having
7 anything to do with the accelerometers?

8 A. I'm -- not for me to say.

9 Q. Based on what you know in the case, do you credit
10 Mr. Armstrong's patent with inventing anything having to
11 do with the accelerometer?

12 A. I can't answer that question because that's -- in
13 my view, it's a technical question.

14 Q. All right.

15 A. And I defer to Dr. Howe.

16 Q. Okay. Can we look at page 158 of your deposition?

17 A. Sure.

18 Okay.

19 Q. If you look at line 14 -- and I believe that says:
20 Do you credit Brad Armstrong and the '700 patent with
21 having invented anything with respect to the
22 accelerometer and the Wii Remote or the Wii Nunchuk?

23 And I believe you said there: No.

24 A. That's true.

25 Q. Okay. Basically, based on what you've learned,

1 would you give Nintendo the credit for the
2 accelerometer?

3 A. No, not from what I've learned, not according to
4 Dr. Howe. Accelerometers have been out there for many,
5 many years, well before Nintendo decided to put it in
6 the Wii.

7 Q. What about giving Nintendo credit for the
8 accelerometer as used in the Remote?

9 A. Well, I understand it's a generic part you can buy
10 for 5, \$7; and if you're buying them in the volumes
11 Nintendo buys them for, you can buy them for even less.
12 There's nothing special about that. It's an
13 off-the-shelf chip.

14 Q. All right. Let's look at 158 again.

15 A. I'm sorry. 158?

16 Q. Yes, sir, the same page we were on.

17 A. I've got it.

18 Q. Right after I asked -- somebody asked you: Do you
19 credit Brad Armstrong with the accelerometer?

20 A. Yes.

21 Q. You said: No.

22 Then you were asked: Okay. Who do you give
23 the credit to -- who do you give the credit to that to?
24 That's what that says.

25 And your answer was what?

1 A. Nintendo.

2 Q. Okay. I think the jury knows this but this
3 deposition that we're referring to, this was a chance
4 for people on our side to ask you questions under oath
5 to see what you knew and what you didn't know.

6 A. Right.

7 Q. And you're very familiar with that process. You've
8 been through it many times.

9 A. That's true.

10 Q. Thank you. Now, did you discuss in your report the
11 extent to which the success of the Wii is tied to the
12 unique Wii Remote controller as opposed to the allegedly
13 incremental benefit of the patent?

14 A. I'm sorry. Would you repeat that?

15 Q. Yes, sir. And I'm trying to make it fairly precise
16 so we can get a "yes" or "no" and move on.

17 A. Well --

18 Q. Did you discuss in your report --

19 A. Sure.

20 Q. -- the extent to which the success of the Wii is
21 tied to the unique Wii Remote controller as opposed to
22 the allegedly incremental benefits of the patent?

23 A. I'm sorry. There's something about that question.
24 I'm not sure what you're asking. Could you just repeat
25 it one more time, please?

1 Q. Did you discuss -- I suspect you're going to have
2 an answer by now. But did you discuss in your report
3 the extent to which the success of the Wii is tied to
4 the unique Wii Remote controller as opposed to what
5 we've been talking about, the alleged benefit from the
6 patent itself? Did you discuss that anywhere in your
7 report?

8 A. Not in those specific words, but I certainly gave
9 Nintendo credit for whatever its contribution was of its
10 technology. And that was discussed in my report.

11 Q. You were here this morning or -- well, let me ask
12 you: Were you here when Mr. Armstrong testified?

13 A. I was here for the entire trial.

14 Q. Okay. And you heard Mr. Armstrong respond in terms
15 of what he thought he had invented and what he thought
16 he had not invented, did you not?

17 A. Yes, but that wasn't today.

18 Q. I said today -- that's why I switched it.

19 Whenever he testified, you heard him testify
20 about what he did invent or what he didn't invent.

21 A. Yes.

22 Q. Do you recall that he testified that he didn't
23 invent -- Mr. Armstrong didn't invent the concept of 3-D
24 graphics on a computer?

25 A. Well, you're asking me what I recall him saying.

1 There was a lot of stuff he said.

2 Q. If you don't know, just tell me you don't know.

3 A. I just don't recall the specifics of that specific
4 statement.

5 Q. What assumption are you making as an expert as to
6 whether he did or did not invent the concept of the 3-D
7 graphics?

8 A. Oh, I'm not assuming he invented 3-D graphics.

9 Q. That's fine.

10 Did you hear him say that he wasn't the first
11 to invent game controllers?

12 A. Yes.

13 Q. And that he wasn't the first to develop a
14 controller for use with 3-D graphics?

15 A. That, I recall.

16 Q. And that he wasn't the first to invent 6 degrees of
17 freedom?

18 A. That -- yes.

19 Q. And he wasn't the first to invent a single member
20 6-degree-of-freedom controller?

21 A. I'm sorry. You said "single member."

22 Q. That he wasn't the first to invent a single input
23 6-degree-of-freedom controller?

24 A. That, I don't specifically recall.

25 Q. All right. Are you making any assumption about

1 that one way or another in your opinion?

2 A. No.

3 Q. Did you hear him say that he wasn't the first to
4 invent the bi-directional proportional sensors?

5 A. I believe so.

6 Q. Did you hear him say that he didn't invent the
7 one-axis or two-axes joystick?

8 A. The one axis -- I'm sorry. Someone coughed.

9 Q. The one- or two-axis joystick.

10 A. Yeah, I think he said that.

11 Q. Maybe I can help you. Have you seen reference to
12 the Nintendo 64?

13 A. Yes.

14 Q. And that doesn't infringe according to the
15 allegations in this case, right?

16 A. That's correct. It really wouldn't matter from an
17 economic perspective anyway because that is a legacy
18 product no one sells.

19 MR. GERMER: Your Honor, could I ask that the
20 witness be responsive and not volunteer information?

21 THE COURT: In this line of questioning, I'm
22 going to overrule that.

23 MR. GERMER: All right.

24 BY MR. GERMER:

25 Q. In the Nintendo 64, it had joysticks, did it not?

1 A. Yes.

2 Q. And it had cross-switches?

3 A. You mean the D-pad?

4 Q. Yes.

5 A. Yes. It had one.

6 Q. Yes, sir. And it had rumble, did it not?

7 A. Well, not in the device. You had to attach it.

8 Q. But it had the concept of rumble. And if somebody
9 bought the game with the attachment, you could have the
10 vibration, the rumble as we talked about?

11 A. If you bought the attachment, you could attach it
12 to the N64 and get rumble.

13 Q. Did you hear him say that he was not the one that
14 thought of using an accelerometer in a controller?

15 A. No, I don't recall that specifically.

16 Q. Do not?

17 Do you make any assumption about that one way
18 or the other?

19 A. No. I didn't assume that to be the case in my
20 analysis.

21 Q. In terms of the games --

22 A. Yes.

23 Q. You've talked about the games a little bit. Some
24 of the games that the Wii system has can be played with
25 just the Wii Remote controller; is that right?

1 A. You mean the Wii Remote?

2 Q. Yes, sir.

3 A. Not the Wii controller, because there is a Wii
4 Classic Controller.

5 Q. Wii Remote.

6 A. Yes. There are some games, some basic games.

7 Q. And other games require the use of more than the
8 Wii Remote. It requires either the Nunchuk or the
9 Classic.

10 A. The most popular games require the use of the Wii
11 Remote and the Nunchuk.

12 Q. Let's see. Have you done a survey to determine
13 which of those games are the most popular?

14 A. No. But I've seen the reports that are produced,
15 the industry reports, showing the ranking of all the
16 games and who's selling what games and what features
17 they have and they are discussed in my report and they
18 were discussed in my deposition.

19 Q. Do you agree that -- well, first of all --

20 THE COURT: Excuse me, counsel.

21 You may want to pull that microphone -- if
22 you want anybody to hear your testimony -- I'll put it
23 this way because I'm not going to mention it again. If
24 you want people to hear what you're saying, I'd lean
25 into that microphone.

1 THE WITNESS: Okay. Thank you.

2 BY MR. GERMER:

3 Q. The Wii Remote has games such as tennis, golf,
4 where you only use the Wii Remote and you don't use the
5 infringing combination.

6 A. Right. They're part of the package when you buy
7 the console.

8 Q. Okay.

9 A. Those basic games.

10 Q. So, some of the games, when you use them, you're
11 infringing, you're doing something infringing according
12 to the assumption you're making; and some of the games
13 you don't.

14 A. Right.

15 Q. Okay. And I think you've told us that in trying to
16 come up with a proper percentage, you have to consider
17 the fact that not all the games infringe.

18 A. I'm not sure what you mean by "proper percentage."

19 Q. In coming up -- I think you've told us that in
20 trying to determine what the proper royalty would be,
21 that you have to consider the fact that not all the
22 games use the technology that you say is infringing.

23 A. No, that's not true at all.

24 Q. All right. Let's look at page 149.

25 A. Okay.

1 Q. If you start it at page 5 [sic] and go down, I
2 think, to 10 or 11.

3 A. I'm sorry. Line 5?

4 Q. Yes, sir, line 5.

5 It says: Not all the games use movement
6 along six axes or vibration feedback.

7 You say: Correct.

8 And then the question is asked: What impact
9 does that have or did that have on your opinions with
10 regard to the hypothetical negotiation?

11 And I believe you answered: Well, that has a
12 dampening effect on how much you can charge for the
13 royalty -- in the royalty rate.

14 Do you agree with that?

15 A. Yes.

16 Q. Okay.

17 A. That's what I said.

18 Q. And actually you said at other places, if you can
19 confirm for me without us going to it, that the fact
20 that not all games use a six axes or vibration feedback
21 should be considered.

22 A. Oh. Yeah, and they were.

23 Q. If somebody was going to buy -- or pay for a
24 royalty -- and I realize you've considered this, but
25 just so the jury could understand. If you're talking

1 about paying for a royalty and you have a system that
2 only uses a few games that actually infringe versus a
3 system that uses every game that infringes, what you're
4 saying is, I think, that would be a factor that would
5 come into consideration.

6 A. It would be a factor. But at the same time, you
7 have to recognize that a company like Nintendo wants
8 total freedom to be able to have his customers use
9 whatever products they want without being able to
10 channel their customers of what games you can and cannot
11 play.

12 MR. GERMER: Your Honor, I would ask that the
13 response be stricken. I asked a simple "yes" or "no"
14 question and got another discussion.

15 THE COURT: I'm going to overrule that.

16 MR. GERMER: All right.

17 THE COURT: Some of these questions are a
18 little more complicated.

19 BY MR. GERMER:

20 Q. Do you agree that Nintendo has over 20 years of
21 history in developing video games and software and
22 actually is the only company in the world that's solely
23 dedicated to the development of video games?

24 A. That is true. That's absolutely true.

25 Q. And that Nintendo has an established reputation of

1 designing and publishing innovative games?

2 A. Yes. That is all true.

3 Q. And that Nintendo has an extensive base in
4 consoles?

5 A. Yes.

6 Q. Customers that have bought its games.

7 A. And they have evolved over time.

8 Q. Okay.

9 A. You know, they have different console systems at
10 different points in time.

11 Q. Let's talk a little bit about the license that
12 you've gone through. I heard Mr. Armstrong say that a
13 license -- he kind of compared it to a license to drive
14 a car. Is that a decent analogy?

15 A. Yeah. That's one way to analogize it. Sorry.

16 Q. And you're assuming, are you not, in your
17 evaluation of a license, that we're talking about a
18 nonexclusive license?

19 A. That is correct. It would be a nonexclusive
20 license.

21 Q. Correct. Now, if you're looking at an agreement,
22 if we're trying to compare agreements out there to see
23 what the royalties are, if you looked at an agreement
24 that involved an exclusive license, would you expect the
25 royalty to be higher or lower for that exclusive

1 license?

2 A. It depends. Depends on a number of factors. I
3 don't think you can make a universal statement that it
4 would be higher or lower.

5 Q. Does an exclusive license mean that only the person
6 that gets it can do the particular thing?

7 A. Right.

8 Q. So, instead of the person just being one of many
9 companies, for example, that could do it, they would be
10 the only company?

11 A. Correct.

12 Q. Is it also true that a lot of these agreements
13 sometimes have more than just a license agreement; they
14 have technology that's involved, also?

15 A. Sure. Sometimes you can have technology sharing
16 agreements --

17 Q. And --

18 A. -- as part of a patent license.

19 Q. And is it also true that if you have technology,
20 that would be sort of like instead of a license to drive
21 a car, it would be like here's a license to drive a car
22 and I'll tell you how to build it?

23 A. Yes. Yeah.

24 Q. And certainly if the agreement contained that type
25 of additional benefit, not just the license to drive but

1 how to build the car, you would expect it to be worth
2 more money.

3 A. I would say it could have more, depending on what
4 you're teaching somebody how to build. If you're
5 teaching somebody how to build an Edsel, that's not all
6 that helpful.

7 Q. True.

8 You would agree that in the real world people
9 negotiate different types of agreements in terms of
10 royalties?

11 A. You mean in the real world? Yes.

12 Q. Yes, sir.

13 A. They come in all flavors, like Baskin-Robbins.

14 Q. Yes, sir. So, when you consider what kind of
15 royalty should be involved here -- first of all, you've
16 only talked about a running royalty; is that correct?

17 A. That's correct.

18 Q. That's all you've addressed in your report.

19 A. Well, no. I concluded a running royalty would be
20 appropriate in this case.

21 Q. Yes, sir. I don't recall you discussing anything
22 about a lump-sum royalty. Did you do that?

23 A. I'm sorry. What is your question? You mean here?

24 Q. Did you consider, in coming up with your opinions
25 for this jury, the notion of a one-time payment instead

1 of a running royalty?

2 A. Did I consider it in my analysis?

3 Q. Yes, sir.

4 A. Yes, I did.

5 Q. Okay. And you recognize that that is something
6 that would come up in a negotiation -- is it going to be
7 a running royalty, is it going to be lump sum, or is it
8 going to be a running royalty with a cap? That's
9 another possibility, isn't it?

10 A. Or annual minimums with running royalties.

11 Q. Yes, sir.

12 A. There's lots of combinations.

13 Q. And you could have combinations of -- you could
14 start off at 5 percent, and you can go down with volume.
15 The more volume there is, the lower it gets. All of
16 these are possible ways to do it, are they not?

17 A. Sure. But they're possibilities to be considered.

18 Q. All right. And, in fact, in different cases where
19 you testified under the circumstances, you have found
20 that those may be the appropriate way to do it.

21 A. Depending on the circumstance. That's right. It's
22 very -- excuse me. I'm sorry. It's very fact-specific
23 to the specific case at hand.

24 Q. Now, we talked a lot about a number of different
25 reports that you read reports of; but I want to talk to

1 you about this Sony license which you mentioned.

2 A. All right.

3 Q. Now, you've told us, I believe -- and we heard
4 Mr. Tyler say -- that under the Sony license, there was
5 \$10 million paid; but it was paid for the '606 patent,
6 which is not the one that's involved in this case.

7 A. That's correct. It was an exclusive license for
8 \$10 million.

9 Q. Yes, sir. And in terms of the patent involved in
10 this case, what you had was Mr. Armstrong giving Sony
11 the application for the '700 which had been approved
12 plus some other patents; and, in return, he got some
13 patents back from Sony.

14 A. There was a cross-license. That's correct, between
15 both parties.

16 Q. So, in terms of cash, Mr. Armstrong did not get any
17 cash -- or Anascape did not get any cash for the '700
18 application.

19 A. For the -- that is correct. They did not get any
20 cash for what was an application at that time; although,
21 they did get valuable patent rights from Sony.

22 Q. They got some cross-rights.

23 A. Right. But they -- Anascape considered them to be
24 very valuable patent rights.

25 Q. Although they haven't used them yet.

1 A. No, they haven't; but they intended to manufacture
2 product to the point where Mr. Tyler was traveling to
3 China with drawings of controllers to have them made.
4 So, they planned on manufacturing. That's why they
5 wanted Sony patents.

6 Q. Would you agree that the fact that Mr. Tyler,
7 Mr. Armstrong, and Anascape were willing to take a lump
8 sum of 10 million for another patent -- not our
9 patent -- would be some indication that they are
10 receptive to lump-sum payments?

11 A. I would agree that it would be some indication, but
12 you'd have to consider the facts and circumstances of
13 how and why they negotiated that transaction in 2004
14 versus what would have happened in June, 2005, in our
15 hypothetical negotiation for the '700 patent.

16 Q. And do you agree that it would be some indication
17 that Sony preferred the lump-sum method?

18 A. Well, Sony definitely preferred a lump sum. That's
19 what they settled for.

20 Q. Okay. Now, at the time of this negotiation with
21 Sony -- that's in 2004 -- as you understand it, was
22 Anascape saying to Sony, "Hey, you're infringing our
23 patents, including the '700 patent. We want to sit down
24 and talk with you and come up with a solution"?

25 A. No. That's not true at all. They couldn't have

1 infringed the '700 patent in 2004. It hadn't issued.

2 Q. Do you think that they were saying to Sony that
3 "You're infringing our patents and you may be infringing
4 our '700 application once it gets approved and it's
5 about to get approved"?

6 A. I don't know how to answer that question. You
7 can't infringe an application. Your question suggests
8 that you can infringe an application.

9 Q. Do you think that Mr. Armstrong, at the time he was
10 negotiating, was thinking to himself, "Gosh, I have the
11 '700 application that's already been approved. I have
12 this valuable application which when it gets approved
13 will let me say to Sony, 'You're infringing my patent'?"

14 A. The valuable patent.

15 Q. Yes.

16 A. The one that you said was a valuable patent
17 application which became a valuable patent, yes. I'm
18 sure he would have considered that.

19 Q. He would have believed, I presume, that once he got
20 that '700, it was going to be valuable.

21 A. Yes.

22 Q. Okay. So, he knows, when he's sitting there in
23 2004 dealing with Sony --

24 A. Yes.

25 Q. -- that he's got an application that's already been

1 approved -- although, you're right, it's not an official
2 license yet; but it's already approved -- and once he
3 gets it, he's going to have a very big case to make
4 against Sony.

5 A. And your question is would he likely have? I don't
6 know. I assume so, but I don't know for sure.

7 Q. Okay.

8 A. I didn't ask him about that.

9 Q. But his mind-set would be that he has something
10 valuable in that '700 application which he knows has
11 already been approved.

12 A. Yeah. But he also knows there is a risk that even
13 though it's been approved, it may not be issued. There
14 is always the possibility it could be withdrawn.

15 Q. Sony at that time was the biggest company in the
16 field by far, right?

17 A. Still are.

18 Q. They were over 50 percent at that time?

19 A. 50, 55 percent, yeah, market share of installed
20 console base.

21 Q. I have some references that -- well, did you read
22 Mr. Armstrong's deposition?

23 A. Yes.

24 Q. You did?

25 A. Well, I'm not sure which one you're asking about.

1 I did read one of his depos.

2 Q. Did you read the Tyler deposition, Mr. Tyler's
3 deposition?

4 A. I believe so, but I'm not sure how many times he
5 was deposed.

6 Q. Do you recall, without me going through this, that
7 they both indicated that they thought that Sony was
8 infringing what was going to be the '700 patent?

9 A. They may have said that. I don't recall.

10 Q. All right.

11 A. Wouldn't surprise me, but I don't recall
12 specifically.

13 Q. Now, in 2005 -- that's one year later, correct?

14 A. Yes.

15 Q. That's the hypothetical question?

16 A. The hypothetical negotiation occurred --

17 Q. Yes, sir.

18 A. -- on --

19 Q. That's the hypothetical negotiation, and that's
20 when we assume they sit down with Nintendo and decide
21 how much should we get for our '700 --

22 A. Well, what they'll do is at the time of -- the
23 hypothetical negotiation would have occurred on or about
24 the time of the issuance of the patent in June, 2005.

25 Q. Yes, sir. So, my only point was that's only about

1 a year after they were willing to walk away from their
2 application for the '700 with no cash at all.

3 A. Well, I don't know what you mean "willing to walk
4 away from" the '700 application.

5 Q. Well, I mean, they ended the negotiation with Sony;
6 and at the end of the deal, they got no cash for the
7 '700.

8 A. No, but they got valuable Sony patents which they
9 considered to be very valuable in this country for them
10 to manufacture a controller.

11 Q. But they got no cash for that patent --

12 A. Well --

13 Q. -- and they're going to sit down -- just to try to
14 walk this through, they're going to be sitting down to
15 talk with Nintendo a year later and saying, "But we want
16 you to pay 50 million."

17 A. Well, sure; but nobody's going to pay for an
18 application. That's the problem. It wasn't a patent
19 when they negotiated with Sony. They didn't have the
20 right to enforce it, again. So --

21 Q. And --

22 A. I'm sorry. And the fact that they didn't pay cash
23 doesn't mean that the consideration they got from Sony,
24 the three Sony patents, were not considered to be
25 valuable to Sony -- to Anascape, which they were.

1 Q. Anascape would have had the option in '04 to say --

2 A. I'm sorry?

3 Q. Anascape would have had the option in 2004 to say
4 to Sony, "We're not going to include this application.
5 If you're not going to give us any money for it, we're
6 not going to include that and we'll come back and sue
7 you next year once we get it"?

8 They could have done it, couldn't they?

9 A. Right. But they also could have said, "Give us
10 some patents, and we'll give you the application," which
11 is what happened.

12 Q. So, they chose to take a deal without any cash that
13 may or may not result in a benefit to them?

14 A. A benefit to whom?

15 Q. To Mr. Armstrong and Mr. Tyler and Anascape. In
16 other words, the patents that they got back from Sony,
17 we don't yet know, do we, whether that's going to be any
18 benefit to them?

19 A. Well, the issue is what they perceived to be the
20 benefit at the time because that's the time you
21 negotiate. Just like in our hypothetical negotiation,
22 you have to look to what you expect to benefit from the
23 value of the '700 patent. And they perceived that the
24 '700 application was something they were willing to put
25 on the negotiation table because they believed that they

1 were getting three very important patents back from Sony
2 and that no cash would change hands but they would get
3 three important patents from Sony which would enable
4 them to get in the controller-making business.

5 Q. And, of course, they would have known at that very
6 moment that it was uncertain whether those patents would
7 end up being a value to them or not.

8 A. No. That's not true. I understand from my
9 interviews of Mr. Tyler and Mr. Armstrong that that's
10 why they negotiated the '700 patent application, to put
11 that into the cross-license, because they were getting
12 three patents that they considered to be very valuable
13 from Sony to allow them to get into the business of
14 making controllers.

15 Q. Yes, sir. And my question was: At that moment,
16 though, they wouldn't have any way of knowing, back in
17 '04, whether that would all work out that way.

18 A. No. That's not true. You get to evaluate patents
19 right there and then. You know what the patents are.
20 The three Sony patents weren't applications; they were
21 issued. Everybody knew what the terms in the claims
22 were.

23 Q. I assume you're like Mr. Armstrong, and you're
24 going by the language of the agreement -- and I'm
25 talking about the Sony agreement -- when you answer

1 these questions.

2 A. Yes. I'm looking at the actual language of the
3 agreement.

4 Q. And as you may recall from earlier, the language of
5 the agreement was the parties said there was uncertainty
6 as to whether there was any value in these
7 cross-licenses.

8 A. That's right, as to the patents. That's right.
9 But that's --

10 Q. Okay.

11 A. That's what was written in the agreement, but
12 Anascape's perspective was that they were willing to
13 give the '700 patent application in exchange for three
14 Sony patents that they wanted to have to get into
15 manufacturing controllers.

16 Q. I'm going to switch now to the -- a couple of the
17 licenses you talked about.

18 A. Yes.

19 Q. One of them you mentioned and I think was up on
20 your little summary was 6 degree of freedom and Mad Catz
21 license.

22 A. Yes.

23 Q. And I believe that was a license that involved Mad
24 Catz at a time when Mr. Tyler owned it.

25 A. Yes.

1 Q. And --

2 A. But the actual agreement wasn't with Mad Catz. It
3 was with Mr. Tyler individually.

4 Q. And I believe you put on your slide -- I don't see
5 it right here, but I think you had that listed up there
6 as something that showed as 4 to 5 percent.

7 A. Right.

8 Q. Do you remember that?

9 A. Yes.

10 Q. Now, that agreement was sort of interesting, wasn't
11 it, in the sense that it had several different royalty
12 rates in it but it also had a cap for Toys-R-Us?

13 A. Only for Toys-R-Us.

14 Q. Yes, sir. And just so the jury understands --

15 A. But that's not all it had.

16 Q. Yes, sir. It had some other things, but let's talk
17 about Toys-R-Us.

18 What it said was you got 4 percent on some
19 things, 5 percent on some others. But as to anything
20 for Toys-R-Us, there would be no royalty paid at all
21 after this 300,000-dollar cap.

22 A. Correct.

23 Q. And --

24 A. That was only for Toys-R-Us -- it didn't say
25 Toys-R-Us. It said any Tyler-branded product. So,

1 Mr. Tyler was branding a product he was selling to
2 Toys-R-Us, which was the Mad Catz product.

3 Q. Right. And we know from Mr. Tyler's testimony
4 earlier that Toys-R-Us was his biggest paying customer.

5 A. No, he didn't say "biggest"; he said "main."

6 Q. He said "main." You're right.

7 A. That doesn't mean it's more than 50 percent. It
8 just means it's the largest account.

9 Q. Do you know how big it was?

10 A. No. But he picked up a lot of customers.
11 Remember, they became the second largest company in the
12 industry two years after they executed the 6 DOF
13 license.

14 Q. Did you do a calculation to see, if you added in --
15 took the original license amount and then you factored
16 in the number of sales that he was going to be making to
17 Toys-R-Us that are going to be capped at 300,000 -- did
18 you do the calculation to figure out, then, what the
19 effective average royalty rate was?

20 A. No, because you would also have to add the 150,000
21 up-front payment as well into the calculation.

22 Q. Yes, sir. So -- but you didn't do that --

23 A. No.

24 Q. -- calculation?

25 So, you can't tell us whether it would be

1 5 percent or 4 percent or who knows.

2 A. Well, I can't tell you. I don't have the
3 information.

4 Q. All right. You talked about, I believe, a couple
5 of Immersion licenses. Are you with me on that?

6 A. Yes.

7 Q. And you talked about Immersion being pretty
8 significant because their president said that "We always
9 get 5 percent," et cetera, et cetera.

10 A. No, that's not why I said they were significant. I
11 mean, every time you turn around in the controller
12 industry, you run into Immersion. They're a major
13 player in the controller industry for games.

14 Q. Did you --

15 A. That's why I say they're significant.

16 Q. I'm sorry.

17 In terms of all of those licenses for
18 Immersion, did you actually study any of them to see --

19 A. No.

20 Q. -- what they provided?

21 A. No. I didn't have the specific license agreements.

22 Q. Well, don't we have a couple on the 1996? Isn't
23 that what you have in one of your exhibits?

24 A. I'm sorry?

25 Q. Don't you have the license agreement on the 1996

1 license? It was in your chart. It says:

2 Immersion/Logitech Agreement, 1996.

3 A. No, I don't have the license agreement. I actually
4 did some research and independently found the
5 Immersion/Logitech license agreements and I found that
6 there were two agreements and the range of royalties
7 were from 3 to 7 percent. But I didn't actually have
8 the agreements because they weren't published.

9 Q. But the royalty ranged from 5 percent down to 3
10 percent?

11 A. And up to 7 percent. There was a second agreement
12 which was from 5 to 7 percent.

13 Q. And you also learned from your investigation, did
14 you not, that that was not a simple royalty agreement?

15 A. I don't know what you mean by "simple" --

16 Q. It was not a simple license agreement. It had
17 technology. It had trademarks --

18 A. That's right.

19 Q. It had know-how.

20 A. That's right.

21 Q. So, all things being equal, if they had to -- if
22 they only got 5 percent for the license and all of their
23 technology and trademarks and know-how, presumably if
24 you only had one license, it would be something less.

25 A. No, not necessarily.

1 Q. Okay.

2 A. Particularly in the Sony -- Immersion/Logitech
3 licenses and any of the other Immersion licenses, the
4 information I had, none of those other agreements ever
5 specified that the Immersion patents would be deemed to
6 be valid and infringed, which would have a big impact on
7 whether or not you would add more value to the patent as
8 opposed to other things thrown in a license.

9 Q. Did you study that agreement to see whether or not
10 the value that the licensee was getting included
11 significant value from the technology and the know-how,
12 et cetera?

13 A. Well, as I told you, that agreement is not
14 available for anybody for inspection; and there is no
15 indication as to anything other than there was a bundle
16 of IP, including patent rights, licensed.

17 Q. And actually those agreements included a long
18 bundle of patents, didn't it -- 15, 20, or so?

19 A. A patent portfolio, that's right.

20 Q. Yes, sir. Now, generally speaking, if you're going
21 to get 5 percent for 20 licenses -- 20 patents, wouldn't
22 you think that if there was only one patent, it might be
23 a little less?

24 A. No. IBM is a classic example. IBM at 1 percent --
25 they'll charge you 3 percent royalty for one patent. If

1 you want to pay 5 percent, you'll get all 22,000 patents
2 in their patent portfolio.

3 Q. Yes, sir. That's an example, but in general --

4 A. Well, they're the biggest patent company in the
5 world. They have more patents than anyone else.

6 Q. In general, wouldn't it be a true proposition that
7 the more licenses you had to offer, the more money you
8 could demand?

9 A. No. That's not the case at all in the real world
10 or in a hypothetical negotiation.

11 Q. Okay. You told the jury a little bit about some
12 Immersion licenses and I think some Sony licenses.

13 A. Yes.

14 Q. And you got those out of what I believe was called
15 the "Wagner report"?

16 A. Correct.

17 Q. Just to be clear, the Wagner report was a report
18 done by an expert -- I presume someone like yourself
19 that's an expert in economics or accounting -- that
20 testified in another case?

21 A. Correct.

22 Q. And in connection with that testimony, he did kind
23 of what you've done. He worked up a report, and he
24 included some information in that report.

25 A. A lot of information.

1 Q. A lot of information.

2 And that person that did that was a paid
3 witness, presumably --

4 A. He was paid for his time, yes.

5 Q. Yes.

6 And he was testifying for the plaintiff.

7 A. For the patentee, yes.

8 Q. He was testifying for Immersion, wasn't he?

9 A. Yes, he was.

10 Q. Okay. So, be sure the jury understands. How many
11 of those licenses, those Sony licenses or those
12 Immersion licenses, did you actually review to see if
13 they said what he said?

14 A. I didn't review any of them. They weren't
15 available for me in this case.

16 Q. So, what you're telling the jury is you're basing
17 your testimony on not something you know yourself, not
18 something you went out and saw yourself, but on what
19 somebody named Wagner testified to or wrote a report
20 about in another case?

21 A. As to the Wagner information, I relied on the
22 Wagner information. It summarized the licenses that
23 Mr. Wagner received in the Immersion litigation where he
24 set out all the Immersion licenses and he set out some
25 Sony licenses that were put on the board here. I

1 haven't seen any of those license agreements, as I
2 mentioned before.

3 Q. So, the truth is, we have no idea -- other than the
4 fact that you're telling us that another expert in
5 another case listed some licenses, we don't know
6 anything about whether that's accurate or not, do we?

7 A. No, that's not true because I've got -- I've got
8 Mr. Viegas' testimony, and I've got other documents that
9 I've seen and other documents in this case that all talk
10 about Immersion's standard 5 percent royalty rate.

11 Q. But wouldn't it be true -- and maybe I don't
12 understand how y'all work. But if you really wanted to
13 know whether or not those licenses said what you say
14 they say, you would have to go look at them?

15 A. Well, if you wanted to know all the details of
16 them, yes. But I have the summary of what the cash
17 terms of the Immersion license agreements were.

18 Q. Yes, sir.

19 A. And they're all consistent with Mr. Viegas'
20 testimony and they're consistent with what I found about
21 Immersion/Logitech and they're consistent with other
22 documents I've seen in this case where other competitors
23 of Nintendo placed a standard royalty of Immersion of
24 5 percent. So, that's all consistent.

25 Q. It's consistent, you say.

1 A. That's right.

2 Q. But if you want to know whether or not those
3 licenses say what you're telling the jury they say, you
4 would have to go look at them, wouldn't you?

5 A. Well, if you want to know the details of them, yes.

6 Q. Or any --

7 A. But my point is I relied on the information that
8 was made available to me, and none of the information I
9 saw that was made available to me was inconsistent with
10 the body of information I've seen in this case regarding
11 Immersion.

12 Q. Now, if you were going to buy a house, if someone
13 told you, "It's worth a hundred thousand dollars and you
14 can take my word for it because I picked up a report in
15 a lawsuit down here at the courthouse and in that report
16 it said it's worth a hundred thousand dollars," do you
17 rely on that if you're going to buy the house; or do you
18 do a little checking to see whether or not that's
19 accurate?

20 A. Well, I would do some checking; and then I'd go out
21 and tell you, "Well, you know what? That sounds good
22 because I've seen other houses in the neighborhood that
23 all sell for that amount of money."

24 Q. And if there was a report and they said to you,
25 "Okay. This expert testified in the case in trial or

1 gave a report and he said that the house sold for a
2 hundred thousand dollars; so, it must be worth a hundred
3 thousand dollars," now would you pay your hundred
4 thousand; or would you want to say, "Wait a minute. I
5 want to go check and see if it really sold for the
6 hundred thousand"?

7 A. I'm sorry. Your question is would I want to check
8 to see if it really sold for a hundred thousand?

9 Q. Yes, sir. It's a simple matter of how we learn
10 things and how to determine whether they are true or
11 not. And if you were trying -- if you were going to buy
12 the house and someone said, "Well, it just sold for a
13 hundred thousand; so, it must be worth that" -- or maybe
14 they said, "The guy bought it for a hundred thousand and
15 now he wants to sell it to you for a hundred thousand
16 and I know that because it's in some expert report in a
17 lawsuit" --

18 A. Right.

19 Q. -- I think it would be clear that you would
20 probably not just take that; you would say, "Well, let
21 me do some double-checking and find out what the facts
22 are."

23 A. Well, the fact is I was not allowed to have access
24 to the underlying Wagner licenses under the rules of
25 this trial. So, none of that information was made

1 available to me or anybody else.

2 Q. Okay.

3 A. Had they been made available to me, I certainly
4 would have looked at them. In the absence of having
5 them, to use your house analogy, it's like looking at a
6 new subdivision where pretty much all the houses are the
7 same and when somebody tells you, "Well, that house sold
8 for a hundred thousand in that subdivision," I can say,
9 "Well, great." I know from other data I've seen that
10 there are five or six or seven or eight other houses in
11 this subdivision that all sold for a hundred thousand
12 and they're very similar; so, I could rely on that.

13 Q. I think I heard you say that it would be better if
14 you had the licenses themselves.

15 A. Sure. It would be great if you could have them,
16 but --

17 Q. Okay.

18 A. -- that wasn't available.

19 Q. Thank you.

20 In terms of the issue as to whether or not
21 the jury should consider a lump-sum award as opposed to
22 a running royalty, do you agree that there's a fair
23 amount of indication that both Anascape and Nintendo
24 have -- would prefer lump sum?

25 A. No. I don't agree with that at all.

1 Q. Okay.

2 A. There's no body of evidence that I've seen in this
3 case to support the notion you just made.

4 MR. GERMER: Could we look at Armstrong's
5 deposition at page 610?

6 A. I don't have it.

7 MR. GERMER: I think it's going to come up on
8 the screen.

9 A. Okay.

10 BY MR. GERMER:

11 Q. Can you tell me which day this was from?

12 A. I cannot -- oh, there it is, March 17th.

13 Q. And this is the deposition where they were talking
14 about the Sony --

15 A. I don't know.

16 Q. -- the Sony deal. Okay?

17 A. Okay. If you say so.

18 MR. GERMER: Now, if you go down about
19 halfway down -- I tell you what, let's just blow it --
20 from 6 down to 14. See if we can do that.

21 BY MR. GERMER:

22 Q. Mr. Armstrong said --

23 A. Could I see what the question was?

24 Q. Sure. The question was "yes."

25 This is one of those really great

1 depositions.

2 A. I didn't take it; so, don't look at me.

3 Q. I didn't, either.

4 But I'm really more concerned about

5 Mr. Armstrong's testimony than I am about what the
6 lawyer said.

7 A. Well, I understand. But he's answering the
8 question; so, it would be nice to see the question.

9 Q. Well, let's see. It looks like at the top the
10 question -- or his answer was: And I think that --

11 The question was: Why was it a lump sum?

12 A. Right.

13 Q. And then the questioner brilliantly said: Yes.

14 A. Right.

15 Q. And then Mr. Armstrong said: Because we felt that
16 that was something that Sony could do. You know, these
17 ongoing royalties, my understanding is a lot of large
18 corporations just don't like them because they can cause
19 continuing problems in the future.

20 A. Right.

21 Q. (Reading) A lump sum is just a done deal.

22 Everybody is happy, and it's just desirable from --

23 especially from -- you know, I think it's desirable for

24 both parties in some ways but certainly for the larger

25 entity's standpoint.

1 A. Right.

2 Q. So, that does tell us that Mr. Armstrong at least
3 was happy with the Sony deal and was happy with the
4 lump-sum deal.

5 A. In the context of that negotiation. And actually
6 we don't have anything different than that here because
7 we know what -- the total units that have been sold from
8 infringement through the time of trial. So, in essence,
9 it would be a 50.3-million-dollar payment, lump-sum
10 payment, for past infringement.

11 Q. Would you look at page 610, please?

12 A. I'm sorry. 610 of...

13 Q. Yes, sir.

14 A. Oh, same -- I'm sorry.

15 Q. I think that's about where we were.

16 MR. GERMER: The last question and answer,
17 let's blow that up.

18 BY MR. GERMER:

19 Q. Question: That's one advantage to a licensor is
20 that if something changes in the technology, you've
21 already been paid, right?

22 And Mr. Armstrong said: Yes. I'm not
23 complaining. You know, I'm happy. It was a good deal
24 for me.

25 A. That's what he said.

1 Q. All right. And, again, you didn't give us, in your
2 report, any recommended number for a lump sum, did you?

3 A. No. That's correct. I do not believe a lump sum
4 is appropriate in this case.

5 Q. Now let's talk briefly about the hypothetical
6 question; and we'll be about through, I believe.

7 A. Okay.

8 Q. Hypothetical negotiations.

9 A. All right.

10 Q. Past practice is very important to that, is it not?

11 A. I'm sorry. What do you mean?

12 Q. Past practice. What the parties have done in the
13 past in terms of their licensing practices.

14 A. That's something that would be considered. But, of
15 course, Ms. Story, the representative from Nintendo,
16 said it depends on the totality of the circumstances as
17 to how you do a deal.

18 Q. Okay. At the time of the hypothetical negotiation
19 in '05 --

20 A. Yes.

21 Q. -- was the GameCube successful or kind of going
22 downhill, or how would you describe it at that point?

23 A. In '05?

24 Q. Yes, sir.

25 A. In June, '05, it was a successful product; but it

1 was on its downward life cycle. So, Nintendo was
2 working on the next generation, which became the Wii.

3 Q. And at that point the Wii was not out.

4 A. No. That's correct.

5 Q. And, in fact, it didn't come out for a year and a
6 half?

7 A. Almost a year and a half. November, '06.

8 Q. So, at the time that they are talking --
9 Mr. Armstrong, Mr. Tyler are talking to Nintendo, the
10 hypothetical time, we're looking at Nintendo with one
11 product going down and another product that's just on
12 the drawing boards.

13 A. Well, I don't know if it was on the drawing boards.
14 I mean, obviously --

15 Q. Hopefully it's beyond there a little bit.

16 A. I hope so.

17 Q. But we don't know because it wasn't out on the
18 market, right?

19 A. Not until November, '06. But they clearly were
20 working on it; so, that would have been known at the
21 hypothetical negotiation.

22 Q. At that time, in '05, both parties, of course,
23 would have been very aware of the Sony deal, would they
24 not?

25 A. Yes.

1 Q. And you said that this is a very competitive
2 market.

3 A. Right.

4 Q. In other words, I think you said that if Sony got
5 the license to this technology, then Nintendo needed it.

6 A. Well, Nintendo would have recognized that everybody
7 in the industry is licensed except for Nintendo; and it
8 would be at a competitive disadvantage if the patent is
9 assumed to be valid and infringed.

10 Q. So, Nintendo would be very conscious of what Sony
11 did?

12 A. Very.

13 Q. Okay. And when Nintendo -- from Nintendo's point
14 of view, they would have said, "Well, let's see,
15 Mr. Armstrong and Mr. Tyler. A year ago you sold this
16 patent for a few cross-licenses -- you sold this
17 application which became a patent for a few
18 cross-licenses."

19 They would have had that in their mind,
20 wouldn't they?

21 A. That would have been known. That's right.

22 Q. And that would certainly be something that would
23 affect Nintendo, would it not?

24 A. Well, no, because we're dealing now with a
25 hypothetical negotiation with a valid and issued patent.

1 The Nintendo license agreement was only for the '606
2 patent and made no specific references to the validity
3 and infringement of the '700 patent which at that time
4 was an application.

5 Q. I think you misspoke. But in any event, Nintendo
6 in '05 would know that Sony in '04 ended up getting the
7 '700 --

8 A. The rights to the '700 patent.

9 Q. The rights to the 700 --

10 A. Correct.

11 Q. -- without paying any cash.

12 A. Correct. And they would have known about it under
13 a cross-license.

14 Q. And they would know that Mr. Tyler and
15 Mr. Armstrong were willing to take a lump sum?

16 A. Well, they -- under the Sony arrangement. And they
17 would have known the reasons why Anascape was willing to
18 take a lump sum, as testified to by Mr. Armstrong and by
19 Mr. Tyler.

20 Q. Nintendo would have known in '05, at the time of
21 the hypothetical negotiation, that whatever their
22 royalty base was going to be -- you know, because the
23 Wii wasn't out; and the GameCube was declining. But
24 whatever it was going to be, it was going to be less
25 than Sony's.

1 A. No. That's not necessarily true. Nintendo has
2 climbed up in their sales of console systems. They're
3 now Number 2. They've eclipsed Microsoft.

4 Q. They -- at the time of the hypothetical
5 negotiation, they would have known that at that time
6 Sony was much bigger.

7 A. Yes. They would have known that Sony and Microsoft
8 were bigger.

9 Q. Okay.

10 A. And that they would have been at a competitive
11 disadvantage by not taking the patent license.

12 Q. And Microsoft is going to want to stay even with
13 Sony if they can?

14 THE COURT: Now, wait a minute. Who?

15 MR. GERMER: I'm sorry. We got off on
16 Microsoft.

17 BY MR. GERMER:

18 Q. Nintendo is going to want to stay even with Sony if
19 they can?

20 A. Well, what do you mean "even"?

21 Q. They want to get the same deal if they can.

22 A. Well, if they can. But the terms and circumstances
23 would have been different in 2005 for Nintendo than they
24 were when Sony voluntarily negotiated a license in 2004.
25 Very different circumstances, different playing field.

1 Q. And according to the numbers we're looking at, a
2 very different result, in your opinion, from no cash to
3 50 million.

4 A. Not a different result at all. I mean, the fact is
5 they would negotiate -- the Sony deal for the '606
6 patent was a very different situation, and the '700
7 patent hadn't issued when the Sony contract was
8 negotiated; whereas, as of June, 2005, we have an issued
9 patent. It's deemed to be valid and infringed for
10 purposes of the hypothetical negotiation.

11 Q. Correct. And you, of course, are making that
12 assumption.

13 A. What's that?

14 Q. That it's valid and infringed.

15 A. Yes. I'm required to make that assumption.

16 Q. And if the jury decides that the patent is not
17 infringed, then, of course, there would be no damages.

18 A. Oh, that's correct.

19 Q. And if the jury decides that the patent was not
20 valid, there would be no damages.

21 A. That's true.

22 Q. Thanks. Thank you very much.

23 MR. PARKER: Just a couple, your Honor.

24 *

25 *

1 REDIRECT EXAMINATION OF WALT BRATIC

2 BY MR. PARKER:

3 Q. All these questions about lump sum versus
4 reasonable royalty, this jury is going to have an
5 opportunity in a couple of days to make a lump-sum
6 award, aren't they?

7 A. Yes.

8 Q. But that lump-sum award will have to represent a
9 reasonable royalty on sales that have occurred to date,
10 correct?

11 A. That is true.

12 Q. And has your opinion about what that amount should
13 be changed in any way after having listened to
14 cross-examination?

15 A. No, it hasn't. My opinion is the royalty rate
16 should be at least 5 percent; and, therefore, the
17 minimum amount of damages are 50.3 million.

18 Q. Thank you, sir.

19 MR. PARKER: I have no further questions.

20 MR. GERMER: No further questions, your
21 Honor.

22 THE COURT: Just for the record and so there
23 is no confusion later on lump sum, would you tell the
24 jury what is the difference between a lump sum and a
25 running royalty? I don't want confusion later on.

1 THE WITNESS: Okay. A lump sum would be --
2 using the Sony/Anascape example, where Sony, for the
3 '606 patent, got an exclusive right to practice the '606
4 patent, put it in its products, and they wrote a check
5 for \$10 million. That means they were no longer
6 accountable, "they" Sony, to Anascape for any sales.
7 They could sell zero, or they could sell billions of
8 dollars of product. They wouldn't have to pay them a
9 penny more. They get one check.

10 A running royalty is -- if you negotiate
11 up-front a running royalty, then a running royalty is if
12 you sell product, you pay royalties. If you don't sell
13 product, you don't pay royalties. So, one of the
14 advantages of a running royalty is if you're not sure
15 how much product you're going to sell or if you're going
16 to sell it at all, you agree to a running royalty
17 because then you don't have to pay anything if you don't
18 sell anything. There's no downside.

19 THE COURT: Any further questions from
20 plaintiff?

21 MR. PARKER: No, sir.

22 THE COURT: From defendant?

23 MR. GERMER: No, your Honor.

24 THE COURT: All right. You may step down,
25 sir.

1 THE WITNESS: Thank you, your Honor.

2 THE COURT: Any further witnesses from
3 plai nti ff?

4 MR. CAWLEY: Yes, your Honor.

5 THE COURT: Who would that be?

6 MR. CAWLEY: Mr. Bovenkamp is going to make a
7 brief interim statement to introduce a video deposition.

8 THE COURT: All right. How long is the
9 video? Do you know?

10 MR. CAWLEY: Thirty-five minutes.

11 THE COURT: Okay. Why don't you go ahead and
12 introduce what the video is, and then we'll go ahead and
13 break -- or what it's going to be about.

14 MR. BOVENKAMP: Thank you, your Honor.

15 Ladies and gentlemen of the jury, my name is
16 Chris Bovenkamp; and you're going to see something
17 probably tomorrow morning that's a little different than
18 what we have done so far in this case. You're going to
19 see a video deposition, video testimony that took place
20 in Japan, of one of Nintendo's engineers.

21 Now, the testimony that you're going to see
22 is just like takes place here in the courtroom. There
23 is going to be a court reporter that was there taking
24 everything down. There is going to be a videographer
25 that is videoing. The only difference is that there is

1 also going to be a translator that is going to be
2 translating for the witness. The questions will be read
3 in English; they will be translated into Japanese. The
4 witness will respond in Japanese, and then the
5 translator will translate it into English.

6 The first witness that you're going to hear
7 from is Mr. Koshiishi. He's a Nintendo engineer who
8 worked on both the N64 controller that you've heard
9 something about as well as the GameCube controller.

10 Mr. Koshiishi is going to testify about the
11 improvements that Nintendo made to the GameCube
12 controller over the N64 controller that you've heard
13 about. In addition, Mr. Koshiishi is going to testify a
14 little bit about the rumble feature that's been talked
15 to -- a lot about in this case. He's going to explain
16 to you that even though it's an expensive feature to
17 include in the game controller and even though they were
18 on a tight budget to make a game controller, that they
19 built it into the GameCube controller.

20 The last thing that Mr. Koshiishi is going to
21 testify about is a 1996 application that is so important
22 in this case. You're going to hear from Mr. Koshiishi
23 that that application discloses multiple input members.

24 THE COURT: All right. Thank you.

25 All right. Ladies and gentlemen, because

1 that video will take a little time, there is no point in
2 breaking it up. We're going to go ahead and break for
3 this evening. I'll ask you to be back again at 8:45 in
4 the morning.

5 In case you're wondering, I think we're still
6 on track for the schedule I indicated before. One
7 reason I say that is because they've got so many -- each
8 side has so many hours to talk; and when they're
9 talking, their time is running. The clock's going right
10 here. So, I can be more confident than many judges
11 about how long a trial is going to take in my court.

12 Again, please remember my instructions.
13 Don't discuss the case. Certainly don't let anybody try
14 to influence you or talk to you about it. Remember that
15 because of this ceremony in Tyler over naming the
16 courthouse there after a deceased Federal judge, which I
17 have to go to, we will not be in session on Friday; but
18 we will go tomorrow until 5:00 just like today. I'll
19 ask you to be back here at 8:45 in the morning. You're
20 excused at this time.

21 (The jury exits the courtroom, 4:53 p.m.)

22 (Discussion off the record, 4:56 p.m. to
23 5:09 p.m.)

24 THE COURT: We are in recess, then, until
25 8:45.

1 Let me mention that I'm going to have two
2 criminals to sentence tomorrow morning. So, if you've
3 got things that -- they will be in handcuffs and they
4 will be watched; but I wouldn't leave, like, a Rolex
5 watch or something on one of those tables out there.
6 But I'm going to have to have them in the courtroom
7 between 8:00 and about 8:30, 8:40. Just a word to the
8 wise. You don't have to clear off everything; but if
9 there's something real valuable, you might stick it in
10 your pocket.

11 We're in recess.

12 (Proceedings adjourned, 5:07 p.m.)

13 COURT REPORTER'S CERTIFICATION

14 I HEREBY CERTIFY THAT ON THIS DATE, MAY 7,
15 2008, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
16 RECORD OF PROCEEDINGS.

17 
18 CHRISTINA L. BICKHAM, CRR, RMR

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