

Jury Trial, Volume 6

1391

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

ANASCAPE, LTD.

DOCKET 9:06CV158

VS.

MAY 13, 2008

8:45 A.M.

MICROSOFT CORP., ET AL

LUFKIN, TEXAS

VOLUME 6 OF __, PAGES 1391 THROUGH 1701

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;
TRANSCRIPT PRODUCED VIA COMPUTER-AIDED TRANSCRIPTION.

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1 (REPORTER'S NOTES ANASCAPE VS. MICROSOFT,
2 JURY TRIAL VOLUME 6, 8:45 A.M., TUESDAY, 05/13/2008,
3 LUFKIN, TEXAS, HON. RON CLARK PRESIDING)

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

6 THE COURT: Okay. The next witness is going
7 to be by video?

8 MR. GUNTHER: Yes, sir.

9 THE COURT: Okay. Bring in the jury, please.
10 (The jury enters the courtroom, 8:46 a.m.)

11 THE COURT: Good morning, ladies and
12 gentlemen.

13 Mr. Gunther?

14 MR. GUNTHER: Good morning, your Honor. Good
15 morning, ladies and gentlemen.

16 The next witness, and the last witness that
17 Nintendo is going to call, is Susan Panico. She's going
18 to testify by deposition.

19 Your Honor, may I make a brief statement?

20 THE COURT: Please.

21 MR. GUNTHER: Ladies and gentlemen,
22 Ms. Panico is a Sony employee. She is senior director
23 of the PlayStation Network. This is going to be a
24 relatively quick -- I think about 15 minutes or so of
25 testimony. She's going to say a couple of things. The

1 first is that the Dual Shock, the Sony Dual Shock
2 controller that we had testimony about yesterday with
3 respect to the invalidity case -- that is Defendant's
4 Exhibit 103. She is going to testify and confirm that
5 the Dual Shock was on sale in the United States starting
6 in June of 1998, before the 2000 date that the '700
7 patent was filed.

8 She's also going to testify that the
9 Dual Shock 2 controller -- that's the one that's
10 basically the same as the Dual Shock that has the
11 proportional buttons on it -- that that was on sale in
12 the U.S. beginning in October of 2000. And that is
13 Defendant's Exhibit 105.

14 Again, both of those before the November,
15 2000, date of the '700 application.

16 She's also going to give some brief testimony
17 on marketing issues with respect to the PlayStation and
18 their controllers. Thank you.

19 DEPOSITION TESTIMONY OF SUSAN PANICO

20 Q. Good morning, Ms. Panico. Can you state your full
21 name for the record?

22 A. Susan Nourai Panico.

23 Q. And is it your understanding you're going to give
24 testimony on a topic involving the marketing of certain
25 PlayStation-related items, particularly controllers?

1 A. Yes.

2 Q. Ms. Panico, there are several Sony entities. There
3 is the Sony Computer Entertainment of America. Is that
4 sometimes referred to as "SCEA"?

5 A. Yes.

6 Q. And there is a parent company; is that correct?

7 A. Yes.

8 Q. How would you prefer that I refer to the Sony
9 company that you're testifying for today? Because it
10 might get confusing as we refer to Sony over the course
11 of the day?

12 A. I work for SCEA.

13 Q. SCEA, okay. Then, my questions -- I'll try to
14 specifically say "SCEA" in each question; but if I do
15 say just "Sony," can we have an understanding that I'm
16 talking about SCEA?

17 A. Yes.

18 Q. If I want to discuss Sony Japan or mention
19 something that came from Sony Japan or -- I'll
20 specifically say "Sony Japan" so that you'll see --
21 you'll be aware of that difference. Is that acceptable?

22 A. Yes.

23 Q. Okay. Ms. Panico, how long have you been with
24 SCEA?

25 A. Thirteen and a half years.

1 Q. What is your current position?

2 A. Senior director of PlayStation Network.

3 Q. Can you briefly sort of run through your time with
4 Sony, the positions that you were -- you've held?

5 A. When I started at Sony, I was a PR assistant and
6 then a department assistant and then a marketing
7 specialist and then an associate product manager, a
8 product manager, a senior product manager, and then the
9 director of PlayStation online marketing and then the
10 director of product marketing.

11 Q. Let's talk about the DualShock 2 controller. Are
12 you familiar with the Sony DualShock 2 controller?

13 A. Yes.

14 Q. I'm going to pass you an item. Let your attorney
15 have a look at it.

16 Can you identify that for me?

17 A. This is the DualShock 2 analog controller.

18 Q. When was the DualShock 2 controller sold at
19 retail -- first sold at retail in the United States?

20 A. In October of 2000.

21 Q. Do you know the specific date, by any chance?

22 A. I do not.

23 Q. Was there a time when you knew the specific date?

24 A. Possibly.

25 Q. Prior to the DualShock 2 being sold at retail, to

1 your knowledge, was the Dual Shock 2 controller used in
2 demonstrations in the United States?

3 A. To my knowledge, no.

4 Q. Does Sony's marketing activities include public
5 demonstrations of their products?

6 A. Yes.

7 Q. Did Sony engage in public demonstrations of the
8 PlayStation 2 in the United States prior to the official
9 product launch?

10 A. Yes.

11 Q. What kind of public demonstrations of the
12 PlayStation 2 were held in the United States prior to
13 the official product launch?

14 A. The -- one instance I recall is the PlayStation
15 truck appearance at a music festival.

16 Q. Now, when you say "PlayStation truck," can you tell
17 me what you mean by that?

18 A. It is a mobile marketing truck that folds out and
19 has video game kiosks on it.

20 Q. How large is the truck?

21 A. I don't know.

22 Q. Now, prior to the Dual Shock 2 being released, were
23 you aware of a controller referred to as the
24 "Dual Shock," which I believe you mentioned earlier?

25 A. Yes.

1 Q. And can you tell me when the Dual Shock controller
2 was first sold at retail in the United States?

3 A. I believe it was in June of 1998.

4 Q. And how would that controller have been packaged?
5 Do you know?

6 How would the Dual Shock controller have been
7 packaged when it was sold in June of 1998?

8 A. I don't remember the specific packaging.

9 Q. In June of 1998, to your knowledge, could a
10 consumer have gone out and purchased a Dual Shock analog
11 controller packaged separately?

12 A. Yes.

13 Q. To your knowledge, in June of 1998, could a
14 consumer have gone out and purchased a Dual Shock -- I'm
15 sorry -- a PlayStation 2 and received a Dual Shock
16 controller bundled with that package?

17 A. No.

18 Q. Why not? Do you not know, or do you not know if it
19 was --

20 A. Can you state the question again?

21 Q. In June of 1998, to your knowledge, could a
22 person -- consumer have gone to a retail outlet and
23 purchased a PlayStation and received a Dual Shock
24 controller bundled with the PlayStation?

25 A. Yes.

1 Q. You're now looking at Exhibit 308. What are the
2 Bates numbers in the lower right-hand corner?

3 A. 01121.

4 Q. Did SCEA produce this in response to the subpoena
5 from Microsoft?

6 A. I assume so.

7 Q. Do you see an SCEA marking --

8 A. Oh, yes.

9 Q. -- in the --

10 A. Sorry.

11 Q. -- right-hand corner?

12 A. Yes.

13 Q. So, was this produced in response to the subpoena?

14 A. Yes.

15 Q. What kind of document is it?

16 A. It's a news wire. I guess it's a news press
17 release.

18 Q. Is there a difference between a news wire and a
19 press release?

20 A. It's just the formatting.

21 Q. But other than that, would this be information that
22 was published by SCEA?

23 A. Yes.

24 Q. I believe you have Exhibit 311.

25 A. Uh-huh.

1 Q. Can you tell me what the number in the lower
2 right-hand corner is?

3 A. 00534.

4 Q. What kind of document is this?

5 A. A press release.

6 Q. Was this press release marked Exhibit 311 kept in
7 the ordinary course of business by SCEA?

8 A. Yes.

9 Q. In this press release it discusses the availability
10 of the DualShock controller. Do you see that?

11 A. Yes.

12 Q. What does it describe with respect to the
13 availability of the DualShock controller?

14 A. Available June 16, the PlayStation DualShock pack
15 is expected to retail for 149.

16 Q. Would that have been in 1998?

17 A. Yes.

18 Q. Do your current job responsibilities involve
19 marketing?

20 A. Yes.

21 Q. How long -- you said you've been with SCEA for 13.5
22 years?

23 A. Yes.

24 Q. Have you always been involved with marketing?

25 A. Yes.

1 Q. Where is your office?

2 A. In Foster City, California.

3 Q. Can you tell me what the purpose is of marketing at
4 SCEA?

5 A. That's a very broad question. To generate
6 awareness and disseminate information about our brand of
7 product.

8 Q. And is the goal to sell more products?

9 A. Yes.

10 Q. And is one of your products a controller?

11 A. Yes.

12 Q. Is one of the purposes of marketing to generate
13 excitement about game controllers?

14 A. Yes, I suppose so.

15 Q. Has SCEA put out press releases that discuss
16 features on its controllers?

17 A. Yes.

18 Q. You said -- I'd like to focus in on the Dual Shock
19 and the Dual Shock 2 controllers. Is that okay with you?

20 A. Yes.

21 Q. What is the name "Dual Shock"? What does that mean
22 to you?

23 A. It is the name of one of our controllers.

24 Q. And what's the meaning of "dual"?

25 A. Two.

1 Q. Okay. And why is it called "dual"? Why is "dual"
2 in the name of your controller?

3 A. Because it has two thumbsticks.

4 Q. Okay. And what do the two thumbsticks do?

5 A. They control things in the game.

6 Q. How about "shock"? What does "shock" mean to you?

7 A. Refers to the vibration functionality.

8 Q. Okay. Is that the same as rumble?

9 A. Yes.

10 Q. Have you ever used a Dual Shock controller?

11 A. Yes.

12 Q. Have you ever used a Dual Shock 2 controller?

13 A. Yes.

14 Q. Have you ever experienced the rumble function?

15 A. Yes.

16 Q. Do you like it?

17 A. Yes.

18 Q. Tell me why you like the rumble function.

19 A. With certain games, it enhances the gaming
20 experience.

21 Q. Has SCEA ever marketed the pressure-sensitive
22 button function of its controllers?

23 A. Yes.

24 Q. Why?

25 A. To communicate to the gamer that they would have a

1 more controlled experience over their games.

2 Q. Are there games that use pressure-sensitive
3 buttons?

4 A. Yes.

5 Q. And in those games, does the gamer have more
6 control over the game because of the pressure-sensitive
7 buttons?

8 A. Yes.

9 Q. Is it a good marketing point for SCEA?

10 A. For the controller, yes.

11 Q. How about -- the same with rumble. Is rumble a
12 good marketing point for SCEA?

13 A. Yes.

14 Q. How about the six-axis controller? Does that have
15 rumble?

16 A. No.

17 Q. Have you ever heard that people were upset with the
18 six-axis controller because it lacked a rumble feature?

19 A. Yes.

20 Q. Is there a new controller coming out by Sony called
21 the "Dual Shock 3"?

22 A. Yes.

23 Q. Does it stand to reason that the Dual Shock 3 has a
24 rumble feature?

25 A. Yes.

1 Q. I mean, if people didn't like the controllers, they
2 may not buy the console. Fair enough?

3 Is that a "yes"?

4 A. That's possible.

5 Q. Okay. And for right now I'll identify Exhibit 311
6 as a document bearing Bates Numbers SCEA 00534 through
7 535. Is that correct? Take a quick look.

8 A. Yes.

9 Q. Okay. The headline is: New PlayStation game
10 console to include DualShock analog controller as
11 standard pack-in for 149.

12 Is that correct?

13 A. Yes.

14 Q. Okay. Can you come down to the last paragraph on
15 SCEA 534?

16 A. Yes.

17 Q. Okay. And the first sentence of that last
18 paragraph says: Completely redefining how PlayStation
19 gamers interact with and play video games, the DualShock
20 analog controller's key features include a unique
21 contact sensing dual vibration feature which shakes or
22 vibrates upon impact throughout game play, offering
23 totally immersive and realistic game play.

24 Do you see that?

25 A. Yes.

1 Q. What is this referring to, this sentence that I
2 read?

3 A. It says "vibration feature."

4 Q. Okay. And what is the vibration feature of the
5 Dual Shock analog controller?

6 A. It's -- based on game play implementation, it makes
7 the controller vibrate or shake.

8 Q. Okay. It says this offers totally immersive and
9 realistic game play. Do you see that?

10 A. Yes.

11 Q. What is "totally immersive and realistic game
12 play"?

13 A. "Immersive" is the idea that it sucks you into the
14 game, and "realistic" meaning that it is based on a real
15 experience.

16 Q. And are both of those things good for games?

17 A. Yes.

18 Q. Do they help to sell more games?

19 A. Yes.

20 Q. The next, I guess, clause in that sentence is:
21 Bigger rubber-coated shoulder buttons and bi -- dual
22 thumbsticks for more precise control and
23 maneuverability.

24 Do you see that?

25 A. Uh-huh.

1 Q. What are the "dual thumbsticks" referred to in this
2 sentence?

3 A. They are the two sticks that appear on the
4 controller.

5 Q. And how do they allow for more precise control and
6 maneuverability?

7 A. Because they're analog, they create 360 degrees of
8 movement versus the digital pad which is just up/down,
9 left/right.

10 Q. Okay. And is that a benefit as opposed to the
11 digital pad that is just up/down, left/right?

12 A. Yes.

13 Q. And Sony's highlighting that benefit here; is that
14 correct?

15 A. Yes.

16 Q. Could you go down maybe two more paragraphs that
17 starts "since"?

18 A. Uh-huh.

19 Q. I direct your attention to the second sentence: We
20 believe that the DualShock analog controller not only
21 provides PlayStation gamers added value but the best
22 quality of gaming they won't find anywhere else.

23 Do you know what that statement's a reference
24 to?

25 A. In the statement, it says the DualShock analog

1 controller.

2 Q. Did the Dual Shock analog controller have the
3 ability to vibrate and jolt in a wide range of
4 frequencies and speeds?

5 A. Yes.

6 Q. Okay. Did that add intensity to the game playing
7 experience?

8 A. Yes.

9 Q. On this document, the first page, could you come
10 down to the -- one, two, three -- fourth paragraph? It
11 reads: The most realistic interactive racing experience
12 to date, Gran Turismo 3 A spec that delivers speed that
13 players can actually feel. The game takes full
14 advantage of the Dual Shock 2 analog controller so that
15 the harder the driver pushes on the touch-sensitive
16 controller, the faster the car goes, simulating the gas
17 pedal of a real car. Drivers can feel the speed as they
18 maneuver through curves and shoot down straightaways
19 while racing fellow competitors.

20 Do you see that?

21 A. Yes.

22 Q. Does Gran Turismo 3 employ the vibration feature of
23 the Dual Shock controller?

24 A. Yes.

25 Q. Does it also use the pressure-sensitive buttons?

1 A. Yes.

2 Q. And do both of those contribute to the gaming
3 experience with Gran Turismo 3?

4 A. Yes.

5 Q. And the vibration allows the user to actually feel
6 blows and turbo-charged racing collisions; is that
7 correct?

8 A. Yes.

9 Q. Fair to say that the DualShock 3 controller is
10 still highlighting rumble?

11 A. Yes.

12 MR. GUNTHER: Your Honor, just for the
13 record, the two press releases that were referred to
14 during Ms. Panico's testimony are Defendant's Exhibits
15 97 and Defendant's Exhibit 99.

16 THE COURT: Okay.

17 MR. GUNTHER: Your Honor, with that, Nintendo
18 rests its defense in this case.

19 THE COURT: Okay. And then subject to all
20 normal motions, which I'll consider as properly filed at
21 the proper time, any witnesses by plaintiff?

22 MR. CAWLEY: Thank you, your Honor. Yes. We
23 would call Professor Robert Howe for a moment.

24 THE COURT: No objection from plaintiff to
25 taking up those motions later as being timely filed?

1 MR. CAWLEY: No, your Honor. We understand.

2 THE COURT: And same with defendants?

3 MR. GUNTHER: Yes, sir.

4 THE COURT: Okay. Please step forward, sir.

5 You remember, of course, sir, that you are still under
6 oath.

7 THE WITNESS: I do.

8 THE COURT: All right. Go ahead.

9 MR. CAWLEY: Thank you.

10 DIRECT EXAMINATION OF ROBERT HOWE

11 CALLED ON BEHALF OF THE PLAINTIFF

12 BY MR. CAWLEY:

13 Q. Professor Howe, why have you returned today?

14 A. Well, I've been listening to the Nintendo experts
15 in the testimony; and I've come to offer some comments.

16 Q. And what is your opinion?

17 A. Well, I'm of the opinion that the '700 patent
18 claims we've been discussing are infringed by the
19 Nintendo controllers; and those claims are entitled to
20 the 1996 priority date.

21 Q. And do you also have an opinion as to whether those
22 claims that have been asserted in this case are
23 supported by the specification of the '700 patent?

24 A. Yes, they are.

25 Q. Let's talk first about accelerometers. We heard a

1 good bit of testimony about that yesterday; and then, of
2 course, we heard about it last week, as well. And
3 you've already given us some explanation of
4 accelerometers; so, I don't want to repeat all that.
5 But did you hear Mr. Dezmelyk yesterday testify about
6 the structure of the accelerometer in the Wii Remote?

7 A. Yes, I did.

8 Q. And did you watch him draw a sketch of that?

9 A. Yes.

10 MR. CAWLEY: May I approach the --

11 THE COURT: You may.

12 MR. CAWLEY: -- easel, your Honor?

13 BY MR. CAWLEY:

14 Q. Does Mr. Dezmelyk's sketch of the accelerometer
15 show the entire internal structure of the accelerometer?

16 A. No. It's greatly simplified, of course. The basic
17 operating principles are there; but there's a lot more
18 going on in the real chip, of course.

19 Q. Could you step down to the easel and explain that
20 to us?

21 A. Certainly.

22 THE WITNESS: Your Honor, may I step down?

23 THE COURT: Please.

24 A. Okay. So, we're recalling Mr. Dezmelyk said there
25 is this mass in the middle; and it's suspended on

1 springs from the corner. Now, this is simplified,
2 again. The real mass is actually a ring, and the
3 springs have a different shape. But this is basically
4 how the device works.

5 And on each side here (indicating), there is
6 a capacitor. And the real structure has finger-shaped
7 structures that move away from the central mass. But
8 they function the way this is shown.

9 Okay. So, as the accelerometer -- I should
10 say as the case of the Wii is moved up and down, we saw
11 from our animation the other day that the mass lags
12 behind a little. So, as the controller goes up, the
13 mass is behind it first, then catches up. And as you go
14 down, the mass is behind, then catches up.

15 BY MR. CAWLEY:

16 Q. Let me interrupt you, Professor Howe; but why don't
17 we go ahead and see that animation.

18 A. Great.

19 Oh, yeah. Here we go. Okay. So, the hand
20 moves --

21 THE COURT: Is that chart in the way of
22 the -- can all the jurors see the screen?

23 A. So, as the controller moves back and forth, the
24 mass stays in place at first; and then the springs apply
25 enough force that it starts to move and catch up.

1 Now, that displacement is just what these
2 capacitive sensors measure. So, as we go back and forth
3 here, the mass lags behind. It gets closer to this
4 (indicating) capacitor plate, and that gives it -- the
5 change in capacitance is measured. That change in
6 distance causes a change in capacitance that is
7 measured. Likewise, when it goes the other way, the
8 same thing happens.

9 Now, up and down, once again, the change in
10 distance between this plate here (indicating) and this
11 plate here (indicating) in the mass provides a signal
12 that then can be amplified and sent out of the device.

13 BY MR. CAWLEY:

14 Q. All right. Can you draw with your red pen the
15 capacitors that are inside the accelerometer?

16 A. You bet. (Illustrating.) So, here's one; here's
17 another; here's a third; and here's a fourth.

18 Q. Are these capacitors sensors?

19 A. Yes, they are.

20 Q. Are there two different sets of capacitors?

21 A. Yes. There's one set for the vertical direction,
22 and there's another set for the right/left direction.

23 Q. Okay. Thank you, Dr. Howe. I think you can
24 probably take your seat again.

25 Professor Howe, you've read Mr. Ikeda's

1 testimony, have you not?

2 A. I have.

3 Q. Do you remember who he was?

4 A. I'm sorry. What was the question?

5 Q. Do you remember who he was?

6 A. Yes. He was an engineer from Nintendo, and he was
7 one of the people who actually developed the Wii
8 controllers.

9 Q. And do you remember this testimony that he gave --

10 A. I do.

11 Q. -- where he was asked: Isn't it true that one set
12 of capacitors in the accelerometer is used to detect
13 acceleration on the X axis?

14 And he answered: The X axis can be measured,
15 as well. But at the same time, measurement can take
16 place along the Y and Z axes.

17 Do you agree with that?

18 A. Yes, I do.

19 Q. And then there was a question: Yes, sir. That's
20 my next question. Isn't it true that a different set of
21 capacitors is used to detect acceleration on the Y axis?

22 And he answered: Yes, different capacitors
23 and probes for the Y axis.

24 Do you agree with that?

25 A. I do.

1 Q. Do you understand that Mr. Ikeda has testified here
2 that there are two -- at least two different sets of
3 capacitors in the accelerometer?

4 A. Yes. That's right.

5 Q. And has he testified that they are sensors for
6 different things?

7 A. That's right.

8 Q. Let me show you just a little bit more of his
9 testimony.

10 Question: So, there are capacitors that
11 sense movement in the X axis, correct?

12 And he answers: That's correct.

13 And there are capacitors that sense movement
14 in the Y axis, correct?

15 And he answers: That's correct.

16 Do you agree with him?

17 A. I do.

18 Q. And do you understand that Mr. Ikeda has told us
19 here that the capacitors that you've drawn on this
20 drawing are sensors?

21 A. Yes. That's right.

22 Q. Now, do these sensors and the associated structure
23 that -- the proof mass that you told us about, do these
24 meet the third element part of claim 19?

25 A. Yes, they do.

1 Q. Okay. Well, let's go through that just one more
2 time. I'll just hold this up.

3 MR. CAWLEY: If I may move this easel now,
4 your Honor?

5 THE COURT: You may.

6 MR. CAWLEY: I think it is in the way.

7 BY MR. CAWLEY:

8 Q. What does the third element require?

9 A. Okay. Well, that's about where your hand is; and
10 it says: A third element movable on two mutually
11 perpendicular axes, said third element structured to
12 activate two bi-directional proportional sensors
13 providing outputs at least in part controlling objects
14 and navigating a viewpoint.

15 Q. Now, how does the structure inside the
16 accelerometer that Mr. Ikeda testified about and that
17 you've told us about satisfy this third element?

18 A. Well, let's see. We've talked about the mass in
19 the middle there; and that's the third element. And
20 we've seen that because of the springs, it can move on
21 two mutually perpendicular axes. It can move up and
22 down; it can move right and left.

23 Then it says: The third element is
24 structured to activate two bi-directional proportional
25 sensors.

1 Now, those are the capacitors we just talked
2 about. And there are two of them, as Mr. Ikeda said and
3 as I agreed. There is a set that measures up and down,
4 and there is a set that measures left and right. And it
5 goes on to say that these sensors provide outputs at
6 least in part controlling objects and navigating a
7 viewpoint.

8 Q. Okay. Let's talk about that. Is the output of the
9 accelerometer capable of moving objects and navigating a
10 viewpoint?

11 A. Yes, it is. And we've seen that, for instance, in
12 the boxing game that Mr. Ikeda demonstrated.

13 Q. And Mr. Ikeda also testified about what the output
14 of this accelerometer is capable of doing, didn't he?

15 A. Yes, he did.

16 Q. He was asked: Could the game designer choose to
17 use the output of the accelerometer to move objects on
18 the screen?

19 And he answered: Well, just the way you can
20 move Mario, if you had a ball-like character, you could
21 move that ball in the same way.

22 Question: Could a game designer choose to
23 use the output of the accelerometer to change the
24 player's point of view on the screen?

25 And he answered: I think so.

1 Do you agree with Mr. Ikeda?

2 A. Yes, I do.

3 Q. Now, have you seen pictures of the interior
4 structure of accelerometers?

5 A. Oh, yes, certainly. Many.

6 Q. And you're familiar with what the internal
7 structure of an accelerometer looks like?

8 A. Yes.

9 Q. Have you seen a picture of the internal structure
10 of the accelerometer in the Nintendo Wii Remote?

11 A. Yes, I have.

12 Q. And does that picture accurately depict the
13 internal structure of that accelerometer?

14 A. Yes. As far as I know, it does.

15 MR. CAWLEY: Your Honor, at this time we'd
16 offer that picture.

17 MR. PRESTA: Objection, your Honor. That's
18 the hearsay document that we spoke about before. That's
19 not a proper predicate. Mr. Howe has previously
20 testified that he doesn't know the company that made the
21 report or where it came from and he did no verification
22 whatsoever regarding the report.

23 MR. CAWLEY: It's classic --

24 THE COURT: Is this the type of information
25 he relies upon?

1 BY MR. CAWLEY:

2 Q. Is this the type of information that you, as an
3 expert, would typically rely on in this case?

4 A. Yes. And Mr. Dezmelyk cited it, as well.

5 THE COURT: Under exception 18 of the hearsay
6 rule, I'll allow him to display it and discuss it in
7 front of the jury. The photo itself is not an exhibit.
8 It may be discussed --

9 MR. CAWLEY: Thank you, your Honor.

10 THE COURT: -- and shown to them.

11 MR. PRESTA: Thank you.

12 THE COURT: And there are cases allowing
13 videos, photos in addition to text in such a situation.

14 BY MR. CAWLEY:

15 Q. All right. Can you show us that picture?

16 A. Yep. There it is.

17 Q. Do you have a laser pointer?

18 MR. CAWLEY: Or can we find one?

19 A. I do not. I would appreciate it.

20 MR. CAWLEY: May I approach, your Honor?

21 THE COURT: You may.

22 BY MR. CAWLEY:

23 Q. Professor Howe, what is this?

24 A. Well, this is sort of an extreme close-up taken
25 with a special microscope, an electron microscope, to

1 show what's inside that accelerometer.

2 Q. Can you walk us through it?

3 A. Sure. Well, again, the key parts here -- the proof
4 mass, as I mentioned and as Mr. Dezmelyk said, as well,
5 is actually wrapped around this.

6 And then here (indicating) you see a bunch of
7 these parallel lines, and you can see the label here.
8 It says "Y capacitors." So, these are the ones that
9 sense motion, actually in this direction (indicating).

10 Over here (indicating) we see something
11 labeled "X capacitors"; and, again, those sense motion
12 in this direction (indicating).

13 So, we have two sets of capacitors shown as
14 structures within this device.

15 Q. So, is this actually a picture of the two separate
16 capacitors in the Wii Remote accelerometer?

17 A. That's correct.

18 Q. And are they sensors?

19 A. Yes, they are.

20 Q. And do they satisfy the elements that you just
21 described to us of this third element claim in the '700
22 patent?

23 A. Yes. They match the description given in the
24 claim.

25 Q. Thank you.

1 Professor Howe, do you consider the Wii
2 Nunchuk, when it's connected to the Wii Remote, as a
3 hand-operated controller?

4 A. Yes, certainly.

5 Q. And why is that?

6 A. Well, you can't use the Wii Nunchuk by itself. You
7 have to use it in combination with the Wii Remote.

8 Q. And why does that make a difference?

9 A. Well, since you can't use it by itself, it's really
10 one device when you hook them up.

11 Q. And have you reviewed the testimony of anyone from
12 Nintendo in coming to this conclusion?

13 A. Yes, a number of the engineers there.

14 Q. Did you consider the testimony of Mr. Takeda?

15 A. Yes.

16 Q. And what did he say about that?

17 A. Well, he said exactly that point, that the Wii
18 Remote -- I'm sorry -- the Wii Nunchuk is really an
19 extension of; it is really part of the Wii Remote and
20 they make one controller when used together.

21 Q. Is this a deposition of Mr. Takeda that you
22 considered in arriving at your opinion?

23 A. Yes, it is.

24 Shall I read it?

25 Q. Sure. Go ahead.

1 A. Okay. So, the question: Mr. Takeda, in front of
2 you are two objects that have been labeled 295 and 296.
3 What is Exhibit 295?

4 Answer: We call it the "Wii Remote
5 controller"; so, it's the controller for the Wii video
6 game.

7 Question: And what's Exhibit 296?

8 Answer: Well, this is part of the Wii Remote
9 control. Exhibit 295, one holds in the right hand.
10 Exhibit 296 is the Wii extension which is plugged in
11 here --

12 The Interpreter: And the witness pointed to
13 plugging into the Wii Remote.

14 It goes on and the answer continues: -- and
15 is held in the left hand. So, it's an extension of the
16 controller for the Wii.

17 Question: Now, to use the Nunchuk, you have
18 to plug it into the Wii Remote, correct?

19 Answer: Yes, the Nunchuk does not exist as a
20 stand-alone product. The Nunchuk depends on the Wii
21 Remote. It operates when attached to the Wii Remote.

22 Q. So, what do you think is the significance of that
23 testimony?

24 A. Well, I think it makes it clear that the Nunchuk
25 and the Remote together constitute one controller. The

1 Nunchuk by itself is not a controller.

2 MR. CAWLEY: May I approach, your Honor?

3 THE COURT: You may.

4 BY MR. CAWLEY:

5 Q. Professor Howe, is what I've just handed you the
6 Wii Remote connected to a Nunchuk?

7 A. That's right. This is the Remote (indicating),
8 this is the Nunchuk (indicating).

9 Q. Does it matter to your opinion that this is one
10 controller that you need two hands to hold it?

11 A. No, certainly not. Most of the controllers that
12 we've seen use two hands so -- for instance, the
13 Nintendo GameCube uses two hands. The Sony Dual Shock
14 uses two hands; Microsoft Xbox; going back to older
15 controllers, the Atari. So, two-handed operation is
16 typical for video game controllers nowadays.

17 Q. Have you, Professor Howe, in the course of your
18 work in this case -- have you studied the 1996
19 application?

20 A. Certainly, yes.

21 Q. And have you studied the asserted claims of the
22 '700 patent?

23 A. I have.

24 Q. Have you come to any opinions regarding the
25 priority date of the asserted claims?

1 MR. PRESTA: Objection, your Honor. This is
2 going outside the scope of his expert report, as we
3 spoke about earlier, when he was going to testify on
4 this issue. In particular, claim 19.

5 MR. CAWLEY: Well, I can refer your Honor to
6 the sections of his report where he offers this opinion.

7 MR. PRESTA: There is no opinion.

8 THE COURT: Since it is in rebuttal, I'll
9 overrule it.

10 BY MR. CAWLEY:

11 Q. Have you come to any opinions regarding the
12 priority date of the asserted claims?

13 A. Yes, I have.

14 Q. What are your opinions?

15 A. My opinion is that the asserted claims are
16 supported by and deserve the priority date of the 1996
17 application.

18 Q. How did you come to that conclusion?

19 A. Well, it's important to compare the claims, the
20 claim limitations, the terms in the claim to the
21 original application and make sure that they're there,
22 they're supported, and also to look at the disclosure,
23 the figures and words in the beginning of the actual
24 '700 patent and make sure that the claims are supported
25 there, as well.

1 Q. And when you were studying the disclosure in 1996,
2 from what perspective did you read it?

3 A. Right. Well, you have to analyze this in terms of
4 one skilled in the art.

5 Q. What do you mean by that?

6 A. Well, my understanding -- it's a legal term. My
7 understanding is that what matters is not what somebody
8 off the street might think; you have to look at this
9 through the eyes of someone who understands this
10 material, who works in the field, and who would be able
11 to apply the teachings in the patent.

12 Q. How do you know if someone is skilled in the art or
13 not?

14 A. Well, in general that's a complicated question;
15 and, of course, it varies from patent to patent. Now,
16 fortunately, Judge Clark here has given us a definition
17 of someone skilled in the art.

18 Q. Do you have that definition with you?

19 A. I do.

20 Okay. So, it reads: The court finds that
21 one of ordinary skill in the art is someone with an
22 equivalent of a four-year degree from an accredited
23 institution, usually denoted in this country as a BS
24 degree, in mechanical or electrical engineering and at
25 least three years experience in designing, developing,

1 or improving electronic systems that include sensors
2 and/or controllers for computers, robotics, video games
3 or other electronic devices. He or she should have some
4 familiarity with pressure-sensitive variable conductance
5 material. Extensive experience and technical training
6 might substitute for educational requirements while
7 advanced degrees might substitute for some experience.

8 So, basically this says you need to be
9 somebody with some engineering background who works in
10 this area in order to be someone of skill in the art.

11 Q. And did you follow the court's instruction in
12 reading and then arriving at opinions on the '96
13 disclosure from the perspective of someone like you just
14 described?

15 A. Yes.

16 Q. Now, yesterday you were here for the testimony of
17 Mr. Dezmelyk, right?

18 A. Yes, I was.

19 Q. And based on what you heard and saw during his
20 testimony and the teachings of the 1996 application, are
21 all of the claim requirements found in the '96
22 application?

23 A. Yes, they are.

24 Q. What is disclosed in the '96 application?

25 A. Well, lots of things. It includes many different

1 ideas. We've heard the word "warehouse patent" and I
2 think that may have been a bit overused, but I think
3 that's not a bad description. So, in addition, we've
4 heard a lot about a one input member controller moving
5 in 6 degrees of freedom; and that's certainly there.
6 Certainly, Mr. Armstrong thought that was an important
7 idea. But he talks about a lot of other ideas, as well.

8 So, for instance, he talks about how to use
9 flexible circuit sheets in order to make the
10 manufacturing of these devices less expensive and more
11 reliable.

12 He talks about these interesting little
13 rocker devices and how they can be configured to either
14 activate unidirectional sensors or bi-directional
15 sensors. There are a lot of different ideas in there;
16 and I think that's shown, for instance -- so far we've
17 been looking at roughly five or six figures that we've
18 shown you again and again; whereas, the actual
19 application, I believe, has 50 figures. So, there are
20 many different ideas present in that patent application.

21 Q. Let me make sure we understand what you just said,
22 Professor Howe. You've agreed with Mr. Dezmelyk -- I
23 think I just heard you say -- that the '96 application
24 does disclose a single member control with 6 degrees of
25 freedom. Is that correct?

1 A. Yes. Certainly, Mr. Armstrong thought that was one
2 good idea.

3 Q. But is that all it discloses?

4 A. No. Again, there are pressure-sensitive buttons.
5 There are different ways of configuring simple sensors
6 to allow complicated control. There's a lot going on in
7 that patent.

8 Q. And has Mr. Dezmelyk yesterday told us that we
9 should simply disregard everything except the single
10 member of control in 6 degrees of freedom?

11 A. Well, I believe that was his, you know, big
12 message, if you will. But I believe he also pointed out
13 that there are a lot of different ideas there.

14 Q. Okay. Well, let's take a look at what he told us.

15 Here's some testimony from Mr. Dezmelyk from
16 yesterday. There was a question -- and I won't read it
17 all; but I'll just start here, that second paragraph:

18 Now, when you began your testimony about that subject,
19 you went through the '96 application; and you

20 testified -- and I'm not trying to put words in your

21 mouth here, but maybe we can work together to get

22 whatever words you're comfortable with. You testified

23 that in your reading the '96 application, you believed

24 that the inventions or ideas that Mr. Armstrong

25 disclosed was a single input member that could control

1 degrees of freedom. Is that accurate?

2 And the answer was: Well, I think it's
3 important that we have a very clear sort of definition
4 of what that is because, first off, there is a number of
5 things described in that application. Some of them are
6 not relevant to this litigation.

7 And the next question: Okay. And you said
8 that this morning.

9 And then he went on: There are also a lot of
10 descriptions of the particular details of the idea, like
11 some sheet connections, some ways of mounting
12 proportional buttons, and so forth. Not all of those
13 are necessarily related to this, either. So, I don't
14 want to appear that I'm characterizing his invention in
15 some kind of very simple, narrow-minded way. I'm saying
16 that relative to the claims we're talking about here,
17 there are certain key aspects of that invention. The
18 scope of the invention -- it would be inappropriate to
19 try and look at every idea that was in the whole
20 application. We could be here for days.

21 Now, Professor Howe, we've already been here
22 for days.

23 A. Yes, we have.

24 Q. But I'm sure we would all agree it would be not a
25 good idea to be here for days more. So, give us a

1 shortcut. Do you agree that it's inappropriate to look
2 at every idea in the application?

3 A. Well, in analyzing these questions of validity and
4 support, yes, you do have to take the whole patent into
5 account. You can't just focus on one of the good ideas
6 in there and say that's the only thing in the patent. I
7 agree with this statement from Mr. Dezmelyk. There are
8 a lot of ideas in there, and we need to consider the
9 whole patent in addressing this question of validity and
10 priority date.

11 Q. So, from reading the whole specification and the
12 whole disclosure in 1996, do you have an opinion as to
13 whether Brad Armstrong only taught using the technology
14 disclosed in the '96 application with a single input
15 member with 6 degrees of freedom?

16 A. No, I don't. He talks about many ideas, and
17 there's nothing in there that limits it to that one
18 idea. Certainly that was an important idea in there,
19 but there are other ideas -- and I think we've seen a
20 number of those examples -- where it's clear the scope
21 is larger than just that one single idea.

22 Q. Okay. And just -- since all of this is being
23 written down, I sometimes, I guess, get a little
24 paranoid about how it's going to look. I think that the
25 long convoluted question that I just asked you was

1 whether you had an opinion; and you started off your
2 answer "No, I don't." So --

3 A. Okay.

4 Q. You have an opinion about that?

5 A. I do have an opinion.

6 Q. And that's the opinion you've just told us?

7 A. That's right, that the material in the patent is
8 broader than a single input 6-degree-of-freedom device;
9 and this supports the claims, as we've been discussing
10 them, from the '700 patent.

11 Q. Now, you heard Mr. Dezmelyk yesterday say that the
12 application in '96 was limited to single input members
13 operating in 6 degrees of freedom, correct?

14 A. Yes. He said that.

15 Q. And you've just told us you disagree with that; is
16 that right?

17 A. That's right. I do.

18 Q. All right. Let's look at a few figures. And as
19 you've correctly told us, we've seen most of these
20 before. So, I don't want to spend a lot of time on
21 them; but I do want to be clear here about your opinion.
22 Let's look at Figure 20.

23 This is the exploded drawing. Tell us again
24 what's shown here.

25 A. Sure. Well, up at the top -- let me point, if I

1 can -- (indicating) is the handle that the user would
2 grab. You see there are a couple of little buttons here
3 (indicating).

4 Then underneath is this set of rockers
5 (indicating) and the carriage and the sensors mounted on
6 the circuit sheet and so on.

7 Q. So, is it true that in his application, one of the
8 things that Mr. Armstrong discussed in connection with
9 this figure was the possibility and even some advantages
10 of a controller with a single input member that operated
11 in 6 degrees of freedom?

12 A. Yes, that's right.

13 Q. But is that all he discussed?

14 A. No, not at all.

15 So, again, there are some useful ideas about
16 clever ways of configuring input elements so that they
17 can activate a number of different kinds of sensors in
18 clever ways. There are extra buttons here. So, there
19 are extra input elements here, as well.

20 Q. Would one of skill in the art reading this
21 application in 1996 and looking in this Figure 20 say to
22 themselves, "Oh, this patent teaches the use of a single
23 input member controlling 6 degrees of freedom"?

24 A. Well, that's one of the things it teaches; but they
25 would also see a lot of other interesting and useful

1 teachings concerning other parts of this device.

2 Q. And, Professor Howe, is it your understanding that
3 the scope of what was disclosed in 1999 is limited by
4 any one of the 50 drawings in the '98 -- excuse me --
5 the '96 disclosure?

6 A. No. No one drawing specifies the scope of the
7 entire patent.

8 Q. In fact, are you familiar with figures or
9 statements in the '96 application that show that
10 Mr. Armstrong's technology was not limited to a single
11 input member operable in 6 DOF?

12 A. Yes.

13 Q. Can you show us one?

14 A. Sure.

15 So, here are a couple of quotes. The first
16 one is from the '96 application, page 13; and it says:
17 The input member of the joystick-type controller may be
18 manipulable or operable in up to 6 degrees of freedom.

19 Q. And what do you understand that to mean as relates
20 to this issue?

21 A. Sure. Well, "up to 6 degrees of freedom" means it
22 could be less than 6 degrees of freedom or it could be
23 6 degrees of freedom. It's pretty clear.

24 Q. Okay. And while we're at it, just so I won't have
25 to come back to it, is similar language included in the

1 '700 patent quoted here below?

2 A. Yes, it is. So, here from the '700 patent on
3 page 2, we have: Hand-operated controllers, providing
4 up to 6 degrees of freedom.

5 So, the same language, "up to 6 degrees of
6 freedom"; so, it could be less. Certainly that was
7 contemplated both in the '96 application and in the
8 final '700 patent.

9 Q. Okay. Well, if the '96 application disclosed
10 members that move in less than 6 degrees of freedom,
11 what does that say to you about Nintendo's claim that
12 that's all Mr. Armstrong disclosed was members that move
13 in 6 degrees of freedom?

14 A. Well, it's not correct. They're trying to narrow
15 it down to something that is much broader in the actual
16 patent and application.

17 Q. Anything else you can show us from the application
18 that shows that something other than a single controller
19 in 6 degrees of freedom was disclosed?

20 A. Certainly. Can I have the next slide?

21 Q. Let's take a look at the next slide.

22 What are we looking at here?

23 A. Okay. So, this -- the top quote is from the '96
24 application on page 48. It says: This structuring also
25 offers tremendous advantage in many

1 non-6-degree-of-freedom applications.

2 So, there he's telling us that the way of
3 putting this particular bit together is also useful in
4 situations where there aren't 6 degrees of freedom.
5 Again, the scope is larger than just that single input
6 6-degree-of-freedom idea.

7 And the lower quote is from the actual '700
8 patent, column 29; and it says: This structuring also
9 offers tremendous advantage in many
10 non-3-degree-of-freedom applications. So, same thing.
11 Here it says you don't have to have 3 degrees of freedom
12 in order to -- or 3-D -- I'm sorry -- you don't have to
13 have 3-D in order to take advantage of the ideas here.

14 Q. And is there disclosure in the '96 application that
15 discloses not just a single input member but multiple
16 input members?

17 A. Yes, certainly.

18 Q. Can you show us that?

19 A. Sure.

20 Well, this is from the '96 application. You
21 can find it on page 61. It's Figure 9. And it shows
22 this idea again of a trackball and a surrounding collar
23 and then a number of buttons for a wireless remote
24 controller.

25 So, this is a way of combining a couple of

1 the elements we've seen before, the idea of a trackball,
2 the idea of this collar you can move with your fingers,
3 and then a number of buttons as well. So, there are a
4 lot of different input modes here.

5 Q. Do you remember yesterday when Mr. Dezmelyk
6 testified about the early Nintendo controller?

7 A. Yes.

8 Q. I think it's still in front of you there. Is it
9 not?

10 A. No. These are -- oh, no. It is, yes. Here it is.

11 Q. Could you hold that up for the jury?

12 A. Sure, yep (complying).

13 Q. Do you remember that Mr. Dezmelyk testified that
14 the cross-shaped, or what we've heard called as the
15 "directional pad," and every one of the buttons on that
16 controller are separate input members?

17 A. That's right. The way you use this thing is you'd
18 hold it in two hands, and you could use your thumbs to
19 hit the buttons and the cross pad or D-pad.

20 Q. So, if Mr. Dezmelyk says that in the Nintendo
21 controller every one of those buttons is a separate
22 input member, is there any reason why, in Figure 9
23 disclosed by Mr. Armstrong in 1996, his buttons aren't
24 also separate input members?

25 A. No. They certainly seem to be input members to me.

1 Q. Let's take a look at the next slide. Tell us what
2 we see here from the '96 application on top and the '700
3 patent below.

4 A. Okay. So, the top quote again is from the '96
5 application on page 28; and it talks in here about two
6 finger select switches which are secondary input
7 members.

8 So, again, this is clearly labelling them as
9 input elements.

10 Q. Okay. And the next slide?

11 A. I should add, down below on that --

12 Q. Sorry.

13 A. -- last slide, we also have the same words from the
14 '700 patent in Column 14.

15 Q. Thank you.

16 If we could go to the next slide, then, what
17 do we -- I don't want to spend a lot of time on these,
18 but what do we see here?

19 A. The words here from the '96 application, page 40,
20 are: Auxiliary secondary input buttons.

21 So, again more inputs.

22 And below are the same words which add: Are
23 readily integrated into the controller from the '700
24 patent, column 23.

25 Q. Okay. And the next slide?

1 A. Okay. So, from the '96 application, page 58, here
2 we see Figure 6, a figure we're all familiar with by
3 now. And this describes two input elements. The text
4 here from the '96 application, page 27, it says: The
5 Trackball 12 input member -- so, that's the round thing
6 in the center, of course.

7 And then down below: The rotatable collet
8 can serve as an additional secondary input member.

9 And that's the thing that's colored yellow
10 there, Number 16 in the figure.

11 Q. All right, sir. And while we're on this figure --
12 and I think we are done with showing these slides
13 related to secondary input member as opposed to single
14 input member.

15 But I notice here some language just outside
16 the highlighting, starting with the sentence: Further,
17 the Trackball 12 input member may be interpretable on
18 all six axes.

19 Do you see that?

20 A. I do.

21 Q. As one of skill in the art reading this, what have
22 you understood that the word "may" here implies?

23 A. Well, when he says "may be interpretable on all six
24 axes," he's saying you could interpret or sense the
25 motion on all 6 degrees of freedom there; but you don't

1 have to. He didn't say "is" interpretable on all six
2 axes; he says "may be."

3 So, again, it's the idea that you can use
4 these ideas in a number of different ways. One of them
5 is this full six axes, 6-degree-of-freedom sentencing;
6 but there are other good ideas, different ways to use
7 this, as well.

8 Q. Now, you've reviewed the testimony of Mr. Koshiishi
9 from Nintendo in Japan, haven't you?

10 A. Yes, I have.

11 Q. And you were here yesterday when I played about a
12 four-minute video clip of his testimony again for the
13 jury during Mr. Dezmelyk's testimony, weren't you?

14 A. Yes.

15 Q. And you remember that Mr. Koshiishi is an engineer
16 for Nintendo and was involved in the development of the
17 Nintendo GameCube controller?

18 A. That sounds right, yes.

19 Q. And did he interpret some figures from the '96
20 application?

21 A. Yes. I think that last figure we were looking at.

22 MR. CAWLEY: Let's put that up again, please.

23 BY MR. CAWLEY:

24 Q. Why was his testimony important?

25 A. Well, we heard him say that the two elements there,

1 the trackball piece and the collet or collar piece,
2 could be separated. For instance, they could be moved
3 to different parts of the controller. They each could
4 provide fewer than 6 degrees of freedom, and this means
5 you would be able to use them as separate input
6 elements.

7 Q. Yeah. I was mistaken. This is actually the figure
8 that Mr. Koshiishi was testifying about, correct?

9 A. Okay. Yes. It's a different view of the same
10 embodiment, the same example from the patent.

11 Q. Okay. And why is his testimony about this
12 important?

13 A. Well, again, this is a Nintendo engineer; so,
14 someone who is skilled in the art. He has, you know,
15 made his living -- he's been paid for designing video
16 games, and he has said that this constitutes two input
17 elements that could be used in a less than
18 6-degree-of-freedom context.

19 Q. So, how does that affect your opinion?

20 A. Well, it confirms what I said earlier, that we
21 aren't limited here by the disclosure in the '96
22 application or the '700 patent to single input
23 6-degree-of-freedom devices. It's broader than that.

24 THE COURT: All right. Counsel, we're going
25 to go ahead and take a break.

1 Ladies and gentlemen, I'll ask you to be back
2 at 10:00.

3 (The jury exits the courtroom, 9:44 a.m.)

4 THE COURT: Last night when we were
5 discussing the jury charge, the one open -- I guess
6 there were two open things, but one of them was the
7 burden of proof issue on the priority date. I had
8 drafted the -- the draft that I gave you was based on
9 the Chiron case. Any more discussion on that?

10 MR. BOVENKAMP: Your Honor, we took a hard
11 look at that and tried to figure out whether we were
12 able to come to an agreement with defendant's proposed
13 construction on that issue; and we believe that
14 your Honor's instruction as is is still the most
15 appropriate way to proceed.

16 THE COURT: Well, I mean, I'll accept a
17 better way from either side if there is one. I mean, I
18 obviously don't want to give an instruction that winds
19 up killing your case should you win; and I don't want to
20 give you an instruction that kills your case should you
21 win. So, have you come up with anything at all that
22 would help us out?

23 MR. FARIS: Your Honor, the Power Oasis case
24 does, at this point, seem to be the case. This is
25 the -- we've been looking for any other case which

1 addresses this specific issue and have not been able to
2 find one.

3 THE COURT: All right. Do you have a
4 pinpoint cite on the pages that I should be looking at?

5 What about just the citation to the case
6 itself if you don't know the --

7 MR. FARIS: It's a slip opinion, the one that
8 I have, your Honor.

9 THE COURT: Do you have that somewhere,
10 Betty, the Power Oasis? We had it somewhere in this
11 pile of stuff.

12 MR. FARIS: And, I'm sorry. I don't have a
13 hard copy to hand up.

14 THE COURT: All right. Well, we're going to
15 go ahead and -- everyone needs a break; so, we'll be in
16 recess, then, until ten of. If you find the pinpoint or
17 whatever that would be helpful on that, if you'll let
18 myself or Ms. Chen have it, that would be appreciated.

19 MR. FARIS: Yes, your Honor. On the slip
20 opinion, it begins on page 6.

21 THE COURT: Okay.

22 MR. GUNTHER: Your Honor, was there a second
23 issue you were about to raise? Was it --

24 THE COURT: Well, if we raise it, we're not
25 going to get a break; so, we can deal with it when the

1 jury comes back.

2 MR. GUNTHER: Let's take a break.

3 (Recess, 9:48 a.m. to 10:00 a.m.)

4 (Open court, all parties present, jury not
5 present.)

6 THE COURT: We had talked about motions for
7 JMOL each way. It would be my preference to go ahead
8 and finish up the evidence. We're going to be having a
9 long break where we're going to be talking about the
10 jury charge and so forth. I would prefer to handle the
11 JMOLs of plaintiff and the renewal by defendant at that
12 time as though they were all timely filed at the precise
13 time they would have been if we had gone ahead and taken
14 breaks and made the jury sit around waiting for us.

15 Any objection from plaintiff?

16 MR. CAWLEY: No objection, your Honor.

17 THE COURT: From defendant?

18 MR. GUNTHER: No, your Honor.

19 THE COURT: Okay. Bring in the jury, please.

20 (The jury enters the courtroom, 10:00 a.m.)

21 THE COURT: All right, Mr. Cawley.

22 BY MR. CAWLEY:

23 Q. Mr. Howe, I just have a couple other topics I want
24 to cover with you; and they are short. But before I go
25 on to the next one, let me just conclude the subject

1 that we were just talking about.

2 You've just shown us some of the drawings
3 from the application, correct?

4 A. That's right.

5 Q. And you've shown us some of the words or text that
6 was in the '96 application, right?

7 A. That's right.

8 Q. And you've been talking about this whole question
9 raised by Nintendo of whether that application is
10 limited to controllers with a single input member
11 operable in 6 DOF, and I want to ask you: What is your
12 conclusion about that?

13 A. Well, the patent is simply not limited to single
14 input 6-degree-of-freedom controllers; and the claims
15 which do not concern those are -- find support in both
16 the 1996 application and the '700 patent.

17 Q. Is the disclosure in the '96 application limited to
18 a single input member movable in 6 DOF?

19 A. No, it's not.

20 Q. Does it include that?

21 A. Certainly. That's one of the ideas in there, yeah.

22 Q. But why is it not limited to that?

23 A. Well, there's nothing in the text which says that's
24 the only possibility here; and there are other ideas
25 which are clearly stated. We saw some of those

1 examples.

2 Q. Okay. Now, let me move from -- move our focus from
3 the '96 disclosure to the specification or the drawings
4 and written description in the actual '700 patent
5 itself. Have you reviewed those?

6 A. Of course.

7 Q. And have you compared them to the claims that are
8 asserted in this case?

9 A. Yes, I have.

10 Q. Do you have an opinion as to whether the asserted
11 claims are supported by the specification of the '700
12 patent?

13 A. Yes, I do. The asserted claims are supported by
14 the '700 patent specification.

15 Q. All right. Now let me ask you about the last
16 subject. Yesterday you heard Mr. Dezmelyk testify about
17 the Wii Classic Controller and what it could do, didn't
18 you?

19 A. Yes, I did.

20 Q. Let's look at a piece of testimony in particular.
21 Yesterday Mr. Dezmelyk was asked this question: Are you
22 aware of any games where both of the joysticks are
23 operable on the Wii Classic Controller?

24 And he answered: No.

25 And then he was asked: Have you read -- did

1 you investigate at all to see, in fact, whether there
2 were games that the Wii Classic Controller could be
3 used, for example, to play GameCube games to require
4 actually two joysticks?

5 He answered: Right. I have read that it
6 cannot be done. I certainly have not tried every game
7 in the world. I only tried the games that were in this
8 case.

9 Question: Okay. And you said you read and
10 heard -- and read it could not be done, did I hear?

11 And he answered: Right. My understanding is
12 that it cannot be done.

13 Now, Professor Howe, were you in the
14 courtroom yesterday when Mr. Dezmelyk told this jury
15 that the Wii Classic Controller could not be used to
16 play a game using both of the joysticks?

17 A. I was.

18 Q. Is that true, sir?

19 A. No. I was very surprised to hear him say that.

20 Q. Can you demonstrate to us that it's not true?

21 A. Certainly.

22 MR. CAWLEY: Your Honor, may the witness step
23 down?

24 THE COURT: He may.

25 THE WITNESS: Your Honor, would it be okay if

1 I speak loudly and don't use the microphone? I don't
2 quite have three hands.

3 THE COURT: Yes.

4 THE WITNESS: Thank you.

5 A. Okay. So, here we have the Wii Remote and the Wii
6 Classic Controller plugged into it and here we have a
7 game and --

8 BY MR. CAWLEY:

9 Q. What's the name of the game?

10 A. Let's see. This is Bash Brothers Brawl, I believe.
11 But we're not going to see any actual fighting here.
12 We've set it up at a point where I can move characters
13 around and change viewpoints as required by claim 19
14 without getting into any of the real fisticuffs here.

15 So, let's see. Let me start the game. We're
16 in pause mode right now, and it's not listening to me.
17 Hello?

18 Okay. So, let me start it up here
19 (demonstrating). So, I'm the character on the right. I
20 believe that's Princess Peach, but don't quote me on
21 that one. And I have the two thumbsticks here, and let
22 me show you what I can do.

23 So, for instance, we'll take the left
24 thumbstick. I move left, and she skips to the left. I
25 move right, and she skips to the right. So, clearly I'm

1 controlling her motion with that one.

2 Now if I push up, she jumps. And when I push
3 down, she crouches down.

4 So, again, we have a down direction as well
5 as a right and left direction. I'm controlling the
6 character.

7 Now, the right side -- whoops. I hate it
8 when that happens.

9 Okay. Let's get her back up again. Let's
10 not run into any of these catastrophic things.

11 Okay. Now, on this one, if I move to the
12 right, she swings to the right. If I move the left
13 joystick to the left, she swings to the left.

14 If I raise it, she twirls around and jumps
15 up. I push the joystick down, and she crouches down and
16 twirls. So, again, all of the directions on the right
17 thumbstick, I'm controlling the character. So, both
18 thumbsticks are able to do this.

19 Now let's put it in pause mode. Okay? And I
20 caught her in mid stride. Let's find her in a slightly
21 better position. Is that better? I don't know.

22 Okay. Now, on pause mode I can now control
23 the viewpoint. So, for instance, I take the right
24 joystick. I move to the right, and you can see the
25 camera slides right and left. I move up and down, and

1 that right joystick moves the camera up and down.

2 I go to the left thumbstick, and I can now
3 rotate the viewpoint and -- by moving it right and left.
4 And if I move it up and down, I'm changing the viewpoint
5 and rotating it around like so.

6 So, both thumbsticks are able to control --
7 in all the directions they move, they are able to
8 control the character; and they are also able to change
9 the viewpoint, move the camera around. So, this matches
10 the requirements in claim 19 for those second and third
11 elements to do that.

12 Q. Thank you. If you'll take the stand again, sir.

13 So, have you just demonstrated to us,
14 Professor Howe, that contrary to what this Mr. Dezmelyk
15 told us, that the -- on the Wii Classic Controller, both
16 the left and the right joysticks are capable of moving
17 objects on the screen?

18 A. Yes. That's right.

19 Q. And have you also demonstrated to us that on that
20 controller, both the left and the right joysticks are
21 capable of moving the point of view on the screen?

22 A. Yes. That's right.

23 MR. CAWLEY: Thank you, your Honor. I pass
24 the witness.

25 THE COURT: Go ahead, counsel.

1 MR. PRESTA: Thank you.

2 CROSS-EXAMINATION OF ROBERT HOWE

3 BY MR. PRESTA:

4 Q. Good morning, Professor Howe.

5 A. Good morning.

6 Q. How are you today?

7 A. I'm fine. And yourself?

8 Q. Very good.

9 Now, you understand, of course, that as an
10 independent expert in this case, it's important that you
11 give unbiased testimony, right?

12 A. Of course.

13 Q. Now -- so, it's your position that your testimony
14 is not tainted towards the plaintiff to help them win
15 but is, in fact, independent --

16 A. That's right.

17 Q. -- expert testimony, right?

18 A. That's right.

19 Q. And you understand how important it is that your
20 testimony is actually supported by the things that
21 you -- that your testimony is supported by the actual
22 facts, right?

23 A. Of course.

24 Q. And it's important, isn't it, as an expert, not to
25 take things out of context and try to help, for example,

1 the plaintiffs win? Would that be inappropriate?

2 A. That would be inappropriate.

3 Q. Okay. Now, you're aware, of course, that you have
4 taken several things completely out of context in the
5 1996 application in order to help the plaintiffs win in
6 this case, haven't you?

7 A. No.

8 Q. Your position is you haven't taken things out of
9 context?

10 A. In the sense you're using it, no.

11 Q. Would you like to clarify anything with respect to
12 the part of the specification that you directed the jury
13 to on page 48 of the jury notebook?

14 A. No.

15 Q. You don't want to clarify anything in your
16 testimony?

17 A. No.

18 Q. Okay. Is there a reason, when you pointed out that
19 part of page 48 in the jury notebook, that you didn't
20 mention the page in the jury notebook? Would you mind
21 if the jury actually looked at the page?

22 A. Sure. That's fine. Of course.

23 Q. All right.

24 MR. PRESTA: What I'd like, then, to do is
25 ask if we could have the 1996 application pulled up at

1 page -- which is page 48 of Exhibit 306 and --

2 BY MR. PRESTA:

3 Q. Now, first of all, you agree perfectly with
4 Mr. Dezmelyk, of course, that there are a variety of
5 different inventions and ideas disclosed in this 1996
6 application, right?

7 A. Yes.

8 Q. Some of which have nothing to do with my client,
9 Nintendo, right?

10 A. That's fair, yeah.

11 Q. For example, there's different types of sensors
12 that he discloses in there that Nintendo doesn't use,
13 right?

14 A. Sure.

15 Q. And there's different types of circuit boards in
16 there that Nintendo doesn't use?

17 A. I'd have to think about that one. Could be.

18 Q. Okay. There could be, though, right?

19 A. Yep.

20 Q. And if, in fact, you are pointing to things in the
21 specification that have nothing to do with Nintendo,
22 then that would be out of context, wouldn't it?

23 A. Let's see. Well --

24 Q. Tell you what. I'm going to strike that question.

25 I'm going to direct -- you testified that, in

1 fact, this page 48 of the 1996 application supported
2 your view that you told the jury that this patent, the
3 1996 application, supports an input member that has less
4 than 6 degrees of freedom, right?

5 A. I believe that's right.

6 Q. Okay. Now, you only showed a small snippet of that
7 paragraph; and the paragraph is on page 48 of the jury
8 notebook, starting around line 7. And we have that page
9 pulled up right here on the screen.

10 Now, on the screen, this is the paragraph;
11 and you cited right here (indicating) "in many non 6 DOF
12 applications."

13 MR. PRESTA: Could we highlight that?

14 BY MR. PRESTA:

15 Q. You and Mr. Cawley put up in front of the jury just
16 these two little parts of this paragraph, didn't you?

17 A. Looks familiar, yes.

18 Q. Do you have any doubt that that's what you did?

19 A. No.

20 Q. Now, is there a reason that you didn't direct the
21 jury to the jury notebook or, in fact, put the whole
22 paragraph up?

23 A. It's a lot to read in court.

24 Q. Would you like to clarify your testimony right now
25 about this, or do you want me to?

1 A. I'll let you do that.

2 Q. All right. Now, it starts off the paragraph saying
3 there: This novel membrane sensing anchoring and
4 activating structure.

5 Do you see that?

6 A. I do.

7 Q. Now, this case doesn't involve a novel membrane
8 sensor anchoring and activating structure, does it?

9 A. Not that piece, no.

10 Q. Now, none of the claims in this case require that,
11 do they?

12 A. No.

13 Q. And, in fact, none of the products that Nintendo is
14 accused of infringing with have that in it, do they?

15 A. I don't believe so. I'm not certain of that, but I
16 don't believe so.

17 Q. Okay. Now, this paragraph has nothing to do with
18 the single input member -- nothing to do with the single
19 input member controller, does it?

20 A. I'd have to read the paragraph. Can you give me a
21 minute?

22 Q. Yes. Please do. It's important.

23 A. No. I think you're right. This speaks about the
24 scope of the patent. It speaks about a lot of different
25 ideas being here, but I don't see a particular mention

1 of a single input member here.

2 Q. Okay. And this paragraph is actually talking about
3 Mr. Armstrong's alleged novel membrane sensor anchoring
4 and activating structure, right? You agree with me?

5 A. That's how the paragraph starts, yes.

6 Q. Okay. And then it says that this structuring --
7 this novel membrane anchoring structure that he
8 discloses -- the paragraph that you pointed to says this
9 structuring -- referring back to the novel membrane
10 sensor anchoring structure -- offers tremendous
11 advantages in many non 6 DOF applications.

12 Do you see that?

13 A. Yes.

14 Q. Now, that isn't at all any support, contrary to
15 your earlier testimony, for the fact that the input
16 member could be -- could provide -- you could have more
17 than one input member to provide 6 degrees of freedom,
18 does it?

19 A. No. It speaks to the idea there are many different
20 configurations in the scope of this patent.

21 Q. But you represented to the jury that this paragraph
22 actually supported the plaintiff's position that the
23 1996 application can provide -- have more than one input
24 member that allows 6 degrees of freedom, right?

25 A. Yes. That's right.

1 Q. And you actually said that this paragraph supports
2 the fact that the single input member could have less
3 than 6 degrees of freedom, didn't you?

4 A. Yes, that's right.

5 Q. And that is absolutely false, isn't it, Professor
6 Howe?

7 A. No, that's not.

8 Q. Professor Howe, when you read a document like this,
9 isn't it important to take the teachings of it in
10 context of the surrounding words?

11 A. Sure.

12 Q. You're a professor at Harvard, right?

13 A. Yes.

14 Q. And don't you agree it's inappropriate to take two
15 sentences out of context and try to convince a jury to
16 help a plaintiff win in a case where you're supposed to
17 be an independent expert?

18 A. Well, if I had done that, I would agree with you;
19 but that isn't what I've done.

20 Q. So, your position is what you did was perfectly
21 fine, right?

22 A. That's right.

23 Q. And you're maintaining your independence up there
24 on the stand, aren't you?

25 A. That's right.

1 Q. Well, let's take a look at another thing you've
2 said.

3 Now I'd like to turn to what Mr. Cawley put
4 up for you on page 13 of the jury notebook. Now, you
5 referenced this page also in your testimony, didn't you?

6 A. It's awful small, but I'll take your word for it.

7 Q. I apologize for that. We will blow it up.

8 MR. PRESTA: And I'd like to blow up the
9 middle paragraph, please, where it starts at "also" and
10 goes down to around line 21.

11 BY MR. PRESTA:

12 Q. Now, this was the second thing out of two that you
13 put up to tell this jury that the 1996 application is
14 not limited to a single input member 6-degree-of-freedom
15 device and, in fact, can have less than 6 degrees of
16 freedom, right?

17 A. That's right.

18 Q. Now, you put up just these two sentences out of
19 this paragraph again, didn't you?

20 A. Yes. You're going to show me the two sentences, I
21 assume, but -- yeah.

22 Q. Yes. Well, you said that the input member of the
23 joystick-type controller may be manipulable or operable
24 in up to 6 degrees of freedom. You pointed to that,
25 right?

1 A. Yes, that's right.

2 Q. And you pointed to that for support for the jury to
3 determine that the 1996 application has teachings of
4 less than 6 degrees of freedom on the single input
5 member, right?

6 A. That's right.

7 Q. And that's not at all what this paragraph says, is
8 it, Professor Howe?

9 A. Again, let me read the paragraph.

10 Okay. I'm sorry. What was your question
11 again?

12 Q. Now, you understand that when you put this in
13 context, as Mr. Dezmelyk explained to Mr. Cawley on
14 cross-examination, that this is telling us that when you
15 have a joystick on top of the ball, that you can't go
16 all the way around. You understand that, right?

17 A. That's one of the things it says, yes. Uh-huh.

18 Q. That's the only thing it says, isn't it?

19 A. No.

20 Q. Professor Howe, it says that there's two different
21 types, a joystick-type and a trackball-type controller,
22 right?

23 A. That's right.

24 Q. And then the paragraph says the differences in
25 these two types is that the input member of the

1 joystick-type may be manipulable or operable in up to
2 6 degrees of freedom, but the freedom of the input
3 member is only to move or rotate within a limited range
4 of travel.

5 Do you see that?

6 A. I do.

7 Q. Because the handle prevents it from going all the
8 way around, right?

9 A. That's right.

10 Q. Then it says: On the other hand, the input member
11 of a trackball-type, typically being spherical in shape,
12 has an unlimited amount of travel.

13 Do you see that?

14 A. I do.

15 Q. So, this paragraph is pointing out that there is a
16 limitation when you put a handle on there because you
17 can't get full 6-degree-of-freedom around the ball,
18 right?

19 A. Well, let's see. No. It's actually saying that
20 there's a limited range of travel in all of the degrees
21 of freedom, and it says there could be up to six.

22 Q. Now, you see the last paragraph here that you
23 didn't show the jury. See that, the last sentence in
24 the paragraph?

25 A. I do.

1 Q. Now, the last sentence says: A 6 DOF trackball
2 embodiment is illustrated in Figures 1 through 10, and a
3 6 DOF joystick embodiment is illustrated in Figures 13
4 through 36.

5 A. Sure.

6 Q. Are you aware -- you're familiar with the figures
7 in this application, right, the 1996 application?

8 A. I am.

9 Q. And you're aware that Figures 1 through 10 and 13
10 through 36 covers every embodiment that is disclosed in
11 that specification regarding the actual controllers,
12 right?

13 A. I'd have to look to be sure, but that sounds right.

14 Q. So, Mr. Armstrong, in drafting it, is telling us
15 that all of his trackballs and all of his joystick
16 embodiments are 6-degree-of-freedom ones, right?

17 A. The examples he gives, yeah.

18 Q. And you took this sentence out of context by taking
19 a snippet of it to give a different impression, didn't
20 you, Professor Howe?

21 A. No. I stand by my testimony. It clearly says that
22 you can have less than 6 degrees of freedom. It says a
23 number of other things there, but certainly one of the
24 things is what I drew from it.

25 Q. Now, you also testified that the -- so, these are

1 the two things you pointed to in order to give -- in
2 order for your opinion that, in fact, the 1996
3 application supports multiple input 6-degree-of-freedom
4 input elements, right?

5 A. Let's see. It -- yes, it does that.

6 Q. And these are the things you pointed to to support
7 that, right?

8 A. Some of the things, yes.

9 Q. Now, what else did you point to?

10 A. Let's see. There are some figures.

11 Q. Okay. Now, this is a very important issue in this
12 case. You understand that, whether the 1996 application
13 can support the claims in 2002?

14 A. Sure.

15 Q. In fact, that might be an issue in this case that
16 the jury relies on to make its determination, right?

17 A. Sure.

18 Q. So, you agree with me that it's very important; and
19 you as an alleged independent expert, your testimony is
20 important on this issue, right?

21 A. Yes.

22 Q. And have you gone through that 1996 application?

23 A. Yes.

24 Q. Now, you understand that the jury -- the jurors
25 have the 1996 application in their notebook, right?

1 A. Yes.

2 MR. PRESTA: Your Honor, I'd like to
3 approach.

4 THE COURT: You may.

5 BY MR. PRESTA:

6 Q. Now, Professor Howe, we don't have a lot of time;
7 but this is an important issue. So, I feel the need not
8 to rush through it.

9 A. Sure.

10 Q. We've been here for a long time. It's important we
11 get this issue right. You agree with me?

12 A. I do.

13 Q. Now, I've handed you my copy of the jury notebook.
14 Okay?

15 A. Okay.

16 Q. Do you see that?

17 A. I do.

18 Q. And you see the 1996 application is in there?

19 A. Yes.

20 Q. And I'm going to ask you, sir, to -- and I can pull
21 up anything that you want me to pull up on the screen,
22 and I have a copy of the application. But I'm going to
23 ask you to show me where in that application there is a
24 disclosure of a three-input device where those three
25 inputs together provide 6-degree-of-freedom of control.

1 A. Okay. Let me be clear here. You're not asking me
2 to show you a three-input device, right, not in general?

3 Figure 20, for instance, shows a three-input
4 device. You've put some extra conditions on it; is that
5 right?

6 Q. Well, let's back up for a minute. And I'm glad you
7 asked that question, because you realize that the claim
8 scope -- this whole exercise is trying to see if the
9 claim scope in 2002 is supported back in 1996, right?

10 A. That's one of the things we're doing, yes.

11 Q. And you understand that the claim scope that you
12 put forth to say that Nintendo is infringing requires
13 three input members, each of which collectively,
14 together -- I'm sorry -- three input members that
15 collectively would provide 6 degrees of freedom of
16 input, right?

17 A. Yes.

18 Q. Okay. So, now, that's the scope of the claim that
19 you used to say that Nintendo's infringing, that it
20 could read on -- the scope is broad enough to cover
21 three inputs where those three together provide 6
22 degrees of freedom instead of one input member. You
23 understand that, right?

24 A. I do.

25 Q. Now -- so, that's the scope of the claims that

1 you're asserting against Nintendo -- well, not you are
2 but you and your team over here -- are asserting against
3 Nintendo. You understand that scope, right?

4 A. Yes.

5 Q. And repeat it to me so I'm sure that you and I have
6 an understanding about that feature I just mentioned.

7 A. Okay. So, you're looking to -- let's see how to
8 phrase this succinctly. The claims require six axes of
9 control or six input signals; and, so, you would like me
10 to find a place in the '96 application where there are
11 six input signals. Is that right?

12 Q. No. I know that's what you'd like me to ask you,
13 but that's not what I'm asking you. That's not --

14 A. I am?

15 Q. That's not the scope of claim 19, is it?

16 A. Well, it's part of the scope. I mean, there are
17 lots of things about sheets; there are things about
18 buttons; a lot of things going on in the different
19 claims we've been talking about.

20 Q. Okay. Let's --

21 A. But you've asked for a particular combination here,
22 and I'm trying to get to that with you.

23 Q. All right. Well, this is important. I want to get
24 to the particular combination that you say these claim
25 scopes cover. Now, I don't care about buttons or other

1 things. I want to ask you about the three input
2 members. You have said the claim scope of claim 19,
3 claim 14, and claim 16 -- you read the elements of those
4 claims onto a device that has three multi-axis input
5 members that together provide 6 degrees of freedom,
6 right?

7 A. That's right.

8 Q. And, in fact, the multi-axis input members are the
9 cross-switch, the joystick, and the other joystick. And
10 it's your position that the claims in this case are
11 broad enough in scope to cover that type of three-input
12 device where they're each multi-axis and they add up to
13 6 degrees of freedom, right?

14 A. Yes, in the sense they have to include a background
15 that covers that; although, to one skilled in the art,
16 you don't have to have two joystick and a directional
17 pad in order to understand that that's present in the
18 '96 application.

19 Q. I understand. So, I'm asking you -- I'm going to
20 ask you to go back and find in the 1996 application a
21 disclosure of three input elements where those three
22 together provide the 6 degrees of freedom in the manner
23 that's set forth in any of the claims -- 19, 14, or
24 16 -- in this case. Do you understand?

25 A. I do. Okay. So --

1 Q. Now I'd like you -- and I'd like you to -- you have
2 the jury notebook. I'd like you to actually refer to
3 the jury notebook and point the jury and myself to the
4 location where you believe those claims are supported in
5 the 1996 application.

6 A. Sure. Well, let's see. There are a number of
7 figures which show many input elements. There are --
8 for instance, the Remote controller with the trackball
9 element with the --

10 Q. Excuse me.

11 A. -- collar --

12 Q. Excuse me, Professor Howe.

13 MR. CAWLEY: Your Honor, I'm sorry. May the
14 witness finish his answer?

15 BY MR. PRESTA:

16 Q. I was just going to ask if you -- along with your
17 answer, when you talk about a figure, if you would tell
18 us what figure you're pointing to in the jury notebook
19 so we could follow along, professor.

20 A. Sure. It will take a second. Forgive me for the
21 delay, but let me find that for you.

22 Okay. Figure 9, for instance --

23 Q. Okay. Just one second. And I'm not going to
24 interrupt your answer. I just want to make sure that
25 the jury can get there. There's actually page numbers

1 on the bottom right-hand page of that book.

2 A. 61.

3 Q. Now, that is --

4 MR. PRESTA: And perhaps we could pull that
5 up, please.

6 BY MR. PRESTA:

7 Q. Is that the one you're referring to?

8 A. Yes.

9 Q. Okay. Now --

10 A. May I finish my answer?

11 Q. I'm sorry. Yes, please do.

12 A. Good.

13 Okay. So, here we see the trackball. We've
14 heard testimony from Nintendo engineers saying that
15 could be a 3- or 6-degree-of-freedom input element. We
16 have the collar surrounding. We've seen that could be a
17 three- or six-input element. Then we've also got a
18 bunch of buttons. So, we also have seen, for instance,
19 in Figure 20 -- so, if you flip forward another 11
20 pages, 72 --

21 Q. Okay. Hold on a minute.

22 A. Sure.

23 Q. If you don't mind, I would like to deal with these
24 one at a time.

25 A. Sure.

1 Q. Are you done with Figure 9? Are you going to --

2 A. Yeah. We can move on.

3 Q. Okay. Well, I'd like to ask you some questions
4 about Figure 9 --

5 A. I'm not through with my answer. I'm sorry. I'd
6 like to finish if you --

7 Q. Okay. Sure. If you want to finish it, go right
8 ahead.

9 A. Okay. So, we look at Figure 20. It's got the
10 handle at the top. We know that top element pivots back
11 and forth in two directions. It's kind of like a D-pad.
12 Then there are also buttons there. Again, that's a
13 three-element case. Now, the shaft of that handle, of
14 course, is hooked up down below to a number of other
15 sensors.

16 So, taken together, we've now seen -- and I
17 can go on, but I want to move along here. You see that
18 we've seen input elements -- more than three input
19 elements on these examples. We've seen that they
20 include more than one multi-axis input element. And, so,
21 to one skilled in the art -- that is, an engineer who is
22 used to building these kind of controllers -- it's clear
23 that you can put this together and it describes the kind
24 of thing that the Nintendo controllers have been
25 configured to do.

1 Q. Are you done?

2 A. I am.

3 Q. Okay. Thank you.

4 Let's stay on Figure 20. Now, you just said
5 that this provides support for something that had -- you
6 said that these have multiple input members that each
7 provide more than one axis of input. You don't agree
8 with that, do you?

9 A. I don't believe that's what I said here.

10 Q. So, then, you'll agree with me that there's only
11 one input member that provides multiple axes of input?

12 A. Yes. In this example, that's right.

13 Q. Okay. So, if we're talking about the things that
14 contribute to 6 degrees of freedom in this embodiment,
15 there's only one, isn't there?

16 A. Well, no. There are two other input elements.
17 They could be used to, you know, add other degrees of
18 freedom.

19 Q. This ball -- this handle right here (indicating),
20 if these buttons weren't there, does it provide
21 6 degrees of freedom of input?

22 A. If you take the buttons off, yes.

23 Q. Okay. So, now adding the buttons doesn't change
24 the fact that the top piece by itself is a single
25 hand-operable 6-degree-of-freedom device, does it?

1 A. No.

2 Q. Now, these buttons are just like mouse buttons,
3 that you could do anything you want with them, right?

4 A. That's right. The controller can do anything --
5 I'm sorry -- the game designer can do anything they want
6 with them.

7 Q. And you, in fact -- haven't you read the
8 specification where Mr. Armstrong said that these
9 buttons have nothing to do with 6 degrees of freedom?

10 A. I don't recall that. I can believe it's in there.
11 I don't recall it.

12 Q. Did you hear him testify to that?

13 A. I wasn't present for much of Mr. Armstrong's
14 testimony.

15 Q. Do you disagree with the fact that these buttons
16 have nothing to do with the 6-degree-of-freedom of
17 control?

18 A. Well, I agree certainly that the handle itself can
19 provide 6 degrees of freedom of control, yes.

20 Q. So -- but it's your position that that Figure 20
21 actually supports a device that has three bi-directional
22 input members that together provide 6 degrees of
23 freedom. Is that your testimony?

24 A. That's -- Figure 20 is one example or one part of
25 the scope of the patent that supports reading claim 19,

1 yes.

2 Q. Now I want you to point to me where the second
3 element -- you're familiar with claim 19, right?

4 A. I am.

5 Q. And the second and third elements you have read on
6 these two joysticks that each move bi-directionally,
7 right?

8 A. That's right.

9 Q. And the claim requires that you have these two
10 elements that move bi-directionally, right?

11 A. That's right.

12 Q. And it also requires a third element that can move
13 bi-directionally and activate four sensors, right?

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

15 Q. Now show me in this figure -- very important
16 question. I'd like you to be very clear about it.
17 Where in this figure are two elements that can be moved
18 by -- each of them bi-directionally?

19 And you understand that the buttons don't
20 move bi-directionally, right?

21 A. That's right.

22 Q. The buttons are not bi-directional elements, are
23 they?

24 A. That's right.

25 Q. These things are not bi-directional elements,

1 right?

2 A. That's right.

3 Q. Okay. Now show me anywhere in this figure where
4 there are two elements that can each move
5 bi-directionally to contribute to 6 degrees of freedom
6 of input.

7 A. Sure. I can show you three, as a matter of fact.

8 So, let's see. Up at the top we have the
9 handle itself which can tip in two directions, like so
10 (indicating).

11 Down here (indicating) it can take, for
12 instance, the shaft, which interacts with the rockers --
13 we saw lots of nice animations of that -- and, so, that
14 can move bi-directionally.

15 And down at the bottom we have a platform
16 here (indicating), and again we saw how that can
17 interact with the housing itself to control these two
18 rockers (indicating) to provide bi-directional inputs.

19 Q. Thank you, professor. So, you're pointing to the
20 inside of the things that are all connected to the one
21 handle, right?

22 A. In this particular case, yes.

23 Q. Now, you have asserted that the claims are broad
24 enough, though, to cover things where, in fact, you
25 would have two additional input members on the outside

1 that can be operated by the user, haven't you?

2 A. Yes. That's right.

3 Q. So, the claim scope that you're asserting
4 doesn't -- isn't limited to things on the inside.
5 You're saying it also covers things on the outside,
6 right?

7 A. Well, it can include those, yes.

8 Q. Does claim 19, the scope that you're asserting,
9 cover three things on the outside that the user can
10 touch?

11 A. Yes, although it covers other things that the user
12 can't touch, as well.

13 Q. And it covers, though, three things that you can
14 touch that each move bi-directionally, right?

15 A. Yes. That's right.

16 Q. Show me in here where there are three things that
17 you can touch that are each moved bi-directionally.
18 That's the question that I want you to help me answer,
19 and I want you to show where in this figure are there
20 three things that the user can touch that can each be
21 moved bi-directionally?

22 A. We don't have it in this figure.

23 Q. Okay. So, just to be clear, Figure 20 does not
24 have three elements that the user can touch that can be
25 each moved bi-directionally, right?

1 A. That's right.

2 Q. Okay. Now, please -- you have the jury notebook.
3 Show me where there is a figure that has three inputs
4 that the user can touch that can each be moved
5 bi-directionally.

6 A. There are certainly examples where there are three
7 elements the user can touch. There are certainly
8 examples which have three elements which can move
9 bi-directionally. But the specific case you're focusing
10 on is not present.

11 Q. Okay. Thank you.

12 The case that I'm focusing on is the scope of
13 claim 19 that you said covers Nintendo where there are
14 three input members that each can be moved
15 bi-directionally and touched by the gamer.

16 A. No. That's not right.

17 Q. Okay. You're not saying that the scope of claim 19
18 is broad enough to cover three input members on the
19 outside that each can be moved bi-directionally?

20 A. No, no. You are misconstruing my answer.

21 Q. Okay. You agree with me that the claim is broad
22 enough, in your view, to cover three input members that
23 the user can touch that can each be moved
24 bi-directionally?

25 A. Yes, that's right.

1 Q. Because if you don't -- if you say that's not the
2 case, there won't be infringement, right?

3 A. In that hypothetical, yes.

4 Q. Okay. There would not be infringement if the
5 claims aren't that broad, right?

6 A. Well, again, you're misconstruing my answers. So,
7 you're holding a GameCube controller; but, of course,
8 we've seen the Wii Remote works in a different way.

9 Q. Okay. Just to be clear, could you point to another
10 figure anywhere in this 1996 application where there are
11 three input members that can be touched by the user and
12 they each can be moved bi-directionally like on the
13 Nintendo GameCube controller?

14 A. No. It's when you take into account the variety of
15 embodiments that we see that the -- and the supporting
16 disclosure, of course -- that we see that the claims are
17 supported in the '96 application's written description
18 in order to cover the Nintendo products.

19 Q. Okay. Now, just to be clear, your answer is that
20 there is no figure that discloses three input members
21 that can each be moved bi-directionally. That's your
22 answer, right?

23 A. Yes.

24 Q. And there's nowhere in the text that describes that
25 feature, is there?

1 A. I don't believe so.

2 Q. Okay. And, in fact, you didn't mention the Chang
3 patent in your direct with Mr. Cawley, did you?

4 A. No.

5 Q. You're familiar with the Chang patent that
6 Mr. Armstrong mentioned in the 1996 application?

7 A. Yes.

8 Q. What did Mr. Armstrong -- isn't it true that
9 Mr. Armstrong said having three inputs that the user can
10 touch that each move bi-directionally is a bad idea and
11 don't do it?

12 A. Let's see. He said that particular combination of
13 three inputs is bad. And I agree with him that the
14 Chang device is not very well conceived.

15 Q. And you'll also agree with me that he said, "Use a
16 single input" in 1996; "Don't use three"? You agree
17 with me?

18 A. Let's see. He said for some applications that's an
19 important thing to do. Yes. He thought that can be
20 important.

21 Q. Now, he didn't say "for some applications"
22 anywhere, did he?

23 A. Well, no. But in some places he talks about
24 using -- as we've seen repeatedly -- not using a single
25 input element and he provides drawings and so on, on

1 more than one input element. So, clearly he thought
2 that was important, too.

3 Q. Just to confirm, though, you can't point to
4 anything in the 1996 application where there's three
5 input members that can each be touched by the user and
6 each be moved bi-directionally to provide 6 degrees of
7 freedom, can you?

8 A. No.

9 Q. Thank you.

10 Now, you also --

11 MR. PRESTA: And for the record, the Chang
12 exhibit is DX 52 -- the Chang patent, I mean.

13 BY MR. PRESTA:

14 Q. Now, you were talking about the accelerometer and
15 you provided some testimony and, in fact, it sounds like
16 you went -- after your testimony the other day, you went
17 out and probably did some research to learn more about
18 the accelerometer, right?

19 A. I read the data sheet, yes.

20 Q. Which data sheet did you read?

21 A. I read -- which one did I read? I think I looked
22 at both of them; that is, both the preliminary and the
23 Revision A sheet.

24 Q. And the Revision A is the one that actually covers
25 the accelerometer in the product, right?

1 A. As far as I can tell, there's no significant
2 difference between the Revision 0 and the Revision A
3 data sheet.

4 Q. Okay. And the revision -- so, your position is
5 there's no difference between the preliminary
6 specification that you relied on for purposes of your
7 opinion in this case and the actual data sheet that
8 covers my client's product, right?

9 A. Well, as far as anything that's pertinent to the
10 function of that device and the parts that are described
11 by claim 19, no. Now, there are certainly some
12 numerical differences; and, as I explained before, when
13 manufacturers release the preliminary data sheet,
14 they're interested in getting the main function of the
15 device out there so customers start using it in new
16 designs. And then the final version when it comes out
17 is based on the experience of manufacturing lots of
18 these so they can tighten up the specs and provide more
19 detailed information. But the basic functionality
20 remains the same.

21 Q. Okay. And you didn't rely -- the preliminary
22 specification didn't provide that picture that you put
23 up that you allege is a picture of the chip in
24 Nintendo's product, right?

25 A. No.

1 Q. That came from this report that you apparently got
2 your hands on from a company called "Chipworks," right?

3 A. That's correct.

4 Q. And you're relying on Chipworks' report for your
5 opinions relating to the accelerometer, right?

6 A. Well, let's see. It's part of the information I
7 used, yes.

8 Q. Well, what other information did you have that
9 would tell you what the inside looked like, of the chip?

10 A. Well, let's see. First of all, I have a lot of
11 experience using accelerometers. There is a chapter in
12 my PhD thesis about accelerometers, for instance.

13 I've used these micromachined -- that is,
14 computer chip -- accelerometers in my lab for some
15 years; so, I'm pretty well acquainted with how they
16 work.

17 Q. Okay. Now, your chapter in your PhD thesis didn't
18 have anything to do with the inside of it, did it?

19 A. Actually, I built accelerometers as part of my PhD
20 research.

21 Q. Okay.

22 A. I don't claim they are nearly as good as the ones
23 that Analog Devices makes and that they sell to
24 Nintendo, of course. But, no, as part of my PhD
25 research, I actually built accelerometers; so, I know

1 what's inside them.

2 Q. Were they MEMS accelerometers?

3 A. No. They were piezoelectric polymer
4 accelerometers.

5 Q. Those are very different, aren't they?

6 A. Same operating principle.

7 Q. Okay. But the technology is very different, aren't
8 they?

9 A. Very different -- it's different. The operating
10 principle, again, is the same.

11 Q. Okay. Then, let me ask you: You relied on the
12 Chipworks report, and you're telling the jury that
13 you're familiar with the technology that's in Nintendo's
14 accelerometer?

15 A. That's right.

16 Q. Okay. Now, could you tell me -- we talked the
17 other day about closed-loop and open-loop
18 accelerometers. Are those two different kinds?

19 A. Yes, they are.

20 Q. Okay. And which kind, in your view, is in
21 Nintendo's -- just to make sure we're talking the same
22 language -- is in Nintendo's Wii Remote that you allege
23 provides infringement?

24 A. Okay. We have to be careful here because it
25 clearly says in the Analog Devices data sheet -- that

1 is, the people who make the accelerometer -- that it's
2 an open-loop device.

3 Now, when you get into the details, there is
4 a self test feature that is built into this chip. That
5 allows you to use the sensing plates and some of the
6 other structures in there -- that is, the capacitive
7 structure -- in order to apply a force; that is, to move
8 the proof mass in order to check that the system works
9 correctly.

10 Now, it's also possible to configure that so
11 that it works like a closed-loop or servo-driven
12 accelerometer; and the Chipworks report talks about some
13 of that, as well.

14 Q. So, then, in your opinion, is it a closed-loop or
15 an open-loop accelerometer?

16 A. Well, in normal operation, it's an open-loop
17 accelerometer.

18 Q. Okay. Now let's, if I could, get you to turn to --

19 MR. PRESTA: If I could get Slide 39 up,
20 please.

21 BY MR. PRESTA:

22 Q. Now, you explained to the jury that in your view,
23 the accelerometer satisfies the third element of claim

24 19. And that's your opinion, right?

25 A. That's right, yes.

1 Q. Okay. Now, this accelerometer issue that we've
2 been debating -- and would probably continue debating
3 for a long time if we had to -- is directed to this part
4 of the claim, the two bi-directional proportional
5 sensors. And our debate between the sides here has been
6 whether there's one or two sensors, right?

7 A. We've certainly discussed that.

8 Q. Okay.

9 A. At length.

10 Q. Now, there's another aspect of this claim that
11 is -- also has to be met in order for there to be
12 infringement, right?

13 A. I'm sorry. I didn't understand the question.

14 Q. Well, the issue of infringement doesn't come down
15 to whether there's one sensor or two. There's other
16 things in the claim language that have to be met.

17 A. Yes, of course.

18 Q. Okay. And that other thing is that you have to
19 have an element that's movable in two mutually
20 perpendicular axes that is structured to activate the
21 sensor or sensors. Let's assume for a moment we put the
22 sensor or sensors issue aside and we focus on the other
23 part of the claim.

24 A. Okay.

25 Q. Now, when there was a joystick embodiment that you

1 said this covers, there was this structure to activate
2 on top, right?

3 A. Yes, and the shaft inside. That's right.

4 Q. And the shaft inside.

5 And you agreed with me that if we took that
6 structure away and the shaft away, that there would be
7 no infringement.

8 A. That's right.

9 Q. Okay. And that's -- there's still two sensors
10 there, right?

11 A. That's right.

12 Q. So, whether there's one sensor or two sensors
13 really isn't the end of the story with respect to
14 infringement of claim 19, is it?

15 A. No. There's other stuff in there, for instance,
16 controlling objects and navigating a viewpoint like we
17 saw earlier.

18 Q. Yes. Now -- so, if the jury was to find that there
19 was actually no structure to activate the accelerometer,
20 then you would agree with me that there would be no
21 infringement, right?

22 A. Yes.

23 Q. Okay. So, the issue of one sensor or two is an
24 interesting issue; but the case doesn't turn on that
25 issue, does it?

1 A. It's part of the issues here, yeah.

2 Q. Well, you want -- and your position is that, in
3 fact, this third element that's movable and the
4 structure to activate the sensors is also present in
5 Nintendo's Wii?

6 A. Yes. That's right.

7 Q. Okay. Now if I could just get you --

8 MR. PRESTA: Could we go to Slide 9, please?

9 BY MR. PRESTA:

10 Q. Now, this was your testimony earlier when you said
11 that the proof mass inside the accelerometer is that
12 third element, right?

13 A. Yes.

14 Q. And that's your position to the jury, that the
15 proof mass is the third element, right?

16 A. Yes, that's right.

17 Q. Okay. Now -- and you showed the jury this -- and
18 you still agree that in your view this is a --
19 simplified, of course, professor -- but in your view a
20 reasonable way to look at the accelerometer?

21 A. It's a simplified model, yep. Uh-huh.

22 Q. Okay. And the proof mass is the thing that you're
23 identifying as being the third element that's structured
24 to activate the sensors, right?

25 A. That's right.

1 Q. Now, I want to ask you this one simple question:
2 Is the proof mass itself part of the sensor?

3 A. Let's see. So, the proof mass is manufactured as
4 part of this whole little system that's inside the
5 accelerometer; and that's what activates the capacitive
6 sensors.

7 Q. Now, if you took that proof mass out, would there
8 still be a sensor?

9 A. Well, if you're speaking strictly of the proof mass
10 and not the capacitive plates, as I showed on that
11 micrograph, that -- that electron microscope picture,
12 just the proof mass and not the plate, then yes, you
13 would still have the capacitive sensors in place.

14 Q. Would they be able to sense anything?

15 A. Well, without the elements in place, there would be
16 nothing to activate them, as it says "structured to
17 activate" here. So, no, there wouldn't be anything
18 to --

19 Q. Okay. So, the proof mass is required as a part of
20 the sensor, right?

21 A. Well, wait a second here. It's the third element
22 which activates the capacitive sensors.

23 Q. Now, isn't it true --

24 MR. PRESTA: May I approach and get the --

25 THE COURT: You may.

1 MR. PRESTA: -- easel?

2 BY MR. PRESTA:

3 Q. Now, Professor Howe, you told the jury that -- were
4 you telling the jury --

5 I couldn't see it when you did it; so, I'm
6 sorry, if you'll help me clarify.

7 A. Sorry about that.

8 Q. -- that this is one of the pairs of capacitors
9 (indicating)?

10 A. Well, let's see. A capacitor requires two plates,
11 two elements; and the distance between them determines
12 the capacitance -- or it's one of the things that
13 determines capacitance. And, so, as that distance
14 changes, that's what produces the signal.

15 Q. Okay. But my question is: Are the capacitors that
16 you're identifying -- it takes two plates to make a
17 capacitor, right?

18 A. That's right.

19 Q. And were you identifying one plate on the left side
20 of the proof mass and one plate on the right side of the
21 proof mass as the capacitor?

22 A. No, no. The -- there are plates that are also
23 attached to each side of the proof mass. And we saw
24 that, the lines, in that micrograph.

25 Q. Thank you. So, the capacitors that you're talking

1 about are actually between the wall of the proof mass
2 (indicating) and the side (indicating), right?

3 A. No. What --

4 Q. There's a plate on the proof mass, and there's a
5 plate on the side. That's what you're telling us,
6 right?

7 A. More or less. Again, this is greatly simplified.

8 The way it actually works is there are a set
9 of those long fingers that are attached to the side, as
10 you say. There are a set of long fingers that are
11 attached to the proof mass. And where they come
12 together, each one of those pairs forms a capacitor.

13 Q. Thank you. And my question is: Is one of those
14 hands that you put together the proof mass and the other
15 one some other plate so that together the proof mass and
16 that plate form the capacitor that you're talking about?

17 A. Well, let's see. Yes, the proof mass is attached
18 to one of those sets of plates; and, so, if you took
19 away the proof mass, you would just have those fingers
20 left. You would just have the plates.

21 Q. There would not be a capacitor there if you took
22 the proof mass away, would there?

23 A. Well, yes. You could take away the proof mass and
24 leave the plates behind. They wouldn't be attached to
25 anything; so, they would no longer act like an

1 accelerometer. But the plates would be left behind.

2 Q. But the plate is actually integral with the proof
3 mass, isn't it?

4 A. It's attached to them. That's right, yeah.

5 Q. So, my question is: If you take away the proof
6 mass with the plate, that other thing that's left would
7 not, in fact, be a capacitor, would it?

8 A. Well, if you take away the proof mass and the
9 plate, then you've taken away half the capacitor.

10 Q. And the plate is integrally formed on the proof
11 mass, isn't it?

12 A. Again, you can clearly point to different parts of
13 the structure which are the plates and a different part
14 of the structure which is the proof mass. And if you'd
15 like to put up the micrograph, I'd be happy to show that
16 to you.

17 Q. Well, let me just ask you this: The proof mass is
18 required for the sensor to operate, right?

19 A. That's right. Yes.

20 Q. And, in fact, it forms half of the capacitor that's
21 in there, doesn't it?

22 A. Well, no. Again, the proof mass and the plates are
23 different parts of the structure that is this whole
24 device made by Analog Devices; and I would be happy to
25 show it to you if you want to show me that micrograph.

1 Q. And you'll agree with me that above the plate that
2 you're talking about, there are plates that are on the
3 proof mass; and to have the capacitor, you have to have
4 a plate here (indicating) and a plate on the proof mass,
5 right?

6 A. Yes, that's right.

7 Q. So, if you took away the proof mass with the
8 plates -- because they're attached to it -- the plate
9 alone on the side wouldn't be a capacitor, would it?

10 A. No. If you take away both the plate and the proof
11 mass, you don't have a sensor.

12 Q. Okay. Now, sensors require that you have an
13 output, right?

14 A. Yes.

15 Q. Okay. How many outputs come out of the
16 accelerometer in Nintendo's Wii Remote?

17 A. Okay. You're asking how many come out of the chip?
18 How many come out of the whole part?

19 Q. How many come out of this (indicating) differential
20 capacitor that's in here?

21 A. There are three outputs multiplexed onto a single
22 line.

23 Q. Okay. So, there's one line -- there's one signal
24 that comes out, right?

25 A. Sure.

1 Q. And that signal, in your view, contains information
2 on both the X, Y, and Z, right?

3 A. All three, yes.

4 Q. Okay. Now, before when you did your report
5 initially --

6 MR. PRESTA: Could I have Slide 8?

7 BY MR. PRESTA:

8 Q. When you first wrote your report, you thought the
9 capacitive -- the accelerometer structure in Nintendo's
10 Wii Remote had three proof masses, didn't you?

11 A. Okay. So, you're talking about that first version
12 of the report that we corrected where I swapped the
13 descriptions of the accelerometer in the Nunchuk and the
14 accelerometer in the Remote but which, again, you
15 received a correction on months ago.

16 Q. Now, let me ask you: When you formed your opinion,
17 you -- your opinion that there was infringement, you
18 believed that you were focusing on the accelerometer in
19 the Wii Remote, right?

20 A. No.

21 Q. The infringement allegation relates to the
22 accelerometer in the Wii Remote, doesn't it?

23 A. That's right.

24 Q. And, in fact, it's irrelevant to infringement in
25 this case -- the allegations of infringement by Anascape

1 against Nintendo -- that there is also an accelerometer
2 in the Nunchuk; isn't that true?

3 A. That's right.

4 Q. It's irrelevant to infringement -- and I just want
5 to make sure I understand. It's your position -- and
6 could you confirm to the jury -- that it's irrelevant to
7 the analysis of infringement whether the Nunchuk has an
8 accelerometer or not?

9 A. That's right.

10 Q. Okay. And that's because both of those sensors
11 need to be found in the one accelerometer, right?

12 A. I'm sorry. Could you say that again?

13 Q. And the reason the second accelerometer can't be
14 looked at for infringement is because the claims require
15 that, in fact, the sensors be within one element.

16 A. Well -- okay. As a matter of fact, the way the
17 other accelerometer is configured --

18 Q. I'm not asking you about the other accelerometer.
19 I'm asking about the accelerometer in the Wii Remote
20 that you're using to allege that there is infringement.
21 You need to find two sensors in that accelerometer,
22 right?

23 A. Yeah, that's right. Uh-huh.

24 Q. And you can't say, "Well, there might be one in
25 this accelerometer and one in that accelerometer;

1 therefore, there's two." That would be an incorrect
2 infringement analysis, wouldn't it?

3 A. Roughly that's correct, yes.

4 Q. Well, that is correct, isn't it?

5 A. (Pausing.)

6 Q. Well, let me ask it this way --

7 A. I mean, you're asking a hypothetical question; and
8 there are a lot of hidden assumptions we'd have to talk
9 about that --

10 Q. Okay. Let me put it this way --

11 MR. PRESTA: Can we go back to Slide 10?

12 BY MR. PRESTA:

13 Q. The movement of this proof mass doesn't activate
14 anything in the other accelerometer that's in the
15 Nunchuk, does it?

16 A. No. That's certainly true.

17 Q. Okay. Thank you.

18 So, you'll agree with me in order for the
19 jury to find infringement, they have to find that there
20 is a third element movable on two mutually perpendicular
21 axes that is structured to activate two bi-directional
22 proportional sensors, right?

23 A. That's right.

24 Q. And, in fact, the -- you also agree with me that
25 the accelerometer is actually a three-axis

1 accelerometer, right?

2 A. Yeah. It has an extra axis that's not relevant
3 here, but it has one.

4 Q. Okay. Let me turn to another topic now.

5 MR. PRESTA: Could I go to Slide 1, please?

6 BY MR. PRESTA:

7 Q. Now, you've indicated, of course, that the Wii
8 Remote itself does not infringe; and you agree with
9 that, right?

10 A. I do.

11 Q. But your position is that when we add the Nunchuk
12 onto the Wii Remote, that there is, in fact -- you can
13 find all the claim elements, right?

14 A. That's right.

15 Q. Now --

16 MR. PRESTA: Could I go to Slide 3, please?

17 Thank you.

18 BY MR. PRESTA:

19 Q. Now, you studied the court's claim construction in
20 this case, right?

21 A. Yes.

22 Q. Now, fortunately, this issue is a much simpler
23 issue than the accelerometer issue for us all to
24 understand, isn't it?

25 A. I like simpler issues, too. That sounds good.

1 Q. Me, too.

2 Now, the court has told us that a controller
3 is defined as: A device held in the user's hand that
4 allows hand or finger inputs to be converted into
5 electrical signals -- and it goes on.

6 The part I want to focus on is "a device held
7 in the user's hand."

8 A. Uh-huh.

9 Q. Now, you recognize that it says "a device," right?

10 A. Yes.

11 Q. And you recognize that it says "the user's hand,"
12 singular, right?

13 A. I do.

14 Q. And you don't dispute that, in fact, to operate
15 those two things, you have to hold one in one hand and
16 one in the other, right?

17 A. Often it's used that way, yes.

18 Q. Are you telling me there's another way to use the
19 Wii Remote and the Nunchuk?

20 A. For instance -- in fact, I think the jury saw this.
21 We've also talked about the Wii Classic Controller --

22 Q. I'm not asking you about the Wii Classic
23 Controller.

24 A. Yeah. You could hold them in both hands.

25 Certainly that capability is there -- or hold them in

1 one hand. That capability is there, as I showed with
2 the Classic and the Wii Remote earlier.

3 Q. Is it your position that it only infringes because
4 you can hold these two things in one hand?

5 A. No, no. All of these controllers for video games
6 are, you know, held bi-manually.

7 Q. And this controller that Nintendo put out is
8 designed to be held in two hands, right?

9 A. That's right.

10 Q. And you operate it by having it in two hands,
11 right?

12 A. That's right.

13 Q. And the court has advised us that the definition of
14 "controller" that is used for claim 19 is that it's "a
15 device held in the user's hand," singular. You see
16 that, don't you?

17 A. I do.

18 Q. And as your position, you're telling the jury that,
19 in fact, when you hold these two things, one in each
20 hand, that you're holding both of them in a hand. Is
21 that your position?

22 A. Yes.

23 Q. Okay. Now, it also says "a device," singular,
24 doesn't it?

25 A. Yes.

1 Q. It doesn't say "devices," plural.

2 A. That's right, yep.

3 Q. And this Wii Nunchuk controller by itself is a
4 device, isn't it?

5 A. Yes.

6 Q. And the Wii Remote controller is a device, isn't
7 it?

8 A. Well, wait a second. I'm sorry. I thought the
9 first question you asked was about the Remote. Did I
10 mishear?

11 Q. Well, I'm going to ask you both.

12 A. Okay.

13 Q. The Wii Remote is a device, isn't it?

14 A. Yes.

15 Q. And the Wii Nunchuk is a device, isn't it?

16 A. Well, it depends. If it's plugged into the Remote,
17 then together they form a device. But the Wii Remote by
18 itself, without the Remote, is a paperweight.

19 Q. Okay. Let me ask you to do a bit of an analogy.
20 Do you use Apple computers at all?

21 A. Not really. A little. My wife has one.

22 Q. Okay. Are you familiar with -- you could have a
23 keyboard on an Apple computer?

24 A. Sure.

25 Q. And, in fact, Apple also provides input elements

1 I like mice, right, like a mouse?

2 A. Sure.

3 Q. And the mouse is a device, isn't it?

4 A. Sure.

5 Q. And the keyboard is a device, right?

6 A. Sure.

7 Q. And, now, are you aware -- that wouldn't change
8 your opinion if you plugged the mouse directly into the
9 computer or if you plugged it into the keyboard, would
10 it?

11 A. No. It works both ways.

12 Q. Okay. So, when you plug the mouse, which is a
13 device by itself, into the keyboard and the mouse
14 communicates through the keyboard to the computer,
15 you're saying that those are still -- those are separate
16 devices in that example, aren't they?

17 A. Yes. The mouse can be used in a number of
18 different ways. It doesn't require the keyboard. You
19 can use it with a computer. Sure.

20 Q. Now, but the mouse that I'm talking about is
21 designed to be plugged into the keyboard and
22 communicates through the keyboard. You understand that,
23 right?

24 A. Well, my understanding is that it provides for a
25 bunch of different functionality. You know, this is one

1 of the things Apple is so proud of is there are a lot of
2 different ways of doing things with their devices.

3 Q. Now, you understand that the Wii Nunchuk
4 controller -- the reason it plugs into here is only so
5 it can communicate -- can signal to the Wii console,
6 right?

7 A. Certainly, that's one key aspect, and that makes it
8 clear that it is not an independent device. But I would
9 also point out that the Wii Nunchuk by itself has two
10 on/off buttons and one thumbstick. So, essentially
11 we're back, you know, here 20 years ago with
12 controllers, like this old Nintendo controller
13 (indicating). It's not a very rich set of inputs, not
14 very interesting, wouldn't be too useful in --

15 Q. I understand. Could you hold that up again,
16 please?

17 That's a device, isn't it?

18 A. Yes, it is.

19 Q. And you just compared that device with the Wii
20 Nunchuk and said it's similar to that, right?

21 A. In some respects, yes.

22 Q. Thank you.

23 Now, let me go on to another issue. You
24 understand that claims 14 and 16, the court has given us
25 the claim construction for the term "3-D," right?

1 A. That's right.

2 Q. Now, you agree completely with me, don't you, that
3 three-dimensional graphics is not the same as "3-D"
4 definition that the court has required us to use when
5 determining infringement in this case?

6 A. Okay. Again, we have to be careful here that -- in
7 claim construction, interpreting the claims, we are
8 guided by the claim construction orders provided by the
9 court. There's also sort of everyday meanings, and I
10 think that's what you're referring to here when you talk
11 about 3-D graphics.

12 Q. Right. And my question is: The everyday usage of
13 the term "three-dimensional graphics" or "3-D" is not
14 the understanding of the term "3-D" that we are to use
15 when we're trying to determine if there is infringement
16 in this case, right?

17 A. Right. Yeah.

18 Q. You don't -- because there's 3-D graphics, that
19 doesn't satisfy this term "3-D," does it? Just because
20 there's 3-D graphics, that wouldn't be enough to satisfy
21 that term, would it?

22 A. That's right.

23 Q. Okay. Because the term that -- the definition that
24 we have to use is "capable of movement in 6 degrees of
25 freedom."

1 A. That's right.

2 Q. Okay. Now, you'll agree with me, won't you, that
3 you can have 6 degrees of freedom of movement even in a
4 two-dimensional graphic system, can't you?

5 A. According to the technical definition we were given
6 by the court, yes, that's true.

7 Q. Okay. And that's the way your -- your
8 understanding of the court's definition, right?

9 A. That's right.

10 Q. So, in your view, even if Nintendo's system was
11 only a two-dimensional system, they could still infringe
12 this claim that says "a 3-D graphics controller," right?

13 A. Well, yes. We have to follow the judge's orders.
14 That's right.

15 Q. Now -- so, I just want to make sure the jury
16 understands, then, that the term "3-D" doesn't mean what
17 we all understand is three-dimensional graphics. It's
18 something very different and very special, isn't it?

19 A. Well, we have to be careful because our everyday
20 meaning is certainly encompassed -- that is, it's part
21 of this definition. It's just this definition, you
22 know, has other particular pieces to it that we have to
23 take into account.

24 Q. Okay. Now, when you played this game or when you
25 saw Mario running around -- and I'm just focusing on the

1 character that you were controlling in that game or in
2 the Mario game that -- I don't know if -- were you ever
3 controlling the Mario game? I apologize if I --

4 A. I haven't in court here; but I have played some of
5 the Mario games, yes.

6 Q. Okay. Well, you just played this game. Do you
7 know who the character was that you were controlling in
8 this game?

9 A. I think it was Princess Peach.

10 Q. Okay. You were controlling Princess Peach in that
11 three-dimensional world, right?

12 A. That's right.

13 Q. And just because you were controlling her in that
14 three-dimensional world doesn't mean she was moving in
15 6 degrees of freedom, does it?

16 A. No, not necessarily.

17 Q. Okay. So, just because she was moving in that
18 three-dimensional graphics doesn't mean she was moving
19 in 6 degrees of freedom. I understand that that's what
20 you're saying, right?

21 A. Not necessarily, no.

22 Q. Okay. Now, what was her name again? I'm sorry.
23 Princess --

24 A. Princess Peach, I think.

25 Q. Princess Peach.

1 Now, do you know if it is possible to control
2 Princess Peach in that game that you demonstrated in
3 6 degrees of freedom within that game?

4 A. I can't give you a definitive answer because I've
5 not spent the many, many hours to explore all the
6 various levels and ways of control and all that in the
7 game.

8 Q. So, you have not confirmed whether the object that
9 you demonstrated in front of the court, in front of the
10 jury to prove infringement -- whether, in fact,
11 controlling that object actually satisfied the claim
12 limitation, did you, doctor?

13 A. Well, I've certainly controlled various aspects of
14 the game in 6 degrees of freedom; but I didn't --

15 Q. Did you hear my question?

16 A. But I did not control just the princess herself,
17 no.

18 Q. Okay. And did you confirm whether you can control
19 the princess in 6 degrees of freedom within that game or
20 not before giving your testimony today?

21 A. No. It's not required by the claims.

22 Q. Now, again, the claim requires "capable of movement
23 in 6 degrees of freedom"; and you did not confirm
24 whether you could control the object in 6 degrees of
25 freedom before giving your testimony today, did you?

1 A. I confirmed you can control 6 degrees of freedom
2 but not one character moving in 6 degrees of freedom,
3 no.

4 Q. Well, isn't that the purpose of these video game
5 controllers, to control characters? Aren't we talking
6 about controlling characters? You're representing to
7 the jury that you have 6-degree-of-freedom of control
8 when, in fact, it's not there, is it, Professor Howe?

9 A. No. As I say, there are 6 degrees of freedom of
10 control. Not one character, but there are 6 degrees of
11 freedom of control and that's what's required.

12 Q. Thank you. So, you'll admit that you have never
13 seen a Nintendo game that allows a character to be moved
14 in 6 degrees of freedom within that game, have you?

15 A. No.

16 Q. Thank you.

17 THE COURT: Anything else, counsel?

18 MR. PRESTA: Just one second, your Honor. I
19 apologize if it's more than that but --

20 THE COURT: Counsel, I think it's a little
21 bit late for long conferences.

22 MR. PRESTA: Thank you.

23 THE COURT: You're either going to move
24 forward or you're not.

25 MR. PRESTA: Understood.

1 BY MR. PRESTA:

2 Q. Now, I have one last question --

3 MR. PRESTA: I apologize, your Honor.

4 BY MR. PRESTA:

5 Q. One last question. You also reviewed the '700
6 specification, didn't you?

7 A. Of course.

8 Q. And that is the 2000 application, right?

9 A. Yes. That's correct.

10 Q. Okay. And part of your -- what you testified to
11 was that the claims that -- the scope of the claims that
12 you said covered the Nintendo GameCube controller, you
13 had an opinion on whether those were supported in the
14 2000 application?

15 A. Yes, as well as the '96 application. That's right.

16 Q. Okay. Can you tell the jury whether you can find
17 in that 2000 application that feature of having three
18 input members that are each movable in 2 degrees of
19 freedom to add up to 6 degrees of freedom? Can you find
20 that feature in the 2000 application?

21 A. Let's see. I'm going to guess you meant to say
22 that can be hand operated, external features?

23 Q. Yes.

24 A. No.

25 Q. Thank you.

1 MR. PRESTA: Pass the witness.

2 MR. CAWLEY: I just have a few questions,
3 your Honor.

4 THE COURT: Go ahead, Mr. Cawley.

5 MR. CAWLEY: Thank you.

6 First, let's go to the accelerometer. Can we
7 bring up the photograph of the inside of the
8 accelerometer?

9 REDIRECT EXAMINATION OF ROBERT HOWE

10 BY MR. CAWLEY:

11 Q. Is this the photograph that you asked to be shown,
12 Professor Howe?

13 While we're looking for that, let me just ask
14 you some other questions about the accelerometer just to
15 clarify.

16 A. Sure.

17 Q. What is the structure inside the accelerometer that
18 activates the sensors?

19 A. There is a proof mass which activates these
20 capacitive sensors.

21 Q. And are there at least two capacitive sensors?

22 A. Yes, there are.

23 Q. And did I understand your testimony that if you
24 took the proof mass out, that you'd still have the
25 sensors left in the accelerometer?

1 A. That's right. The capacitor plates that are
2 attached to the proof mass are separate; so, you could
3 cut out the proof mass and leave the capacitor plates
4 that are attached to the proof mass and you would still
5 have a capacitive sensor. Wouldn't do you much good,
6 but the pieces would be there.

7 Q. Okay. Now, this is the photograph that you asked
8 to be shown; is that right?

9 A. That's right. It's an electron micrograph.

10 Q. And what did you want to say about that?

11 A. Okay. So -- this is what Mr. Cawley [sic] didn't
12 show me.

13 So, here you see these stripes (indicating)
14 are the Y capacitors; and these stripes are the X
15 capacitors. And all around here in the outside is the
16 proof mass. So, you can see that if you cut it off here
17 (indicating) at this end, you have one set that's
18 attached to the center here. That's the fixed frame --
19 again, this is inside-out from that drawing that we've
20 been looking at -- and then the proof mass is around the
21 outside.

22 But you'd have one set. Here (indicating)
23 you can see the anchors, these oval-shaped dark things.
24 Those are the anchors where the capacitor plates on the
25 fixed side are located.

1 And the other side here (indicating), you see
2 some of these stripes are attached to this checkerboard
3 thing. That's the proof mass. And, so, you could cut
4 them off here (indicating). You could cut off the proof
5 mass, and you'd leave behind both sides of the plates
6 here. So, they are really separate parts of the
7 structure; and you can remove the proof mass and leave
8 the capacitive sensor behind.

9 Q. Okay. Now, let me go to a different subject.

10 MR. CAWLEY: Let's call up, please, Figure 20
11 from the '96 application.

12 A. I don't know if we need the picture. I suspect
13 we've all memorized it by now.

14 BY MR. CAWLEY:

15 Q. I'm sure when we see it, we'll all remember it.

16 Okay. Here it is again. You remember you
17 were asked a lot of questions by Nintendo's lawyer about
18 this, right?

19 A. I do.

20 Q. But I want to clarify something that I'm afraid
21 crept into your cross-examination. You remember that
22 Nintendo's lawyer asked you to consider the controller?

23 A. That's right.

24 Q. And he asked you if the controller showed three
25 inputs movable by hand. Do you remember that?

1 A. I do.

2 Q. And then he asked you to go back to this Figure 20
3 and say, well, does this figure show three inputs
4 movable by hand, right?

5 A. He asked me that, yeah.

6 Q. And you said, "No, it doesn't; it shows one."

7 A. That's right.

8 Q. Are you aware, Professor Howe, that it is not the
9 proper way to do it to compare the product back to the
10 '96 application?

11 A. Yes. My understanding is that the proper way to do
12 this is to compare the claims to the product.

13 Q. The claim of the patent, correct?

14 A. That's right. And that's how you determine
15 infringement.

16 Now, there's another question, which is
17 validity -- you know, is the patent valid -- and there
18 what you have to do is compare the claims back to the
19 application and to the current patent text and pictures.

20 Q. All right.

21 A. So, he kind of mixed up two issues there.

22 Q. Instead of comparing that controller where the big
23 point was three hand movable inputs, let's now actually
24 compare the claim.

25 A. Indeed, yeah.

1 Q. Where is the first input?

2 A. Okay. So, the second little bit there says:

3 Structure allowing hand inputs rotating a platform on

4 two mutually --

5 Q. Okay.

6 A. Yeah.

7 Q. So, that one requires that it be movable by hand,

8 right?

9 A. That's right.

10 Q. Okay. Now, let's look -- where is the second input

11 in the claim?

12 A. Okay. It says: A second element movable on two

13 mutually perpendicular --

14 Q. What happened to "hand input"?

15 A. Well, those words don't appear in that claim

16 element.

17 Q. So, this claim is not limited to hand input, is it?

18 A. No, it's not. In fact, we saw -- getting down to

19 the third element, which is the same as the second --

20 that the Wii Remote has an accelerometer. You don't

21 touch that second element directly, but there's nothing

22 in the claim that says you have to touch the element

23 directly.

24 Q. And the same is true of the third element, isn't

25 it?

1 A. That's right. Nothing about hand touching that
2 element.

3 Q. So, the second and third element that don't say
4 "hand" could include something movable by hand, correct?

5 A. That's right. It's not excluded. It's not limited
6 out. It could be touched by hand, but it doesn't have
7 to be touched by hand.

8 Q. All right, sir. So, to ground us again in the
9 issue, what we were talking about is whether this claim,
10 19, is disclosed back in 1996 by, among other things,
11 Figure 20, correct?

12 A. That's right.

13 Q. And does Figure 20 show a structure allowing a hand
14 input, et cetera?

15 A. Yep.

16 Q. And does it show a second element movable on two
17 perpendicular axes, et cetera?

18 A. Yes, it does.

19 Q. And does it show a third element movable on two
20 mutually perpendicular axes, et cetera?

21 A. Yes. That's there, as well.

22 THE COURT: Anything else, counsel?

23 MR. CAWLEY: Yes, your Honor.

24 Let's see Figure 21.

25 *

1 BY MR. CAWLEY:

2 Q. This is Figure 21 from the '700 patent?

3 A. Yes.

4 Q. Let's also go to Figure 21 -- actually, maybe I can
5 just do it on the Elmo faster -- Figure 21 from the --
6 here we go.

7 Figure 21 from the 1996 disclosure.

8 A. Very good.

9 Q. Does this figure disclose an active tactile
10 feedback means?

11 A. Yes, it does.

12 Q. Have you testified about that before on your
13 earlier testimony?

14 A. Yes, I did.

15 Q. Okay. Let me show you now some pages from the '96
16 disclosure that you were asked about and accused of
17 taking out of context. Do you remember that?

18 A. I do.

19 Q. I'll make sure I've got the right one. Here's the
20 first one.

21 Do you remember the questions you were asked
22 about this?

23 A. I do.

24 Q. Could someone use the idea that was disclosed in
25 this part of the specification in a single input

1 6-degree-of-freedom controller?

2 A. Yes, they could.

3 Q. Couldn't it be used in other kinds of controllers,
4 as well?

5 A. Yes.

6 Q. So, does this show that Mr. Armstrong, in 1996,
7 disclosed technology for use in many kinds of
8 controllers and not just a single input controller with
9 6 degrees of freedom?

10 A. Yes. That's correct.

11 Q. Similarly, you were asked about this language.
12 This is a discussion of general controllers, correct?

13 A. Yeah, joystick-type, trackball-types, and so on.

14 Q. So, doesn't this suggest to you, when read in
15 context, that Mr. Armstrong disclosed technology that
16 was usable in many types of controllers?

17 A. That's right.

18 Q. Including 6-degree-of-freedom single input
19 controllers?

20 A. Yes, and also for non-6-degree-of-freedom
21 controllers. Again, he says "up to 6 degrees of
22 freedom."

23 Q. You were asked some questions about the Nunchuk
24 used with the Remote. Do you remember the testimony of
25 Nintendo's own engineer that he considered the Nunchuk

1 to be an extension of the Remote?

2 A. Yes. I think those are the words we saw. That's
3 right.

4 Q. And, finally, do you remember that you were asked
5 some questions at the very end of your cross-examination
6 about actual games and whether, for example, you could
7 move Princess Peach in 6 degrees of freedom? Do you
8 remember that?

9 A. I do.

10 Q. Do you remember, though, that the judge's claim
11 construction related to whether the controller is
12 capable of moving things on the screen in 6 degrees of
13 freedom?

14 A. Yes, I do.

15 Q. If a particular game -- or, in fact, if many games
16 choose not to use the outputs of the controller in that
17 way, does it make any difference to whether the
18 controller infringes or not?

19 A. No. The patent claims talk about the capability.
20 You describe structures for these devices and what they
21 are able to do.

22 Now, the game programmers do a lot of
23 different things with these. Some use more of the
24 features. Some use different choices and so on. But
25 the point is that it's capable of moving things in these

1 six different ways, not that any given game moves them
2 in six different ways.

3 Q. And for all of the controllers that you've told the
4 jury are infringing, are they all capable of moving
5 things in 6 degrees of freedom?

6 A. Yes. That's right.

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

8 THE COURT: All right. You may step down.

9 Next witness?

10 MR. CAWLEY: Your Honor, that's our last
11 witness in the rebuttal.

12 THE COURT: So, you rest?

13 MR. CAWLEY: Yes, your Honor.

14 THE COURT: Defense rests --

15 MR. CAWLEY: Oh, there is one matter, your
16 Honor, that we had discussed yesterday and agreed on and
17 it is that the parties have agreed that the actual
18 physical accused products should be introduced into
19 evidence.

20 THE COURT: All right.

21 MR. GUNTHER: Your Honor, that's correct
22 along with all of the physicals that have been moved in,
23 photographs and the actual physicals --

24 MR. CAWLEY: Yes. We already have the
25 photographs in, and we want to make sure that the

1 physical --

2 THE COURT: All right. They'll be admitted.
3 Of course, the record on appeal is all going to be on a
4 disk; so, you'll have to take them back and substitute
5 the photos.

6 MR. GUNTHER: Understood, your Honor.

7 MR. CAWLEY: Understood, your Honor.

8 THE COURT: So, plaintiff rests?

9 MR. CAWLEY: Yes, your Honor.

10 THE COURT: Defense rests?

11 MR. GUNTHER: We're done, your Honor.

12 THE COURT: Subject to all motions, of
13 course.

14 So, plaintiff closes?

15 MR. CAWLEY: Yes, your Honor.

16 THE COURT: Defense closes?

17 MR. GUNTHER: Yes, sir.

18 THE COURT: Okay. Ladies and gentlemen, you
19 have heard all of the evidence in the case. It took a
20 little bit longer this morning than I thought. I
21 thought we may be taking an earlier break. But what I'm
22 going to do now is release you for lunch. I'm going to
23 ask you to be back at 1:00. I have to deal with some
24 objections and motions and so forth. At 1:00 I'll give
25 you the instructions. The lawyers will make their

1 argument, and then you'll retire.

2 I have a note here that the lunches that were
3 ordered are now here; so, that works out well in timing.

4 Even though you've heard all of the evidence,
5 you've not heard my instructions on the law yet. So,
6 please don't discuss the case among yourselves or let
7 anybody else discuss them with you; and I'm going to ask
8 that you be back here at 1:00.

9 (The jury exits the courtroom, 11:23 a.m.)

10 THE COURT: All right. We've been going here
11 for an hour and a half; so, let's take a break until 25
12 of and then I will consider the JMOL motions and any
13 other issues and then Ms. Chen will have a draft on the
14 jury issues for you to consider and we'll take the
15 objections on that.

16 So, we'll be in recess until 25 of.

17 MR. GUNTHER: Your Honor, could I just hand
18 up our JMOLs at the close of the evidence?

19 THE COURT: Yes. Yes. If you've got a
20 different one -- if it's different than the other one.

21 MR. GUNTHER: Yes, sir.

22 THE COURT: All right. We're in recess until
23 25 of.

24 (Recess, 11:24 a.m. to 11:33 a.m.)

25 (Open court, all parties present, jury not

1 present.)

2 THE COURT: All right. We've got counsel
3 from both sides. Let me start off with Nintendo's
4 motion for judgment as a matter of law. I'm
5 gathering -- and I believe this is correct -- that
6 actually there's no dispute over the infringement by
7 doctrine of equivalents. That's not being pushed any
8 further by plaintiffs; is that correct?

9 MR. BOVENKAMP: That's correct, your Honor.

10 THE COURT: Okay. So, that motion is moot.
11 It's been dropped by plaintiff. In case there is any --
12 well, it's been dropped by plaintiff; so, that one is
13 moot.

14 So, then we get into the issue of no legally
15 sufficient evidentiary basis for a jury to find that the
16 accused controllers literally infringed any of the
17 asserted claims in the '700 patent. The court concludes
18 that on a review of the exhibits and the testimony,
19 especially of defendant's own witnesses, Ikeda and the
20 gentleman with the long -- Koshiishi?

21 MR. GUNTHER: Koshiishi, your Honor.

22 THE COURT: Koshiishi. I speak Spanish. I'm
23 not good on Japanese.

24 -- Koshiishi, that there is at least what's
25 called "substantial evidence" -- a funny term when

1 you're talking about a small amount but -- to justify a
2 finding, should the jury tend to believe the various
3 witnesses, including Dr. Howe, of infringement.

4 As to, for example, the GameCube controllers,
5 it's -- it wasn't quite admitted. But by accusing
6 Mr. Armstrong of copying and writing his claims
7 specifically to cover the GameCube, it's a little
8 difficult to say that there wouldn't be at least a
9 finding that those infringed. The argument would be he
10 deliberately copied them but he was a bad copier. I
11 didn't hear anything about him being a bad copier; so,
12 that's virtually -- I'm not going to say it's an
13 admission, but it's awful close on what he supposedly
14 copied.

15 As to the Wii -- and the big issue here, of
16 course, is the accelerometer. And I'll note for the
17 record -- I don't know if it makes any difference to the
18 higher court, but they sometimes seem to talk about how
19 much work or effort a court has put into it. I have
20 listened very carefully to both experts and have also
21 consulted with the court's technical advisor, Dr. Howard
22 Schmidt, professor at Rice University, who, of course,
23 has his doctorate in chemistry, his master's in
24 chemistry, his bachelor's in electrical engineering and
25 computer science, and is executive director of the

1 carbon and nanotechnology laboratory and has been
2 keeping up with all of this, helped me during the
3 Markman phase and discussed this, also.

4 It is true that the Analog refer to their
5 device, their chip, as "a sensor." But that does seem
6 to be a matter of how you phrase it. For example, in
7 the military there are sensors that they use to
8 determine whether someone is approaching; but that's a
9 combination of a couple of different sensors, vibration
10 and sound and -- so, in the sensor that the soldier puts
11 out, there are sensors inside it. And, similarly, in
12 this sensor, the testimony of Mr. Ikeda -- I don't even
13 have to rely on plaintiff's witnesses -- indicated that
14 there were pairs of capacitors on each axis, or for each
15 axis. That was quite clear. That bolstered what
16 Dr. Howe said.

17 But when the man who is in charge of the Wii
18 program says that, I have to take that very seriously.

19 And then the question about whether -- is the
20 capacitor -- or are capacitors sensors, I think that's
21 pretty well covered, both in the '700 patent and in the
22 earlier application. For ease of reference, I'll refer
23 to the '525 patent, Column 6, starting at line 50: For
24 purposes of this teaching specification and claims, the
25 term "sensor" or "sensors" is considered to include --

1 and then it goes down to proximity sensors, variable
2 resistive and/or capacitive sensors. And then it also
3 mentions piezo sensors.

4 But then, additionally, (reading) and also
5 other electricity controlling, shaping, or informing
6 devices influenced by movement or force.

7 So, you have the capacitor sensors there; and
8 if some argument is to be made that, well, this is a
9 movement that's going on or something, that seems to be
10 covered in there, also.

11 Now, that's the same language that we see in
12 the '700 patent at Column 4 between lines about 20 and
13 29. So, clearly there is sufficient evidence that
14 having a pair of capacitors there for each axis -- or
15 capacitive sensors there on each axis would meet that;
16 and I think that --

17 I've also taken time to review the IEEE
18 dictionary and the Wiley dictionary and took a look,
19 also, at the description in the data sheets in those two
20 exhibits where they make it pretty clear that there's
21 probes and capacitors set out there. And after -- as I
22 said before, discussing this in detail from the point of
23 view of one of skill in the art and, in my case,
24 discussions, obviously, with a technical advisor and
25 listening to the experts and Mr. Ikeda and

1 Mr. Koshiishi, I think there is evidence there on that.

2 Then we have the next issue, and it's
3 slightly different. In the original motion for JMOL, it
4 was in terms of (reading) as a matter of law the '700
5 application was a continuation-in-part of the '525
6 patent, not a continuation. And here, it's (reading) no
7 legally sufficient evidentiary basis exists for a
8 reasonable jury to find that the '700 patent has an
9 effective filing date earlier than November 16 of 2000.

10 So, the JMOL seems to have switched to
11 evidentiary basis as opposed to just a finding as a
12 matter of law. And actually, I think that is the
13 correct argument to make. It is, in fact, a
14 determination as at least in part based upon facts.
15 And, again, listening to the testimony of the witnesses
16 and reviewing the application, the '525 patent itself,
17 and the figures, comparing them with the claims, it to
18 some degree -- as with the accelerometer product, for
19 that matter -- is going to come down to evaluation by
20 the jury of the credibility of the respective experts
21 and the other witnesses in their determination.

22 I mean, obviously they could decide that
23 Dr. Howe is completely wrong about that photograph and
24 everything else; and they could decide that opposing
25 expert was confused or wrong. I mean, that's part of

1 the determination they have to make. And, likewise,
2 they've got to rely on the evidence they have received
3 on this other. But the court finds that there is
4 sufficient evidence for this to go to a jury and for
5 them to make that determination and so -- on that issue
6 about evidentiary basis for the -- on the effective
7 filing date.

8 And then on the -- your next one is there's
9 no legally sufficient basis for the jury to find that
10 the '700 patent is not anticipated or rendered obvious.
11 Actually, I don't think that's the test. You have to
12 prove that it is; they don't have to prove that it's
13 not. They don't have to find that it's not. If they
14 find -- I mean, they could find that you just failed to
15 prove it. And only if it was against -- I mean, there
16 would have to be a lot of evidence going the other way,
17 I think, to overturn that. But regardless, I think
18 the -- I mean, it may just be a wording question there;
19 but I want to be sure we're not getting confused on the
20 burden. The burden is on defendant by clear and
21 convincing evidence on that issue.

22 And to say there is no evidence for them to
23 find that you didn't meet your burden, I think, is
24 incorrect. So, on that basis I'll deny it. But if what
25 you really meant was -- is that as a matter of law there

1 is enough evidence for the court to just decide
2 anticipation and obviousness, the court finds that that
3 is hotly contested and not proper at this time for a
4 JMOL.

5 And then, finally, the -- not -- well,
6 there's the -- again, the written description, the no
7 legally sufficient basis to find that the claims of the
8 '700 patent are supported by the written description of
9 the '700 patent specification. Again, the court finds
10 that is contested. A good deal of that may depend on
11 the evaluation by the jury of the credibility of the
12 witnesses.

13 The court's review of the evidence, listening
14 to the witnesses and listening to the -- or reading the
15 specification itself, there is enough there to find --
16 or to support a jury's verdict, depending on how they
17 decide to go with it.

18 And then, finally, there is the issue of no
19 legally sufficient evidentiary basis exists for a jury
20 to find that they are entitled to damages. Well, I
21 guess entitlement is based on all the previous ones.
22 So, if you're talking about liability issues, I think
23 I've already dealt with that. If you're talking about
24 is there sufficient evidence to support a finding of a
25 particular number based on the testimony of the damages

1 expert, the court finds there is sufficient evidence for
2 a jury to make a decision there.

3 So, for those reasons, I will overrule the
4 motions for JMOL on that general.

5 And let's see. This brings up, I guess, a
6 couple of points. And one of them is this -- in your
7 motion -- and this deals with the tactile feedback.

8 Now, I will point out that when the
9 Markman Hearing came along, the parties represented to
10 the court that that had been agreed upon, there was no
11 dispute. I got that in at least one of the briefs,
12 perhaps two of them. And then at the hearing itself and
13 the transcript I've checked and that -- that was the
14 representation that was made, that there was no real
15 dispute.

16 Now it seems to be that there needs to be
17 some kind of an instruction to the jury on what that
18 means; and, so, I'm intending to give that. I think
19 it's fairly clearly set out in the specification itself.
20 The specification states what the -- what they're
21 talking about with tactile feedback and then refers back
22 to an earlier patent, giving it as an example -- or its
23 equivalents. I'm referring here particularly to
24 Column 4 of the -- I'm sorry -- Column 5 of the '700
25 patent.

1 Now, has there been any agreement -- I mean,
2 I've got -- well, let me not get out of order.

3 Anyways, based on that, I don't believe that
4 is a basis for granting judgment as a matter of law. I
5 think there is testimony about a weight, and the jury
6 can decide whether or not it winds up meeting a
7 definition that they are going to have to be given.

8 MR. FARIS: Your Honor?

9 THE COURT: Yes.

10 MR. FARIS: I just need to say something on
11 that. The issue is -- there is a disagreement as to the
12 corresponding structure.

13 THE COURT: Right.

14 MR. FARIS: Anascape is contending that the
15 corresponding structure is "a shaft with an offset
16 weight." Nintendo contends that the corresponding
17 structure is "a shaft with an offset weight on the
18 shaft" -- I'm sorry -- "a" --

19 THE COURT: Okay. I guess right now what I'm
20 going over, though, is the JMOL --

21 MR. FARIS: Yes, sir.

22 THE COURT: And that is a basis for JMOL. I
23 think that's going to depend on what the jury decides
24 the evidence is that was presented. I'm going to have
25 to come up with a definition, but we'll get to that

1 next.

2 MR. FARIS: Thank you, your Honor.

3 THE COURT: If I try to make the definition
4 in the middle of the JMOL, it's going to be very
5 confusing. Let me get through the JMOL.

6 I think there is evidence that there is, in
7 fact, a rumble feature, vibration feature in each of
8 the -- in the accused product and it does involve a
9 weight and it does involve a shaft and I understand
10 there may be some disagreement on the evidence. That's
11 something the jury will have to decide; so, JMOL on that
12 ground is denied.

13 There's also a JMOL on this issue of "hand,"
14 and that seems to be one that you've kind of walked into
15 with your eyes wide shut. At the Markman Hearing --
16 Claim Construction Hearing -- I'm looking at -- I think
17 it's part 2, starting about page 9. I was asking
18 Mr. Stevenson, for plaintiffs: The specification makes
19 it pretty clear that it's something in the human hands
20 or a handheld game interface or something like that. Is
21 there any question from plaintiff's point of view that
22 that part of it is what we're talking about, a handheld
23 user interface or a hand device?

24 Mr. Stevenson: Not really any significant
25 dispute there. The real issue is, is it a single input

1 member.

2 The Court: Okay.

3 Mr. Stevenson: That's the fight.

4 A little bit later, starting at line 14: And
5 the same for defendant. Would you agree that we're
6 talking about -- and I think all your constructions talk
7 about hand-operable or held in the hands?

8 Mr. Gunther: Yes, sir.

9 Now, as it happened, I used the singular in
10 the construction. I don't recall any objection to that,
11 any request for clarification on that, or any debate
12 that it was going to be one hand or two hands. I mean,
13 almost all these controllers, like the GameCube and
14 everything else, is actually generally held in two
15 hands. You've got two thumbsticks, two joysticks,
16 whatever. You're using two thumbs; although, I suppose
17 someone who is quick could use one hand.

18 To move for JMOL on the basis of that
19 undisputed and -- definition of the "use of hand," the
20 use of the singular when that wasn't a dispute -- in
21 fact, I specifically asked about that, didn't seem to be
22 any dispute. That wasn't a problem. No one was
23 concerned about it. Keep in mind that at that time I'm
24 not trying to define things with an eye toward what was
25 involved. I had actually never seen a Wii before in my

1 life at that point. No idea you were talking about
2 things held in two hands or that was even going to be an
3 issue.

4 But to now move for JMOL after those
5 representations at the hearing and after sitting quiet
6 with my claim construction there saying "hand" as
7 opposed to "hands," "hand or hands," or "hand(s)" -- and
8 I know you've asked your witnesses a lot of questions;
9 and, boy, it sounds like a neat argument. But that one
10 you've brought on yourself.

11 You made the representation at the hearing.
12 You let that definition go forward. If that was
13 something important, that should have been brought to my
14 attention so I could have considered whether it was
15 going to be "hand" or "hands." And to now bring it up,
16 that, I think, is -- well, I mean, I guess it's a neat
17 argument; but it's unsupportable in terms of JMOL or as
18 a matter of law or anything else. And I am definitely
19 not granting JMOL on the basis that now suddenly it's
20 "hand" versus "hands" with those two pieces of the
21 controller there. So, that's being denied.

22 But I've stated for the record the reasons
23 for it, especially when you take into the -- there's
24 also -- and I think -- I mean, the reason for that is we
25 take a look as far back as the '525 patent, Column 1,

1 Background of the Invention, right at the beginning, at
2 about line 17: Computer image controllers which serve
3 as interface input devices between the human hand(s).
4 So, it's human hands; but with that "(s)," it clearly
5 could refer to "hand" or "hands."

6 There was no doubt at the hearing, there was
7 no doubt when I was writing my construction, and no
8 doubt that all through this case, until we got to this
9 trial, that there was any question about that; and I
10 think that was pretty obvious from the specification
11 itself. Same thing in the '700 patent. So, that's
12 denied on that ground.

13 I think I have covered all of the issues
14 brought up. Is there one that I have missed,
15 Mr. Gunther?

16 MR. GUNTHER: Your Honor, can I let Mr. Blank
17 speak to that?

18 THE COURT: That's fine.

19 MR. GUNTHER: Is that okay?

20 THE COURT: I mean, I tried to go through
21 your motion and hit all the points that you raised. But
22 if there is a general point that was raised and I
23 missed, let me know.

24 MR. BLANK: We did have a section in there on
25 damages, your Honor; and I didn't hear you rule on that.

1 THE COURT: Okay. I think I said --
2 actually, I know I said that there is evidence, assuming
3 the jury believes the damages expert, that they could
4 find an amount of damages. If that was intended to be
5 no liability and, thus, no damages, I think I've already
6 dealt with those under the separate subsections.

7 MR. BLANK: Thank you.

8 THE COURT: All right. So, based on that,
9 I'm overruling all of the defendant's motions for JMOL
10 other than under the doctrine of equivalents. That
11 one's moot because that one's been withdrawn.

12 Plaintiff?

13 MR. BOVENKAMP: Yes, your Honor. We'd like
14 to make our judgments as a matter of law. As the court
15 indicated, we are making them now as if they were
16 entered timely.

17 The first one we would like to address is
18 Anascape would like to move under Rule 50 for judgment
19 as a matter of law on the basis of ownership. It's our
20 belief that a reasonable jury would not have legally
21 sufficient evidentiary basis to find for Nintendo that
22 Anascape does not own full legal right and title --

23 THE COURT: I don't even see a jury issue
24 that we talked about last night on that. Are you
25 still -- is defendant still pushing that one?

1 MR. GUNTHER: Your Honor, I don't know that
2 we ever pushed that.

3 THE COURT: Okay.

4 MR. GUNTHER: So --

5 THE COURT: That one's either moot because
6 it's not there, or it's granted.

7 Next?

8 MR. BOVENKAMP: The next, your Honor, is
9 Anascape believes that pursuant to Federal Rule of Civil
10 Procedure 50, that there is not legally sufficient
11 evidentiary basis for a reasonable jury to find for
12 Nintendo on the issue of noninfringement with regard to
13 the GameCube controller on claims 14, 16, 19, 22, and
14 23. This is the issue that the court referred to
15 earlier.

16 They have accused Mr. Armstrong of copying,
17 and the only argument that they made on that with regard
18 to the GameCube controller was this 3-D argument, that
19 it wasn't capable of moving in at least 6 degrees of
20 freedom. I think the evidence is uncontroverted by
21 Nintendo's own engineer, Mr. Ikeda, that software
22 designers can use the signals coming out of these
23 joysticks for whatever they want, including controlling
24 objects in 6 degrees of freedom, navigating viewpoints,
25 and controlling objects.

1 THE COURT: All right. I'll overrule that.
2 I think there is evidence, and the jury will have to
3 make its decision on that one.

4 MR. BOVENKAMP: Your Honor, we would make the
5 same motion with regards to the Wavebird controller as
6 to claim 14.

7 THE COURT: And same ruling. I'll overrule
8 that. Again, I think there is evidence and arguments
9 going both ways. And, of course, in this one the burden
10 of proof is on you. So, it isn't so much whether
11 they've put in evidence; it's did you put in evidence to
12 convince the jury.

13 MR. BOVENKAMP: Your Honor, I do not believe
14 that Nintendo has entered sufficient -- legally
15 sufficient evidence for a reasonable jury to find that
16 the patent is invalid for enablement or best mode. I
17 don't think there's been any testimony whatsoever on
18 those two.

19 THE COURT: Okay. I haven't -- again, I
20 haven't seen enablement or best mode come up.

21 MR. GUNTHER: Your Honor, I -- again, we can
22 go back to the Pretrial Order. I don't think that that
23 was --

24 THE COURT: Okay.

25 MR. GUNTHER: -- stated as --

1 THE COURT: Yeah. I didn't think you had
2 brought it up; so, that's moot.

3 MR. BOVENKAMP: Okay. The last one we have,
4 your Honor, is with regards to damages. Plaintiff's
5 expert testified with regard to his analysis of the 15
6 factors under Georgia-Pacific. He also testified about
7 the 5 percent reasonable royalty, and he also testified
8 that the application of that royalty should be to the
9 \$1.007 billion of accused sales of the controllers. We
10 do not believe there has been any evidence controverting
11 those facts.

12 THE COURT: Well, of course, the burden is on
13 you to prove it. If the jury doesn't believe him or
14 just decides he's blowing smoke -- he was rigorously
15 cross-examined, and the jury will just have to decide.
16 That right there is a credibility issue and an
17 evaluation issue. If there's one thing that a jury can
18 figure out, I think, is something like damages. So,
19 I'll overrule that.

20 MR. BOVENKAMP: That's all we have with
21 regards to our JMOLs, your Honor.

22 THE COURT: Okay. All right. Both sides
23 have had a copy of the revised draft. I made some
24 slight changes, especially on that issue of burden of
25 proof. I looked again at Power Oasis as brought up by

1 counsel for defendant and compared it with the Chiron
2 case. And just for the record, Power Oasis, Inc.,
3 versus T-Mobile USA at 2008 WestLaw 1012561; and then
4 comparing that with Chiron Corp versus Genentech, Inc.,
5 363 F.3d 1247, Fed Circuit 2004.

6 As I think I mentioned in an earlier hearing,
7 the Power Oasis case was in the context of a summary
8 judgement which has to look very closely at the burden
9 of proof and the burden of going forward. And in that
10 case the court pointed out that the defendant had met
11 the burden of proof and had presented clear and
12 convincing evidence of invalidity; and, so, the
13 plaintiff -- the patentee then had the burden of going
14 forward, and they did not. I think the court phrased it
15 in terms of they came with a few conclusions and some
16 argument or something; they obviously didn't think much
17 of the evidence that was brought forward by patentee
18 and, thus, upheld the judgment.

19 However, the court also recognized -- and
20 this is at page star 3 of that WestLaw site: It is well
21 established that a patent is presumed valid and the
22 burden of persuasion to the contrary is and remains on
23 the party asserting invalidity. Citing back to the
24 Ralston Purina Company versus Far-Mar-Co, Inc., 772 F.2d
25 1570 at page 1573. That's -- the Far-Mar case is the

1 name I kept not being able to remember.

2 Chiron, on the other hand, was an actual jury
3 trial; and in that case -- it was similar because in
4 that case I believe the parties stipulated again that if
5 the patentee couldn't get the earlier priority date,
6 then there was intervening invalidating art. And that's
7 at page 1252 of that case. (Reading) Also before trial,
8 the parties stipulated the '561 patent would be invalid
9 under Section 102 based on intervening prior art if the
10 patent were not entitled to claim priority to the filing
11 date.

12 So, to that extent, it was somewhat similar.
13 However, the court approved the instruction which placed
14 the burden squarely on the defendant in that case; and
15 that's at page 1259 under Headnote 18, where the burden
16 was, in fact, on them.

17 And, so, what I draw from these two cases --
18 and if Power Oasis intended to -- and this is -- I think
19 we have to be very careful. The district judge
20 evidently was talking in terms of the burden of proof
21 when there has been no actual determination made by the
22 Patent Office as to whether it's a continuation or a
23 continuation-in-part because there's been no
24 interference proceeding. And that opinion cites the
25 patent examiner's manual and so forth.

1 Recognizing that argument could be made that
2 applies to this case, the Fed Circuit did not take the
3 opportunity to make it very clear that somehow the
4 burden of proof or presumption of validity goes away
5 once something like this comes up. And, in fact, going
6 to the contrary is the fact that there is a statute that
7 says that a patent is presumed valid and I don't think
8 that the examiner's manual gets to somehow overrule or
9 override that.

10 Now, again, in terms of burden of proof and
11 burden of persuasion, burden of going forward, those
12 things may become very, very important in the summary
13 judgement context. But Title 25, Section 120 -- I'm
14 sorry. Title 35, Section 120, provides: An application
15 for patent for an invention disclosed in the manner
16 provided by the first paragraph of Section 112 in an
17 application previously filed in the United States shall
18 have the same effect as to such invention as though
19 filed on the date of the prior application.

20 Now, that means, of course, that the -- you
21 can claim priority only if the earlier application meets
22 the requirements of 112; but it also says it has the
23 same effect.

24 So, I read the Chiron Corporation case as
25 holding that while -- and taking it in light of Power

1 Oasis, while the burden of going forward might change --
2 or may be clarified -- maybe not changed because the
3 Far-Mar case, I think, also discussed that -- the
4 ultimate burden of proof is still on defendant to prove
5 by clear and convincing evidence if it is going to use
6 this particular defense, i.e., that this is not -- these
7 claims, these particular claims -- and we're only
8 looking at certain claims -- are not entitled to the
9 earlier priority date as set out.

10 And, so, what I'm going to do is give that
11 instruction to the jury stated at page 1259 of the
12 Chiron Corporation case. I have taken out that one
13 sentence which emphasizes the burden of proof and it
14 goes back down into the -- I mean, I think the burden of
15 proof is still there. There's -- I guess there's a
16 point where you emphasize it too much.

17 I will also mention -- and I think Judge
18 Parker brought this up last night -- about the
19 presumption of validity. The Chiron Corporation case
20 mentioned that -- you know, in its opinion, that there
21 is not a need to have both in there. And since I'm
22 following them on this as to who gets the burden of
23 proof and what burden of proof they have, I think the
24 better course of valor would be to follow them, also, on
25 the "it's not necessary to say presumption of validity"

1 and then go ahead with the clear and convincing evidence
2 on this particular issue.

3 That explains why I'm going to do what I'm
4 going to do, and at this point -- do we have any
5 objections as to the instructions?

6 MR. BOVENKAMP: Yes, your Honor. Plaintiffs
7 would request that the court give the instruction that,
8 with regards to preambles of the claim, that all of the
9 claims in this case have preambles. (Reading) A
10 preamble is the first words of a patent claim and is
11 often a single phrase indicating the field of art.
12 Preambles here are not claim limitations; rather, the
13 remaining parts of the claim define the scope of the
14 invention.

15 THE COURT: Overruled. Is that it?

16 MR. BOVENKAMP: A moment to consult, your
17 Honor. I think that's it, though.

18 One more, your Honor.

19 THE COURT: Okay.

20 MR. BOVENKAMP: We would also request that
21 the jury be instructed with regards to the presumption
22 of validity for a patent.

23 THE COURT: All right. Overruled for the
24 reasons stated. We're already going to -- since I'm
25 relying on Chiron, I think I'll rely on them completely.

1 MR. BOVENKAMP: Okay. Those are all the
2 objections that we have, your Honor.

3 THE COURT: Okay. From defendants?

4 MR. BLANK: Nintendo objects to the claim
5 constructions set forth in --

6 THE COURT: Okay. You need to speak into the
7 microphone, sir.

8 MR. BLANK: I'm sorry, your Honor.

9 Nintendo objects to the instructions set
10 forth in Appendix A, which are the claim constructions,
11 for the reasons set forth in its Markman briefing.

12 THE COURT: No. That's unacceptable.

13 MR. BLANK: I'm sorry.

14 THE COURT: That is absolutely unacceptable.
15 This idea that, "Oh, well, there's some error out there
16 and you'll just have to find it, judge," that may be
17 what the Fed Circuit is intending to do with that case;
18 but they're going to have to say it. So, you go ahead
19 and state your objections. You've waited through this
20 entire trial, and you have not argued about them.
21 They've been sitting there in front of the jury. And to
22 play that game at this point, I think, is just
23 absolutely abominable. It's one of the problems I have
24 with that decision. It was an invitation almost from
25 the court for defense lawyers and plaintiff's lawyers to

1 play that. There hasn't been any objection to those,
2 and I have said more than once, through the pretrial,
3 that if there is a problem with them, let me know. But
4 to wait now at this point to say for all of those
5 constructions, go back to the Markman briefing, I'm not
6 going to accept that. Now, if there are some particular
7 ones, bring them out.

8 MR. BLANK: Okay.

9 LAW CLERK: I think he was referring to
10 (indicating) these --

11 THE COURT: Well, that's not what he said.
12 He said he's objecting to all of the ones in Appendix A.
13 If that's not what you meant, then explain
14 what you mean.

15 MR. BLANK: What I'm saying is is that we
16 proposed -- with the proposed final jury instructions
17 filed on April 18th, 2008, we attached as an appendix
18 the constructions that we advanced during the
19 Markman Hearing. That's all I'm saying. That's all I'm
20 trying to do is preserve the right to argue those if and
21 when the Federal Circuit looks at this on a de novo
22 basis. That's all I'm saying.

23 THE COURT: All right. Overruled.

24 The one I guess I'd be interested in is the
25 tactile feedback, because that's the one that there

1 hasn't been any agreement on or no prior ruling on.

2 MR. BLANK: The only issue on that, your
3 Honor, is I see that your instruction is "a motor having
4 a shaft with an offset weight and equivalents thereof";
5 and our -- Nintendo's position is that the corresponding
6 structure is a "motor, shaft, and offset weight on the
7 shaft and equivalents thereof."

8 THE COURT: All right. What's plaintiff's
9 position on that?

10 MR. BOVENKAMP: Your Honor, frankly, I'm
11 surprised that we're having a disagreement about this.
12 There is no question there was an agreement between the
13 parties during the Markman briefing on the construction
14 of this term. There was originally a dispute in the
15 claim construction proceedings that Anascape contended
16 was not a 112(6) clause; defendants contended that it
17 was.

18 In order to simplify and streamline things,
19 right prior to the Markman briefing, Anascape agreed
20 verbatim to the defendant's proposed constructions. We
21 noted that on the first page with a footnote in our
22 opening brief. The court recognized that at the
23 Markman Hearing, your Honor. We don't think it's an
24 issue. We think there's been an agreement.

25 THE COURT: Okay. I will note that -- and

1 I've got here a copy of the original -- or the revised
2 joint claim construction statement where that came up.
3 And then noting at -- looks like page 1 of Anascape's
4 opening claim construction brief, Footnote 3: Since
5 filing the revised PR 4-3 statement on May 1, 2007, the
6 parties have agreed to constructions for two additional
7 terms. And then they -- Anascape has agreed to
8 Microsoft's proposed constructions of Exhibit 2 of the
9 revised PR 4-3 statement.

10 Now, I suppose Nintendo could say, "Oh, we're
11 not Microsoft; we're different." But you sure didn't
12 say it at the Markman Hearing, and I think it is a
13 little late now to be trying to bring this up.

14 But taking a look, then, at what we have in
15 the patent itself, we have in the Abstract the reference
16 to "tactile feedback motor with shaft and offset
17 weight." And then on the '700 patent, Column 5, lines
18 20 to 21, we have the words: Active tactile feedback
19 means (electric motor, shaft and weight).

20 And then a little bit further down in
21 Column 5, at line 22: "Tactile feedback means" in
22 reference to the active type as herein used can be an
23 equivalent to or that which is detailed in the
24 incorporated U.S. Patent Number 5,589,828, which is
25 shown and described therein basically as a motor with a

1 shaft and weight on the shaft -- I'm sorry -- with a
2 shaft and weight on the shaft, the shaft being offset so
3 that when rotated, vibration occurs which can be felt by
4 the hand(s) operating the controller.

5 And taking a look at the '828 patent, we see
6 a description of that.

7 Based on all of that and based on the
8 agreement that came earlier, the court concludes that
9 the function of "tactile feedback means for providing
10 vibration" is: Providing electromechanical-created
11 vibration to the user. And the structure is: Motor
12 having a shaft with an offset weight and equivalents
13 thereof.

14 So, I will deny your objection as to the
15 construction of that particular term and partly for not
16 having brought it up -- I think it's a little bit late
17 to change everything now after having made those
18 agreements, but also based on the references and my
19 review of the patent -- the underlying patent and the
20 disclosures.

21 Go ahead, counsel.

22 MR. BLANK: Okay. On page 13 of the
23 instructions, your Honor, the sentence that begins:
24 Rather, the 1996 application itself must describe the
25 invention and the claim --

1 THE COURT: Wait a minute. Let me get there.

2 MR. BLANK: Yes, sir.

3 THE COURT: Did you say page 13?

4 MR. BLANK: Yes, sir.

5 THE COURT: Okay. All right. Yes?

6 MR. BLANK: Yeah. Second paragraph -- the
7 first full paragraph, your Honor.

8 THE COURT: Right.

9 MR. BLANK: The sentence that begins
10 "rather." Nintendo believes that that should read --
11 and would request that the jury be charged as follows:
12 Rather, the 1996 application itself must describe the
13 invention in the claim and do so in sufficient detail
14 that one skilled in the art can clearly conclude that
15 the inventor invented and possessed the full scope of
16 the claimed inventions recited in the asserted claims as
17 of July 5th, 1996.

18 THE COURT: All right. And a number of cases
19 talk about invention and possession, and in the cases it
20 makes clear that the inventor had that. There's been --
21 on the other hand, I've got to explain this to a jury of
22 laypeople; and what I'm trying to do is give them the
23 idea that he invented it with all of its limitations and
24 in sufficient detail. No issue has been brought up
25 about possession. As Mr. Gunther said, you know, who

1 owns the patent or so forth hasn't been in. And to try
2 to explain to the jury that by "possession" we don't
3 really mean who actually owns it, we mean that he has it
4 all in his mind -- I think that concept has been
5 properly conveyed by the wording that we have in the
6 instruction as it is; that is -- and it talks about it,
7 for example, right above there: The July 5th, 1996,
8 application must disclose the invention of the new claim
9 with all of its limitations.

10 And I don't think -- while the phrase you're
11 using is one that is used in some cases, I don't think
12 it helps the jury understand what the issue is here; so,
13 I'll deny that.

14 MR. BLANK: Okay. And, likewise, your Honor,
15 on page 23, just for the record, the middle paragraph
16 that begins, "This written description requirement for a
17 particular claim is satisfied," we would request that
18 the jury be charged as follows: This written
19 description requirement for a particular claim is
20 satisfied if the November 16th, 2000, patent application
21 demonstrates to a person of ordinary skill in the art at
22 the time the 2000 application was filed that
23 Mr. Armstrong invented and possessed the full scope of
24 the inventions recited in the asserted claims of the
25 '700 patent.

1 THE COURT: I'm going to deny that. What I
2 am going to add at the end of that sentence, where it
3 says that it describes the invention will include the
4 phrase that we had before "with all of its limitations."
5 And that will tie in with what's on page 13.

6 Next?

7 MR. BLANK: Yes, sir. Back to page 13, your
8 Honor. The second full paragraph that begins "This
9 written description requirement," we would propose that
10 after the first sentence and before the last sentence,
11 the following charge -- as follows: Individually
12 describing each element of the asserted claims in a
13 patent application is not sufficient to satisfy the
14 written description requirement. It is necessary for
15 the application to support the full scope of the claimed
16 embodiments as a whole, period.

17 THE COURT: Overruled.

18 MR. BLANK: The final objection with respect
19 to the liability-related instructions goes to the issue
20 of whose burden it is to prove priority and Mr. Faris is
21 going to speak to that and then we have one additional
22 objection with respect to damages that Mr. Germer will
23 address.

24 THE COURT: All right.

25 MR. FARIS: Your Honor, we have also reviewed

1 the Power Oasis case. And given the changes which you
2 have made to the instructions, to that specific
3 instruction, by removing that specific statement
4 concerning burden --

5 THE COURT: You need to speak up so she can
6 hear you.

7 MR. FARIS: Yes, sir. Given that change, we
8 don't have an objection to that specific instruction.

9 THE COURT: Okay. Good.

10 Mr. Germer?

11 MR. GERMER: Yes, your Honor. I'm back on my
12 lump-sum campaign. We object to the failure of the
13 court in the verdict form to submit, as an alternative,
14 "lump sum" and object to the failure of the court to
15 submit our requested instruction in the form that would
16 include "lump sum."

17 THE COURT: Okay.

18 MR. GERMER: I think the effect -- if I
19 understand the burden of proof correctly, what the court
20 would have to be saying is that the plaintiffs who have
21 the burden on damages have established as a matter of
22 law that it could only be by a royalty, a running
23 royalty. And that would be an incredibly tough burden
24 when, particularly, as the court has already noted,
25 their damage expert can be believed or not believed.

1 It's basic law that what the damage expert says, the
2 jury can accept part or none or all. I don't think I
3 need to belabor the court with the fact that there's
4 clearly evidence supporting lump sum. The Sony
5 decision, the plaintiff's admission that he liked lump
6 sum and that he knows big companies like lump sum is
7 strong evidence.

8 The only thing that I heard the court express
9 concern about -- and this may not have been the court's
10 concern, but it was the fact that there was no expert
11 testifying about -- and saying that it should be lump
12 sum. I cannot give the court a case in point on lump
13 sum, but I can refer the court and have given copies to
14 Betty of several cases -- the plaintiff's attorneys have
15 copies -- but the Federal Circuit in Unisplay versus
16 American Electronic, 69 F.3d 512, 1995, where they were
17 appealing from a plaintiff verdict, the court noted at
18 page 7 that there -- there was a particular license in
19 that case, kind of like our Sony license. The court
20 said that that particular license agreement should carry
21 considerable weight.

22 I would say the Sony lump-sum settlement
23 should carry considerable weight, not just some
24 evidence.

25 But then the court said more broadly -- and

1 this is the point I hope to make -- (reading) in
2 rendering our decision, the court said, we do not hold
3 that a jury may only arrive at a royalty specifically
4 articulated by the parties during the trial. A court is
5 not restricted in finding a reasonable royalty to a
6 specific figure put forth by one of the parties.
7 Rather, a jury's choice simply must be within the range
8 encompassed by the record as a whole.

9 And I would urge the court that that same
10 logic would apply to this running royalty versus
11 lump-sum issue and it's clearly within the record as a
12 whole for the jury to make that determination and it
13 clearly has not been established as a matter of law by
14 the plaintiffs that it can only be a running royalty.

15 There is another patent case by the District
16 Court that said, for example, expert testimony may be
17 received -- this is a 2008 case -- expert testimony may
18 be received but is not required as an aid to determine
19 appropriate damages in a patent infringement case.

20 Now, that -- I know the court knows that; so,
21 I don't mean to belabor it. But it makes the point that
22 expert testimony is not even required for the plaintiff
23 to sustain its burden of proving damages. It can be
24 done without that. So, surely there's not a requirement
25 for expert testimony, somebody to come in paid to say,

1 "Oh, I think it should be lump sum" if there's evidence
2 fairly raising it. And I have other cases; but that's
3 the tenor of it, your Honor.

4 I think clearly if we look at the record in
5 the case, we're going to see that it's a pretty strong
6 record for lump sum; and that, I think, is what the jury
7 is going to have to decide, which way they want to go.

8 Thank you -- and unfortunately, as I said
9 last night, I mean, I do think this is not a trivial
10 matter because if the defendant doesn't get this
11 submission and we're entitled to it -- not that we're
12 going to win it. The jury still can decide and may well
13 decide, if they go for plaintiff, to give a running
14 royalty. But if we don't get this in our submission and
15 we're right that there's evidence in here, then clearly
16 the whole damage part of the case at least would have to
17 be redone.

18 THE COURT: I mean, you make some good
19 arguments there; and the -- I'm gathering that the
20 defendants don't want it in there still, the
21 possibility.

22 MR. GUNTHER: Plaintiffs, your Honor?

23 MR. BOVENKAMP: Plaintiffs.

24 THE COURT: Plaintiffs. I'm sorry.

25 MR. BOVENKAMP: That's correct, your Honor.

1 We do not.

2 THE COURT: Okay. I mean, it's possible you
3 were so confident you were going to win and you wouldn't
4 care just to...

5 But the problem I have on this -- and the
6 court is fully aware that an expert is not always
7 necessary to establish damages. On the other hand, the
8 Fed Circuit is -- and it seems to be almost a given
9 nowadays that we all have to go through these
10 Georgia-Pacific factors. Ever since that came out, I
11 haven't seen a case where that didn't happen. Whereas,
12 in almost every other kind of property case, an expert
13 might talk about them or might not, those similar kind
14 of factors, and come up with something as long as there
15 was basis. But now evidently -- and I think I've even
16 seen some cases where the expert didn't properly
17 consider these 15 factors; and, thus, the evidence was
18 insufficient.

19 We do have some licenses in here; but if I'm
20 recalling right, each of the ones that was a lump sum
21 also had in it some other factor, such as
22 cross-licensing, the giving of a bunch of patents,
23 getting patents back; and we've had no explanation about
24 how that would play in when it goes in. So, it would be
25 asking the jury to guess at this kind of economic damage

1 and how do you extract out the lump sum from those other
2 factors that were in those licenses.

3 I could be wrong, but I don't recall a just
4 bare -- what is sometimes called a "bare license" for a
5 lump sum. If I'm recalling right, they're almost all
6 involving other issues, more than one patent,
7 cross-licensing, and so forth.

8 And, so, without that and without some other
9 testimony and given the -- I guess, the evidence that we
10 have from -- it seems to be uncontroverted that in this
11 particular case -- and it was the last question I think
12 the expert was asked by counsel, was that this lump sum
13 would be only for the amount of time between, I guess,
14 the filing of suit and today. And actually, that's not
15 correct. The lump sum would be for all time.

16 I asked a question -- I was concerned about
17 that; and I actually asked a question of what's lump
18 sum, what's -- but there was no follow-up, nothing to
19 get into anything further. And I don't think it would
20 be proper for the jury to give a lump-sum judgment just
21 based on damages suffered up to today. It's obviously a
22 lump sum for all time, and they've had no evidence on
23 that at all.

24 For those reasons, I -- and I have submitted
25 "lump sum" questions before. I'm not submitting it in

1 this particular case.

2 I think I'll also note that I had to make up
3 that question the last time I submitted it because I
4 didn't -- I can't remember finding it in a form
5 anywhere. I don't think many people do it very often,
6 but -- but I think that may be partly because defendants
7 don't usually bring it.

8 All right. Anything else? Any other
9 objections?

10 MR. PARKER: One other issue, your Honor, in
11 an abundance of caution. Because the court applied
12 Chiron and is not instructing the jury on presumption,
13 the court, I assume, is not telling the plaintiffs we
14 can't argue --

15 THE COURT: No. They were told that in the
16 video. That statement was made in the video. If people
17 want to make that statement, go ahead and make it. I'm
18 not going to tell you "no"; I'm just not going to
19 emphasize to the jury and give the court's imprimatur on
20 yes, it's presumed valid because presumptions and
21 bursting bubble presumptions -- I'm not going to get
22 into all that legal argument with the jury.

23 MR. PARKER: We just wanted to be careful.

24 THE COURT: Yes. No, you're -- you may do
25 it.

1 All right. We've got about 20 minutes before
2 1:00. In the interest of time, I could -- if the jurors
3 are there, I could bring them back a few minutes
4 earlier; or if those of you who are making the
5 arguments, you want to wait the full 20 minutes, I'll
6 give you your choice.

7 MR. PARKER: We vote for the 20 minutes, your
8 Honor.

9 THE COURT: Okay. All right. At 1:00 we'll
10 start with the instructions. We're in recess.

11 (Recess, 12:39 p.m. to 1:15 p.m.)

12 (Open court, all parties present, jury
13 present.

14 THE COURT: All right. Ladies and gentlemen,
15 what we're going to do is I'm going to give you your
16 instructions. We will then have the opening argument of
17 plaintiff. We'll take a short break, and then we'll
18 have the argument of defendant, rebuttal from the
19 plaintiff, and I'll have a couple more instructions to
20 give you on what to do in the jury room.

21 You've heard the evidence in the case, and I
22 will now instruct you on the law that you must apply.
23 It is your duty to follow the law as I give it to you.
24 On the other hand, you, the jury, are the judges of the
25 facts. Do not consider any statement that I have made

1 in the course of this trial or make in these
2 instructions as an indication that I have any opinion
3 about the facts of this case.

4 Now, after I instruct you on the law, the
5 attorneys will have an opportunity to make their closing
6 arguments. Statements and arguments of the attorneys
7 are not evidence and are not instructions on the law.
8 They are only intended to assist the jury in
9 understanding the evidence and the parties' contentions.

10 It is my duty as the judge to explain what
11 some of the words used in the patent claims mean. Now,
12 attached as Appendix A to this charge are the claim
13 terms I've defined for you; and these are the same
14 definitions used in your juror notebook. Now, you must
15 accept as correct the definitions contained in
16 Appendix A.

17 The claim language of the patent I have not
18 defined for you in Appendix A is to be given its
19 ordinary and accustomed meaning as understood by one of
20 ordinary skill in the art, in the context of the patent
21 specifications and prosecution history. A person of
22 ordinary skill in the art covered by the patent-in-suit
23 is someone with the equivalent of a four-year degree
24 from an accredited institution, usually denoted in this
25 country as a BS degree, in mechanical or electrical

1 engineering and at least three years of experience
2 designing, developing, or improving electronic systems
3 that include sensors and/or controllers for computers,
4 robotics, video games or other electronic devices. He
5 or she should have some familiarity with
6 pressure-sensitive variable conductance material.
7 Extensive experience and technical training might
8 substitute for educational requirements, while advanced
9 degrees might substitute for some of the experience.

10 Now, when words are used in these
11 instructions in a sense that varies from the meaning
12 commonly understood, you are given a proper legal
13 definition which you are bound to accept in place of any
14 other meaning. The other words in these instructions,
15 and in the definitions I have provided to you, have the
16 meaning commonly understood.

17 Answer each question from the facts as you
18 find them. Do not decide who you think should win and
19 then answer the questions accordingly. Your answers and
20 your verdict must be unanimous.

21 Now, you will be instructed to answer some
22 questions based on a preponderance of the evidence.
23 This means you must be persuaded by the evidence that
24 the claim is more probably true than not true. You will
25 be instructed to answer other questions by clear and

1 convincing evidence. This is a higher burden than by a
2 preponderance of the evidence, but it does not require
3 proof beyond a reasonable doubt. Clear and convincing
4 evidence is evidence that shows something is highly
5 probable. In deciding whether any fact has been proved
6 in the case, you may, unless otherwise instructed,
7 consider the testimony of all witnesses, regardless of
8 who may have called them, and all exhibits received in
9 evidence, regardless of who may have produced them.

10 In determining the weight to give to the
11 testimony of a witness, you should ask yourself whether
12 there was evidence tending to prove that the witness
13 testified falsely concerning some important fact or
14 whether there was evidence that at some other time the
15 witness said or did something, or failed to say or do
16 something, that was different from the testimony the
17 witness gave before you during the trial.

18 You should keep in mind, of course, that a
19 simple mistake by a witness does not necessarily mean
20 that the witness was not telling the truth as he
21 remembers it, because people may forget some things or
22 remember other things inaccurately. So, if a witness
23 has made a misstatement, you need to consider whether
24 that misstatement was an intentional falsehood or simply
25 an innocent lapse of memory. The significance of that

1 may depend on whether it has to do with an important
2 fact or with only an unimportant detail.

3 In making up your mind and reaching your
4 verdict, do not make your decisions simply because there
5 were more witnesses on one side than on the other. Do
6 not reach a conclusion on a particular point just
7 because there were more witnesses testifying for one
8 side on that point. The testimony of a single witness
9 may be sufficient to prove any fact, even if a greater
10 number of witnesses may have testified to the contrary
11 if, after considering all the other evidence, you
12 believe that single witness.

13 While you should consider only the evidence
14 in this case, you are permitted to draw such reasonable
15 inferences from the testimony and exhibits as you feel
16 are justified in the light of common experience. In
17 other words, you may make deductions and reach
18 conclusions that reason and common sense lead you to
19 draw from the facts that have been established by the
20 testimony and evidence in the case.

21 There are two types of evidence you may
22 consider in properly finding the truth as to the facts
23 in the case. One is direct evidence, such as testimony
24 of an eyewitness. The other is indirect or
25 circumstantial evidence, the proof of a chain of

1 circumstances that indicates the existence or
2 nonexistence of certain other facts. As a general rule,
3 the law makes no distinction between direct and
4 circumstantial evidence but simply requires that you
5 find the facts from a preponderance of all the evidence,
6 both direct and circumstantial.

7 During the trial, I sustained objections to
8 certain questions. You must disregard those questions
9 entirely. Do not speculate as to what the witness would
10 have said if permitted to answer the question.

11 Also, do not assume from anything I may have
12 done or said during the trial that I have any opinion
13 concerning any of the issues in this case. Except for
14 the instruction to you on the law, you should disregard
15 anything I may have said during the trial in arriving at
16 your own findings as to the facts.

17 If you have taken notes, they are to be used
18 only as aids to your memory; and if your memory should
19 be different from your notes, you should rely on your
20 memory, not on your notes. If you did not take notes,
21 rely on your own independent memory of the testimony.
22 Do not be unduly influenced by the notes of other
23 jurors. A juror's notes are not entitled to any greater
24 weight than the recollection of each juror concerning
25 the testimony.

1 If scientific, technical, or other
2 specialized knowledge may be helpful to the jury, a
3 witness with special training or experience may testify
4 and state an opinion concerning such matters. However,
5 you are not required to accept that opinion. You should
6 judge such testimony like any other testimony. You may
7 accept it or reject it and give it as much weight as you
8 think it deserves, considering the witness' education
9 and experience, the soundness of the reasons given for
10 opinion, and all the other evidence in the case.

11 In deciding whether to accept or rely upon
12 the opinion of such a witness, you may consider any bias
13 of the witness, including any bias you may infer from
14 evidence that the witness has been or will be paid for
15 reviewing the case and testifying, or from evidence that
16 he testifies regularly.

17 The patent involved in this case is referred
18 to as the '700 patent. The plaintiff, Anascape Limited,
19 contends that the defendant, Nintendo of America, Inc.,
20 infringes claims 14, 16, 19, 22, and 23 of this patent
21 by making, using, offering to sell, or selling within
22 the United States or importing into the United States
23 certain video game controllers. The specific game
24 controllers Anascape says are infringing are called the
25 "accused" game controllers. Anascape states that it is

1 entitled to damages for the alleged infringement in the
2 form of a reasonable royalty rate.

3 Nintendo denies that it is infringing any of
4 the claims in this patent. Nintendo also contends that
5 all asserted claims of the patent are invalid.
6 Invalidity is a defense to infringement. Therefore,
7 even though the PTO examiner has allowed the claims of
8 the patent, you, the jury, have the responsibility for
9 deciding whether the claims of the patent are valid.
10 Nintendo denies that Anascope is entitled to any
11 damages.

12 To decide the questions of infringement and
13 invalidity, you must first understand what the claims of
14 the patent cover; that is, what they prevent anyone else
15 from doing. This is called "claim interpretation." You
16 must use the same claim interpretation for both your
17 decision on infringement and your decision on
18 invalidity. I instructed you earlier on the definitions
19 you must use in interpreting claims.

20 Now, the patent claims are numbered sentences
21 at the end of each patent. Each claim describes a
22 separate invention. The claims are divided into parts
23 called "limitations." These limitations also may be
24 referred to as "elements." The claims are "word picks"
25 intended to define, in words, the boundaries of the

1 inventions. Only the claims of the patent can be
2 infringed. Neither the written description, sometimes
3 called the "specification," nor the drawings of a patent
4 can be infringed. Each of the claims must be considered
5 individually.

6 In this case, there are five claims; namely,
7 claims 14, 16, 19, 22, and 23. The preamble to claims
8 14, 16, and 19 use the words "comprises" or
9 "comprising." These terms mean "including the following
10 but not excluding others." Comprising claims are
11 open-ended. Therefore, if you find that an accused
12 video game controller includes all of the elements of
13 such a claim, the fact that the game controller might
14 include additional features, functions, or elements
15 would not avoid infringement of that claim.

16 There is one clause used in claim 19 of the
17 '700 patent in a special form called a
18 "means-plus-function clause." This type of clause in a
19 claim does not cover all possible structures that
20 perform the recited function but covers only the
21 structures described in the patent specification and
22 drawings that perform the respective function, or an
23 equivalent of that structure. For the
24 means-plus-function clause in issue, I have determined
25 the corresponding structures in the patent specification

1 that perform that function; and I've provided that for
2 you at the end of Appendix A. You must use my
3 interpretation of the means-plus-function elements in
4 your deliberations regarding infringement and
5 invalidity.

6 Now, patent claims may exist in two forms,
7 referred to as independent claims and dependent claims.
8 An independent claim does not refer to any other claim
9 of the patent. Thus, it is not necessary to look at any
10 other claim to determine what an independent claim
11 covers. Claims 14, 16, and 19 are independent claims.

12 Claims 22 and 23 are dependent claims. A
13 dependent claim refers to at least one other claim in
14 the patent. A dependent claim includes each of the
15 limitations of the other claim or claims to which it
16 refers, as well as the additional limitations recited in
17 the dependent claim itself. Therefore, to determine
18 what a dependent claim covers, it is necessary to look
19 at both the dependent claim and the other claim or
20 claims to which it refers.

21 To prevail, Anascape must establish literal
22 infringement of one or more claims of the patent. To
23 provide literal infringement of a claim, Anascape must
24 prove by a preponderance of the evidence that during the
25 time the '700 patent is in force, Nintendo has made,

1 used, offered to sell, or sold within the United States
2 or imported into the United States a video game
3 controller that incorporates all of the elements of that
4 claim and has done so without the permission of the
5 patent holder. You must compare each accused Nintendo
6 game controller with each and every one of the elements
7 of that claim of the '700 patent to determine whether
8 Anascape has proved, by a preponderance of the evidence,
9 that each element of that claim is present.

10 Someone can infringe a patent without knowing
11 that what they are doing is an infringement of the
12 patent. They may also infringe even though they believe
13 in good faith that what they are doing is not an
14 infringement of any patent. On the other hand, someone
15 does not infringe by inventing a new and different way
16 of accomplishing the same result; that is, to create a
17 video game controller that does not incorporate all of
18 the limitations of any claim of the patent. However,
19 the mere fact that elements of an accused game
20 controller are covered by one or more of Nintendo's
21 patents does not protect the accused controller from
22 infringing the '700 patent.

23 Only a valid patent may be infringed. A
24 patent cannot take away from people their right to use
25 what was known or what would have been obvious when the

1 invention was made. Therefore, you, the jury, have the
2 responsibility for deciding whether each claim in
3 question is valid.

4 For a patent to be valid, the invention
5 claimed in the patent must be new and nonobvious in
6 light of what came before. That which came before is
7 referred to as the "prior art." Nintendo contends that
8 the claims in the '700 patent are not valid because they
9 are described in one or more prior art references.
10 Nintendo must prove invalidity by clear and convincing
11 evidence.

12 There are three ways in which Nintendo
13 contends that the invention described in a particular
14 claim is invalid. These ways -- sometimes called
15 "anticipation," "obviousness," and "written
16 description" -- are described below. You must consider
17 each of these separately as to each claim and decide
18 whether Nintendo has proven any of them by clear and
19 convincing evidence.

20 Now, Nintendo is relying on several items of
21 prior art. In order to rely on these items of prior
22 art, Nintendo must prove by clear and convincing
23 evidence that these items fall within one or more of the
24 different categories of prior art recognized by the
25 patent laws. These categories include:

1 Anything that was publicly known or used in
2 the United States by someone other than the inventor
3 before the inventor made the invention;

4 Two, anything that was sold or on sale in the
5 United States more than one year before the effective
6 filing date of the '700 patent;

7 Three, anything that was patented or
8 described in a printed publication anywhere in the world
9 before the inventor made the invention or more than one
10 year before the effective filing date of the '700
11 patent;

12 And, four, anything that was invented by
13 another person in this country before the inventor made
14 the invention, if the other person did not abandon,
15 suppress, or conceal his or her invention.

16 Two of the different categories of prior art
17 refer to the date on which the inventor made the
18 invention. This is called the "date of the invention."
19 For purposes of this case, the date of the invention for
20 a particular claim is the same as the effective filing
21 date, which is referred to in the other two categories
22 of prior art.

23 The effective filing date of a claim of the
24 '700 patent is the date the application was filed --
25 November 16, 2000 -- or the date on which the earlier

1 patent application was filed -- July 5th, 1996 -- if
2 that earlier application discloses the invention in that
3 claim in the later patent.

4 Anascape asserts that the claims of the '700
5 patent are entitled to an effective filing date of July
6 5, 1996. Nintendo asserts that the claims of the '700
7 patent are not entitled to the 1996 effective filing
8 date but, rather, they have the effective filing date of
9 November 16, 2000.

10 If the patent application process -- I'm
11 sorry.

12 In the patent application process, the
13 applicant may change the claims between the time the
14 patent application is first filed and the time a patent
15 is finally granted. As long as an application is
16 pending, an applicant may amend the claims or add new
17 claims. An applicant may add new patent claims in a new
18 application that are intended to cover another's
19 products about which the applicant learned of during the
20 prosecution of the application. However, for any new
21 claim to be entitled to the July 5, 1996, filing date,
22 the July 5, 1996, application must disclose the
23 invention of the new claim with all of its limitations.

24 The question is not whether a claimed
25 invention is an obvious variant of that which is

1 disclosed in the specification. Rather, the 1996
2 application itself must describe the invention in the
3 claim and do so in sufficient detail that one skilled in
4 the art can clearly conclude that the inventor invented
5 the claimed invention as of July 5, 1996. A disclosure
6 in the application that merely renders the claim obvious
7 is not sufficient to meet this written description
8 requirement. The disclosure must describe the claim of
9 the '700 patent with all its limitations.

10 The written description requirement may be
11 satisfied by the words, structures, figures, diagrams,
12 formulas, et cetera, in the patent application and any
13 combination of them, as understood by one of ordinary
14 skill in the field of technology of the invention. A
15 requirement in a claim need not be expressly disclosed
16 in the patent application as originally filed, provided
17 persons of ordinary skill in the field of technology of
18 the invention would have understood that the missing
19 requirement is inherent in the written description of
20 the patent application.

21 Nintendo can meet its burden of proving that
22 the 1996 application fails to satisfy the written
23 description requirement for a particular claim of the
24 '700 patent -- and, thus, establish that claim is not
25 entitled to the July 5, 1996, effective filing date --

1 by showing that by clear and convincing evidence that
2 the entirety of the specification of the 1996
3 application would clearly indicate to a person of
4 ordinary skill in the art that the invention described
5 in that application is of a narrower -- that should be
6 "narrower" -- scope than the invention of that
7 particular claim in the '700 patent.

8 I will now list the categories of prior art
9 you may consider. Later, I will list the specific items
10 of prior art upon which Nintendo is relying to establish
11 that the claims of the '700 patent are invalid.

12 Knowledge or use in the United States of a
13 game controller can be prior art to the patent claims.
14 The knowledge or use will be prior art if it meets the
15 following requirements:

16 The knowledge or use must be by someone other
17 than the inventor;

18 The knowledge or use must be before the
19 effective filing date of the claim;

20 The knowledge or use must be in the United
21 States. Prior knowledge or use outside the United
22 States cannot be relied upon to invalidate a patent
23 claim;

24 And, four, the knowledge or use must have
25 been public. Private or secret knowledge or use by

1 someone other than the inventor is not prior art.

2 The sale or offer for sale in the United
3 States of a game controller may be prior art to a patent
4 claim if sold or offered for sale before the effective
5 filing date of the claim. The sale or offer for sale of
6 the system or method must be public.

7 In order for there to be an offer for sale,
8 two requirements must be met. First, the invention must
9 have been the subject of a commercial offer for sale;
10 and, second, the invention must be ready for patenting.

11 Even a single offer for sale to a single
12 customer may be a commercial offer, even if the customer
13 does not accept the offer.

14 An invention is ready for patenting if the
15 system offered for sale has been developed to the point
16 where there was reason to expect that it would work for
17 its intended purpose. The invention may be ready for
18 patenting even if it is not ready for commercial
19 production or has not been technically perfected.

20 A printed publication in this or another
21 country, or a foreign patent, may be prior art. A
22 printed publication must be reasonably accessible to
23 those members of the public who would be interested in
24 its contents. It is not necessary that the printed
25 publication be available to every member of the public.

1 So long as the printed publication was
2 available to the public, the form in which the
3 information was recorded is unimportant. The
4 information must, however, have been maintained in some
5 permanent form, such as printed or typewritten pages or
6 photocopies.

7 An invention made in the United States by
8 another person may be prior art as to a claim of the
9 '700 patent if it was made before the date of invention
10 of that claim of the '700 patent and that person did not
11 abandon, suppress, or conceal the invention.

12 In this regard, Nintendo must show by clear
13 and convincing evidence either that before the date of
14 invention of a claim of the '700 patent, another person
15 or company made that invention in this country and that
16 such person or company exercised reasonable diligence in
17 later reducing that invention to practice. In addition,
18 Nintendo must show that the invention was sufficiently
19 developed that one skilled in the art would have
20 recognized that it would work for its intended purpose.
21 However, it is not necessary that Mr. Armstrong had
22 knowledge of that prior invention.

23 Anticipation. A patent claim is invalid if
24 the claimed invention is not new. For the claim to be
25 invalid because it is not new, all of its requirements

1 must have existed in a single item of prior art as
2 described above. If a patent claim is not new, we say
3 it is "anticipated" by a prior art reference.

4 Nintendo is relying upon the following prior
5 art references as anticipating prior art:

6 One, claim 19 is anticipated by the Sony
7 Dual Shock controller;

8 Two, claims 14, 19, 22, and 23 are
9 anticipated by the Sony Dual Shock 2 controller.

10 Three, claim 19 is anticipated by the Goto
11 patent, European Patent Application Number EP 0 867 212
12 A1.

13 For a prior art reference to anticipate a
14 claim of the '700 patent, each element in the claim must
15 actually be present in that item of prior art. Of
16 course, you must first decide whether Nintendo has shown
17 by clear and convincing evidence that these references
18 are prior art as defined above.

19 Obviousness. Nintendo also contends that
20 claim 16 of the '700 patent is invalid because the
21 claimed subject matter is obvious to one of ordinary
22 skill in the art at the time the invention was made. To
23 be patentable, an invention must not have been obvious
24 to a person of ordinary skill in the pertinent art at
25 the time the invention was made.

1 Obviousness may be shown by considering more
2 than one item of prior art in combination with each
3 other. Nintendo contends that claim 16 of the '700
4 patent would have been obvious to a person of ordinary
5 skill in the field of the invention at the time the
6 invention was made in light of the following prior art
7 references:

8 One, the Goto patent, European patent
9 application number EP 0 867 212 A1;

10 And, two, the Sony DualShock controller.

11 Again, you must first determine whether
12 Nintendo has shown by clear and convincing evidence that
13 these references are prior art as defined above.

14 The next question is: Would it have been
15 obvious to those skilled in the art who knew of these
16 items of prior art to make the invention described in a
17 claim? If the answer to that question is "yes," then
18 that patent claim is invalid. Nintendo has the burden
19 of proving by clear and convincing evidence that
20 claim 16 of the '700 patent is invalid for obviousness.

21 Obviousness is determined from the
22 perspective of a person of ordinary skill in the field
23 of the invention. The issue is not whether the claimed
24 invention would have been obvious to you, to me as a
25 judge, or to a genius in the field of the invention.

1 Rather, the question is whether or not the invention
2 would have been obvious to a person of ordinary skill in
3 the field of the invention.

4 You must not use hindsight when comparing the
5 prior art to the invention for obviousness. In making a
6 determination of obviousness or nonobviousness, you must
7 consider only what was known of before the invention was
8 made. You may not judge the invention in light of
9 present-day knowledge.

10 In determining whether or not these claims
11 would have been obvious, you should make the following
12 determinations from the perspective of a person of
13 ordinary skill in the art, as I have previously defined
14 it for you, in light of the scope and content of the
15 prior art.

16 First, are there any material differences
17 between the scope and content of the prior art and each
18 asserted claim of the '700 patent?

19 Second, are there any objective indications
20 of nonobviousness?

21 Determining the scope and content of the
22 prior art means you should determine what is disclosed
23 in the prior art relied upon by Nintendo. You must
24 decide whether this prior art was reasonably relevant to
25 the particular problem the inventor faced in making the

1 invention covered by the patent claims. Such relevant
2 prior art includes prior art in the field of the
3 invention and also prior art from other fields that a
4 person of ordinary skill would look to when attempting
5 to involve the problem.

6 In determining whether there are any material
7 differences between the invention covered by the patent
8 claims and the prior art, you should not look at the
9 individual differences in isolation. You must consider
10 the claimed invention as a whole and determine whether
11 or not it would have been obvious in light of all the
12 prior art.

13 If you conclude that the prior art discloses
14 all the steps or elements of the claimed invention but
15 those steps or elements are in separate items, you may
16 consider whether or not it would have been obvious to
17 combine those items. A claim is not obvious merely
18 because all the steps or elements of that claim already
19 existed.

20 In determining whether to combine what is
21 described in various item was prior art, you should
22 consider whether or not there was some motivation or
23 suggestion for a skilled person to make the combination
24 covered by the patent claims. You should also consider
25 whether or not someone reading the prior art would have

1 been discouraged from following the path taken by the
2 inventor.

3 It is common sense that familiar items may
4 have been obvious beyond their primary purposes, and a
5 person of ordinary skill often will be able to fit the
6 teachings of multiple patents together like pieces of a
7 puzzle. Multiple references in the prior art could be
8 combined to show that a claim is obvious. Any need or
9 problem known in the field and addressed by the patent
10 can provide a reason for combining the elements in the
11 manner claimed. To determine whether there was an
12 apparent reason to combine the known elements in the way
13 a patent claims, you can look to interrelated teachings
14 of multiple patents, to the effects of demands known to
15 the community or present in the marketplace, and to the
16 background knowledge possessed by a person of ordinary
17 skill in the art. Neither the particular motivation of
18 the person of ordinary skill in the art nor the alleged
19 purpose of the patentee controls. One of ordinary skill
20 in the art is not confined only to prior art that
21 attempts to solve the same problem as the patent claims.

22 You must also consider what are referred to
23 as "objective indications of nonobviousness." Some of
24 these indications of nonobviousness are: Long-felt and
25 unmet need in the art for the invention, failure of

1 others to achieve the results of the invention,
2 commercial success of the invention, praise of the
3 invention by those in the field, expression of disbelief
4 or skepticism by those skilled in the art, the invention
5 proceeded in a direction contrary to accepted wisdom in
6 the field, and the invention achieved any unexpected
7 results.

8 These objective indications are only relevant
9 to obviousness if there is a connection or nexus between
10 them and the invention covered by the patent claims.
11 For example, commercial success is relevant to
12 obviousness only if the success of the product is
13 related to a feature of the patent claims. If the
14 commercial success is a result of something else, such
15 as innovative marketing, and not to a patented feature,
16 then you should not consider it to be an indication of
17 nonobviousness.

18 Again, you must compare separately each of
19 the claims of the patent asserted by Anascape with the
20 prior art references to determine whether Nintendo has
21 proved by clear and convincing evidence that one or more
22 of the claims was obvious.

23 Now, to be valid, a patent must meet the
24 written description requirement. In order to meet this
25 written description requirement, the description of the

1 invention in the specification portion of the '700
2 patent must be detailed enough to describe the invention
3 that is claimed in the claims of the '700 patent.
4 Nintendo may also establish that a patent claim of the
5 '700 patent is invalid by showing, by clear and
6 convincing evidence, that the written description of the
7 invention of the '700 patent itself is not adequate. In
8 the patent application process, the applicant may change
9 the claims between the time the patent application is
10 first filed and the time a patent is finally granted.
11 An applicant may amend claims or add new claims. These
12 changes may narrow or broaden the scope of the claims.
13 The purpose of the written description requirement is to
14 ensure that the '700 patent provides an adequate
15 description of the invention and to ensure that the
16 scope of the claims that are eventually issued remain
17 within the scope of the written description of the
18 invention that was provided with the application for the
19 '700 patent.

20 This written description requirement for a
21 particular claim is satisfied if the person of ordinary
22 skill reading the specification of the '700 patent would
23 recognize that it describes the invention with all its
24 limitations.

25 The written description requirement may be

1 satisfied by words, structures, figures, diagrams,
2 formulas, et cetera, in the patent and any combination
3 of them as understood by one of ordinary skill in the
4 field of the technology of the invention. A requirement
5 in a claim need not be expressly disclosed in the
6 specification, provided persons of ordinary skill in the
7 field of technology of the invention would have
8 understood that the missing requirement is inherent in
9 the written description of the specification.

10 Now, if you find by a preponderance of the
11 evidence that a claim has been infringed and you do not
12 find by clear and convincing evidence that the same
13 claim is invalid, then Anascape is entitled to an award
14 of damages adequate to compensate for the infringement.
15 You should not interpret the fact that I have given
16 instructions about damages as an indication in any way
17 that I believe that Anascape should, or should not, win
18 this case. It is your task first to decide whether
19 Nintendo is liable. I am instructing you on damages
20 only so that you will have guidance in the event you
21 decide that Nintendo is liable and that Anascape is
22 entitled to recover money from Nintendo.

23 You may award Anascape damages for any
24 infringement you have found starting July 31, 2006. The
25 amount of those damages must be adequate to compensate

1 Anascape for the infringement. Your damage award, if
2 you reach this issue, should put the patent holder in
3 approximately the same financial position that it would
4 have been in had the infringement not occurred, but in
5 no event may the damages be less than a reasonable
6 royalty.

7 Anascape has the burden to establish the
8 amount of its damages by a preponderance of the
9 evidence. Damages are limited to acts of infringement
10 in the United States. You should award only those
11 damages that Anascape establishes that it more likely
12 than not suffered. Anascape is not entitled to damages
13 that are remote or speculative or based on guesswork.
14 While Anascape is not required to prove its damages with
15 mathematical precision, it must prove them with
16 reasonable certainty.

17 In this case Anascape is seeking damages in
18 the form of a reasonable royalty. A royalty is the
19 amount of money a licensee pays to a patent owner for
20 use made of the invention under the patent. A
21 reasonable royalty is the amount of money a willing
22 patent owner and a willing prospective licensee would
23 have agreed upon at the time of the infringement for a
24 license to make use of the invention. It is the royalty
25 that would have resulted from an arm's-length

1 negotiation on or about June 14, 2005, between a willing
2 licensor and a willing licensee, assuming that both
3 parties believed the claims in question to be valid and
4 infringed and that the licensee would respect the
5 patent.

6 In making your determination of the amount of
7 a reasonable royalty, it is important that you focus on
8 the time period when the infringer first infringed the
9 patent and the facts that existed at that time. Your
10 determination does not depend on the actual willingness
11 of the parties to this lawsuit to engage in such
12 negotiations. Your focus should be on what the parties'
13 expectations would have been had they entered
14 negotiations at the time the infringing activity began
15 and the facts that existed at that time.

16 In determining the reasonable royalty, you
17 should consider all the facts known and available to the
18 parties at the time the infringement began. Some of the
19 kinds of factors that you may consider in making your
20 determination are:

21 One, whether the patent holder had an
22 established royalty for the invention; in the absence of
23 such a licensing history, any royalty arrangements that
24 were generally used and recognized in the particular
25 industry at that time. In this connection, when

1 evaluating evidence about amounts paid under other
2 licenses and agreements, you should consider whether
3 such licenses and to what extent the license was
4 comparable; that is, was the technology exchanged and
5 the terms of the agreement similar in terms and scope to
6 the technology of the patent-in-suit and the bare
7 license for the patent in the hypothetical negotiation;

8 The nature of the commercial relationship
9 between the patent owner and the licensee, such as
10 whether they were competitors or whether their
11 relationship was that of an inventor and a promoter;

12 The established profitability of the patented
13 method or system, its commercial success, and its
14 popularity at the time;

15 Whether the patent owner had an established
16 policy of granting licenses or retaining the patented
17 invention as its exclusive right, or whether the patent
18 holder had a policy of granting licenses under special
19 conditions designed to preserve its exclusivity;

20 The size of the anticipated market for the
21 invention at the time the infringement began;

22 The duration of the patent and of the
23 license, as well as the terms and scope of the license,
24 such as whether it is exclusive or nonexclusive or
25 subject to territorial restrictions;

1 Seven, the rates paid by the licensee for the
2 use of other patents comparable to the plaintiff's
3 patent;

4 Eight, whether the licensee's sales of the
5 patented invention promote sales of its other methods or
6 systems and whether the invention generates sales to the
7 inventor of his nonpatented items.

8 Nine, the utility and advantages of the
9 patent property over the old methods or systems, if any,
10 that had been used for working out similar results.

11 Ten, the extent to which the infringer used
12 the invention and any evidence probative of the value of
13 such use.

14 Eleven, the portion of the profits in the
15 particular business that are customarily attributable to
16 the use of the invention or analogous inventions.

17 Twelve, the portion of the profits that
18 should be credited to the invention as distinguished
19 from nonpatented elements, the manufacturing process,
20 business risks or significant features or improvements
21 added by the infringer.

22 Thirteen, the opinion and testimony of
23 qualified experts and of the patent holder.

24 Fourteen, any other factors which, in your
25 mind, would have increased or decreased the royalty the

1 infringer would have been willing to pay and the patent
2 owner would have been willing to accept, acting as
3 normally prudent businesspeople.

4 The amount that a licensor and a licensee
5 would have agreed upon just before the patent-in-suit
6 were issued if both had been reasonably and voluntarily
7 trying to reach an agreement; that is, the amount which
8 a prudent licensee who desired, as a business
9 proposition, to obtain a license to use a particular
10 system or method embodying the patented invention would
11 have been willing to pay as a royalty and still be able
12 to make a reasonable profit and which amount would have
13 been acceptable by a prudent patentee who was willing to
14 grant a license.

15 Now, you'll also get, a little bit later, a
16 form which the lawyers, I think, on both sides will be
17 showing you with a verdict and each one of those is a
18 particular question on some of those issues you received
19 an instruction on; and after the final argument, I have
20 a few more instructions on what you'll be doing in the
21 jury room.

22 At this time, since plaintiff generally has
23 the burden of proof, plaintiff will begin the closing
24 argument.

25 MR. CAWLEY: Thank you, your Honor.

1 This is a story about a man who had a vision.
2 His vision was to become an inventor, and one of the
3 things he had the vision to invent was a way of
4 controlling something that he saw would be needed in the
5 future. He had the vision to see that in the future,
6 video games would operate in three dimensions and that
7 the simple kinds of controllers that the industry used
8 up until the time of his invention wouldn't be good
9 enough.

10 He started working and worked hard for
11 several years; and at the end of that time, he invented
12 a better controller to be used in the control of
13 three-dimensional video games.

14 The United States Patent Office recognized
15 his invention. After five years of examination and
16 study by the Patent Office, he was issued this '700
17 patent. The Patent Office told us that this patent was
18 valid and useful. And they weren't the only ones.
19 You've heard that giant companies in the video game
20 industry recognized his technology, and some of them
21 agreed to pay him fair value in order to be able to
22 import their products into the United States and to sell
23 them.

24 But you've also heard that Nintendo has
25 refused to pay fair value for the use of Brad Armstrong

1 and Anascape's patent.

2 A few years ago I had an opportunity to serve
3 on a jury, and it was a wonderful experience for me
4 because I had a chance to see what a trial is like from
5 your side of the courtroom. And in that case, just like
6 in this one, the judge instructed us, of course, that we
7 couldn't talk about the evidence until the trial was
8 over. But, eventually, the trial was over; and just as
9 Judge Clark is about to instruct you when the arguments
10 are over, we had a chance to finally begin to talk
11 together about the case when we went back into the jury
12 room.

13 And we found that we had a lot of things to
14 talk about. We had seen a lot, and we wanted to talk
15 about the things that we'd seen. We wanted to talk
16 about the things we'd heard. We wanted to talk about
17 the evidence. We wanted to talk about the witnesses,
18 and we even wanted to talk about the lawyers.

19 But as we talked, we began to realize that in
20 order to do our job to decide, there were really only a
21 few big questions that we would have to answer to reach
22 a decision. And I'm going to suggest to you that you
23 may have the same experience. Even though there's been
24 a lot of evidence in this case, a lot of witnesses, a
25 lot of things to see and hear and a lot of them are new

1 to all of us, I'm going to suggest to you that as you
2 discuss the evidence in doing your job of deciding, you
3 may find that there are really three big questions that
4 you'll have to decide in order to decide this case.

5 I think you'll find that those questions are:
6 First, did Nintendo infringe the patent; second, is the
7 patent valid; and, third, how much is a reasonable
8 royalty for Nintendo's infringement of the patent.

9 So, I'd like to spend the next few minutes
10 discussing with you each one of these three questions
11 and discussing with you and reminding you of some of the
12 evidence that you've seen that I think will help you
13 answer those questions.

14 The first: Does Nintendo infringe? At the
15 very beginning of the trial, Mr. Brad Armstrong
16 explained to you his invention. He showed you several
17 pictures of it, and this is one of them. He invented a
18 device that was a better way of controlling 3-D video
19 games. He told you that it combined certain building
20 block ideas in a brand-new way that no one had ever done
21 before. He took ideas like rumble, proportional
22 buttons, sheet-connected sensors, and better ways of
23 controlling motion and 3-D in 6 degrees of freedom. And
24 he combined those building blocks into a way that
25 created a controller that was different than any

1 controller that had ever been invented before.

2 He wrote claims in his patent to cover and
3 describe what his invention was. Now, you've seen
4 several claims in the case; and I won't take the time
5 now to go back again in laborious detail through any of
6 the claims. But this is one that you've heard about, a
7 lot about, claim 19 of the patent; and there are others.

8 Somebody, though, did do an extensive study
9 of the patents and of the Nintendo products; and that
10 was Professor Howe from Harvard University. You'll
11 remember that Professor Howe testified to you that he
12 made an extensive study of all of the Nintendo
13 controllers and an extensive study of the patents. He
14 told you his opinion that the Nintendo products
15 infringed the claims of the patents, but he didn't stop
16 with just his opinion.

17 These slides may remind you of the great
18 detail that Professor Howe went into to explain to you
19 why he found that each and every piece of each of the
20 asserted claims is present in the relevant Nintendo
21 products.

22 For claim 19, in order to avoid our having to
23 go through that in detail, you may remember that we
24 created these boards actually in the courtroom.

25 And let's put the other one up for the

1 GameCube.

2 And as Professor Howe went through his
3 explanation to you of how every part of claim 19 is
4 found in Nintendo's GameCube controller, he told me to
5 check off each piece by piece by piece as he showed you
6 the pictures, demonstrations of the actual controllers
7 themselves, how claim 19 written by Brad Armstrong
8 describes the GameCube controller, and why the GameCube
9 controller, therefore, infringes that claim.

10 He went through the same exercise for claim
11 19 for the Wii Nunchuk with Remote control. Remember
12 that he went through each and every piece of the claims.
13 He described to you how each one is found in that
14 Nunchuk with Remote.

15 And at the end of his testimony, he provided
16 you this information, his conclusion:

17 That the GameCube controller infringes claims
18 14, 16, 19, 22, and 23 of the patent;

19 That the Wavebird wireless controller
20 infringes claim 14;

21 That the Wii Classic with the Wii Remote
22 infringes claims 19, 22, and 23;

23 And that the Wii Nunchuk and Wii Remote
24 infringe claim 19.

25 Well, what does Nintendo have to say about

1 this? I think you'll find that what you've heard from
2 Nintendo in this case from the very beginning in the
3 opening statements through the evidence and what I'm
4 afraid you're about to hear even through the closing
5 arguments is that Nintendo will basically offer you any
6 argument you might possibly believe in the hopes that
7 you'll buy one of them and that they won't have to pay a
8 reasonable royalty for the use of Anascape's invention.

9 The first thing they have to tell you is,
10 "Well, we don't infringe." And why do they say they
11 don't infringe? The first thing they have to say is,
12 "Well, we don't infringe because Nintendo developed its
13 own products. Nintendo did it."

14 That brings us to the testimony of Mr. Ikeda.
15 You'll remember Mr. Ikeda who took the stand. He was
16 the young gentleman who testified in Japanese. Let's
17 talk for a minute about his testimony. You know, I have
18 to say I liked Mr. Ikeda. I liked what he said about
19 his mother. I was moved when he got choked up on the
20 stand when he was talking about how proud he is of the
21 products that he developed and how his parents are proud
22 of him.

23 But the thing about it is no one in this
24 trial has accused Mr. Ikeda of copying Mr. Armstrong.
25 No one in this trial has accused Mr. Ikeda of taking any

1 shortcuts. All of us have probably read how common it
2 is that people who are working hard on the same problem
3 often come up with the same ideas, the same solution,
4 sometime in completely different parts of the world.
5 The good news, ladies and gentlemen, is that because
6 Mr. Ikeda developed his product, he is absolutely free
7 to make it and sell it in Japan. But the facts have
8 shown you that Brad Armstrong invented that idea seven
9 years earlier in the United States. And the United
10 States Patent Office has granted him a patent on that
11 idea. What that means, under the laws of our country,
12 is that anyone who wants to bring a product to our
13 country to sell it, that uses this patent, is required
14 to pay Anascape a reasonable royalty. That's all we're
15 saying. If you want to bring your product to the United
16 States and sell it here, you have to respect the laws of
17 the United States.

18 Well, if you don't find that the fact that
19 Mr. Ikeda had an idea in Japan will provide a reason to
20 let Nintendo escape having to pay a fair royalty for
21 sales in the U.S., then the next thing they have to say
22 that maybe you'll believe is, "Well, we don't infringe
23 because we have an accelerometer."

24 You've heard a lot of testimony about
25 accelerometers. You've heard -- and nobody seems to

1 dispute this -- that Mr. Ikeda and Nintendo didn't
2 invent accelerometers; they've been around for decades.

3 You've also seen that the claims of the
4 patent don't say anything about accelerometers or
5 thumbsticks or anything of the kind. What the claims --
6 the relevant claims of the patent talk about are a third
7 element. You've heard that that element could be a
8 thumbstick as it is in many controllers, but you've also
9 heard that that element could be this thing called a
10 "mass" that's inside that accelerometer chip and that
11 that mass element has movement that is sensed by sensors
12 that are inside that accelerometer chip.

13 Now, I think that Professor Howe offered us a
14 useful analogy when we're trying to understand the
15 importance of these sensors inside the accelerometer.
16 Remember he told us that you could have a claim, for
17 example, that says "a piece of sporting equipment that
18 you swing." Well, that could be a golf club. It could
19 be a tennis racket. It could be a baseball bat. The
20 important thing is -- is if the claim says simply a
21 piece of sporting good is equipment that you swing,
22 there is a lot of different things that it could be.

23 This claim doesn't say "thumbstick," doesn't
24 say "accelerometer," doesn't spell out "golf club" or
25 "tennis racket" or "baseball bat." It says: A third

1 element with two sensors. And anything that satisfies
2 that description meets that element, just like a
3 baseball bat or a golf club meets the other element.

4 You've heard some dispute, though, about
5 whether the accelerometer has two sensors. Remember,
6 these are sensors that go -- the engineers have been
7 calling "capacitors." You heard Dr. Howe who testified
8 that absolutely he has been working with accelerometers
9 his whole career. He wrote chapters in his doctoral
10 dissertation about how they work and how they are built,
11 and they have two sensors.

12 But then you heard Mr. Dezmelyk yesterday
13 say, "Oh, no. This accelerometer only has one sensor."
14 So, how do you decide that? You've got two people who
15 both told you that. Dr. Howe showed you a picture of it
16 and actually showed you where the two were.

17 Mr. Dezmelyk didn't do that. But I'm going to suggest
18 to you that there is a very believable tie-breaker if
19 you're uncertain about this issue and it's Mr. Ikeda
20 again. Mr. Ikeda testified about this, and he was
21 asked: So, there are capacitors that sense movement in
22 the X axis, correct?

23 And he said: That's correct.

24 And there are capacitors that sense movement
25 in the Y axis, correct?

1 And he said: That's correct.

2 Mr. Ikeda, the man at Nintendo who designed
3 the Wii Remote, who put the accelerometer in it, freely
4 and honestly told you that there are two capacitors in
5 the accelerometer and that they are sensors; they sense
6 movement.

7 In addition to that, there's been a lot of
8 discussion about what the '96 application discloses or
9 doesn't disclose. So, you may have been surprised
10 yesterday, on the next to last day of trial, to hear for
11 the very first time that Nintendo had not told you that,
12 in fact, in '96 Brad Armstrong had described to the
13 Patent Office that sensors are considered to include
14 capacitive sensors, exactly the kind of sensor that is
15 inside the accelerometer.

16 Now, Professor Howe was attacked by this on
17 cross-examination by claiming, "Well, he looked at the
18 wrong papers. He looked at some papers that talked
19 about 2g that describe an accelerometer inside the
20 Nunchuk; and, actually, we're talking about the
21 accelerometer inside the Remote." We had some back and
22 forth about how that happened in his expert report and
23 how he corrected it immediately.

24 But at the end of the day, Mr. Ikeda also
25 testified about this; and he testified it doesn't make

1 any difference because he said --

2 (Reading) Mr. Ikeda, let me repeat my
3 question for you. You agree, don't you, that the
4 accelerometer in the Nunchuk works in the same way as
5 the accelerometer in the Remote?

6 And he testified: Yes. They operate in the
7 same way.

8 And, finally, today we heard a lot of
9 sparring back and forth about whether the output, the
10 signals that come out of the accelerometer, can be used
11 to do things like change the viewpoint, which is one of
12 the things that's required here, "controlling objects
13 and navigating a viewpoint."

14 Once again Mr. Ikeda was very straightforward
15 about this. I asked him: Can a game designer choose to
16 use the output of the accelerometer to move a character
17 on the screen?

18 He said: Yes. You can do a simple motion,
19 like a jump.

20 Answer: You can also indicate to Mario, once
21 he's on the ball, which way to go.

22 Then I also asked him: Could a game designer
23 choose to use the output of the accelerometer to change
24 the player's point of view on the screen?

25 And he said: I think so.

1 Mr. Ikeda has put this issue to rest and has
2 told you that, of course, the output of the
3 accelerometer can be used to do any of those two things
4 required by the claim.

5 Well, if you don't buy Nintendo's argument
6 that they developed their own product and if you don't
7 buy Nintendo's argument that they don't infringe because
8 they use an accelerometer, the next thing they would
9 like to ask you to buy is, "Well, the Remote alone
10 doesn't infringe. By itself it doesn't infringe; so, we
11 don't infringe."

12 Well, the fact of the matter is, ladies and
13 gentlemen, nobody has accused the Remote by itself of
14 infringing. What is accused of infringing is the Remote
15 combined with its extension, the Nunchuk.

16 The demonstration that you've seen in the
17 courtroom where, for example, someone was boxing with
18 these Nintendo controllers, that requires the Remote
19 with the Nunchuk. Most of the most important and
20 profitable games of Nintendo -- like Zelda in which the
21 character Link appears, Mario, Princess Peach, Luigi,
22 Samus -- all of these games that were testified about by
23 Ms. Story last week, they all require in order to play
24 those games that you have the Remote and the Nunchuk.

25 Most importantly, you've heard that the Wii

1 system is always sold with a Nunchuk. Last week we saw
2 the video testimony of a Nintendo representative who
3 said -- when asked the question: The Wii system is sold
4 with a Nunchuk and a Wii Remote every time?

5 And she responded: Every time.

6 And the simple fact of the matter, ladies and
7 gentlemen, is that Mr. Bratic -- and I'll talk more
8 about him in a minute; but you remember he was the man
9 who has analyzed the amount of a reasonable royalty in
10 this case who testified last week. Mr. Bratic explained
11 to you that if there are any sales of the Remote by
12 itself, he has not included those for purposes of
13 determining infringement. The only thing that's
14 included in infringement is when they sell both
15 together.

16 You'll be asked some questions at the end of
17 the case, and I'll show you what they'll look like. If
18 you believe that the Nintendo products infringe the
19 indicated claims of the patents, then you should answer
20 "yes. "

21 But what does Nintendo tell us next? Let's
22 talk about the next big question: Is the patent valid?

23 You heard from Judge Clark's instructions
24 that if Nintendo wants to tell you the patent is
25 invalid, because the Patent Office has already decided

1 that the patent should issue after five years of study,
2 that they have to show you that by clear and convincing
3 evidence. This is what Judge Clark just told you about.
4 And this is because in the law in our country there's
5 something called the "presumption of validity." And the
6 presumption is that the Patent Office did its job
7 properly; so, anyone who says they didn't has to come
8 into court and show you otherwise by clear and
9 convincing evidence.

10 So, what does Nintendo say about that? Well,
11 first of all, of course, they hope you believe that the
12 patent is invalid. And let's see some reasons that
13 they've thrown up in the hope that you'll buy one.
14 First, they say, "Well, Brad Armstrong didn't invent
15 anything."

16 They took him through a long list of
17 questions -- "Did you invent this? Did you invent this?
18 Did you invent this?" -- to which he honestly answered
19 "No" because, ladies and gentlemen, those things were
20 the building blocks that he used to make the new
21 combination of his invention.

22 You can build a cathedral without having to
23 invent bricks. If Thomas Edison was on the stand,
24 Nintendo's lawyers would no doubt ask him, "How could
25 you claim you invented the light bulb? You didn't

1 invent glass. You didn't invent wire. You didn't
2 invent electricity."

3 That's not the point, of course. What was
4 invented here was a new combination of things, most of
5 which were already known; and the Patent Office
6 recognized that it was new.

7 Well, if you don't buy that, then how about
8 this argument, that Mr. Armstrong copied, that he part
9 of the time he was writing his claims was looking at a
10 Nintendo controller. Well, that got shot down right
11 away. As soon as Nintendo's lawyer sat down, Judge
12 Clark gave this instruction: The fact that a later
13 claim is written and even if it is specifically written
14 to cover a later product does not make it invalid.

15 Well, okay. If you don't buy that argument,
16 Nintendo's got another one, backdating. Here's a slide
17 from their opening statement to you when they said: Is
18 it fair for Armstrong to change his invention after
19 Nintendo's multiple-input controller is introduced and
20 try to backdate those claims?

21 Well, once again, right after the argument,
22 Judge Clark gave an instruction on that; and he said:
23 If someone writes an application, they can later on file
24 a continuing application and write new claims.

25 You remember Mr. Newman, the man whose mother

1 and father worked for the Patent Office, who told you
2 that in his 50 years in or practicing before the Patent
3 Office, he had never heard this practice referred to as
4 "backdating."

5 Well, if you won't buy backdating, how about
6 this one? Nintendo will say Sony did it. Sony did a
7 controller, and it was like what was in the invention.
8 But, of course, as we heard today, Sony put out the
9 controller that Nintendo is relying on two years after
10 Mr. Armstrong described his invention to the Patent
11 Office.

12 Well, here's another one, then. If you won't
13 believe all of the things that have gone before, it
14 wasn't disclosed. It wasn't adequately disclosed to the
15 Patent Office.

16 Ladies and gentlemen, here (indicating) is
17 the disclosure that Brad Armstrong made to the Patent
18 Office. Here are some of the drawings from that
19 disclosure.

20 Now, I don't have time now and I'm sure none
21 of us have the patience for me to go through in detail
22 any of these drawings yet again. But just look at them.
23 Just get an idea of the richness and completeness of
24 what Mr. Armstrong showed the Patent Office in 1996.

25 "Yeah, but," says Nintendo, "you know, okay,

1 maybe he disclosed a lot of things and maybe there's a
2 lot in there, but maybe you'll believe this. What he
3 really meant to disclose was just a single input
4 member. "

5 Well, ladies and gentlemen, that may be
6 Mr. Dezmelyk's summary of what he disclosed; but I
7 suggest to you that what he disclosed is in the papers.
8 That's what he disclosed.

9 And both Mr. Dezmelyk on cross-examination as
10 well as Dr. Howe today, went through and picked out for
11 you the specific places in the '96 application where all
12 the pieces of the asserted claims were disclosed. And
13 Dr. Howe told you that one of skill in the art would
14 understand from reading this application that the full
15 scope of the invention was disclosed.

16 And if you can see that last controller --
17 you remember the picture of the controller in
18 Mr. Armstrong's application that sort of looks like the
19 Wii Remote, that has all the buttons on it? You heard
20 Mr. Dezmelyk testify that this Nintendo controller
21 (indicating) has five input members because it has this
22 D-pad and four buttons. And he specifically said that
23 every one of these buttons is an input member. Well, if
24 it's good for Nintendo, it's good for Brad Armstrong.
25 Every one of the buttons on this picture, Figure 9 that

1 he disclosed to the Patent Office, is a member of
2 control. And I'll suggest to you that it's just plain
3 wrong for Nintendo to tell you that all he described in
4 the '96 application was a single input member.

5 When you're trying to answer this second big
6 question, is the patent invalid, you'll be shown some
7 questions about obviousness and about anticipation and
8 about written description. If you believe that the
9 patent is valid and that the U.S. Patent Office was
10 correct after its five years of study in issuing
11 Mr. Armstrong the '700 patent, then you should answer
12 those questions "no." The patent is not invalid.

13 Finally, we come to the last of the big
14 questions: How much is a reasonable royalty?
15 Mr. Bratic took the stand and testified that he has 30
16 years' experience in trying to evaluate matters like a
17 reasonable royalty for this patent. He showed you this
18 slide which is a summary of some of the factors that he
19 considered in trying to evaluate the reasonableness of a
20 royalty in this case. And interestingly, if you
21 listened carefully to Judge Clark's instructions -- and,
22 of course, you'll have them in writing when you go back
23 to the jury room -- you'll see that the factors
24 Mr. Bratic considered on this slide were exactly the
25 things that Judge Clark has instructed you to consider

1 in arriving at the amount of a reasonable royalty.

2 Mr. Bratic concluded that a reasonable
3 royalty in this case is 5 percent. Well, what did the
4 Nintendo witnesses say about the amount of a reasonable
5 royalty? Nothing. Where was the Nintendo witness who
6 came to court to tell you that 5 percent was not
7 reasonable? Do you think that Nintendo can't afford to
8 hire somebody like Mr. Bratic to do a study to determine
9 the amount of a reasonable royalty, or do you think that
10 they did hire somebody and that that somebody agreed
11 with Mr. Bratic and they decided not to bring them to
12 court at all so you wouldn't hear it?

13 Well, what do they say about the amount of a
14 reasonable royalty? They don't give you any evidence.
15 "Something for nothing," remember that from the opening?
16 They stood here and told you that Brad Armstrong wants
17 something for nothing. That's Brad Armstrong, who had
18 the idea for his invention in 1989, who worked on it, he
19 told you, obsessively for the next seven years, who
20 started off with popsicle sticks and coke cans and moved
21 on to better and better prototypes that were more and
22 more sophisticated until finally he was able to apply
23 for a patent. Seven years of work on the invention.
24 And then you heard he's been dealing with the Patent
25 Office and trying to license his invention and

1 protecting his property in the patent ever since, down
2 to this day. But Nintendo tells you that that's
3 nothing.

4 Well, ladies and gentlemen, I'll respectfully
5 suggest to you that maybe it's true that Mr. Ikeda
6 worked hard on developing his product; but Brad
7 Armstrong worked hard, too. And if Nintendo wants to
8 come to the United States to sell its products, it's
9 required to play by the rules in the United States. And
10 the law in this country says that if they're going to
11 bring a product here that uses Mr. Armstrong's
12 invention, they have to pay a reasonable royalty.

13 Now, you've heard that Sony entered into an
14 agreement with Anascape. You heard that they paid \$10
15 million -- it wasn't for this patent; it was for a
16 different patent; although, there were some
17 similarities.

18 But you also heard Mr. Tyler, Mr. Kelly Tyler
19 who's here for the closing, and Mr. Armstrong both tell
20 you the reason they did that deal with Sony for \$10
21 million was not because they thought that's what a
22 reasonable royalty was. They thought that that number
23 was low. They did that deal with Sony, first of all,
24 because Mr. Armstrong's friend, Mr. Tyler, had invested
25 money in his idea; and Mr. Armstrong wanted to make sure

1 that Mr. Tyler got repaid. And the second reason they
2 did it is because they hoped that they might be able to
3 build up some momentum so that other companies would
4 take a license to the invention and do the right thing
5 if they could tell them that Sony had done so.

6 It wouldn't be fair, ladies and gentlemen,
7 for Nintendo to get the same deal as Sony when Sony
8 stepped up to the plate and Nintendo hasn't.

9 I also suggest to you that it's not fair for
10 Sony to pay fair value to bring its products into the
11 United States when Nintendo refuses.

12 The only evidence in this case you've heard
13 about the amount of a reasonable royalty is 5 percent.
14 Of course, 5 percent is 5 cents on the dollar. That's
15 all.

16 You've also heard, though, that just in the
17 time this lawsuit has been pending, Nintendo has sold,
18 in this country alone, a billion dollars worth of
19 infringing products.

20 Now, Mr. Bratic has done the arithmetic for
21 us; and in this Plaintiff's Exhibit 364, which you'll
22 have available with you in the jury room if you want to
23 look at it, he has calculated 5 cents on the dollar as
24 compared to the total sales of Nintendo in the United
25 States. And he's concluded that it's about

1 \$50.3 million.

2 So, ladies and gentlemen, if, after
3 considering this third big question -- how much is a
4 reasonable royalty -- if you believe that Anascape is
5 entitled to a royalty for Nintendo's use of the patented
6 invention, you'll be asked to fill in a figure. And the
7 number that you should fill in is \$50,341,723, the
8 number that appears on Mr. Bratic's calculations.

9 Ladies and gentlemen, I thank you for your
10 attention. After a break and after you've heard from
11 Nintendo's lawyers, I'll have an opportunity to spend
12 just another few minutes with you; and I'll look forward
13 to that.

14 THE COURT: All right. Ladies and gentlemen,
15 we're going to take a break. Remember you've not heard
16 my final instructions nor the final closing argument;
17 so, please continue not to discuss the case among each
18 other. And I'll ask you to be back at 20 of.

19 (The jury exits the courtroom, 2:25 p.m.)

20 THE COURT: Without waiving any of the
21 objections you had previously, any objections to the
22 charge as read from plaintiff?

23 MR. CAWLEY: No, your Honor.

24 THE COURT: From defendant?

25 MR. GUNTHER: Your Honor, we have -- I don't

1 know how much of an issue this is. But when your Honor
2 was going through obviousness -- and this is on page 18
3 of the charge.

4 THE COURT: Okay.

5 MR. GUNTHER: At point 2 when your Honor was
6 reading what the combination was with respect to
7 obviousness, I believe your Honor left out the "2" after
8 "Dual Shock 2." Given, your Honor, that fact that that
9 is there in the printed page that they were reading
10 along and given that they have it in front of them, I
11 don't think that there is something that we need to do
12 to correct it. But I did note that, was the only thing.

13 THE COURT: Well, I can remind them again if
14 you want what the proper -- was. I mean, when -- before
15 they leave if you want me to remind them again what the
16 proper thing is.

17 They each had a copy of it in front of them
18 reading along with me and they'll each have a copy back
19 there, but I would be more than glad --

20 MR. GUNTHER: Yes, sir. In view of that --
21 and I think your Honor is absolutely correct -- I am not
22 going to lodge an objection.

23 THE COURT: Okay. I mean, that's why I asked
24 the question. It would be easy to miss something in a
25 long text like that.

1 All right. We'll be in recess, then -- oh.
2 Is there any objection -- I did catch one typo that I
3 think Ms. Chen has probably already corrected. Anybody
4 have an objection to me switching that page out in the
5 final set of instructions that go back to them?

6 MR. GUNTHER: No, sir.

7 THE COURT: Plaintiff?

8 MR. CAWLEY: No, your Honor.

9 THE COURT: Okay. We'll be in recess, then,
10 until 20 of.

11 (Recess, 2:27 p.m. to 2:38 p.m.)

12 (Open court, all parties present, jury
13 present.)

14 THE COURT: Mr. Gunther?

15 MR. GUNTHER: Thank you, your Honor.

16 Ladies and gentlemen, this is a case about
17 two dreamers. The first dreamer was Mr. Armstrong. He
18 literally had a dream that resulted in his development
19 of single input member 6-degree-of-freedom controllers
20 like the prototypes that are in front of you right now
21 on the table. That was his dream. And unfortunately
22 for him, that was a dream that did not go anywhere in
23 the marketplace. That was a dream that the video game
24 industry was not and has never been interested in.

25 This case is also about a second dreamer, the

1 gentleman who you saw come in -- he flew and drove some
2 14 hours from Japan to come in here and testify in front
3 of you -- and that was Mr. Akio Ikeda. And Mr. Ikeda
4 told you about his dream, his dream that after work and
5 ideas and thought and creativity resulted in the Wii
6 Remote, the most revolutionary controller ever.

7 Now let's look at both of those dreamers, and
8 let's see what the evidence -- now that all of the
9 evidence is in -- what it shows about both of those
10 dreamers. Let's talk about Mr. Armstrong first. He
11 develops a single input member 6-degree-of-freedom
12 controller. He does that based on his experience. He's
13 a pilot. He's someone who has been knocking around in
14 various different areas, including flying. And you'll
15 recall his testimony about when he was a kid, seeing a
16 controller like a joystick that was able to control all
17 of the controls of an airplane. And he testified that
18 that part of that experience influenced what he
19 ultimately did and what he came up with.

20 And Mr. Armstrong also is not a gamer. He
21 admitted that to you. So, he came up with something
22 that was a single input member movable in 6 degrees of
23 freedom from his experience as a pilot but not as a
24 gamer. And it was something that did not go anywhere in
25 the video game industry.

1 He files his application in 1996, and then he
2 goes about trying to commercialize what you see in front
3 of you on the table. He tries to sell single input
4 member 6-degree-of-freedom controllers. He calls them
5 "global navigators." No one wants them. He sells 30 of
6 them altogether. He attempts to license other
7 companies. He testified that he enters into a joint
8 venture with a company called "Key Tronic" to
9 manufacture single input member 6-degree-of-freedom
10 controllers. Key Tronic never makes a single one.

11 He testified that he -- his good friend -- he
12 enters into a license with his good friend, Mr. Tyler,
13 when he's at Mad Catz. Mr. Tyler, the person who
14 founded Mad Catz, who has his ear to the video game
15 industry. He licenses his invention to Mr. Tyler; and
16 Mr. Tyler, on behalf of Mad Catz, never makes any
17 controllers that embodied Mr. Armstrong's invention. He
18 never does it. The video game industry today -- you can
19 look today, and there has been no evidence that any
20 company in the video game industry has ever developed a
21 controller like the ones you see before you with a
22 single handle or a single ball that's movable in
23 6 degrees of freedom to achieve that kind of control.

24 So, after ten years of failure, of trying, he
25 thinks he's got a revolutionary idea; but as he goes out

1 to the market, the video game industry is not
2 interested. What does he do? What does the dreamer do?
3 What he does is he enters into an agreement;
4 and he forms a company called "Anascape" with his
5 business partner, his friend but his business partner,
6 in 1999. And what do they do with Mr. Tyler's money?
7 Mr. Tyler testified that he put in over a million
8 dollars into the enterprise. Do they do more R&D? Do
9 they go out and try to market a product? No. What they
10 do is they sit down and spend that time and money trying
11 to write new claims trying to change the application in
12 a way not to cover what Mr. Armstrong disclosed in his
13 1996 application but to try to cover the work of others,
14 to try to cover the work of Nintendo in this case.

15 Mr. Tyler -- let's go to the next slide.

16 Mr. Tyler -- and you saw this slide. It's
17 Defendant's Exhibit 216 in evidence. Mr. Tyler takes
18 the 1996 warehouse application; and in the year 2000, he
19 starts giving Mr. Armstrong ideas on what he should do
20 to write new claims. And one of the things he says is:
21 I think we can get some additional valuable claims out
22 of this application, the zero application. That's the
23 1996 application. He says: Broadens definition of 6
24 DOF controllers -- 6-degree-of-freedom controllers -- to
25 3-D graphic image controllers, probably a better

1 definition of controllers on the market today.

2 They are not innovating; they're writing
3 claims. They're trying to write claims to copy products
4 that are on the market. Mr. Armstrong is no longer
5 trying to find success in his own ideas; he's trying to
6 find success in the ideas of others.

7 Mr. Tyler again in September -- this is very
8 shortly before the '700 application is filed in November
9 of 2000 -- to Mr. Armstrong, on 6 degrees of freedom: I
10 wonder if we can change the claims to reflect our new
11 direction?

12 Now, both Mr. Tyler and Mr. Armstrong
13 testified that they couldn't remember what the new
14 direction is. I ask you to use your common sense and
15 your perception of what's gone on in this case and the
16 evidence that has come in before you. And I will
17 suggest to you that the reason -- that there is a reason
18 and a new direction. And what that new direction was
19 was to write claims in 2002 that copied the GameCube
20 controller. They tried to cover the GameCube controller
21 and to take that invention as his own. The new
22 direction was to claim Nintendo's technology as his own.

23 And I want you to keep in mind one thing.
24 Mr. Armstrong is a 56 percent owner of Anascape. He
25 stands to get the lion's share of the \$50 million that

1 they are asking for in this case. And it's not just
2 \$50 million, ladies and gentlemen, because the patent
3 continues out until 2012; and they are going to ask for
4 a 5 percent royalty on all of that. So, it could be a
5 hundred million or more at the end of the day.

6 That's Mr. Armstrong. Now let's look at what
7 the evidence showed about Mr. Ikeda.

8 He had a revolutionary idea. His idea was
9 for a controller with an accelerometer and a pointer
10 that could respond to body motion as it was moved
11 around. His idea also came from his prior experience.
12 He was an engineer with 15 years working in video games
13 at Nintendo, right after he got his degree in electrical
14 engineering and got out of college. That's what he
15 focused on. And his idea came from, you'll recall, his
16 experience with that Game Boy game called "Kirby Tilt 'n
17 Tumble" which had an accelerometer in it and it gave him
18 the idea, when he was put on that group that was doing
19 planning, to come up with a prototype. And he came up
20 with a prototype; and he took it to his boss,
21 Mr. Miyamoto. And Mr. Miyamoto thought it was a good
22 idea, and it began to catch fire. There was excitement
23 at the company. And the next thing you know, Mr. Ikeda
24 is in charge of the group that's developing the
25 controller for Nintendo's next generation system. And

1 it takes years of effort and hard work for him and his
2 team to do that.

3 And you'll remember, we had Mr. Bratic, the
4 accountant, who's come in here to tell you how to get to
5 \$50 million. There is one part of his testimony that
6 I'll ask you to recall. It was during the
7 cross-examination; and he made a comment to the effect
8 of, "Oh, the accelerometer is just an off-the-shelf
9 part. You can basically just get -- there was nothing
10 big here. Nintendo just buys those off the shelf and
11 puts them in the Wii Remote."

12 To have an accountant come in here -- to try
13 to denigrate the invention like that, I respectfully ask
14 you to consider that as you think about who's the
15 inventor in this case. And as a matter of fact, after
16 years of effort, Mr. Ikeda and his team designed the Wii
17 Remote and the Wii Nunchuk; and they were revolutionary
18 and evolutionary. Revolutionary in the sense that you
19 know it has the accelerometer in there and it has the
20 camera; so, it can do incredibly sophisticated body
21 sensing to allow the games like bowling that you saw and
22 baseball and all of those other different games, boxing.
23 But evolutionary, as well, because, as you know,
24 Nintendo has carried through from the very beginning of
25 its controllers, including the one Mr. Cawley showed

1 you, different features like cross-switches and buttons
2 and joysticks.

3 A revolution and an evolution.

4 And you heard Mr. Ikeda's pride. No one, I
5 think, disagrees with that, even Mr. Cawley. His pride
6 in terms of the work that he did and his team and what
7 they brought to the world of video gaming.

8 I think you should ask yourself: Why did
9 Mr. Ikeda come here? He has no real monetary stake in
10 this case. Whether the \$50 million is awarded or not,
11 he'll have a job tomorrow. He'll be able to go back to
12 work. Why did he come here? Think about that. I want
13 to suggest an answer to you. He came here to protect
14 his reputation. Money is important, and a lot of money
15 is at stake in this case. But he came here to protect
16 his reputation. And his reputation is on the line in
17 this sense, that what's being said to you here in this
18 courtroom is that in order for Nintendo to play by the
19 rules in coming to the United States, that they have to
20 somehow look at what Mr. Armstrong invented and say,
21 "Oh, that's something that covers our product. That
22 covers Nintendo's Wii Remote and Wii Nunchuk."

23 And as a matter of fact, what Mr. Ikeda came
24 in here to tell you is that that's not something that
25 Mr. Armstrong invented. That wasn't his idea. That was

1 the idea of Mr. Ikeda and his team. And he came in here
2 to protect and defend his reputation and his honor.

3 Imagine how Mr. Ikeda and Jacqualee Story and
4 John Pederson, who you'll recall testified -- imagine
5 how they feel after decades of hard work. Along comes a
6 man with their most revolutionary product and says, "I
7 invented that. I invented that idea."

8 Now I want to go to show you this slide.
9 Mr. Cawley put this up. This was the first slide that
10 he put up in his opening statement. Now, why did he do
11 that, to put up those big numbers with respect to the
12 video game industry, \$17 billion? I suggest to you he
13 did it because he wanted you to see how big a market
14 this is so that you could say to yourself maybe,
15 "\$50 million, that's not that big. Look at 17 billion.
16 Nintendo -- what's \$50 million for Nintendo? They're
17 making tons of money."

18 Is that how you should decide this case? If
19 Nintendo decides that it did nothing wrong, is it wrong
20 for Nintendo to say, "No, we're not going to pay. We're
21 going to defend our products, and we're going to defend
22 our reputation and ourselves"?

23 I know what my dad would say.

24 Now, I told you in my opening that we were
25 going to prove two things to you, that the '700 patent

1 claims are invalid and that Nintendo does not infringe.
2 Now with all of the evidence in, let's look at where we
3 are with respect to those two issues.

4 This is the slide, again, from Mr. Cawley's
5 opening where they went through the various parts of the
6 invention, the 1996 application. And remember, on the
7 cross-examination of Mr. Armstrong, I took him through
8 each one of these. Let's start with the first one,
9 rumble.

10 His testimony, on cross-examination, was,
11 frankly, something where he overreached. It's a theme
12 of this case in terms of their overreaching. He said:
13 Rumble is a technology that I invented.

14 And then you'll recall -- that was on direct
15 examination. You'll recall the next day I came in, and
16 I showed him his deposition. I said, "Wait a minute.
17 You invented rumble? You told me two months ago, in
18 March, that you thought there was a motor and offset
19 weight thing, some German thing, that you had found that
20 predated what you had done."

21 "I invented rumble."

22 "But two months earlier you told me it was
23 something in Germany that had already been done."

24 What was the next thing? Proportional
25 buttons. Mr. Armstrong admitted -- he admitted that

1 proportional buttons -- that is, buttons that provide
2 some type of analog proportional output -- are not used
3 in the Wii Remote or the Wii Nunchuk. He admitted that.
4 90 percent of the money that's at stake in this case
5 relates to these two items, and he admitted they don't
6 have proportional buttons.

7 And Dr. Howe admitted in his examination that
8 Mr. Armstrong did not -- was not the first to invent
9 proportional buttons.

10 Let's go to the next one. One more, please.

11 Screen-connected sensors, or sheet-connected
12 sensors. He said that was another part of his
13 invention. And you'll recall Mr. Cawley had shown you
14 the Atari 2600 controller from the Seventies in his
15 opening statement. He said this is how people did
16 things in the Seventies, and he showed you a screen of
17 the Pac-Man game.

18 But as a matter of fact, you'll recall -- and
19 I think it was a fairly dramatic moment in the trial --
20 I had Mr. Armstrong take one of these apart and open it
21 up. And he admitted to each of you that sheet-connected
22 sensors is something that was available since the 1970s.
23 It was in the very controller that his lawyer used in
24 his opening statement.

25 What was the fourth thing? Better control of

1 3-D screen motion. That's what they said the fourth
2 part of the invention was. But how did he do that? How
3 did he accomplish that? He accomplished that through a
4 single input member device that achieved 6 degrees of
5 freedom with that single input member. You could move
6 it forward, back, up, down, side to side, and turn it,
7 as well, to get all of those degrees of freedom.

8 Look at his prototypes. They're in front of
9 you. The first prototype, the second, and the third.
10 Each one of those have a single handle that can be moved
11 in all of those 6 degrees of freedom. And when he
12 actually sat down and wrote in his application, in 1996,
13 his invention, that is what he disclosed.

14 That takes us to a core issue in this case,
15 and you will have to decide whether it's Nintendo making
16 excuses or Nintendo defending itself because it did
17 nothing wrong. Core issue. Nintendo has proven by
18 clear and convincing evidence that the '700 claims are
19 invalid.

20 Now, there's been a lot about the burden of
21 proof and the fact that we have to prove invalidity by
22 clear and convincing evidence. Ladies and gentlemen, I
23 embrace that burden. I'm not afraid of it. We're not
24 afraid of it, and we're not running from it. We embrace
25 it. And why? Because we're asking you to look at

1 Mr. Armstrong's own words. What could be any more clear
2 or convincing than that?

3 Look at the claims that he wrote in 2002 to
4 cover the GameCube controller, the multiple input member
5 GameCube controller; and then look at the words that he
6 wrote in 1996 in terms of telling the world what his
7 ideas were. It's there in black and white. When he
8 wrote those words in 1996, there were no Nintendo
9 accused controllers; there was no lawsuit; and there was
10 no \$50 million at stake. He wrote those words at a time
11 when he had no motive other than to tell the Patent
12 Office what he thought he had actually invented.

13 And remember, there's been some discussion
14 about this. I have never said to you -- and Nintendo
15 has never taken the position that he cannot write claims
16 later. The law is clear. And I stated it in my opening
17 statement, and I state it now. He is allowed to write
18 later claims, but there is a critical caveat with
19 respect to that.

20 And this is from the court's instruction:
21 However -- this is the "however"; this is what he has to
22 do in order to get back to 1996 -- for any new claim to
23 be entitled to the 1996 filing date, the 1996
24 application must disclose the invention of the new claim
25 with all of its limitations.

1 That's our point. That's what he hasn't
2 done. That's what the evidence clearly and convincingly
3 shows he has not done, and that's why he can't get back
4 to 1996.

5 Let's look at his own words in 1996. Right
6 under the "Summary of the Invention" -- and this is in
7 your juror notebook. But right under the "Summary of
8 the Invention," he talks about controllers provide --
9 the controllers that he has developed provide
10 structuring for converting full 6-degree-of-freedom
11 input on a hand-operated single input member into
12 representative outputs. So, he says that.

13 Let's go on. Again, in that same "Summary of
14 the Invention" section: A primary object of the
15 invention is to provide a 6-degree-of-freedom image
16 controller which includes a single input member.

17 Seventeen times in the 1996 application, he
18 uses the words "single input member capable of achieving
19 6 degrees of freedom." And one of the things that they
20 want to tell you in this case is that, "Oh, well,
21 there's an awful lot of other things in there."

22 Ladies and gentlemen, look through
23 Defendant's Exhibit 306. Every time there is a
24 completed controller described or depicted, it has a
25 single input member that is movable -- itself movable in

1 6 degrees of freedom.

2 Now, Mr. Cawley has pointed to various other
3 figures and said, "Well, look, there are sometimes some
4 buttons; or there's some extra things." Our point is --
5 that's not our point. There can be extra buttons or
6 things like that, but those are not used for
7 6-degree-of-freedom control. They are used for other
8 things. So, in every embodiment -- and let's go to --
9 let's show --

10 Mr. Cawley put this up. This is Figure 6,
11 and then he put up some text. And he said, "Look,
12 there's two input members here, the trackball and the
13 collar." But what didn't he highlight? That the
14 trackball -- this is in the text that describes
15 Figure 6 -- the trackball may be interpretable on all
16 six axes and the collet can serve as a second member,
17 not for 6-degree-of-freedom control but for other things
18 that the game controller wants to do with it.

19 So, our point -- let's go to the next slide.

20 Again, Mr. Cawley showed this to
21 Mr. Armstrong. He said, "Well, look, there's multiple
22 input members on there." But remember my
23 cross-examination. Mr. Armstrong admitted that that
24 device -- and it's Item 12 -- is a single input member
25 movable in 6 degrees of freedom. He actually said, "I

1 concede. It's there." So, the fact that there are
2 other buttons on there are of no moment because our
3 point is that this invention, as described in the 1996
4 application -- it may have some other buttons and things
5 for non-6-degree-of-freedom control; but it was all
6 about a single input member that achieved the
7 6-degree-of-freedom control.

8 One more figure. This was Figure 28. This
9 is the top of the handle that's part of Figure 20. I'm
10 not going to show you Figure 20 again. You know that
11 one, the exploded view.

12 And he said, "Look. The button's on the
13 side. That's additional input members." And he said,
14 "Look, the buttons. I'm highlighting the language about
15 the buttons." What didn't he highlight? The buttons
16 are for other than 6-degree-of-freedom input. So, those
17 buttons may be used for other things like mouse inputs;
18 but the fact of the matter, when you get right down to
19 it -- and they can't run from this -- is that that
20 handle, that single handle, is movable in 6 degrees of
21 freedom. And that's what the patent application in 1996
22 is about.

23 Take a look. Remember Mr. Cawley
24 cross-examined Mr. Dezmelyk on, "Oh, you can find some
25 rockers over here and you can find some buttons over

1 here and you can sort of take all of those parts and
2 match them up to claim 19." Ladies and gentlemen, he's
3 told you -- Mr. Cawley has told you in his closing
4 statement that the invention is not the parts. It's not
5 the individual parts; it's the sum of the parts. It's
6 the parts as put together.

7 And how were they put together in the 1996
8 application? In every case they were put together in a
9 controller that has a single input member capable of
10 movement in 6 degrees of freedom.

11 Remember what Mr. Armstrong told the Patent
12 Office, that the patent -- remember in 1996 he said,
13 "Here is what my invention is not -- Chang." Very
14 interesting. When Mr. Howe was being put back on in
15 rebuttal, Mr. Cawley took him to all different parts of
16 the patent specification in the 1996 application. He
17 did not once take him to Chang. Why didn't he do that?
18 I suggest to you because they can't deal with Chang.
19 They don't have a way to run from Chang.

20 He says the Chang device is a
21 6-degree-of-freedom controller. Remember, three
22 different inputs to achieve 6-degree-of-freedom control.
23 And he says that because it doesn't have a single input
24 member, it lacks -- it has problems. It is bad. It has
25 significant disadvantages.

1 The Chang controller is functionally and
2 structurally deficient because it doesn't have a single
3 input member such as one ball or one handle which can be
4 operated in 6 degrees of freedom.

5 That's what he told the Patent Office in 1996
6 and he's now trying to turn around and say, "I can cover
7 multiple input member controllers that achieve that
8 6-degree-of-freedom control by multiple different input
9 members."

10 That is the point, ladies and gentlemen, the
11 exact point, where he stops trying to actually take
12 credit for what he did, right there on the table, and
13 tried to take credit for Nintendo's products. And
14 you're going to have to make a decision as to whether
15 that's fair or not.

16 And how do we know -- what's another way that
17 we know the 1996 application is not good enough, it
18 doesn't do the job to support the claims that he's
19 written to cover Nintendo's products? Because in 2000,
20 when he filed the actual application that became the
21 '700 patent, he decided he had to do some pretty serious
22 renovations to the warehouse.

23 The first thing he did -- this is from the
24 1996 application. I'm putting up all seven paragraphs
25 that relate to Chang. They're highlighted. Remember,

1 the Chang -- the two paragraphs that talked about Chang
2 being functionally and structurally deficient because it
3 doesn't have a single input member operable in 6 degrees
4 of freedom.

5 What did he do when he did the renovations to
6 the warehouse in 2000? They're all gone. If the 1996
7 application with Chang in it was good enough, ask
8 yourself this commonsense question: Why did he take it
9 out in 2000 when he filed the 2000 application?

10 Now, he testified -- this is Mr. Armstrong --
11 testified on cross-examination. I asked him: Why did
12 you hit the "delete" key with respect to Chang in the
13 2000 application?

14 And he said: It just was a faster way to get
15 to the point, to get to the invention.

16 Ladies and gentlemen, I ask you again to
17 apply your common sense. He didn't make those changes
18 simply to get to the invention faster. He did it
19 because he knew he had a big problem with Chang and that
20 if his effort to write claims that covered our products,
21 that took our products for his own -- that he was going
22 to have a problem doing that unless he could somehow get
23 Chang out. But what do you know? You know that he has
24 to live or die by what's in 1996 in that application.
25 He cannot delete Chang in order to get back to 1996. He

1 has to live with everything that he said about it.

2 Again, ask yourself this commonsense
3 question: Was he trying to get to the point of the
4 invention faster, or was he really trying to change the
5 warehouse in a way that would let him try to take credit
6 for inventions he had never come up with?

7 Now let me show you also in terms of his
8 changes to the warehouse. In 1996 he says: A primary
9 object of the invention is to provide
10 6-degree-of-freedom control in a single input member.

11 That's what he says in terms of his primary
12 invention. When he renovates the warehouse in 2000, he
13 says: A primary object of the invention is to provide
14 3-D image control which includes at least one input
15 member.

16 It was a very important part of the
17 cross-examination of Mr. Armstrong where I said to him:
18 Does the GameCube controller that you wrote claims to
19 cover in 2000 -- does that fit within that language up
20 from the 1996 application?

21 He said: No, because GameCube doesn't have a
22 single input member operable in 6 degrees of freedom.

23 Then I said to him: Well, what about the new
24 language that you wrote in 2000? Does that embrace the
25 GameCube?

1 And he said: Yes.

2 When you want to think about whether or not
3 what he was doing was trying to change from what he had
4 invented in 1996, a single input member operable in
5 6 degrees of freedom, and trying to cover our products
6 with something he never invented, what better evidence
7 is there of that? But he can't live -- remember, he
8 can't make those changes. He can't live with those
9 changes in 2000. He must live with what the 1996
10 application says. And the 1996 application does not
11 cover those claims as he is now trying to read them on
12 our multiple input member 6-degree-of-freedom products.

13 DEPUTY CLERK: Fifteen-minute warning.

14 MR. GUNTHER: Thank you.

15 Now I want to get to invalidity. Our point
16 is he can't get back to 1996. So, what does that mean?
17 There is an easy way to get to invalidity, and I think
18 there is a more detailed way. The easy way to look at
19 the question of invalidity is what I asked Mr. Armstrong
20 and what he admitted to me.

21 If you can't get a date of invention of 1996
22 for your 2002 claims, you agree with me that the patent
23 is invalid, right?

24 Answer: Well, I guess.

25 The inventor, the man who wrote the patent

1 application and who prosecuted the patent application in
2 the Patent Office, has admitted to you -- it's an
3 extraordinary admission. He's admitted to you that if
4 he can't get back to 1996, his claims are invalid.

5 Now, why is that? We proved that to you. We
6 proved that to you because if he can't get back to
7 1996 -- the Dual Shock and the Dual Shock 2 were both out.
8 It's undisputed. You heard Ms. Panico's testimony.
9 It's undisputed that they were both out before the 2000
10 application. In that instance, they completely
11 anticipate every claim and render one claim obvious.

12 And why is that? Look at the Dual Shock
13 controllers versus the GameCube that he was trying to
14 cover. They have the same things. They have the
15 rotating platform, the D-pad. They've got the two
16 joysticks. They've got rumble. If he says that the
17 GameCube infringes, then it is clear and convincing and
18 undisputed that the Sony Dual Shock controllers have
19 every one of those same elements. And if he can't get
20 back to 1996, as Mr. Armstrong himself has told you from
21 the witness chair, his claims are invalid.

22 Now I want to go to the issue of
23 infringement, and I want to focus on the Wii in claim 19
24 because that's where the money is. That's where
25 90 percent of the damage is. And I want to just give

1 you two figures from that 50.3 million, and it's some
2 math I did based on Mr. Bratic's math.

3 He says 50.3 million is the right damages.
4 Well, it breaks down this way, ladies and gentlemen.
5 47.7 million of the 50.3 is for the Wii Remote when used
6 with the Wii Nunchuk, over 90 percent, 47.7 million.

7 Everything else -- the GameCube, the Wii
8 Classic, and the Wavebird -- the total number with
9 respect to that is 2.8 million. They're really the tail
10 wagging the dog here.

11 So, I'm going to focus on claim 19 and the
12 Wii Remote and the Wii Nunchuk. Remember, he wrote the
13 claims in 2002 to cover the GameCube. Now he's trying
14 to take those claims he wrote to cover the GameCube and
15 stretch them to cover something he never dreamed of, the
16 Wii Remote and the Wii Nunchuk.

17 Now, it's no surprise that in some ways some
18 of the elements fit, like the cross-switch and the
19 joystick, because if you look at Nintendo -- you'll
20 remember Mr. Pederson's testimony. Nintendo has had an
21 evolution and has kept many of those things. The
22 cross-switch goes all the way back to the 1982 Game &
23 Watch; the joystick, all the way back to 1995-1996 with
24 the Nintendo 64 controller.

25 But where does he run into real problems? In

1 fact, I suggest to you he runs into a brick wall when he
2 tries to read the third element on the accelerometer.
3 He admits he never designed an accelerometer. He admits
4 there is nowhere mentioned in the warehouse an
5 accelerometer. And he also admitted in his
6 cross-examination that Nintendo was the first with the
7 Wii Remote, to come out with a controller that had an
8 accelerometer to sense body motion.

9 Now let's look at claim 19. And I've
10 highlighted the third element. The court has instructed
11 you that to find infringement, every element of that
12 claim must be present. If one element is not present,
13 we do not infringe. And there are several reasons as to
14 why the accelerometer in the Wii Remote does not meet
15 that third element. There is no movable element; there
16 is no element structured to activate the sensors; and at
17 the end of the day, there is only one sensor.

18 Let's look at the third element, and you'll
19 remember this figure. I'm sure you've looked at it
20 quite a bit. But here's the point on this. Remember,
21 it's got to be movable. The third element has to be
22 movable. Dr. Howe admitted that the Wii accelerometer
23 is fixed to the circuit board. It does not move like
24 the joystick that he wrote to -- the claim that he wrote
25 to cover that joystick.

1 It has to be structured to activate the
2 sensors. When he wrote to cover the joystick -- that is
3 structured. That joystick and the rock activates the
4 two potentiometers. But you heard the testimony. There
5 is nothing that is structured to activate the
6 accelerometer. That works on responding to acceleration
7 and gravity.

8 Now, Dr. Howe has pointed to the proof mass,
9 that, I guess, mass inside the accelerometer and said,
10 "Oh, that's the third element structured to activate."
11 But there is a key piece of testimony from him. This is
12 a key admission. It's crucial.

13 He says -- okay. You're saying that the
14 proof mass is the third element?

15 That's right.

16 Okay. In fact, the proof mass is part of the
17 sensor, right?

18 Answer: Yes.

19 Ask yourself this question: How can the
20 proof mass be the third element structured to activate
21 the sensor if it's actually part of the sensor? That
22 doesn't make any sense. And what it is -- what it
23 reflects and shows is an effort to try to cover
24 something that he had no intention of covering. They're
25 stretching; they're overreaching.

1 And remember the point on the accelerometer,
2 the theory of operation. This is the Analog Devices
3 document itself. It talks about one sensor. It talks
4 about a single structure for sensing the X, Y, and Z
5 axes. And Dr. Howe admitted -- he absolutely admitted
6 that there are accelerometers with more than one sensor.
7 In fact, the one he looked at in error was one that had
8 three different proof masses in it when he gave his
9 opinion. So, there are ones with single; and there are
10 ones with multiple.

11 What is Analog Devices? I'm just asking you
12 to look at the words just like I'm asking you to look at
13 the words in 1996 and the claims in 2002. It talks
14 about a single.

15 That element, that accelerometer in the Wii
16 Remote, simply does not meet the third element. There
17 is no infringement.

18 Now let me turn to the last thing, which is
19 damages. And I want to ask just -- may say a few words
20 about that. Again, Mr. Armstrong is overreaching.

21 He says Sony -- remember the Sony license.
22 No money for the '700 application. A year later we were
23 supposed to be negotiating in the hypothetical
24 negotiation. Sony paid no money for the '700
25 application, and they were selling the DualShock at the

1 time. Think about that.

2 The \$10 million is for a different patent,
3 the '606 patent, that has nothing to do with this case.
4 We were accused of not bringing a damage expert in.
5 Ladies and gentlemen, I don't think we need to bring a
6 damage expert in here to point you to the words of the
7 Sony license. And that Sony license makes absolutely
8 clear that there was no payment at all for the '700
9 application, and it was included with all of
10 Mr. Armstrong's patents. No payment then. A year later
11 what he's saying for one patent -- not all of
12 Mr. Armstrong's patents, for one -- we would pay
13 \$50 million.

14 Ladies and gentlemen, it's overreaching. It
15 doesn't make sense. You don't need some kind of
16 professional damage expert here to come in and tell you
17 that.

18 And, finally, I want to come back to this.
19 As you go back into the jury room to deliberate --
20 remember, I don't get to get up again. Mr. Cawley gets
21 to speak one more time. I'm done after this.

22 I want to ask you to keep two things in mind
23 as you go back to deliberate.

24 The first is Mr. Ikeda and his work and what
25 he did and his reputation. His reputation is at stake

1 in this case. Make no mistake about it. He's entrusted
2 his reputation to each one of you. And as you go back
3 and you -- you listen to the rest of Mr. Cawley and you
4 go back and actually start thinking about and
5 deliberating and looking at the evidence, keep that in
6 mind.

7 Yes, money is at stake in this case; but a
8 man's reputation is at stake, too. Was he the one that
9 came up with the idea, or was it Mr. Armstrong? A
10 crucial issue.

11 And I'd like you to keep one more thing in
12 mind as you go back, and that's this. I want you to
13 think -- remember my opening. Think about a father in a
14 bicycle shop in Valley Stream, Long Island, in 1966
15 giving a life lesson to his son about what's right and
16 what's wrong and whether or not someone should be able
17 to get something for nothing.

18 Mr. Armstrong -- we've got no problem with
19 Mr. Armstrong in terms of what he invented in 1996.
20 We're not trying to take that away from him. We're not
21 trying to denigrate it. I'm sorry his invention didn't
22 go anywhere. It would have been nice and maybe we could
23 have avoided this lawsuit if it had, but it didn't.
24 We're not trying to take that away from him. But when
25 he changed -- when his idea changed from trying to

1 create success through his own inventions to trying to
2 write claims that would cover our products and those
3 claims were not supported by what he did in 1996, ladies
4 and gentlemen, that is something for nothing. That is
5 something for nothing.

6 Mr. Ikeda's reputation, keep it in mind.
7 Don't let Mr. Armstrong morph his invention into
8 something it never was and get something for nothing.

9 Thank you very much for your attention in
10 this case, and we look forward to your verdict.

11 THE COURT: Mr. Cawley?

12 MR. CAWLEY: Thank you, your Honor.

13 Ladies and gentlemen, as I predicted, what
14 you've just heard from Nintendo is now another long
15 series of reasons why they throw up in the hopes that
16 you'll believe one and decide that they don't have to
17 pay a fair value for the use of Mr. Armstrong's
18 invention. Some of them we heard before. Some of them
19 I didn't talk about before. But let's just remind
20 ourselves what we've just heard.

21 The first thing we heard Nintendo's lawyer
22 say was that Mr. Armstrong's a failure. Well,
23 apparently it wasn't enough to simply say that, as they
24 did in their opening and their testimony, that he didn't
25 invent anything, that he was out to get something for

1 nothing. Now they characterize him as a failure.

2 Well, I guess it depends on your perspective.
3 This is a man who, from the time he was a young boy,
4 wanted to be an inventor. He self educated. He didn't
5 have an education but he found what he needed in books
6 and in libraries and he invented something that the
7 United States Patent Office agreed, after five years of
8 study, was a valuable invention.

9 Mr. Armstrong, and the friend that believed
10 in him, Mr. Kelly Tyler, has made a substantial amount
11 from that invention. Is he a failure? Well, Nintendo
12 says so. I suppose you'll have to decide.

13 Next, they say that it was really Mr. Ikeda
14 who developed the Nintendo product. Well, remember, as
15 I explained to you when I first spoke to you, nobody is
16 saying that Mr. Ikeda took any shortcuts. What we're
17 saying is that if Nintendo wants to bring products to
18 the United States that use the patent that was awarded
19 in the United States to Brad Armstrong, they have to
20 respect those patent rights. The law in this country
21 requires that if they want to do that, they have to pay
22 a reasonable royalty for use of that invention.

23 Then they mentioned something that we heard
24 about a few times in the trial but was never really
25 explained, that there is a camera in the Wii Remote.

1 But you'll remember the Nintendo witnesses admitted you
2 can aim the camera at the ceiling and the accelerometer
3 still works the same way. In fact, they told you on
4 cross-examination that the Nunchuk, which also has an
5 accelerometer in it, doesn't even have a camera. That's
6 a clear indication to you that this camera is just
7 something that's being thrown up in the hopes you might
8 latch onto it because the camera has nothing to do with
9 the way the accelerometer works.

10 We just heard Nintendo's lawyers tell you,
11 yet again, that Brad Armstrong didn't invent anything.
12 He didn't invent rumble, he didn't invent proportional
13 buttons, he didn't invent this, and he didn't invent
14 that.

15 As you've heard a number of times in this
16 trial and as I mentioned in my first remarks to you,
17 what he invented was a combination. No one's saying
18 that he invented the bricks and the mortar that he used
19 to build a better kind of controller. Instead, the
20 Patent Office recognized that Mr. Armstrong took the
21 bricks and took the mortar that some people already knew
22 about and used them to build something that had never
23 been seen before.

24 We just heard a lot of talk about the single
25 member again. I thought that Professor Howe explained

1 that this morning about as well as I think it could be
2 explained. What he said was simple. Yes, there is a
3 disclosure in the 1996 application about using a single
4 member. That's in there. But it's not all that's in
5 there. There's a lot of other ideas disclosed,
6 including using multiple input members -- and you've
7 seen those in the drawings over and over and over
8 again -- the buttons, the buttons on this, the buttons
9 on the handle, the buttons on the device that looks
10 almost just like the Wii Remote.

11 What Nintendo is trying to do is to say that
12 because one of the things disclosed was the single
13 member idea, that's all you should consider and that you
14 shouldn't say that there's any disclosure for anything
15 different in 1996.

16 But, ladies and gentlemen, Nintendo doesn't
17 get to define it that way. Mr. Dezmelyk doesn't get to
18 summarize what he thinks is in the application and then
19 say to you, "That's all there is and, therefore, you
20 have to find there was no disclosure of claim 19, for
21 example, back in 1996."

22 Professor Howe went through in great
23 detail -- as did Mr. Dezmelyk during his
24 cross-examination; although, he apparently didn't want
25 to -- to show you time after time after time in the

1 drawings and in the specification where there was not a
2 limitation just to a single member of control, but there
3 were secondary members of control.

4 And more than that, ladies and gentlemen,
5 there is ample support for that in the 1996 application.
6 And Nintendo's argument that the patent is invalid for
7 failure to have adequate disclosure back in '96 just
8 doesn't hold water.

9 On the same idea of the single member, they
10 talked about the Chang reference. Well, Professor Howe
11 also explained that this morning; and he said, "Yes,
12 there was a discussion of the Chang reference; and, yes,
13 Mr. Armstrong told the Patent Office he didn't think
14 that Mr. Chang" -- poor Mr. Chang, he's not even here to
15 defend himself -- "but Mr. Armstrong didn't think that
16 Mr. Chang had made a very good controller and he didn't
17 think that the way he had designed his three-input
18 controller worked very well."

19 Well, Professor Howe said he didn't think it
20 was very good, either; but that's not really the point.
21 The point is just because Mr. Armstrong told the Patent
22 Office in '96 that he didn't think Mr. Chang had a very
23 good controller has nothing to do with whether
24 Mr. Armstrong himself in that application also disclosed
25 controllers that used multiple input members.

1 Next, Nintendo raises again the
2 accelerometer. There's a clever piece of semantics
3 that's going on here where Nintendo continues to ask you
4 to believe that the chip itself is a sensor -- and some
5 people refer to it as a "sensor" -- and that you should
6 stop there. But Professor Howe explained to you not
7 only in words and in drawings but showed you in pictures
8 that inside that chip, there is a movable element called
9 a "mass," that there are at least two sensors that sense
10 the movement of that mass.

11 Ladies and gentlemen, that's what claim 19
12 requires in the third element; and the evidence has
13 shown you it's present in the accelerometer.

14 And, finally, we heard, "Well, Sony didn't
15 pay anything for this invention. Why should Nintendo
16 have to?"

17 Ladies and gentlemen, the evidence is
18 undisputed that when Mr. Armstrong and Mr. Tyler entered
19 into the Sony agreement, the '700 patent hadn't yet
20 issued from the Patent Office. Sony couldn't pay for
21 this patent because it didn't exist yet. They did,
22 however, you'll remember, in their agreement, take care
23 to make sure that they had the right to use any future
24 inventions by Mr. Armstrong, which just happens to
25 include the '700 patent.

1 Ladies and gentlemen, now that you've heard
2 all the evidence, we believe it shows you that this man,
3 Brad Armstrong, had a vision, a vision of a way to build
4 a better video game controller. You've heard that the
5 United States Patent Office agreed that his invention
6 was valid and was worthwhile. You've heard that others
7 in the industry have recognized that. And we believe
8 the evidence has shown you that Sony, in the controllers
9 we've described to you, uses that invention and
10 infringes his patent. The time has now come for you to
11 write the last chapter to this story, and we look
12 forward to your response.

13 THE COURT: All right. Ladies and gentlemen,
14 it is your sworn duty as jurors to discuss the case with
15 one another in an effort to reach agreement, if you can
16 do so.

17 Now, each of you must decide the case for
18 yourself but only after consideration of the evidence
19 with the other members of the jury. Now, while you're
20 discussing the case, don't hesitate to reexamine your
21 own opinion and change your mind if you become convinced
22 that you are wrong. However, do not give up your honest
23 belief solely because the others think differently or
24 merely to finish the case.

25 Remember that in a very real way, you are

1 judges. You are the judges of the facts. Your only
2 interest is to seek the truth from the evidence in the
3 case.

4 Do not let bias, prejudice, or sympathy play
5 any part in your deliberations. The case should be
6 considered and decided by you as an action between
7 persons of equal standing in the community, of equal
8 worth, and holding the same or similar stations in life.
9 A corporation is entitled to the same fair trial at your
10 hands as a private individual and should be treated as
11 such. The law is no respecter of persons; all persons,
12 including corporations and other organizations, stand
13 equal before the law and they are to be dealt with as
14 equals in a court of justice.

15 Now, when you retire to the jury room to
16 deliberate on your verdict, you will take the charge
17 with you as well as the exhibits which the court has
18 admitted into evidence. When you go to the jury room,
19 the first thing you should do is select one of your
20 number as your foreperson, who will help guide your
21 deliberations and speak for you here in the courtroom.

22 The foreperson should read, or have another
23 juror read, these instructions to the jury; and you
24 should then begin your deliberations.

25 Now, if you recess during your deliberations,

1 follow all the instructions that the court has given you
2 on your conduct during the trial. Don't discuss the
3 case unless all jurors are present in the jury room.
4 After you've reached a unanimous verdict, your
5 foreperson must fill in your answers to the written
6 questions and initial and date the verdict form. You've
7 seen some pictures of it. You'll have an original
8 verdict form in there. It has a series of questions for
9 you to answer. And then on the last page, a spot for
10 the date and the initials of the foreperson.

11 Do not reveal your answers until such time as
12 you are discharged, unless otherwise directed by me.
13 You must never disclose to anyone, not even to me, your
14 numerical division on any question.

15 Now, if you want to communicate with me at
16 any time, please give a written message or question to
17 the court security officer who will bring it to me; and
18 I'll respond as promptly as possible in writing or by
19 having you brought into the courtroom so I can address
20 you orally.

21 The presiding juror or any other juror
22 who observes a violation of the court's instructions
23 shall immediately warn the one who is violating the same
24 and caution the juror not to do so again.

25 Now, after you've reached a verdict, you are

1 not required to talk with anyone about the case unless
2 the court orders otherwise.

3 What we're going to do is give each of you,
4 as you file out, a copy of what I just read plus a copy
5 of the verdict form for you to have.

6 You may now retire to the jury room to
7 conduct your deliberations.

8 (The jury exits the courtroom, 3:32 p.m.)

9 THE COURT: Any objection to that final
10 portion of the charge as read from plaintiff?

11 MR. CAWLEY: No, your Honor. No objections.

12 THE COURT: From defendant?

13 MR. GUNTHER: No, sir.

14 THE COURT: All right. I'm going to ask that
15 at least one lawyer from each side remain available in
16 case a question comes back. You don't have to keep your
17 entire team here. But if a question comes back from the
18 jury, I want to answer it just as quickly as possible.

19 What I'd like to do is take a short break and
20 then let's start looking at the inequitable conduct
21 portion while all of the other facts are still fresh in
22 my mind. So, we'll be in recess until ten of 4:00.

23 (Recess, 3:33 p.m. to 3:48 p.m.)

24 (Open court, all parties present, jury not
25 present.)

1 THE COURT: All right. We've got the
2 inequitable conduct part of the case. I noted from a
3 footnote in, I think, Anascape's brief some discussion
4 about at some point you might be getting together and
5 agreeing on at least some of the items. Did counsel
6 ever get a chance to do that?

7 MR. PRESTA: I'm sorry. No, we have not,
8 your Honor.

9 THE COURT: Okay. Well, I presume that the
10 stipulations that were a part of the Pretrial Order are
11 still stipulated; and I guess there's really not much
12 contest about the order in which the various patents
13 were filed. I mean, what I would suggest is that we get
14 into what the real case is. And since defendants have
15 the burden of proof on it, my guess is that they
16 probably ought to go first.

17 MR. PRESTA: That's fine, your Honor.

18 THE COURT: Okay.

19 MR. PRESTA: We call our first witness.

20 THE COURT: All right.

21 MR. PRESTA: The defense calls Brad
22 Armstrong.

23 THE COURT: Okay. And if you want to help me
24 out with an interim statement about where you're going
25 as we go along here, that -- no point in trying to hide

1 it from me.

2 MR. PRESTA: Understood, your Honor. And I
3 do believe we --

4 THE COURT: Okay. Debbie, first of all, go
5 ahead and -- you might as well go ahead and swear
6 Mr. Armstrong in so there is no doubt.

7 (The oath is administered.)

8 THE COURT: And maybe it would be helpful if
9 I gave counsel for both sides my questions or what -- I
10 mean, it seems to me there's a lot of focus on this
11 CyberMan. There seems to be -- I'm not sure it's
12 uncontested that it wasn't provided at one point; it was
13 provided later on. And defendant's argument is it was
14 inequitable because it wasn't provided earlier with the
15 '525 and that the later submission is insufficient, that
16 '525 is still, as they call it, "infected" and the
17 Baxter rule doesn't apply because the two prongs of that
18 test are not met. Is that a fair summary?

19 MR. PRESTA: You got it.

20 THE COURT: Okay. Go ahead.

21 MR. PRESTA: Your Honor, an interim statement
22 would be that you're correct. The entire inequitable
23 conduct argument centers around a piece of prior art
24 called the "CyberMan," which you saw a little bit of in
25 the jury trial. It is one of those 6-degree-of-freedom

1 single input member devices that was available back in
2 1993. And there's no dispute, I don't believe, about
3 the date that it was available. There's no dispute
4 about the date -- 1994 -- that Mr. Armstrong had a lot
5 of interaction with this company who made the CyberMan.
6 Mr. Armstrong has admitted in his depositions that he
7 had taken this thing apart and he knew it intimately in
8 1994.

9 One of the most important issues, your Honor,
10 is that it was disclosed in the earlier patent
11 applications just as a brochure.

12 THE COURT: I'm sorry. Just as what?

13 MR. PRESTA: Just as a product brochure.

14 THE COURT: Oh, okay.

15 MR. PRESTA: Not as a -- the inner workings
16 of it were never described to the Patent Office. So,
17 really the dispute is going to center around the fact
18 that Mr. Armstrong disclosed what the thing looked like
19 in a brochure, but he didn't tell the Patent Office what
20 he knew about the inner workings of the device. That's
21 really going to be the focus.

22 And, in particular, there is a term I know
23 your Honor is familiar with, which is the term "flexible
24 membrane sheet." That term comes back and haunts us in
25 this part of the trial.

1 There was a flexible membrane sheet inside
2 that handle in 1994 that Mr. Armstrong knew all about.
3 That flexible membrane sheet was claimed by
4 Mr. Armstrong in the '525 application. The flexible
5 membrane sheet was never disclosed in the two
6 applications that led up to the '525 or anytime during
7 the '525 prosecution or for several years into the '700
8 prosecution. And in the '525 prosecution, Mr. Armstrong
9 cut a deal with the examiner where the examiner didn't
10 know about this flexible membrane sheet and
11 Mr. Armstrong convinced the examiner to give him claims
12 that read specifically on this exact flexible membrane
13 sheet in a 102 anticipation context while Mr. Armstrong
14 knew, in fact, that the CyberMan piece of prior art had
15 this exact sheet in it.

16 THE COURT: Well, what was this "deal"?

17 MR. PRESTA: He had an interview with the
18 examiner -- I shouldn't have called it a "deal." It was
19 an interview where they agreed that, in fact, the
20 examiner said, "It doesn't appear to me that the prior
21 art shows a flexible membrane sheet that has four
22 sensors for a bi-directional input member and also some
23 sensors for some buttons."

24 If you look at the CyberMan product in the
25 top here, this thing here is bi-directional. I'm sure

1 your Honor's familiar by now what that's all about. And
2 there are some buttons on the front (indicating). And
3 the examiner said, "Well, nothing else appears to be
4 patentable."

5 But what does appear to be patentable based
6 on what he knew about was this sheet that I'm holding in
7 my hand. And I'd be happy to pass it up if your Honor
8 would like to see it. Inside that handle is this sheet
9 where the sensors for the four ways this thing can rock
10 and those three buttons are all on one sheet. And, in
11 fact, you can see that sheet --

12 Thank you. I forgot I had figures for that.

13 This is actually the sheet that's inside the
14 CyberMan. I don't think this bench trial will involve
15 any disputes about what exactly is in that product or
16 what Mr. Armstrong knew about it.

17 There are claims in the '525 that were
18 asserted against Nintendo in this case by Mr. Armstrong
19 that were actually exact copies of this flexible
20 membrane sheet word-for-word and are 102 anticipatory.
21 This CyberMan was a 102. Mr. Armstrong knew about it
22 when he was meeting with the examiner and crafting his
23 claims and actually got claims on this exact sheet that
24 is in the 1993 CyberMan product. And those claims were
25 all asserted against Nintendo in this case.

1 THE COURT: All right. Go ahead with the
2 testimony, then.

3 MR. PRESTA: Thank you.

4 DIRECT EXAMINATION OF BRAD ARMSTRONG

5 CALLED ON BEHALF OF THE DEFENDANT

6 BY MR. PRESTA:

7 Q. Good afternoon, Mr. Armstrong.

8 A. Good afternoon.

9 Q. Now, you heard that interim statement, right?

10 A. Yes, I did.

11 Q. And you don't disagree with me. In fact, you --

12 MR. PRESTA: Could we just start, please, at
13 Slide 7? That's fine right there.

14 BY MR. PRESTA:

15 Q. Do you agree, Mr. Armstrong, that, in fact, the
16 CyberMan product came out in 1993?

17 A. Yes, it did.

18 Q. Okay. And you were aware of it around that time,
19 right?

20 A. Yes, sir.

21 Q. In fact, you saw it personally in 1993?

22 A. Yes, sir.

23 Q. And you had some interaction, in fact, with the
24 company who made the CyberMan, right?

25 A. Yes, sir.

1 Q. What was the company name?

2 A. Logitech.

3 Q. Okay. Could you tell me about your relationship
4 with Logitech back in 1993, if there was one?

5 A. Yes. After I had filed the '828 patent
6 application, I had a meeting with Logitech shortly
7 thereafter. That didn't go anywhere.

8 But then I had went to a Meckler VR
9 Conference, where I had a booth; and at that show
10 Logitech got very interested in my controller. And then
11 there were a lot of meetings at Logitech.

12 Q. Okay. And isn't it true that shortly after that
13 product came out, you obtained one?

14 A. Yes, sir.

15 Q. And isn't it true that you actually took it apart
16 to see inside it to see if, in fact -- you were
17 concerned that they might be -- might have stolen some
18 of your technology, right?

19 A. Yes, sir.

20 Q. And you took it apart to check and see if they, in
21 fact, used your technology on the inside, didn't you?

22 A. Yes, sir.

23 Q. And that was in -- at least as early as 1994,
24 right?

25 A. Yes, sir.

1 Q. And in 1994 you learned, in fact, that there was
2 this flexible membrane sheet in there, right?

3 A. Yes, sir.

4 Q. And, in fact, you learned that the flexible
5 membrane sheet that was used in the handle of the
6 CyberMan product had four sensors on it for a
7 bi-directional input member, as well as some sensors for
8 buttons all on the same sheet, right?

9 A. Yes, sir.

10 Q. Now, you can't see that flexible membrane sheet
11 from the outside of the product, can you?

12 A. No, sir.

13 Q. In fact, there would be no way to confirm whether
14 or not it had a flexible membrane sheet without opening
15 it up, could you?

16 A. I believe that's correct.

17 Q. Okay. Now, CyberMan -- and just backing up in
18 time, the '700 patent that we have been litigating for
19 the past week traces back to three earlier patents,
20 right, starting with the '828 application?

21 A. Yes, sir.

22 Q. And that was filed when?

23 A. 1992.

24 Q. Okay. So, at that time, in 1992, you had a patent
25 application on file. Did that patent application

1 disclose a flexible membrane sheet?

2 A. No, sir.

3 Q. In fact, the first patent application you ever had
4 that disclosed a flexible membrane sheet was in 1996,
5 right, the '525 application?

6 A. Yes, sir.

7 Q. Now, when you were prosecuting the '828 application
8 that you filed in 1992, you had entered into a
9 nondisclosure agreement with Logitech, right?

10 A. In 1992?

11 Q. Sometime during the --

12 A. Yes.

13 Q. Well, you tell me. Did you have a nondisclosure
14 agreement with Logitech?

15 A. Yes. I think I had two.

16 Q. Okay. Was there one around 1992 that you recall?

17 A. Yes, sir.

18 Q. And what was that related to?

19 A. I don't remember the specifics, but it was to my
20 inventions.

21 Q. Okay. You had actually shown them some of your
22 ideas and you had a nondisclosure agreement with them?

23 A. Yes, sir.

24 Q. Okay. Now, moving on, that 1992 application which
25 turned into the '828 patent application, you submitted

1 the CyberMan brochure in that application in order to
2 tell the patent examiner that Logitech had -- in your
3 view had taken your invention, right?

4 A. Yes, sir. Probably not exactly in those words, but
5 yes, sir.

6 Q. But you submitted it to try and get the Patent
7 Office to potentially speed up your prosecution because
8 you told the patent examiner that you believed Logitech
9 had stolen your ideas and put them into the CyberMan,
10 right?

11 A. Yes, sir. I don't think I was trying to get them
12 to speed up but -- yes, sir.

13 Q. Okay. You didn't submit it as a formal Information
14 Disclosure Statement in the '828, did you?

15 A. No, sir.

16 Q. But you did bring it to the attention of the
17 examiner and complained to the examiner that, in fact,
18 maybe Logitech had stolen your ideas?

19 A. Probably something like that, yes, sir.

20 Q. Okay. Now, I have some deposition testimony; but I
21 don't want to waste any time. I just want to make
22 absolutely clear that you testified earlier and in your
23 deposition that at least as early as 1994, you were
24 fully aware of the flexible membrane sheet that was used
25 in CyberMan.

1 A. Yes, sir.

2 Q. Now --

3 MR. PRESTA: If I could move just to Slide 22
4 just to speed things along.

5 BY MR. PRESTA:

6 Q. In 1994, during the pendency of that '828
7 application, you gave the CyberMan brochure to the
8 Patent Office, right?

9 A. When?

10 Q. In 1994, during the pendency of that '828
11 application.

12 A. Okay. Yeah, I think that's right. Yes, sir.

13 Q. Okay. And I know this isn't a memory test; and I
14 did bring --

15 MR. PRESTA: For fairness, we have books -- I
16 don't know if I've given you a set or the court a set,
17 which I should probably pass out, with your Honor's
18 permission.

19 THE COURT: Please.

20 BY MR. PRESTA:

21 Q. Don't worry. We're not going to go through all of
22 these. But if you could just set them down, we'll refer
23 to them when we need to.

24 MR. PRESTA: And don't be concerned, your
25 Honor. They are only so large because they involve file

1 hi stories.

2 THE COURT: It will give me something to read
3 tonight.

4 BY MR. PRESTA:

5 Q. Now, that CyberMan brochure, for the record, is
6 Defendant's Exhibit 25.

7 Now, Mr. Armstrong, you'll agree with me --
8 I'm sorry. Actually, here's an example of -- here's an
9 example of -- in that '828 application, this was some of
10 your writings that you submitted to the Patent Office;
11 and I just ask you: Do you recognize that?

12 A. It looks familiar, yes, sir.

13 Q. Okay.

14 THE COURT: Hold up one second. As far as I
15 know so far, you've not handed up either Defendant's
16 Exhibit 25 or 22 that you have on the screen now. Is
17 that correct? All you've got up so far is Defendant's
18 Exhibits 1, 2, 4, 18 -- okay. Here it is. Here it is.
19 It was just buried in the back. I'm sorry. Go ahead.

20 MR. PRESTA: My understanding is they should
21 all be in there, your Honor; but I can't guarantee that.
22 It was a late night.

23 THE COURT: No. I've found it.

24 BY MR. PRESTA:

25 Q. Now, Defendant's Exhibit 22 is the file history;

1 and, Mr. Armstrong, this is some of the -- you were
2 writing to the Patent Office saying that the company
3 copied your invention. They copied it identically, that
4 the controllers -- you're referring to the CyberMan
5 product here, right?

6 A. Yes, sir.

7 Q. You're telling the Patent Office that the CyberMan
8 product was an exact copy of your invention; and you
9 actually told the Patent Office that, "Here's a
10 brochure. You can see it. It's under a trade name
11 'CyberMan,' " right?

12 A. Yes, sir.

13 Q. Okay. Then -- and you actually gave the Patent
14 Office the brochure. Do you recognize that?

15 A. Yes, sir.

16 Q. And that's actually a copy of the brochure. It's
17 Defendant's Exhibit 22, which is a part of the file
18 history. It's contained within the file history.

19 That brochure doesn't in any way tell you
20 what's on the inside of the controller, particularly
21 with respect to the flexible membrane sheet, does it?

22 A. That's correct.

23 Q. So, somebody looking at the brochure would have no
24 way of knowing that there is a flexible membrane sheet
25 inside there?

1 A. Yes, sir.

2 Q. Now, the next thing that happened -- and, again,
3 this is in the '828 prosecution history, the first one.
4 It did tell some things about the CyberMan brochure --
5 about the product. It said it was an input device
6 that's built for hard-core gamers, for example, didn't
7 it?

8 A. Yes, sir.

9 Q. And it also said it had proportional control in X
10 and in Y, right?

11 A. Yes.

12 Q. Okay. And, then, there was a second page of the
13 brochure which, again, you've confirmed -- and correct
14 me if I'm wrong. But there's no information in the
15 brochure that there is a flexible membrane sheet used in
16 there, is there?

17 A. I'm unaware of any.

18 Q. Okay. Now, in the '828 application, the
19 examiner -- this is Defendant's Exhibit 108 [sic] --
20 issued an Office Action --

21 THE COURT: Wait a minute. I guess I'm
22 getting confused.

23 MR. PRESTA: I'm sorry. It's Defendant's
24 Exhibit 22, page 108, that we're on at the moment. I'm
25 going to work you through the file history of the '828

1 patent application, which was the first one in the
2 line --

3 THE COURT: I've got Defendant's Exhibit 12,
4 Defendant's Exhibit 12.1, Defendant's Exhibit 2, 4, 18,
5 21, 25, and 293.

6 MR. PRESTA: Okay.

7 THE COURT: Is 22 a -- I mean, if it's a file
8 history, is it in a separate volume somewhere maybe?
9 Maybe you've missed a three-ring binder.

10 MR. PRESTA: We may have, your Honor.

11 It doesn't appear that -- I apologize -- that
12 we have that Defendant's Exhibit 22 in the courtroom
13 with us at the moment, or a copy for you, your Honor.
14 Of course, we have it electronically.

15 MR. BOVENKAMP: Your Honor?

16 THE COURT: Yes.

17 MR. BOVENKAMP: Defendant's Exhibit 22.

18 THE COURT: Okay.

19 MR. PRESTA: Thank you. Appreciate that.

20 THE COURT: I guess that's only if you want
21 me to read it.

22 MR. PRESTA: Certainly that was the
23 intention.

24 THE COURT: All right. Let me catch up with
25 you here. Page 108.

1 MR. PRESTA: We are at page 108. And the
2 last slide we were on we were looking at his comments
3 about the CyberMan was on page 77. And we're not going
4 to spend a lot of time in this file history. I just
5 have a few events that I want to point out.

6 THE COURT: All right. Go ahead.

7 BY MR. PRESTA:

8 Q. Now, currently we're looking at Defendant's
9 Exhibit 22, page 108; and there was an Office Action
10 issued on September 28th of 1994 that I have on the
11 screen, Mr. Armstrong. Do you recall that?

12 A. I don't have a specific memory of it, no, sir.

13 Q. I certainly understand that, but I'll represent to
14 you that there was. And, in fact, on page 109, the
15 examiner commented about the Information Disclosure
16 Statement and because you had submitted a CyberMan
17 brochure, the examiner was writing back saying that it
18 wasn't submitted in a way that was proper to have it
19 considered as prior art. Do you recall that?

20 A. Yes, approximately.

21 Q. And he suggested that it would be placed in the
22 file but it wouldn't be considered. Do you recall that?

23 A. Yes, sir.

24 Q. Okay. And then the prosecution went on and -- up
25 to page 127 of Defendant's Exhibit 122 [sic]. You filed

1 what was called an "Urgent, Response [sic] to Final
2 Action." And that was on January 11th of 1995 at page
3 127. And, again, this is really just preliminary, but
4 I'm just trying to get your Honor to understand a little
5 bit of the history.

6 In that final "Urgent, Response [sic] to
7 Final Action" that you drafted -- right, Mr. Armstrong?

8 A. Yes, with my friend Brian Carlson.

9 Q. Okay. And, in fact, just to be clear, so the court
10 understands, if it doesn't already, you handled your
11 patent applications yourself, right?

12 A. Yes, with one friend. Yes, sir.

13 Q. Okay. But you were the one that usually signed the
14 papers and -- were you primarily responsible for
15 drafting them?

16 A. I don't know that I would go that far, but I
17 certainly signed them. I was primarily responsible for
18 the content.

19 Q. Okay. And on page 130 you told the examiner that
20 there was no reason for you to submit it as prior art
21 because, in your view, the CyberMan was not prior art to
22 your '828 application and, instead, you believed it was
23 infringing or somebody that was violating your rights,
24 right?

25 A. Yes, sir.

1 Q. And, in fact, the examiner agreed with you on that
2 because you had a filing date back to 1992, right?

3 A. Yes, sir.

4 Q. So, you were able to actually remove the CyberMan
5 as a piece of prior art because you had a filing date
6 that was earlier than it.

7 A. I did have an earlier date, yes, sir.

8 Q. Okay. So that it never really became a big issue
9 in the '828 application because the CyberMan -- because
10 you had priority over CyberMan in the '828, right?

11 A. Yes, sir.

12 Q. But, again, your '828 application did not disclose
13 a flexible membrane sheet, did it?

14 A. No, sir.

15 Q. Now, you also then -- in February 23rd of 1995, do
16 you recall filing a second application; in other words,
17 a patent application that ultimately resulted in the
18 '891 patent?

19 A. Yes, sir.

20 Q. And this was the second one in that family?

21 A. Yes, sir.

22 Q. Okay. Now, when you filed -- after you filed that
23 application, you got an Office Action -- first of all,
24 that application was filed on February 23rd of 1995,
25 right?

1 I'm sorry. I'll represent -- I don't expect
2 you to remember those things. I'll represent to you
3 that it was.

4 A. Okay.

5 Q. And then you eventually got an Office Action in
6 July of 1995. Do you have any reason to dispute that?

7 A. No, sir, no reason.

8 Q. Okay. And the Office Action indicated that it had
9 been examined; and, in fact, there was a rejection that
10 the examiner gave based on CyberMan. Do you recall
11 that?

12 A. Yes, sir.

13 Q. And, then, do you recall having an interview -- a
14 telephone interview with the patent examiner?

15 A. I don't recall that, no, sir.

16 Q. Okay. Well, let me see if I can refresh your
17 recollection. This is what's called an "Interview
18 Examiner [sic] Summary Record."

19 THE COURT: Hold up, counsel.

20 MR. PRESTA: Yes.

21 THE COURT: We have two notes from the jury.
22 One is the juror -- the foreperson is Terence
23 Harshbarger; and the second is the jury wants to recess
24 at 5:00, until 8:45 in the morning.

25 Would you let them know that before they

1 recess, I'm going to bring them in here -- bring them in
2 about five of 5:00 and I'll give them their instructions
3 for leaving? They can leave. I just need to -- it's
4 got to be on the record that they are leaving and coming
5 back in. That's all.

6 COURT SECURITY OFFICER: Yes, sir.

7 THE COURT: Okay.

8 Go ahead, counsel.

9 MR. PRESTA: Thank you. We're in Defendant's
10 Exhibit 22, page 61, where there is a record of
11 Mr. Armstrong having a telephone interview with the
12 Examiner Chen in connection with his second application,
13 which resulted in the '891 patent.

14 BY MR. PRESTA:

15 Q. And you had an interview summary -- do you remember
16 receiving this interview summary?

17 A. Yes, sir.

18 Q. Okay. And, in fact, the discussion that you had
19 was about the CyberMan, right?

20 A. I think so, yes, sir.

21 THE COURT: Let me ask a question here. Was
22 CyberMan disclosed by Mr. Armstrong prior to this? In
23 other words, you seemed to indicate that in the prior
24 application dealing with the '828 patent, the PT0
25 examiner said that it wasn't proper for a disclosure and

1 so -- I don't know if he wasn't going to read it, he was
2 just going to ignore it, or he was just going to use
3 some technicality, but evidently it wasn't good enough.
4 But now somehow it shows up again in this application
5 for the -- what? The '881?

6 MR. PRESTA: '891.

7 THE COURT: '891?

8 MR. PRESTA: Yes.

9 THE COURT: So, how did the examiner get it
10 this time? Do we know?

11 MR. PRESTA: Yes -- well, we don't exactly.
12 But as a patent lawyer and understanding the Patent
13 Office, my understanding is that the examiner handling
14 it would have looked at the parent application. And
15 when he looked at the parent application, even though it
16 wasn't a formal document in that application, apparently
17 the examiner looked at it and issued a rejection based
18 on it.

19 THE COURT: All right. So, given that,
20 aren't these parents in the chain of getting up to the
21 '525 and the '700? Why wouldn't the same apply?

22 MR. PRESTA: Yes, your Honor. And if there
23 had been a complete disclosure of the CyberMan and the
24 fact that there was a flexible membrane sheet, we
25 wouldn't be having this bench trial. The issue is that

1 the brochure doesn't disclose anything about the inside,
2 about the flexible membrane sheet that Mr. Armstrong was
3 aware of the entire time. It was just a brochure. And
4 you'll hear from Mr. Fiorito -- and you might already
5 know this -- that an applicant has a duty, if they know
6 about things that are relevant to their claims. A
7 brochure that doesn't disclose those things doesn't
8 satisfy your duty of disclosure. There was a further
9 obligation to actually tell the examiner that, "Hey, I
10 know what's inside this thing; and what's inside there
11 is very relevant to my claims." You have a duty in that
12 situation to do more than just provide a flyer that
13 shows the outside of the product.

14 THE COURT: All right.

15 MR. PRESTA: That's the heart of the case,
16 your Honor.

17 THE COURT: All right. Go ahead.

18 BY MR. PRESTA:

19 Q. Now, the examiner actually issued a rejection; but
20 your interview you correctly --

21 MR. PRESTA: And we don't take any issue with
22 what happened in the '828 or the '891, your Honor, just
23 to be clear. Mr. Armstrong actually explained to the
24 examiner that his patent was earlier. So, he had an
25 earlier date than CyberMan; so, it was not prior art

1 because the publication date of CyberMan was not until
2 1993 and he was claiming priority back to 1992. So,
3 this is again just background. We're not using it as --
4 we're not accusing Mr. Armstrong of anything improper in
5 these two file histories.

6 BY MR. PRESTA:

7 Q. But the CyberMan was removed as a prior reference
8 against your '891 application, Mr. Armstrong. Do you
9 remember that?

10 A. You know, I don't have any specific memories of any
11 of this but that's what the record reflects and, so, I
12 do believe that's exactly what happened. Yes, sir.

13 Q. Okay. Thanks.

14 MR. PRESTA: Then, in July 15th -- now we're
15 getting a little bit more into the heart of the matter.
16 In July of -- July 5th, 1996, Mr. Armstrong filed what
17 turned into the '525 patent, the '525 application.

18 Very shortly after that interview in
19 September of 1996 in the earlier case, he filed the '525
20 which also claimed priority back to both of these
21 earlier applications.

22 BY MR. PRESTA:

23 Q. Do you recall that, Mr. Armstrong?

24 A. I did do that, yes, sir.

25 Q. Okay. And this is the application that resulted in

1 the '525 patent that you -- that was one of the patents
2 that you sued Nintendo on in this case, right?

3 A. I think so, yes, sir.

4 Q. And --

5 MR. PRESTA: Well, the court's aware of the
6 reason that '525 was not litigated in the jury trial.

7 BY MR. PRESTA:

8 Q. The next thing, this patent application -- we just
9 showed you the front of the '525 patent itself. Again,
10 it was filed in 1996. It was titled "Image Controllers
11 with Sheet-Connected Sensors." This is the first time,
12 isn't it true, Mr. Armstrong, that you ever filed
13 anything that had to do with flexible membrane sheets?

14 A. I think so, yes, sir.

15 Q. In 1996. Correct?

16 A. Yes, sir.

17 Q. And you indicated that it was a
18 continuation-in-part of the '891 which was a
19 continuation-in-part of the '828, those two earlier ones
20 we just looked at, right?

21 A. Yes, sir.

22 Q. Okay.

23 MR. PRESTA: Now, this is the actual
24 application filing date. It's the '525 application, and
25 that's Defendant's Exhibit 12. I think some of these

1 exhibits might have been called out separately from the
2 main file to make it easier, or perhaps 12 is the entire
3 file history. Let me just confirm that. It's the
4 entire file history for the '525. Okay. It's actually
5 12-1 because it was a corrected copy, I believe; and
6 it's the one your Honor has.

7 BY MR. PRESTA:

8 Q. Now, Mr. Armstrong, do you remember that '525
9 patent application?

10 A. Yes, sir.

11 Q. Did you draft it yourself, together with your
12 friend?

13 A. Yes, sir.

14 Q. Okay. And you're the inventor?

15 A. Yes, sir.

16 Q. And you indicated -- in fact, you signed paperwork
17 saying that you were the inventor, right?

18 A. I did.

19 Q. Do you recall this figure -- some of the figures
20 are actually the same as the figures we've seen in this
21 jury trial, right?

22 A. Yes, sir.

23 Q. Now, do you recognize this figure?

24 A. Yes, sir.

25 Q. Now, this figure is a figure that's the first time

1 you've given a figure to the Patent Office that
2 discloses a flexible membrane sheet, right?

3 A. Yes, I believe so.

4 Q. Okay. Now, that flexible membrane sheet looks
5 awfully similar to the CyberMan flexible membrane sheet,
6 doesn't it?

7 A. There are similarities, yes, sir.

8 Q. In fact, they are almost identical, aren't they?

9 A. They're very similar.

10 Q. In fact, this flexible membrane sheet includes
11 sensors for having a two-axis control element mounted in
12 the middle, right?

13 A. I would guess so. I haven't looked at this in a
14 long time.

15 Q. Well, this is the same exact drawing that's in your
16 '700 application that we just did the jury trial on,
17 right? This is the same figure. You have this figure
18 in that application, too, right?

19 A. I think all the figures are identical, yes, sir.

20 Q. Okay. Well, again, in looking at it, it has four
21 sensors on it, right, that can be used to sense, in
22 fact, a two-axis control member, right?

23 A. You know, I haven't focused on this drawing for a
24 long time. I suspect that it's probably a six-axis --

25 Q. Okay. But it has at least four, right, that it can

1 sense on the top?

2 A. I would guess so, yes, sir.

3 Q. Okay. And it also has these fingers sticking out
4 along here (indicating). Those were for, for example,
5 buttons, right?

6 A. I don't recall.

7 Q. Okay.

8 MR. PRESTA: Now, I'd like to just go back to
9 page -- with this image in mind, I'd like to go back to
10 Slide 16, please.

11 BY MR. PRESTA:

12 Q. Now, this is the flexible membrane sheet that came
13 out from the inside of the CyberMan product, right?

14 A. Yes, sir.

15 Q. And, in fact, this is that top handle of the
16 CyberMan product, isn't it?

17 A. Yes, sir.

18 Q. And that CyberMan product actually has a rumble
19 motor in it, too, right, that was prior art to your 1996
20 filing?

21 A. That's a complex question.

22 Q. Okay. I'm sorry.

23 The CyberMan product -- there's no question
24 in your mind that the CyberMan product was prior art to
25 your 1996 patent application.

1 A. The CyberMan was prior to the 1996 patent
2 application, yes, sir.

3 Q. Yes. And it had a rumble motor in it, right?

4 A. Yes, sir.

5 Q. And it had this flexible membrane sheet with these
6 four sensors that could sense two directions and these
7 long flexible strands coming off to the end to hook up
8 with the buttons, right?

9 A. Yes, sir.

10 Q. And that shows the integration of buttons on a
11 flexible membrane sheet together with the two-axis
12 control member, right?

13 A. Yes, sir.

14 Q. And your 1996 application was designed to protect a
15 flexible membrane sheet that had these exact features,
16 wasn't it?

17 A. The 1996 application had really a lot of stuff in
18 it.

19 Q. Okay. But it also -- it also got -- you had claims
20 in there that are exactly the same as this flexible
21 membrane sheet, right?

22 A. I think at one point there was a claim like that.

23 Q. And, in fact, claims issued that are completely
24 anticipated by this flexible membrane sheet, aren't
25 they?

1 A. I believe so, yes, sir.

2 Q. And do you know what claims those may be?

3 A. I suspect you're probably talking about claim 12.

4 Q. Yes. And claim 12 is a claim you asserted against
5 Nintendo in this litigation that you've brought, isn't
6 it?

7 A. I don't know.

8 Q. And you knew, in fact, that that claim was
9 anticipated by the CyberMan prior art when you brought
10 that litigation, didn't you?

11 A. No, sir. I mean -- no, sir.

12 Q. When did you gain your understanding that, in fact,
13 the claim that you brought against Nintendo was, in
14 fact, anticipated by a piece of prior art that you were
15 aware of and didn't disclose to the Patent Office?

16 A. I think when you brought this issue up.

17 Q. And when was that?

18 A. Recently.

19 MR. PRESTA: Okay. If we could go forward
20 now to -- sorry. If I could jump ahead now to Slide 40.

21 BY MR. PRESTA:

22 Q. So, again, Mr. Armstrong -- and you learned about
23 the flexible membrane sheet from looking at the CyberMan
24 product, didn't you?

25 A. No, sir.

1 Q. You knew about -- you didn't have any flexible
2 membrane sheets in any earlier applications, did you?

3 A. No, sir.

4 Q. But the first time you had a flexible membrane
5 sheet in your patent application was in your 1996
6 filing, right?

7 A. Yes, sir.

8 Q. And this is the first figure in any patent
9 application you've ever had that discloses a flexible
10 membrane sheet, isn't it?

11 A. Yes, sir.

12 Q. Okay. Now, you continued -- this patent
13 application in 1996 was titled --

14 THE COURT: Hold up one minute, counsel.

15 MR. PRESTA: I apologize.

16 THE COURT: Okay. Go ahead.

17 MR. PRESTA: Okay.

18 BY MR. PRESTA:

19 Q. Now, when you filed the 1996 patent application on
20 the flexible membrane sheet, you actually included
21 claims specifically directed to the flexible membrane
22 sheet, right?

23 A. Yes, sir.

24 Q. For example, there's claim 10. Do you see that?

25 A. Yes, sir.

1 Q. Okay. And when you filed that patent application,
2 you also filed an inventor declaration, right?

3 A. Yes, sir.

4 Q. And you had filed inventor declarations in your
5 earlier cases, hadn't you?

6 A. Yes, sir.

7 Q. In fact, numerous times, right?

8 A. Yes, sir.

9 Q. And you understood that a duty of disclosure
10 existed -- that you had an obligation as an inventor and
11 somebody who is prosecuting the patent application --
12 that you had a duty to disclose information that may be
13 material to the examination of your application?

14 A. Yes, sir.

15 Q. In fact, you indicated to the Patent Office in that
16 declaration that you were the original, first, and sole
17 inventor of this graphic controller with sheet-connected
18 sensors that you were describing in your 1996
19 application, right?

20 A. Yes, sir.

21 Q. And you acknowledged that you have a duty to
22 disclose information that may be material to
23 patentability in that same declaration, right?

24 A. Yes, sir.

25 MR. PRESTA: And, your Honor, for the record,

1 I've now moved up to Defendant's Exhibit 12-1, page 55.
2 We tried to put the page numbers in the corner, if it's
3 helpful.

4 THE COURT: That's what I was going to say.
5 You didn't happen to number these pages, did you?

6 MR. PRESTA: Oh, I'm sorry. Those are not
7 numbered? They should have --

8 If I could approach?

9 THE COURT: Yes.

10 MR. PRESTA: I apologize about the number of
11 the notebooks, but there are pages --

12 THE COURT: Is that another version of 12-1?

13 MR. PRESTA: That's a numbered version of
14 12-1, two volumes of --

15 THE COURT: Then let me give you back the
16 unnumbered one.

17 MR. PRESTA: Okay.

18 THE COURT: And that one actually goes to
19 Mr. -- that's yours, I think.

20 MR. PRESTA: Thank you.

21 THE COURT: All right. I'll note for the
22 record that I can now finally read some of these
23 exhibits; so, I'll start paying attention.

24 Go ahead.

25 MR. PRESTA: Okay. Could I go to Slide 40,

1 please?

2 BY MR. PRESTA:

3 Q. Again, the flexible membrane sheet is in Figure 14
4 at page 70 of that notebook.

5 And the claim that was filed with the
6 application, including the flexible membrane sheet, one
7 of them is claim 10 that appears on page 51. And then
8 the declaration that we were just talking about appears
9 on page 55.

10 And, Mr. Armstrong, you recall acknowledging
11 your duty to disclose information that was material to
12 the examination of your application?

13 A. Yeah. I presume that that's the language that I
14 signed, yes, sir.

15 Q. Okay. And when you signed these documents, you had
16 a full understanding of what that duty was, right?

17 A. Yes, sir.

18 Q. And you also -- you signed a statement that said if
19 you provide any false statements -- that you understood
20 you were making a declaration that everything you told
21 the Patent Office was true, right?

22 A. Yes, sir.

23 Q. And part of that declaration was saying that you
24 were, in fact, the first and sole inventor of an
25 invention that contained a flexible membrane sheet in

1 it, right?

2 A. I mean, I think that I was signing something that
3 said that this is a patent application that I believed
4 that I was the inventor of, yes, sir.

5 Q. Okay. And you included -- and the application was
6 directed to the feature of a flexible membrane sheet,
7 wasn't it?

8 A. It was an element.

9 Q. Okay. And, in fact, the title of it was (reading)
10 a graphic controller with sheet-connected sensors,
11 right?

12 A. That's the title, yes, sir.

13 Q. And you signed that on July 15th of 1996. That's
14 the date of the filing of the application, right?

15 A. Yes, sir.

16 Q. Now, on Defendant's Exhibit 12 at page 99, do you
17 recognize that document?

18 A. Is that an IDS?

19 Q. Yes.

20 A. Yes, sir.

21 Q. And "IDS" is short for Information Disclosure
22 Statement?

23 A. Yes, sir.

24 Q. Okay. And you disclose some prior art there,
25 right?

1 A. Yes, sir.

2 Q. Because this is actually a list of prior art cited
3 by the applicant, right?

4 A. I think it is, yes, sir.

5 Q. And you listed, in fact, three references for the
6 examiner to consider, right?

7 A. Yes, sir.

8 Q. And you didn't list the CyberMan product, did you?

9 A. No, sir.

10 Q. And, in fact, you didn't even put the brochure for
11 the CyberMan product in, did you?

12 A. I believe that's correct.

13 Q. But the brochure was in the earlier application,
14 right?

15 A. Yes, sir.

16 Q. And, in fact, are you familiar with the rule that a
17 patent examiner may -- or, in fact, should go back to
18 the earlier application and take a look at what prior
19 art might be contained in an earlier application?

20 A. Yes, sir.

21 Q. You are familiar with that rule?

22 A. Yes, sir.

23 Q. Okay. Now, the brochure, of course, if the
24 examiner went back and looked at it -- you've already
25 told us that it would not disclose the fact that the

1 CyberMan had a flexible membrane sheet in it, would it?

2 A. The brochure didn't disclose a flexible membrane,
3 yes, sir.

4 Q. Okay. So, if the examiner went back and found the
5 brochure in your earlier patent applications, it would
6 not tell the examiner anything about the fact that it
7 had a flexible membrane sheet in it, would it?

8 A. That's correct.

9 Q. Now, the next thing that happens is the Patent
10 Office rejects certain of your claims by a patent to a
11 man named "Engle." Do you remember Engle? I don't even
12 know if I'm pronouncing that right, but E-N-G-L-E?

13 A. Not really, no, sir.

14 Q. Okay. And, again, it's not a memory test; so, let
15 me try and refresh your memory on what happened.

16 In September 30th of 1999, the Patent Office
17 issued a rejection in this application. That is at page
18 335 of Exhibit 12-1. And the examiner actually said the
19 claims 1 and 9 through 12 were rejected as being
20 anticipated by Engle. Does that refresh your memory at
21 all about that?

22 A. I don't remember that, no, sir.

23 Q. Okay. Now, Engle -- I have an image of Engle,
24 which is Defendant's Exhibit 12, page 25. The Engle
25 patent was called a "miniature isometric joystick." Do

1 you remember that?

2 A. No, sir.

3 Q. Okay. So, do you have any recollection that your
4 claims were rejected over that?

5 A. No. I don't remember that reference.

6 Q. Okay. Now, the patent examiner pointed out that
7 there was some type of a sheet in one of the figures in
8 Engle; and you got a rejection in that 1996 application.
9 Do you have any reason to dispute that that took place?

10 A. No, sir.

11 Q. Okay.

12 THE COURT: All right. Slow down a minute.
13 You're saying -- where does he say that in 12-1?

14 MR. PRESTA: Okay. The rejection over Engle
15 was at page 340.

16 THE COURT: Right. But all that says is
17 being anticipated. You said --

18 MR. PRESTA: Oh.

19 THE COURT: -- Later on -- I'm assuming that
20 there is some detail where you got the idea that it was
21 because of the sheets.

22 MR. PRESTA: Yes. And that's Defendant's
23 Exhibit 12, page 25.

24 THE COURT: Well, that's just the patent.
25 Why do you say what the examiner's reason was?

1 MR. PRESTA: Okay. Well, the examiner had a
2 rejection over it; and he has those detailed reasons on
3 page 340 -- or in the document that's contained at page
4 340.

5 THE COURT: That's what I'm wondering. Where
6 are the detailed reasons? I'm missing those. All I'm
7 getting is it's anticipated.

8 MR. PRESTA: Okay. I see, your Honor.

9 THE COURT: Where does it --

10 MR. PRESTA: I'll explain that to you.

11 If I could back up to Slide 46, please.

12 Your Honor, the page that you're on -- it's
13 not much of an explanation, but it says: Note
14 Figure 1C, Element 168.

15 THE COURT: All right. And that's in the --

16 MR. PRESTA: That's in the Engle reference,
17 Defendant's Exhibit 12, page 25 and particularly page
18 28.

19 THE COURT: Okay. 168 of the Engle patent is
20 a flexible membrane sheet?

21 MR. PRESTA: It's not clear whether --

22 THE COURT: It says it's a sensor assembly in
23 Column 7. It says: Drives -- through a clearance hole
24 in the sensor assembly 168 into contact with a membrane
25 switch 173...

1 All right. Well, given this -- and it goes
2 on to talk about membrane and the membrane sensor switch
3 which you have two -- two sheets interspersed by a
4 middle one with the holes in it so that you can make the
5 contact pushing down through it. You have the sensor.

6 If the examiner is aware of this and is
7 actually putting out rejections based on this -- not
8 that I'm trying to shortcut you, but why doesn't
9 CyberMan become cumulative?

10 MR. PRESTA: That's a good question, your
11 Honor. And if it was cumulative, we wouldn't have
12 brought --

13 THE COURT: Well, tell me why.

14 MR. PRESTA: Okay. It's because the feature
15 that Mr. Armstrong was seeking a patent on, the feature
16 that the examiner thought was patentable over this, was
17 the combination of having this four-way sensor membrane
18 with finger-depressible buttons also on the same
19 membrane, because there was known to have just a
20 joystick that would be on the membrane. But what
21 Mr. Armstrong sought a patent on was the feature that
22 was in CyberMan that made it much easier to make a --
23 something that had two axes and finger buttons. So,
24 that flexible membrane sheet extends beyond just that
25 axis of that joystick out to the locations where the

1 buttons are located. And that was part of something
2 that is described in great detail in Mr. Armstrong's
3 '525 application.

4 So, it's the combination of a two-axis
5 element on a membrane along with finger-depressible
6 buttons on the same membrane. That's the feature that
7 Mr. Armstrong ultimately patented in the '525, and it's
8 the feature that he learned in the CyberMan product in
9 1993. And you'll see that the examiner and
10 Mr. Armstrong discussed that particular feature in great
11 detail as the prosecution continues.

12 THE COURT: All right. Go ahead.

13 MR. PRESTA: Okay. The examiner ultimately
14 issues a -- I'm sorry. Mr. Armstrong responds to that
15 Office Action by canceling claims 1 through 15. But he
16 still keeps, for example, claim 24 where -- that still
17 contains a flexible membrane sheet. That's on page 47.

18 Another Office Action is then shortly issued
19 after that, at page 72, where the examiner issues a
20 rejection over Hoyt and Yoshida; and that is on page 74.

21 And in response to this rejection --

22 THE COURT: Well, tell me about -- where are
23 Hoyt and --

24 MR. PRESTA: Hoyt and Yoshida.

25 THE COURT: -- Yoshida? Where are they?

1 MR. PRESTA: Now, we didn't spend time
2 analyzing Hoyt and Yoshida; and I'm happy to provide
3 those to your Honor --

4 THE COURT: Well, I'm trying to see if those
5 two patents have anything to do with this or if it's a
6 rejection for something else.

7 MR. PRESTA: Yes.

8 THE COURT: He's talking about rejection
9 because of writing natural language but doesn't seem to
10 have much to do with flexible membrane sheet.

11 MR. PRESTA: Right.

12 THE COURT: If they're irrelevant, they're
13 irrelevant. But if they're not --

14 MR. PRESTA: Understood. They actually -- my
15 belief is that they are irrelevant, and it becomes very
16 clear in the next papers that you see.

17 THE COURT: All right. Go ahead.

18 MR. PRESTA: So, I didn't analyze them in the
19 presentation.

20 THE COURT: Go ahead.

21 MR. PRESTA: Now, after that, there was an
22 interview summary with Mr. Armstrong where he has a
23 telephone interview again with the examiner, Jeffery
24 Brier, on July of 2000; and that is on page 79. And in
25 that telephone interview, the examiner writes some

1 things that are relevant to your Honor's question, on
2 page 81 of that interview summary.

3 THE COURT: Okay.

4 MR. PRESTA: So, I believe that if your Honor
5 read that section that I have on the screen, the
6 examiner was saying that Hoyt and Yoshida do not teach
7 an integrated membrane. So, that's the issue, an
8 integrated membrane, where the membrane includes keys or
9 buttons along with a 6 DOF joystick. That something
10 along those lines may be patentable is what he advises
11 Mr. Armstrong. And it goes on from there.

12 So, what Mr. Armstrong does is he files new
13 claims directed to the flexible membrane sheet; and that
14 is page 85. And Mr. Armstrong states, in his comments
15 with the new claims -- or, more particularly, on page
16 86 -- that he has reached an agreement as to
17 allowability of the claims as currently written -- oh,
18 I'm sorry. He says there was not an agreement of the
19 claims as currently written but that the examiner
20 indicated that while a new search would be needed, he
21 thought that a sheet connecting both buttons and a
22 multi-axes joystick would be allowable, if claimed.

23 So, this is where Mr. Armstrong is having a
24 meeting of minds with the examiner about trying to
25 identify some allowable subject matter.

1 BY MR. PRESTA:

2 Q. Mr. Armstrong, is that particular feature that is
3 being highlighted that you wrote about shown in the
4 CyberMan -- provided in the CyberMan product from 1993?

5 A. (Pausing.)

6 Q. And, in particular, a multi-axes joystick and
7 buttons that are both contained on a sheet?

8 A. I believe it is, yes, sir.

9 Q. Do you have any doubt in your mind?

10 A. No, sir.

11 Q. In fact, you were intimately familiar with the
12 CyberMan product at this time, weren't you?

13 A. Well, it had been, like, six years since I'd taken
14 it apart.

15 Q. Okay. But you had been having tons of
16 back-and-forth with Logitech for years and years about
17 accusing them of ripping off your invention, right?

18 A. No, at this time it had been settled for about five
19 years or something.

20 Q. Okay. Isn't it true that some of your issue with
21 Logitech even resulted with at some point your sending
22 your alleged story of them ripping you off to
23 newspapers?

24 A. I think I sent something to one reporter once.

25 Q. Okay.

1 THE COURT: Wait a minute. You said
2 something was settled five years ago? What do you mean
3 by that? Was there a suit or a license or something?
4 What do you mean by "settled"?

5 THE WITNESS: Your Honor, I did exchange many
6 letters with Logitech and had meetings about this issue;
7 and they did reach a settlement agreement in which they
8 paid me a sum of money.

9 THE COURT: And when was that?

10 THE WITNESS: I don't have the exact date,
11 but it would have been -- I'm just guessing -- in 1995
12 or something.

13 THE COURT: All right.

14 Okay. Go ahead, counsel.

15 BY MR. PRESTA:

16 Q. Can you tell us what the amount of the settlement
17 was? Was there a payment from Logitech to you?

18 A. My recollection, it was \$40,000.

19 Q. Okay. And did that settle all the claims that you
20 had against them and/or that they had against you? Did
21 that resolve the entire conflict?

22 A. Yes, sir.

23 Q. Okay. So, at this point in time, you're writing
24 that the examiner indicated that this feature that is
25 provided in the CyberMan product in 1993 would be

1 patentable. And, in fact, then you added claims
2 directly to that feature, right?

3 A. I believe I did, yes, sir.

4 Q. Okay. And, in fact, you wrote further that: The
5 examiner further agreed that, pending a search, the
6 sheet integration of multi-axes input devices and a
7 plurality of buttons was likely allowable.

8 Do you remember writing that?

9 A. Is this my summary of the --

10 Q. Yes.

11 A. -- interview?

12 Yes, sir. I don't remember it, but I believe
13 that I did.

14 Q. Okay. Now, based on your knowledge of the CyberMan
15 product at this time, you knew, in fact, that that
16 feature was not allowable, right?

17 A. You know, I think that it was out of mind.

18 Q. Okay. You understand that a feature would not be
19 allowable if it's contained in a piece of prior art,
20 right?

21 A. Yes, sir.

22 Q. And you had a lot of --

23 THE COURT: Let me ask a question here. And
24 it's not part of the Baxter test, I guess. But if he's
25 licensed this thing to these people, is it prior art

1 against him?

2 MR. PRESTA: Yes, your Honor. In fact, I
3 think we -- it's what you call a "statutory bar,"
4 because the CyberMan product came out in 1993. There
5 was just a settlement. Logitech never agreed that
6 they -- they didn't take a license. There was just a --
7 Mr. Armstrong was making a lot of threats to Logitech;
8 and from what I can see, they paid him \$40,000 to avoid
9 further hassles they were having.

10 THE COURT: Well, it doesn't really matter
11 what -- and I guess it depends on what the settlement
12 agreement says but -- I mean, do we have that someplace?

13 MR. PRESTA: I don't believe that was part of
14 the record, and I don't believe that we've gotten it.

15 But to answer your question directly, the
16 product was available in 1993 on the market. You can't
17 get around a statutory bar, under Section 102 of Title
18 35, by having a license or a settlement agreement.

19 Otherwise, people could all the time remove pieces of
20 prior art just by having some agreement with somebody
21 that -- and pay them some money, and then it would no
22 longer be prior art.

23 THE COURT: Wasn't the claim that -- I mean,
24 I thought early on he was claiming they stole it from
25 him and had been fighting with them for years over that.

1 If it's his invention to begin with, they steal it and
2 try to put it out and he fights them and finally gets
3 them to take a license on it -- does that still become a
4 statutory bar if someone steals something from you?

5 MR. PRESTA: Absolutely, your Honor. Even if
6 it was true that they, in fact, did steal it from him,
7 the bottom line is that they put the product out in
8 1993. Maybe Mr. Armstrong had some type of cause of
9 action against them for that. But he had never filed
10 flexible membrane sheet and -- in any patent application
11 until 1996. The product came out in 1993. He had a
12 dispute with them from 1993, 1994. But the bottom line
13 is the product was on the market three years prior to
14 the time Mr. Armstrong filed the 1996 application. No
15 matter how you look at that, that CyberMan product is a
16 statutory bar to anybody getting a patent on it.

17 And, in fact, there was not a license
18 between -- my understanding -- I should ask
19 Mr. Armstrong that, as to what the nature of the
20 agreement was but --

21 THE COURT: Hold on. Mr. Cawley?

22 MR. CAWLEY: I don't know if it's appropriate
23 for me to stand up at this point but -- I'm not sure if
24 we're doing an examination here or an argument or what
25 we're doing. But I can't resist taking this opportunity

1 to say, your Honor, the ultimate inquiry here is whether
2 or not Mr. Armstrong had an intent to deceive the Patent
3 Office. And I simply will post a note here and ask the
4 court to recall the court's own reaction to this chain
5 of circumstances when it comes time to talk about
6 Mr. Armstrong's explanation for why he did what he did.

7 THE COURT: No. I understand the ultimate --
8 I mean, it just -- no one had raised this idea of this
9 prior license and that may be me going off down a rabbit
10 trail, but it just seemed kind of odd, an odd set of
11 circumstances. You don't normally read that fact
12 pattern in an inequitable conduct case. I mean, at
13 least I haven't seen it, where there's that going on.
14 And I was trying to see how that -- I hope you haven't
15 brought me a brand-new, novel issue because --

16 MR. PRESTA: Well, I'm quite confident that
17 it's -- there's a statutory bar and there's --

18 THE COURT: Okay.

19 MR. PRESTA: -- really no analysis that needs
20 to be done.

21 THE COURT: Is the jury -- I had indicated
22 previously that -- the jury wanted to leave at 5:00, and
23 I wanted to go ahead and give them their final
24 instructions. So, if they are about ready to leave, if
25 you'd bring them on in, please.

1 COURT SECURITY OFFICER: Yes, sir.

2 MR. CAWLEY: Could we get Mr. Armstrong off
3 the stand to avoid any confusion about what's going on
4 here?

5 THE COURT: Please.

6 Well, in any case, I'm about ready to recess
7 on this part of it anyway. It would be very helpful to
8 me -- you've got -- you're working through a chart with
9 a timeline there. At some point I'd like a copy of
10 that. And it would be very helpful, actually, if
11 counsel would confer; and if you can agree on the
12 various dates -- you provided them in your brief. If
13 you could agree on what the timeline is, the way I
14 analyze things, having a chronology is very helpful
15 because then I can start applying the legal theories to
16 it. And I know, you know, you need to develop it;
17 but --

18 MR. PRESTA: Understood.

19 THE COURT: -- you've got it almost up there.

20 MR. PRESTA: Understood.

21 THE COURT: I just don't have a copy of it, I
22 don't think. And I think each brief has kind of an
23 outline. If you can talk to each other about it by
24 tomorrow morning, then we can -- we'll have that out of
25 the way; and that may make the examination of witnesses

1 go a little faster, also.

2 MR. PRESTA: Agreed, your Honor. In fact,
3 the PowerPoint is actually a timeline of all the
4 important events; and it would be helpful. I'll give
5 you a copy.

6 MR. CAWLEY: Your Honor, Anascape has
7 prepared an additional trial brief on the doctrine of
8 curability. May we submit that to the court at this
9 time?

10 THE COURT: Please.

11 (The jury enters the courtroom, 4:57 p.m.)

12 THE COURT: All right. Mr. Harshbarger.

13 THE FOREPERSON: Yes, your Honor.

14 THE COURT: I understand you are the
15 foreperson?

16 THE FOREPERSON: Yes, sir.

17 THE COURT: And I understand the jury wants
18 to recess until tomorrow morning?

19 THE FOREPERSON: Yes, sir.

20 THE COURT: Okay. That is fine. Please
21 remember my instructions. In fact, now it's even more
22 important than anything because you've got all the
23 evidence. You've got my final instructions. You've
24 heard the argument. It's very important that you not
25 discuss this with people on the outside. And I don't

1 know if any of you happen to now be friends or whatever
2 or are going to dinner. But don't discuss it unless all
3 of the jurors are together.

4 I understand you want to be back tomorrow at
5 8:45 in the morning. That's fine. Wait until everybody
6 is in the jury room before you start having any
7 discussions on that.

8 Should anybody try to contact you or
9 interfere with you or find out what you're doing or try
10 to influence you in any way, get their name. Report it
11 to the court security officer. That is a violation of
12 Federal law; and, believe me, I will have that
13 investigated.

14 In that case, at this time you are excused.
15 Please, if you've got any notes or exhibits, leave them
16 in the jury room. We'll have that locked up. But at
17 this time you are excused until 8:45 in the morning.

18 (The jury exits the courtroom, 4:59 p.m.)

19 THE COURT: With all the criticism this
20 district gets about -- from around the rest of the
21 country, it is again heartening to see how our jurors at
22 least take this stuff very, very seriously and work on
23 these cases very hard. I've noticed that in each one of
24 these patent trials I've tried here.

25 Now -- yes. I'm going to ask counsel to

1 check this timeline out and see if you can come up with
2 something agreed or, at the very least, come up with one
3 that you can tell me where the disputes are. I think
4 that will speed things up.

5 I don't know if I've said it before, but I
6 generally allow about two hours per side on inequitable
7 conduct. So, we need to be moving along. I'm not
8 intending, regardless of how long the jury takes, to be
9 here several days on this issue. I think I get from the
10 briefs what the guts of the measure is. And, actually,
11 defendant, I think, has pretty well fleshed out why they
12 think there is inequitable conduct. There may be a few
13 more details. So, obviously plaintiff will then be
14 prepared to start explaining their side of it.

15 Anything further at this time from point of
16 view of the plaintiff?

17 MR. CAWLEY: No, your Honor.

18 THE COURT: From point of view of the
19 defendant?

20 MR. PRESTA: No, your Honor.

21 THE COURT: Okay. I will mention one of the
22 first orders you're going to get after the trial --
23 after the jury comes back and the trial is over is that
24 I'm going to ask each side to submit on disk the current
25 exhibits that have been admitted and are before the jury

1 and so forth with any redactions that were made and
2 delete anything that wasn't used. And that will be the
3 final record copy kept by the District Clerk and you
4 will each be responsible for the originals of those --
5 plaintiffs for their originals, defendant for their
6 originals. And should the Court of Appeals want for
7 some reason to look at an original, you'll be
8 responsible for that. If there's any dispute, I'll have
9 the disk copy here. But we just simply don't have room
10 to store all those.

11 And then all the ones that were not offered,
12 were not admitted, were not discussed, we're going to
13 want you to take those with you because I simply don't
14 have room in the building to store them because I've
15 got, I think, seven more of these cases to try this
16 year; and it just piles up in our space. So, please
17 have your respective teams be making plans for that.

18 Now, until the jury is through, of course,
19 we'll hang onto the originals of what was admitted. And
20 we can keep them for a very short time, but you will be
21 getting that order that those -- that the file copy will
22 be what's on disk. The Fed Circuit now can handle
23 electronic things; and, so, they can deal with it that
24 way.

25 All right. If nothing else, we'll be in

1 recess until 8:45 in the morning.

2 (Proceedings adjourned, 5:02 p.m.)

3 COURT REPORTER'S CERTIFICATION

4 I HEREBY CERTIFY THAT ON THIS DATE, MAY 13,
5 2008, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
6 RECORD OF PROCEEDINGS.

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8 CHRISTINA L. BICKHAM, CRR, RMR

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