

# Exhibit 1

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1 Q. And are they in the video game business, as well?  
2 A. Yes, sir, they surely are.  
3 Q. Do they make controllers?  
4 A. Yes, sir, they do.  
5 Q. You mentioned that your company, Anascape, has  
6 entered into a license agreement with Sony. How did  
7 that license come about?  
8 A. Well, we negotiated with them for a number of  
9 years; and they just decided to step up to the plate and  
10 be responsible and make a license for using my  
11 technology.  
12 Q. When did you first contact Sony?  
13 A. The year 2000.  
14 Q. And what happened next?  
15 A. Well, we had a representative that had been high in  
16 Sony PlayStation 1, I believe; and he took patents of  
17 mine to people at high levels in Sony and that didn't  
18 pan out. And, so, my partner, Kelly Tyler, and I just  
19 started negotiating with them in person; and eventually  
20 they took a license.  
21 Q. And how long did you negotiate with them?  
22 A. I think it was nearly four years.  
23 Q. Was it hard?  
24 A. Yes.  
25 Q. Were there times when you got frustrated with the

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1 process?  
2 A. Surely.  
3 Q. What kind of deal did Anascape finally make with  
4 Sony?  
5 A. It was a license agreement, and it had a few  
6 different components to it. The real important thing  
7 was that -- well, the real important thing to me was  
8 that they paid me money. But there was a cross-license,  
9 also, which was where -- a cross-license is where I  
10 granted them the right to make my inventions and they  
11 granted Anascape the right to make inventions covered  
12 under their patents. And, so, that was very valuable, I  
13 thought.  
14 And then there was the money that you  
15 mentioned, which was \$10 million. That was valuable to  
16 me for several reasons. My partner, Kelly Tyler, had  
17 over a million -- I think about a million and a half  
18 dollars invested; and for an individual, that's a lot of  
19 money. And I wanted him to get paid back. You know, he  
20 was really out -- he was putting himself at risk for me;  
21 and I wanted him to get paid back.  
22 But another really important thing for us was  
23 that, you know, Sony was showing that it was  
24 responsible; and that would set a standard, we hoped,  
25 for other --

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1 MR. GUNTHER: Your Honor, I object --  
2 A. -- big companies --  
3 MR. GUNTHER: -- and move to strike --  
4 A. -- in the --  
5 THE COURT: Wait, wait, wait, wait.  
6 MR. GUNTHER: I object and move to strike.  
7 The question was what were the terms of the Sony  
8 license, and now we're getting a lesson on corporate  
9 responsibility.  
10 THE COURT: Okay. All right. Just state the  
11 objection.  
12 MR. GUNTHER: Yes, sir.  
13 THE COURT: Perhaps another question would be  
14 in order to stop --  
15 MR. CAWLEY: Yes, your Honor.  
16 THE COURT: -- the narrative.  
17 MR. CAWLEY: Sure.  
18 BY MR. CAWLEY:  
19 Q. So, Mr. Armstrong, let me go back to the question  
20 that I asked you. And I think you were most of the way  
21 through it; so, let me rephrase the question a little  
22 bit.  
23 You've told us that Sony paid \$10 million for  
24 an exclusive license to a patent, correct?  
25 A. Yes, sir.

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1 Q. And you told us that Sony got the right to use all  
2 your other patents, correct?  
3 A. Yes, sir.  
4 Q. And you got the right to use some Sony patents,  
5 correct?  
6 A. Yes, sir.  
7 Q. Okay. When did this happen?  
8 A. It was signed in 2004.  
9 Q. In 2004, what was the status of the '700 patent?  
10 A. It was under what they call "Notice of Allowance,"  
11 which is a very advanced stage. It means that it's  
12 ready to issue as a patent, that the Patent Office has  
13 done all of their assessing and that they are going --  
14 that they have already agreed that this will be a  
15 patent.  
16 Q. Okay. So, let me make sure we understand that.  
17 When the patent that's involved in this lawsuit, the  
18 '700 patent -- at the time you did your deal with Sony,  
19 you had applied for that patent at the Patent Office in  
20 the year 2000, correct?  
21 A. Yes, sir.  
22 Q. And at this time of the Sony deal, in 2004, the  
23 Patent Office had told you that it was going to -- it  
24 intended to give you a patent; is that right?  
25 A. Yes, sir.

6 (Pages 216 to 219)

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1 Q. But you didn't get that patent actually from the  
2 Patent Office until the following year, 2005; is that  
3 correct?  
4 A. Yes, sir, that's correct.  
5 Q. Now, did you agree in the Sony deal that Sony would  
6 have the rights to what became your '700 patent?  
7 A. Yes, sir.  
8 Q. Let's take a look at Plaintiff's Exhibit 54.  
9 A. Yes, sir.  
10 Q. Just a minute and we'll bring it up on the screen.  
11 But what is this?  
12 A. This is a copy of my license with Sony.  
13 Q. When you say your license, you mean Anascape's  
14 license?  
15 A. Anascape's license, yes, sir.  
16 Q. And is this the deal that you just described?  
17 A. Yes, sir.  
18 Q. You said that the way that the deal was structured,  
19 the \$10 million was for an exclusive license to a  
20 patent. Why did you do the deal that way?  
21 A. It was explained to me that that was the best way  
22 to do it for taxes.  
23 MR. GUNTHER: Objection, hearsay.  
24 A. I--  
25 THE COURT: Wait. Let me --

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1 MR. CAWLEY: It's not being offered for the  
2 truth of the matter, your Honor.  
3 THE COURT: Overruled.  
4 MR. CAWLEY: Okay. So, since we had a little  
5 interchange there, could I ask him to repeat that  
6 answer, your Honor? I'm afraid it just got confused.  
7 THE COURT: Yes.  
8 BY MR. CAWLEY:  
9 Q. Do you remember the question?  
10 THE COURT: Why don't you go ahead and ask  
11 the question again?  
12 MR. CAWLEY: Okay. That would be the easiest  
13 way to do it.  
14 BY MR. CAWLEY:  
15 Q. Why did you do the deal that way, where you got the  
16 \$10 million in exchange for an exclusive license to one  
17 of your patents?  
18 A. My understanding was that that was the best way to  
19 structure that license for -- to get favorable tax rate  
20 from the government.  
21 Q. Okay. But was the overall effect of this agreement  
22 that we see with Sony in Plaintiff's Exhibit 54 -- was  
23 it that Sony got the right to use all of your game  
24 controller inventions and technology?  
25 A. Yes, sir.

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1 Q. Do you think that giving that to Sony for \$10  
2 million was a good deal?  
3 A. Yes, it was a good deal. It's a very good deal for  
4 them.  
5 Q. Why do you say that?  
6 A. Because it was a very, very low amount of money  
7 compared to what they were selling.  
8 Q. Well, then, why did you agree to give them all of  
9 your technology for no more than \$10 million?  
10 A. Well, we thought that it showed responsibility on  
11 their part and that we could parlay that, that that  
12 would start negotiating with other large companies  
13 that -- you know, Sony was the industry leader. We  
14 thought it showed an example of taking responsibility  
15 for using my inventions.  
16 Q. Did you think you'd be able to use that example to  
17 help you in negotiating with others later on?  
18 A. Yes, sir. We sure hoped so.  
19 Q. Did you ever have discussions with Nintendo about  
20 the possibility of Nintendo licensing your game  
21 controller technology?  
22 A. I don't know if "discussions" would be the right  
23 word. We -- yes, we tried.  
24 Q. Okay.  
25 A. We sent letters. We had a couple of meetings --

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1 Q. Let me ask you -- let me ask you some more specific  
2 questions about it. And we're talking about things now  
3 before the lawsuit -- this lawsuit was filed, correct?  
4 A. Yes, sir.  
5 Q. Did you ever meet with Nintendo or a representative  
6 of Nintendo?  
7 A. Yes, sir.  
8 Q. When was that?  
9 A. I met with Howard Cheng in 1997.  
10 Q. Okay. And that's -- the court reporter discovered,  
11 to her shock yesterday, that there seemed to be two  
12 Chengs in the lawsuit. So, that's Mr. Howard Cheng with  
13 an E. He spells his name with an E; is that right?  
14 A. I think so, yes.  
15 Q. C-H-E-N-G. Where did you meet with Mr. Cheng?  
16 A. In Silicon Valley.  
17 Q. In California?  
18 A. Yes, sir.  
19 Q. And did you suggest to him that Nintendo might want  
20 to take a license to your patents?  
21 A. Yes, sir.  
22 Q. But did it ever happen?  
23 A. No, sir.  
24 Q. When did you first learn that Nintendo was using  
25 the invention that's protected by your '700 patent?

7 (Pages 220 to 223)

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1 Q. Okay. Is everything else there?  
2 A. Yes. All the rest of the sensors, the input  
3 switches and all that we talked about for the GameCube  
4 controller, are just the same. They're accurately  
5 described by the claim language. So, for that case, for  
6 claim 14, for the same reasons we talked about with the  
7 GameCube, the Wavebird controller infringes claim 14.  
8 Q. Thank you, sir. Is that the only claim of the  
9 patent that is infringed by this Wavebird controller?  
10 A. That's the only one we're discussing, yes.  
11 Q. Shall we move on to a new controller, then?  
12 A. Yes, let's do.  
13 Q. Which one is this?  
14 A. Well, why don't we talk about the Wii Remote with  
15 the Wii Classic Controller.  
16 Q. All right.  
17 MR. CAWLEY: Your Honor, I'd like to approach  
18 the witness to hand him Plaintiff's Exhibit 416 and 414.  
19 THE COURT: You may.  
20 MR. CAWLEY: And at the same time, we request  
21 permission to publish replicas -- or not replicas,  
22 publish duplicates of these exhibits to the jury.  
23 THE COURT: Any objection?  
24 MR. PRESTA: No, your Honor.  
25 THE COURT: Okay. You may do so. Will you

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1 collect back up the other ones?  
2 MR. CAWLEY: Yes, your Honor. If I could ask  
3 everyone to hand the old controllers up and we'll give  
4 you the new ones.  
5 BY MR. CAWLEY:  
6 Q. All right. Professor Howe, show us what this is.  
7 A. Sure. Well, this is the Wii Classic Controller  
8 plugged into the Wii Remote controller.  
9 Q. Okay. And I guess since part of this is being  
10 written down and just so people who are reading it  
11 instead of looking at what you have in your hands --  
12 give us a little more of a visual description of which  
13 one is which.  
14 A. Oh, sure. Okay. So, the Wii Classic Controller  
15 has a pair of these thumbsticks, once again. It has a  
16 cross pad, some buttons on the face of it; and it also  
17 has a pair of these triggers and some buttons on the  
18 front, not unlike the GameCube controller you saw  
19 earlier.  
20 Then the other piece of this, the Wii Remote  
21 controller, the long, thin one, has a cross pad on the  
22 top and has some buttons on the face. It has a simple  
23 trigger, an on/off switch for a trigger underneath it.  
24 And the two are connected by a cable.  
25 Q. Now, can the Wii Classic -- and hold that up again

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1 if you would, please.  
2 A. (Complying.)  
3 Q. Can the Wii Classic be used to control games by  
4 itself?  
5 A. No, it cannot.  
6 Q. And why is that?  
7 A. It can't communicate with the console, with the  
8 computer that runs the video games. It has to be  
9 connected to the Wii Remote, and then the Wii Remote has  
10 a wireless connection over to the console.  
11 Q. So, is it true that you have to have the Wii Remote  
12 connected to be able to use the Wii Classic Controller?  
13 A. That's right. The two of them together really make  
14 up one controller in terms of communicating with the  
15 console.  
16 Q. And how does one use the controller?  
17 A. Well, there are a couple different ways you can do  
18 it. For instance, you can hold the Remote in one hand  
19 and use the cross pad and buttons there. You could hold  
20 the Classic in the other and use the thumbstick here.  
21 Another alternative, you might drop this in  
22 your lap and then you could use two hands, one on each  
23 thumbstick, and so on.  
24 Q. Okay. Now, you've told us that you can't use the  
25 Classic by itself. Can you use the Remote by itself

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1 without the Classic?  
2 A. Yes, you can.  
3 Q. And is there, nevertheless, some useful  
4 functionality in the Classic part?  
5 A. Sure. For instance, if you're used to playing a  
6 game, perhaps from the old GameCube that you want to  
7 play on the Wii, you might want to have the same  
8 interface functions that you did on that old controller,  
9 thus the name the "Classic Controller."  
10 Q. Okay. Does the Wii Classic Controller have a  
11 rumble motor inside of it?  
12 A. Well, this piece here does not have a rumble motor  
13 in it; however, the Wii Remote does have a rumble motor  
14 in it.  
15 Q. And since you've told us that you can't use the  
16 Classic piece without the Remote, does that mean that  
17 every time you're using the Wii Classic, you have a  
18 rumble feature?  
19 A. Yes, you do. That's right.  
20 Q. And have you actually used this setup of  
21 controllers to see if it uses rumble?  
22 A. Yes. For instance, you can use the Wii Remote to  
23 go through the menu options in a game; and every time  
24 you go from one menu option to the next, you feel a  
25 little pulse of vibration and that helps let you know

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1 he could get his little scooter that he wanted.  
2 At one time I was up at -- I had a friend  
3 that got really sick. He was up skiing and --  
4 snowboarding, actually, and he had to be Life-Flighted  
5 from Lake Tahoe to Reno, Nevada, and he was there in the  
6 hospital and I flew up to see my friend and he had all  
7 these tubes and stuff in him and -- anyway, he was in  
8 ICU. So, I couldn't stay there the whole time. Brad  
9 lived in the area and I went and saw him and I made a  
10 little video presentation and Brad was really concerned  
11 about my friend and he wanted to be part of that video  
12 and when I showed it to my friend, it cheered him up  
13 later on when he was getting better.  
14 Anyway, we just got to be friends.  
15 Q. Okay. Why did you call your business "Anascape"?  
16 A. Anascape was kind of a combination of a couple  
17 words. We had a tag line that was "Anascape, the analog  
18 landscape of the future."  
19 And, so, "Anascape" was kind of a combination  
20 of "analog" and "landscape." So, "Ana" from "analog"  
21 and "scape" from "landscape."  
22 Q. And what did Mr. Armstrong put into this company  
23 Anascape?  
24 A. He put his -- all of his patent portfolio, his  
25 technology, his know-how.

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1 Q. Okay. What did you put into the company?  
2 A. I put in any rights that I had to the patent  
3 portfolio and money. I had just sold my company, Mad  
4 Catz, and had some money; and we decided to go from  
5 there.  
6 Q. How much money did you invest in Anascape over the  
7 years?  
8 A. It ended up being more than a million, probably  
9 around a million and a half.  
10 Q. Now, I'm going to ask you about some documents here  
11 that have to do with the transfer of Mr. Armstrong and  
12 others' rights to the patents into this company,  
13 Anascape. And I apologize that this is probably not the  
14 most exciting part of the trial, but it's something  
15 important and something we need to do.  
16 So, I'd like you to take the binder in front  
17 of you and look at these exhibits and tell us what they  
18 are. They are Plaintiff's Exhibit 46, 47, and 265. If  
19 you would just run through those and tell us what they  
20 are, please.  
21 A. 46 is a certificate of limited partnership for  
22 Anascape, showing that it was formed in Nevada.  
23 And there's the limited partnership agreement  
24 for Anascape that Anascape would operate under in  
25 Nevada.

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1 47?  
2 Q. Yes, sir.  
3 A. 47 is an Assignment Agreement between Brad  
4 Armstrong and Anascape, where Anascape assigned his  
5 patents to Anascape.  
6 Q. Could you say that again? I think you said  
7 Anascape assigned its patents to Anascape.  
8 A. Oh, I'm sorry. Where Brad Armstrong assigns his  
9 patents to Anascape.  
10 Q. Okay. And 265?  
11 A. 265 is a letter from Brad Armstrong to the  
12 commissioner of patents, and he is letting them know  
13 that he has assigned his rights in an application -- a  
14 patent application to Anascape.  
15 Q. Now, the patent that was to become the '700 patent  
16 in this lawsuit was still an application in the Patent  
17 Office at this time, right?  
18 A. That's correct.  
19 Q. Do these documents assign -- did Mr. Armstrong  
20 assign to Anascape in these documents not only the  
21 patents he already had but the applications and any  
22 patents he might get from those applications in the  
23 future?  
24 A. That's correct.  
25 Q. So, is this how Anascape ended up owning the '700

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1 patent?  
2 A. That's correct.  
3 Q. Now, did Anascape that you eventually started as a  
4 Nevada partnership eventually become a Texas company?  
5 A. Yeah. Brad was living in Texas shortly after or, I  
6 guess, right before we sold -- well, not sold. We had a  
7 license agreement with Sony. But, anyway, right when we  
8 came to this -- right before we licensed to Sony, I had  
9 been the general partner up until that point. Brad  
10 became the general partner. He was living here in Texas  
11 and decided that he wanted to have the company here in  
12 Texas instead of in Nevada, and I had no problem with  
13 that.  
14 Q. Okay. Now, there's three more exhibits that I'm  
15 going to need to show you that I'd once again like to  
16 ask you to go through quickly and tell us what they are.  
17 They're Plaintiff's Exhibit 249, 246, and 263.  
18 A. This is a conversion document filed with the State  
19 of Texas just saying that we're converting Anascape  
20 Nevada to Anascape Texas.  
21 The next one is a similar document filed with  
22 the State of Nevada saying we're converting Anascape  
23 Nevada to Anascape Texas.  
24 And 263?  
25 Q. Yes, sir.

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1 Q. Is that important to players?  
2 A. Yeah, I think so. It makes the game more, you  
3 know -- you know, people like that more, I believe.  
4 Q. Okay. Are you familiar with a feature called  
5 "rumble"?  
6 A. Yes. Rumble or vibration.  
7 Q. Why -- is that important in controllers?  
8 A. Yeah. Initially the controllers -- you know, you  
9 just played the controller. The controller talked to  
10 the video game machine; and, you know, it was all  
11 visual. But now you have a two-way communication. If  
12 something happens in the game, if you run into a wall,  
13 if you run into something, you feel that vibration. It  
14 kind of immerses you into the game.  
15 There was a time -- like Sony, I think they  
16 had vibration in their controllers. There came a time  
17 when they pulled it out for some reason. They got a lot  
18 of complaints, and they put it back in.  
19 Q. Have you heard of a company called "Immersion"?  
20 A. Yes, uh-huh.  
21 Q. Who is Immersion?  
22 A. Immersion is a company that does technology. They  
23 provide -- it's called a "haptic," I believe; and it's  
24 technology that's used in video game controllers.  
25 Q. All right. Are they a well-known supplier of

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1 technology to the video game controller industry,  
2 Immersion?  
3 A. Yes, uh-huh.  
4 Q. As time went on -- you told us you sold your  
5 company Mad Catz. You got into business with  
6 Mr. Armstrong and formed Anascape. Did you have  
7 discussions with him from time to time about the work he  
8 was doing on his patent applications?  
9 A. Yes.  
10 Q. From time to time, did you read through some of the  
11 applications he was filing and try to give him comments  
12 that might help him?  
13 A. Yes, uh-huh.  
14 Q. Let's take a look at Defendant's Exhibit 216. Do  
15 you have that in the binder in front of you?  
16 A. Yes, I do.  
17 Q. What is this?  
18 A. This is an email from myself to Brad Armstrong back  
19 in 2000.  
20 Q. Okay. And you say in the email -- if we can go  
21 down a little bit -- (reading) I believe we can get some  
22 additional valuable claims out of this application. Do  
23 you see that?  
24 A. Let's see. Yes, I see that.  
25 Q. What did you mean by that?

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1 A. Well, from my understanding, you can write a  
2 specification and there can be a gazillion inventions in  
3 that one specification. But in order to get those  
4 inventions out and have them protected, you have to  
5 write claims on those.  
6 Q. Okay. And if we could also go to another piece of  
7 this email -- I don't want to take the time to read it  
8 all. You say here that: Page 28, lines 31 through 35  
9 broadens definition of 6 DOF controllers to 3-D graphic  
10 image controllers (probably a better definition of  
11 controllers on the market today) and combines tactile  
12 break-over devices with proportional or variable  
13 sensors.  
14 What did you mean when you said this in your  
15 email to Mr. Armstrong?  
16 A. Well, I talk about broadening; and what I'm talking  
17 about is -- you know, on the street if you talk to  
18 anybody -- I don't know of anybody, any of my friends or  
19 anything, that really know what 6 D-O-F is or 6 DOF. If  
20 I went out on the street and said, "I have a 6 DOF  
21 controller," they'd just look at me like "What's that?"  
22 But if I went out on the street and said, "I have a 3-D  
23 controller," you know, people have heard about 3-D.  
24 They've learned that in school. They've made art  
25 projects that are three-dimensional. So, they kind of

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1 understand that. So, it's, you know, more understood.  
2 Q. So, do you think that it would be a definition that  
3 would be understood by a broader number of users?  
4 A. Yes, uh-huh.  
5 Q. As far as you're concerned, do these two terms "3-D  
6 graphic image controllers" and "6 DOF controllers" mean  
7 the same thing?  
8 A. In my mind, they do.  
9 Q. Now, in 1999 did Mr. Armstrong also send you some  
10 emails that was sort of a to-do priority list that is  
11 Defendant's Exhibit 215?  
12 A. Yes, uh-huh.  
13 Q. And do you see under the "First Order of Business"  
14 there, it says: Strengthen Sony claims?  
15 A. Yes, uh-huh.  
16 Q. What did that mean?  
17 A. Well, this is before we actually set up the  
18 company; and Brad was telling me what his first order of  
19 business is, what he wanted to do. And if you look  
20 through this document, there's -- you know, it mentions  
21 six inventions up here and then there's four inventions  
22 there and you turn over to the next page; there's three  
23 or four inventions. So, probably over 12 inventions  
24 that he wants to get claims for that are already  
25 probably in the specifications.

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1 A. Well, some of them went on a long time. We had one  
 2 negotiation session where it went on a couple of days.  
 3 Q. How long total from your first contact with them  
 4 until you made a deal?  
 5 A. Whew, that was probably about four years.  
 6 Q. Let me show you Plaintiff's Exhibit 54. I think  
 7 we've already seen it before, but tell us again. What  
 8 is this document?  
 9 A. Let me turn to it real quick. This is a Patent  
 10 License Agreement between Sony and Anascape.  
 11 Q. This is the deal you entered into with Sony; is  
 12 that right?  
 13 A. Yes, it is.  
 14 Q. What were the terms of the deal that you finally  
 15 agreed to with Sony?  
 16 A. With Sony, there are a few components to it. They  
 17 would pay us \$10 million. They would give us a  
 18 cross-license of some of their patents, and they would  
 19 give us additional technology. And on our side, we  
 20 would give them a nonexclusive license to our whole  
 21 patent portfolio; and there was one patent that we had  
 22 that we licensed to them exclusively.  
 23 Q. And was that the '606 patent?  
 24 A. Yes.  
 25 Q. Okay. So, let's make sure that we understand what

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1 you just said because there were several pieces to it.  
 2 Sony gave Anascape \$10 million, right?  
 3 A. Yes. Uh-huh.  
 4 Q. That's fairly easy. And for that \$10 million, the  
 5 deal was structured so that Anascape gave Sony the  
 6 exclusive rights to the '606 patent; is that right?  
 7 A. Yes.  
 8 Q. And then Sony also gave Anascape the right to use  
 9 certain Sony patents, correct?  
 10 A. Yes.  
 11 Q. And then Anascape gave Sony the right to use all of  
 12 Anascape's patents, correct?  
 13 A. That's correct.  
 14 Q. Including pending patent applications, correct?  
 15 A. Yes, that's right.  
 16 Q. And one of those pending applications was the  
 17 application that was soon to become the '700 patent,  
 18 correct?  
 19 A. That's correct.  
 20 Q. On that patent that you agreed to give to Sony  
 21 exclusive rights to, the '606, what was the technology  
 22 involved in that patent?  
 23 A. That was a child of the '525 patent, similar to the  
 24 '700 patent. It involved technology with game  
 25 controllers.

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1 Q. So, the '606 was another continuation from that  
 2 same 1996 application; is that right?  
 3 A. That's correct.  
 4 Q. And it involved controller technology?  
 5 A. Yes.  
 6 Q. Why did you agree to do this deal with Sony for \$10  
 7 million?  
 8 A. Well, at the time I thought it was low. I didn't  
 9 think it represented a fair royalty. But I'd put in a  
 10 lot of money, and I wanted to get my money out. Brad  
 11 didn't have any money, and I wanted to get some for him.  
 12 I mean, he was -- I mean, one of his dreams was to give  
 13 his mom a car of her choice; and, you know, if he got  
 14 some money, he was going to be able to do that.  
 15 Q. Did he do that?  
 16 A. Yeah, he did. It just seemed right to be able to  
 17 sign up, you know, a big company and get some money off  
 18 the table.  
 19 Q. Did you think that signing a license like this to  
 20 Sony might have some effect on your ability to negotiate  
 21 license agreements with other companies?  
 22 A. Yeah. When you sign up, you know, the biggest  
 23 company in the industry, or one of the biggest companies  
 24 in the industry, it sends a message that, yes, it is  
 25 something that others should do, also.

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1 Q. And is that another reason why you were willing to  
 2 take less from Sony than what you thought was really a  
 3 reasonable royalty?  
 4 A. Yeah. I considered it a sweetheart deal because  
 5 they were one of the first ones to sign up.  
 6 Q. Is Sony using Anascape's technology?  
 7 A. Yes.  
 8 Q. Now, if Nintendo had come to you in 2005 when you  
 9 did the Sony deal or after you did the Sony deal, would  
 10 you accept \$10,000 from Nintendo for a license to the  
 11 '700 patent?  
 12 MR. GUNTHER: Objection, your Honor.  
 13 A. \$10,000?  
 14 MR. GUNTHER: Objection, your Honor. Calls  
 15 for speculation.  
 16 THE COURT: Sustained.  
 17 MR. CAWLEY: I don't guess it would make any  
 18 difference if I correct myself and say "\$10 million."  
 19 THE COURT: The objection is still sustained.  
 20 MR. CAWLEY: That's what I thought, judge.  
 21 BY MR. CAWLEY:  
 22 Q. Well, let me turn, then, to Nintendo. Did you have  
 23 some communications with Nintendo in an effort to get  
 24 them to negotiate with you to get a license for using  
 25 Mr. Armstrong's patents and invention?

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1 which would be, obviously, the amount of royalty that  
 2 would be owed.  
 3 Q. Well, I'll use your terminology of "buckets." So,  
 4 we'll go to the first bucket, which is "Licensing  
 5 Characteristics," on Slide 10.  
 6 A. Right.  
 7 Q. How did you consider these factors relating to  
 8 licenses?  
 9 A. Well, what I did is I considered various  
 10 documentation in this case. I conducted several  
 11 interviews of some of the people we talked about. And I  
 12 looked and did research; and I found additional  
 13 information on royalty rates for controller-related  
 14 technology in the marketplace, which would shed a lot of  
 15 light to me as part of my analysis on what an  
 16 appropriate royalty rate would be in this case.  
 17 Q. And you reviewed some actual license agreements?  
 18 A. Yes.  
 19 Q. Okay.  
 20 MR. PARKER: If we can go to 11.  
 21 A. Okay.  
 22 BY MR. PARKER:  
 23 Q. Are these some you reviewed?  
 24 A. Yes. In fact, the first one, the 6-DOF Trust,  
 25 slash, Mr. Tyler, that was one that was shown to

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1 Mr. Tyler during his examination, which he executed  
 2 shortly after he met Mr. Armstrong; and they signed up a  
 3 license agreement with royalty rates of 4 to 5 percent,  
 4 in that range.  
 5 Q. Does this chart support your opinion of a minimum  
 6 5 percent royalty rate in this case?  
 7 A. It does, but it's only part of the support for my  
 8 opinion. But it clearly does support my view of a  
 9 royalty rate of 5 percent. But there's a lot more, in  
 10 my view, that supports the 5 percent, as well.  
 11 Q. Okay.  
 12 A. Do you want me to explain the others?  
 13 Q. Well, let's go to Slide 13.  
 14 A. All right.  
 15 Q. This is one.  
 16 A. This is the 6 DOF license agreement that was shown  
 17 to Mr. Tyler and that he testified to. And this was  
 18 between Mr. Tyler when he was at Mad Catz and with  
 19 Mr. Armstrong -- or his trust that he set up for running  
 20 royalty rates, as you can see, of 5 percent and  
 21 4 percent for controller products.  
 22 Q. Are you familiar with a company by the name of  
 23 "Immersion"?  
 24 A. Yes.  
 25 Q. Have you heard of the phrase "Immersion standard

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1 royalty rate"?  
 2 A. Yes, I have.  
 3 Q. And what is that?  
 4 A. Well, first of all, Immersion is a company that, as  
 5 I did my research investigation, I kept coming across  
 6 over and over again. They are a leader in controller  
 7 technology for the gaming industry. They design a lot  
 8 of controller products. And they have a lot of patents  
 9 out there, and they have widely licensed those patents.  
 10 And that's how I came across Immersion.  
 11 And because Immersion has been so active in  
 12 licensing their patents, they view that a royalty for  
 13 their controller technology -- to command a 5 percent  
 14 royalty rate.  
 15 MR. PARKER: Can we go to 14, please?  
 16 BY MR. PARKER:  
 17 Q. What is this, Mr. Bratic?  
 18 A. Now, this is a quote from Mr. Viegas, Vic Viegas,  
 19 who is the president and CEO of the Immersion  
 20 Corporation. And his statement to the public was that:  
 21 Our typical license is approximately 5 percent of the  
 22 wholesale selling price.  
 23 And I've seen other documents in this case  
 24 that support that statement made by Mr. Viegas.  
 25 MR. PARKER: And if we can now go to 15,

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1 please.  
 2 A. Okay.  
 3 BY MR. PARKER:  
 4 Q. As I understand it, one of the things you examined  
 5 in this case was a data compilation by a gentleman by  
 6 the name of Mr. Wagner that was prepared in another  
 7 matter.  
 8 A. Correct.  
 9 Q. Is that correct?  
 10 And the compilation dealt with a number of  
 11 licenses, correct?  
 12 A. Yes.  
 13 Q. Okay. What's the significance of your statement  
 14 regarding the Wagner report?  
 15 A. Well, in the Wagner report he went through and he  
 16 analyzed and looked at a number of Immersion license  
 17 agreements; and these 17 agreements were agreements that  
 18 were in his report that were Immersion's licenses. So,  
 19 Immersion had 17 licenses for joystick or controller  
 20 technology that were all at a minimum royalty rate of  
 21 5 percent.  
 22 Q. Now, the data in this report, is it the type data  
 23 that's reasonably and typically relied upon by experts  
 24 in your field?  
 25 A. Yes.



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1 Q. Even though you didn't conduct the study?  
2 A. That's correct.  
3 Q. You mentioned -- do you have the information  
4 regarding the companies that executed these agreements?  
5 A. Yes.  
6 Q. Can you tell the jury about that?  
7 A. Well, some of the companies that licensed this  
8 technology included, you know, some of Nintendo's  
9 competitors, such as Sony.  
10 Q. Okay. You have a chart relative to Sony; is that  
11 correct?  
12 A. Yes.  
13 Q. Okay. What's the significance of that chart?  
14 A. Well, from the review of the Wagner report that  
15 had -- Mr. Wagner had access to a variety of Sony  
16 license agreements. And if you look at the Wagner  
17 report and the Sony licenses for controllers, if you  
18 look in the far right-hand column, this talks about the  
19 device. And if you look at the royalty rates, the  
20 royalty rate that Sony was getting for its controller  
21 technology when it licensed its controller technology to  
22 other companies, it was generally getting 5 percent.  
23 Q. Now, I assume, Mr. Bratic, that you haven't  
24 personally read or examined the contents of all these  
25 various licensing agreements that have been -- that are

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1 on this chart and have been involved in the Wagner  
2 report; is that correct?  
3 A. That's correct.  
4 Q. Is it your experience that individuals in your  
5 business or individuals in the licensing business can  
6 rely on reports like this?  
7 A. Oh, sure. I've been doing licensing work for 30  
8 years, and you don't always have perfect information and  
9 lots of times companies may report a license, but they  
10 don't publish the license agreement. And I do research  
11 all the time for clients -- and I did research in this  
12 case -- helping me to identify data points as far as  
13 what royalty rates are in different industries, and in  
14 this case there's no difference.  
15 And an example would be that a client I'm now  
16 representing in Australia, I, in fact, started doing  
17 research with them; and it has to do with food  
18 processing technology. And I have subscriptions to  
19 databases that I pay \$200 and I get a report on known  
20 information on food processing licenses and then I have  
21 to do a little drilling and a little analysis, but the  
22 point is that information is available. And I've  
23 certainly used it for the last 30 years in guiding  
24 clients in their negotiations.  
25 Q. Does the fact that you didn't personally prepare

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1 these reports, this data, influence your conclusions  
2 regarding reasonable royalty rate in this case?  
3 A. No, because I came across a lot of different  
4 independent sources of this information which still  
5 corroborated that 5 percent royalty. For example, I had  
6 the statements by Mr. Viegas that their standard royalty  
7 rate is 5 percent. I went and found two Immersion  
8 licenses on my own in my research that showed royalty  
9 rates of 3 to 7 percent. The 5 percent is a midpoint,  
10 and I discussed them in my report. I have the Sony  
11 licenses where Sony licenses its controller technologies  
12 for 5 percent, and I have a whole series of summaries of  
13 Immersion licenses that Mr. Wagner analyzed where the  
14 average royalty rate was 5 percent. So, these are all  
15 consistent. They all corroborate each other.  
16 Q. Before we move to the next bucket --  
17 A. Yes.  
18 Q. -- what did you learn from the licenses you  
19 examined?  
20 A. Well, what I learned was a typical licensing  
21 arrangement for controller technology were running  
22 royalty rates, meaning you pay as you go. As you sell  
23 product, you pay royalties, rents. And that typical  
24 royalty rate was in the 5 percent range.  
25 Q. All right. The next bucket is "Commercial

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1 Success."  
2 A. Yes.  
3 Q. Did you consider the Georgia-Pacific factors  
4 relating to commercial success?  
5 A. I did.  
6 Q. Okay. Could you tell the jury about it?  
7 A. Well, sure. The fact is that -- can you go back to  
8 chart -- let me find it. I think it's Chart 6.  
9 Q. I can't, but perhaps Mr. Martin can.  
10 A. So, these are the dollar sales. As you can see,  
11 they've sold a billion -- Nintendo has sold in the  
12 United States -- well, these are U.S., Canada, and Latin  
13 America sales because they're all sold from the United  
14 States. That's why they're all here. But they've sold  
15 over a billion dollars of product in less than two years  
16 when they introduced the Wii system.  
17 The important thing is here, behind that  
18 billion dollars in sales, is -- I'm going to give you a  
19 number -- about 43 million individual units. In other  
20 words, if I had the Nunchuk, you know, here in my hand  
21 and I had the Wii Remote and I had the Wii Classic and  
22 the Wavebird and Wavebird wireless -- I mean, the  
23 GameCube and the Wavebird wireless, there's about 45  
24 million individual articles, parts that were sold that  
25 are these accused products supporting a billion dollars

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1 in sales.

2 Now, I haven't factored in any of my analysis

3 the significant money that Sony generates on its games

4 that are sold with these systems or to have systems that

5 can use these controllers.

6 Q. This is restricted to controllers?

7 A. Strictly controllers. There's three components to

8 a system, console system. There's the console which I

9 think the jury saw. In fact, I think Mr. Tyler held one

10 up. There's the games that you play on your screen, and

11 there's the controllers. And I've only considered the

12 sales of the controllers.

13 Q. Well, this bucket is titled "Commercial Success."

14 A. Yes.

15 Q. That raises the issue of whether Nintendo's accused

16 products are profitable.

17 A. Well, they are successful; and they are profitable.

18 Nintendo does make profits on selling these --

19 Q. How do you --

20 A. -- products.

21 Q. I'm sorry. I spoke at the same time as you did.

22 Were you through?

23 A. Yes.

24 Q. Okay. Do you define success separate from

25 profitability, or are the two interconnected?

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1 A. Well, success can be measured in different ways.

2 And one way to measure success is how much product did

3 you sell. Now, they've sold a billion dollars of

4 product. They've sold about 45 million units. So,

5 those are different ways to measure success. And when

6 they've sold those products, they've been widely touted

7 in the, you know, gaming community and in the

8 marketplace as highly successful products. So, it's put

9 Nintendo back in the game, so to speak. And they are

10 also profitable products. They make money on them. So,

11 those are all measures, in my view, of commercial

12 success.

13 Q. All right. The next slide deals with the nature

14 and use of the invention.

15 A. Yes.

16 Q. Did you consider these Georgia-Pacific factors --

17 A. Yes, sir.

18 Q. How did you consider them?

19 A. Well, I considered them in the context of how the

20 controller functions and what its relationship is to the

21 console system. And, for example, I've prepared a chart

22 to kind of explain the nature and use of the invention.

23 Q. And that's 20.

24 A. Right.

25 Q. Would you explain it?

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1 A. Sure. What I've tried to do here is deal with the

2 issue of nature and use of these controllers and what

3 drives demand in this industry. And as mentioned, there

4 is an interrelationship --

5 Q. May I interrupt you, please --

6 A. Sure.

7 Q. -- before you get to that?

8 And I admit this is my subjective

9 interpretation. It sounds to me as though Nintendo

10 takes the position that rumble and six axes of control

11 are not really very important technologies for

12 developing games and, therefore, not important to the

13 sale of consoles.

14 First of all, do you agree with that

15 statement?

16 A. No, I don't agree with that at all.

17 Q. All right. And does this chart provide any

18 guidance on that question?

19 A. Yes, it does.

20 Q. Okay. I apologize for the interruption. Proceed.

21 A. Not at all.

22 Well, let's stop at the top -- start at the

23 top. So, here what I'm saying is in this box:

24 Controllers define the active interaction and form the

25 bond between the gamer and the game.

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1 You have to have a controller to play these

2 games. You can't play these games without a controller.

3 It's integral to the experience. And that's why, for

4 example -- I heard the testimony about the rumble. It's

5 the tactile feedback. Having a controller with the

6 rumble feature is what lets you interact with the game

7 and enjoy that experience. For example, in the Madden

8 NFL game, when somebody gets tackled or blocked, they

9 make contact on the screen, well, you feel it on your

10 hands. The controller is an integral part of that

11 experience. If you didn't have a controller with the

12 rumble, you would never feel the impact or experience

13 the impact that's on the screen, for example, in a

14 sporting event.

15 Systems are not sold without controllers.

16 Every time Nintendo packages up and shrink-wraps and

17 sells a system at Best Buy or Wal-Mart or somewhere, you

18 go in and you buy it, you've got the controllers and the

19 console and you've got some built-in games to get you

20 started. But the point is the controller is always

21 there. There's always a controller that's sold with a

22 console system; and then, of course, you can later buy

23 more controllers if it breaks or if you want more to

24 have more players. But it's an integral part of the

25 entire system.

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1 Q. What about other Nintendo employees?  
2 MR. PARKER: Slide 27, please.  
3 A. This is testimony from Mr. Ikeda in January of this  
4 year. And this is pretty short so, I'll read it to you.  
5 The question is: Why did you see a problem  
6 in providing a game controller with a high degree of  
7 freedom using two or more controller units?  
8 Answer: Well, this was to realize, enable  
9 new game control. So, using this new game controller,  
10 this would enable new ways of expressing games.  
11 So, again, this is the point that this is the  
12 interlink between a controller and a game experience.  
13 You get to experience and express yourself through the  
14 controller and the game.  
15 Q. So, were you able to reach any conclusions  
16 regarding the contribution of the teachings of the '700  
17 patent to the commercial success of the gaming systems?  
18 A. Yes. In my view, from the documents I've seen and  
19 the testimony I've seen, that the claimed features of  
20 the '700 patent were very important features to put into  
21 a controller and add to the success that Nintendo has  
22 experienced with the Wii system.  
23 Q. The next bucket is market/competitive position.  
24 A. Yes.  
25 Q. And you considered these factors?

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1 A. Yes.  
2 Q. How many companies compete really, are major  
3 players, competitors, in the video game console  
4 industry?  
5 A. Well, today there's only three. There's Nintendo,  
6 there's Sony, and there's Microsoft with its Xbox and  
7 Xbox 360. There used to be some other companies, but  
8 they basically went out of the console business. Sega,  
9 Atari are two well-known names that were very popular in  
10 the 1990s; but they are gone. They don't make consoles  
11 anymore.  
12 Q. So, I gather you consider this to be a highly  
13 competitive industry.  
14 A. It's intensely competitive. These companies are  
15 climbing over each other trying to fight to introduce  
16 the next generation game controller. They're trying to  
17 change the dynamics in the marketplace and their  
18 relative competitive position.  
19 For example, the GameCube was a major product  
20 for Nintendo when it came out in the early part of this  
21 decade. But it started kind of getting long in the  
22 tooth, so to speak, as Nintendo came out with a  
23 PlayStation 2 and as Xbox came out with Xbox 360 and,  
24 so, Nintendo knew that it needed to bring a next  
25 generation product out, the Wii system. So, they did.

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1 So, these companies are always jockeying to get the best  
2 technology out there to protect their competitive  
3 position.  
4 Q. So, why is this important to the hypothetical  
5 negotiation?  
6 A. Well, if you have a company like Sony that's  
7 licensed to have the '700 patent and can practice the  
8 rumble feature and Sony can practice the 6 degrees of  
9 freedom and put it in the games that are used on its  
10 console system, that gives it a big competitive  
11 advantage over a company like Nintendo if they didn't  
12 have a license and would have to remove their products  
13 from the marketplace that had those features.  
14 Q. We used this phrase "hypothetical negotiation."  
15 A. Yes.  
16 Q. You're going to address that a little later, but  
17 that's focused at the time of the first alleged  
18 infringement, correct?  
19 A. Yes.  
20 Q. And there are rules that govern it, simply a  
21 methodology that's tied to the Georgia-Pacific factors  
22 as well as other factors that give the jury some  
23 guidelines on how they could determine what might be a  
24 reasonable royalty in a particular case, correct?  
25 A. That's correct.

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1 Q. Okay. Regarding Sony --  
2 A. Yes.  
3 Q. -- is the dominant presence of Sony in the  
4 market -- in this market also important, or is it  
5 important to the hypothetical negotiation?  
6 A. Well, it's very important because at the  
7 hypothetical negotiation, the parties would have known  
8 that Sony had a license because Sony took out a license  
9 in 2004. We've seen that license on the screen several  
10 times.  
11 The patent issued in June, 2005 and that's  
12 the time of first alleged infringement and that's when  
13 the hypothetical negotiation would have occurred between  
14 Anascape and Nintendo. So, they would have known at  
15 this hypothetical negotiation that Sony, the company  
16 with the biggest market share for console systems, for  
17 gaming systems, had a license for this technology.  
18 Q. We're now to the last bucket --  
19 A. Okay.  
20 Q. -- Mr. Bratic, "Experts & Negotiation."  
21 MR. PARKER: Slide 30, please.  
22 A. All right.  
23 BY MR. PARKER:  
24 Q. How do you consider these Georgia-Pacific factors?  
25 A. Well, I did rely and read Dr. Howe's report. I did

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1 rely on him, and I interviewed other people in  
2 connection with my work in this case; so, that relates  
3 to opinions.  
4 G-P Factor 15 is what I've called the  
5 "catchall." It takes all the other 14 factors and rolls  
6 them up into this hypothetical negotiation that would  
7 have occurred between Anascape on one hand and Nintendo  
8 on the other hand back in June, 2005, when the '700  
9 patent issued.  
10 And, so, you had mentioned earlier there's  
11 various rules that govern the negotiation; and I've got  
12 a slide that goes through some of the factors and some  
13 of the positions of -- the bargaining position on how  
14 the parties would have approached negotiation.  
15 Q. Well, why don't we move to Slide 31?  
16 A. Okay.  
17 Q. And what does Slide 31 address?  
18 A. Well, this is dealing with Georgia-Pacific Factor  
19 15, which is setting up that hypothetical negotiation  
20 for a hypothetical license. So, coming to this  
21 hypothetical negotiation, Anascape would have come into  
22 that negotiation with a certain perspective and Nintendo  
23 would have come with a certain perspective. So, I've  
24 kind of tried to summarize what the key points of those  
25 parties were --

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1 Q. Are those perspectives -- are those positions  
2 typically referred to as their "bargaining position"?  
3 A. Yeah, their bargaining position or their bargaining  
4 point. It's no different than what happens in the real  
5 world of licensing where two parties come together to  
6 negotiate and do some horse trading and everybody's got  
7 their view of what they think is important and they  
8 bring it to the negotiation.  
9 Q. Do you want to go through Anascape's bargaining  
10 position?  
11 A. Sure. Well, at the hypothetical negotiation in  
12 this case, Anascape would have known that the '700  
13 patent was assumed to be valid and infringed. They also  
14 would have been aware -- Anascape's personnel, that  
15 being Mr. Armstrong and Mr. Tyler, based on their work  
16 in the industry and the research I've done that would be  
17 attributed to everybody, they would have been aware of  
18 royalty rates in the industry for controller technology.  
19 Both Mr. Armstrong and Mr. Tyler had  
20 negotiated licenses before for controller technology;  
21 so, they were experienced negotiators. They would have  
22 been aware of the industry demand for innovative  
23 features, including the rumble and six axes of control.  
24 And they would have been aware that the '700 patent  
25 offered important technology that Microsoft -- I'm

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1 sorry -- that Nintendo would be at a competitive  
2 disadvantage, without a license, to Sony because they  
3 would have known at this hypothetical negotiation that  
4 Sony, the biggest company in this industry, had a  
5 license to the '700 patent.  
6 And then Anascape would have insisted on or  
7 asked for a royalty rate, in my view, of at least  
8 5 percent.  
9 Q. What about Nintendo?  
10 A. Well, from Nintendo's perspective, Nintendo would  
11 have walked into that negotiation also recognizing that  
12 the '700 patent was assumed to be valid and had been  
13 infringed. They would be seeking to get a competitive  
14 advantage, and they would be aware of the importance of  
15 controller features in offering that competitive  
16 advantage. And I'm meaning specifically the six axes of  
17 control and the rumble.  
18 And this would have been very important to  
19 Nintendo because they were about to roll out a new video  
20 system. The Wii system hadn't been introduced yet.  
21 That was to be introduced in November, 2006. But they  
22 were working on it then because they knew they needed to  
23 replace the GameCube system back in 2005.  
24 And they would have known that the gaming  
25 industry is a highly profitable industry. Nintendo, of

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1 course, was a large manufacture market of video game  
2 systems with a large distribution network and a strong  
3 customer base.  
4 They would have been aware of the importance  
5 of, and dedicated to, technological innovation and  
6 controller design. And what I mean by that is Nintendo  
7 certainly would have made known the fact that Nintendo  
8 also contributed technology to the controller. So, I  
9 don't want to suggest that Anascape is the only one  
10 going to the table with technology.  
11 And then they would have recognized that  
12 Nintendo didn't have any alternatives. They didn't have  
13 any design-around. They couldn't go back and put the  
14 genie in the bottle and reconfigure the Wii and bring it  
15 back out as something else.  
16 Q. Were you able to reach any conclusion --  
17 MR. GERMER: Your Honor, I would have to  
18 object to that last comment and ask that it be stricken  
19 from the record, the comment about the design-around.  
20 That's not in his report. It's never been discussed.  
21 It was not supposed to be presented to the jury.  
22 THE COURT: All right. Well, ladies and  
23 gentlemen, whether there are or are not any  
24 design-around needs to be determined from the  
25 technological experts. Of course, this witness is a

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1 damages expert. All he can do is try to rely on what  
 2 the technologists have said.  
 3 So, I will instruct you to disregard his  
 4 opinion as to whether there are or are not  
 5 design-arounds. You'll have to determine that from  
 6 whether or not there is any testimony from other  
 7 technological engineering-type experts.  
 8 And for purposes of the damages expert, he  
 9 has got to assume that what he's been told is correct on  
 10 that. But that's just an assumption in terms of are  
 11 there or aren't there based on -- you'll have to  
 12 determine that -- whether you believe that from  
 13 testimony from the technological experts. So, I'll  
 14 instruct you to disregard it as an opinion that he has.  
 15 MR. PARKER: May I inquire of the witness,  
 16 your Honor, whether he is aware of any design-around  
 17 capabilities on the part of Nintendo?  
 18 MR. GERMER: Your Honor, my objection is  
 19 there is just nothing in his report about that.  
 20 THE COURT: Okay. Why don't we wait until we  
 21 get the other experts about -- into that, whether there  
 22 are or are not.  
 23 MR. PARKER: Thank you.  
 24 BY MR. PARKER:  
 25 Q. So, did you reach any conclusions regarding

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1 respective bargaining positions?  
 2 A. Yes.  
 3 Q. And what were those conclusions?  
 4 A. Well, at the end of the hypothetical negotiation,  
 5 it is my view that the parties would have come to an  
 6 agreement on a hypothetical license. And the license  
 7 terms would be based on the sale of the licensed  
 8 products, the various accused products.  
 9 If you go back to Table 6 -- I think it's  
 10 Chart 6.  
 11 Q. That's correct.  
 12 A. Could you put that up?  
 13 MR. PARKER: Mr. Martin?  
 14 BY MR. PARKER:  
 15 Q. And while we're doing that, you understand, do you  
 16 not, that the Wii Remote does not -- it is not alleged  
 17 to infringe alone and the Wii Remotes sold are only the  
 18 ones -- that you've reflected here, as I understand it,  
 19 are only the ones sold with the Nunchuk, correct?  
 20 A. Yeah. I just need to clarify that to make it very  
 21 clear.  
 22 Q. All right.  
 23 A. What I've done here is I've capped the number of  
 24 Wii Remotes. There were 20.7 million Nunchuks that were  
 25 sold. I counted up 20.7 million Wii Remotes because you

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1 have to have a Wii Remote and a Nunchuk. The Nunchuk  
 2 can't work by itself.  
 3 There were another 5 million -- approximately  
 4 5 million -- in other words, there was about 26 million  
 5 total Wii Remote controllers that have been sold. I  
 6 didn't count in all the Wii Remotes into my analysis. I  
 7 strictly limited it to the number of Nunchuks that were  
 8 sold. So, there's another 5 million Wii Remote  
 9 controllers out there that I did not consider in my  
 10 analysis.  
 11 Q. Before we do our wrap-up --  
 12 A. Yes.  
 13 Q. -- I neglected to ask you something about your  
 14 background earlier. And now that I have remembered it,  
 15 let me ask: You've testified in other cases?  
 16 A. Yes, sir.  
 17 Q. Many cases or few cases?  
 18 A. Many cases, over the years.  
 19 Q. Pardon?  
 20 A. Over the years.  
 21 Q. Have you testified and given opinions only for one  
 22 side, such as the plaintiff; or have you been employed  
 23 by parties on both sides?  
 24 A. No. I've represented both parties in dispute,  
 25 whether plaintiff or defendant.

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1 Q. Can you give the jury a rough estimate of the  
 2 percentages, how many, what percentage plaintiff side,  
 3 what percentage defense side?  
 4 A. Well, interesting enough, over 30 years, it's kind  
 5 of shaken out that it's about 50/50.  
 6 Q. All right. We're now ready for the final recap,  
 7 Mr. Bratic.  
 8 A. Okay.  
 9 Q. Did you prepare charts -- yes, sir?  
 10 A. Well, this is the formula we talked about at the  
 11 very beginning. We figure out the royalty base, the  
 12 billion dollars in product; you figure out what the  
 13 royalty rate is, the 5 percent; and you multiply them  
 14 both. And I think that's the last chart I have, just  
 15 shows how I got the \$50 million.  
 16 Q. No. We have another.  
 17 A. Oh. Well, this is --  
 18 Q. This relates to the hypothetical negotiation.  
 19 A. Correct. They agree on the base; they agree on the  
 20 rate.  
 21 Q. Do you have an opinion regarding the reasonable  
 22 royalty rate and what that royalty rate would reflect,  
 23 if the jury agreed, would be damages in this case?  
 24 A. Yes, I do.  
 25 Q. What is it?

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1 about paying for a royalty and you have a system that  
 2 only uses a few games that actually infringe versus a  
 3 system that uses every game that infringes, what you're  
 4 saying is, I think, that would be a factor that would  
 5 come into consideration.  
 6 A. It would be a factor. But at the same time, you  
 7 have to recognize that a company like Nintendo wants  
 8 total freedom to be able to have his customers use  
 9 whatever products they want without being able to  
 10 channel their customers of what games you can and cannot  
 11 play.  
 12 MR. GERMER: Your Honor, I would ask that the  
 13 response be stricken. I asked a simple "yes" or "no"  
 14 question and got another discussion.  
 15 THE COURT: I'm going to overrule that.  
 16 MR. GERMER: All right.  
 17 THE COURT: Some of these questions are a  
 18 little more complicated.  
 19 BY MR. GERMER:  
 20 Q. Do you agree that Nintendo has over 20 years of  
 21 history in developing video games and software and  
 22 actually is the only company in the world that's solely  
 23 dedicated to the development of video games?  
 24 A. That is true. That's absolutely true.  
 25 Q. And that Nintendo has an established reputation of

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1 designing and publishing innovative games?  
 2 A. Yes. That is all true.  
 3 Q. And that Nintendo has an extensive base in  
 4 consoles?  
 5 A. Yes.  
 6 Q. Customers that have bought its games.  
 7 A. And they have evolved over time.  
 8 Q. Okay.  
 9 A. You know, they have different console systems at  
 10 different points in time.  
 11 Q. Let's talk a little bit about the license that  
 12 you've gone through. I heard Mr. Armstrong say that a  
 13 license -- he kind of compared it to a license to drive  
 14 a car. Is that a decent analogy?  
 15 A. Yeah. That's one way to analogize it. Sorry.  
 16 Q. And you're assuming, are you not, in your  
 17 evaluation of a license, that we're talking about a  
 18 nonexclusive license?  
 19 A. That is correct. It would be a nonexclusive  
 20 license.  
 21 Q. Correct. Now, if you're looking at an agreement,  
 22 if we're trying to compare agreements out there to see  
 23 what the royalties are, if you looked at an agreement  
 24 that involved an exclusive license, would you expect the  
 25 royalty to be higher or lower for that exclusive

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1 license?  
 2 A. It depends. Depends on a number of factors. I  
 3 don't think you can make a universal statement that it  
 4 would be higher or lower.  
 5 Q. Does an exclusive license mean that only the person  
 6 that gets it can do the particular thing?  
 7 A. Right.  
 8 Q. So, instead of the person just being one of many  
 9 companies, for example, that could do it, they would be  
 10 the only company?  
 11 A. Correct.  
 12 Q. Is it also true that a lot of these agreements  
 13 sometimes have more than just a license agreement; they  
 14 have technology that's involved, also?  
 15 A. Sure. Sometimes you can have technology sharing  
 16 agreements --  
 17 Q. And --  
 18 A. -- as part of a patent license.  
 19 Q. And is it also true that if you have technology,  
 20 that would be sort of like instead of a license to drive  
 21 a car, it would be like here's a license to drive a car  
 22 and I'll tell you how to build it?  
 23 A. Yes. Yeah.  
 24 Q. And certainly if the agreement contained that type  
 25 of additional benefit, not just the license to drive but

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1 how to build the car, you would expect it to be worth  
 2 more money.  
 3 A. I would say it could have more, depending on what  
 4 you're teaching somebody how to build. If you're  
 5 teaching somebody how to build an Edsel, that's not all  
 6 that helpful.  
 7 Q. True.  
 8 You would agree that in the real world people  
 9 negotiate different types of agreements in terms of  
 10 royalties?  
 11 A. You mean in the real world? Yes.  
 12 Q. Yes, sir.  
 13 A. They come in all flavors, like Baskin-Robbins.  
 14 Q. Yes, sir. So, when you consider what kind of  
 15 royalty should be involved here -- first of all, you've  
 16 only talked about a running royalty; is that correct?  
 17 A. That's correct.  
 18 Q. That's all you've addressed in your report.  
 19 A. Well, no. I concluded a running royalty would be  
 20 appropriate in this case.  
 21 Q. Yes, sir. I don't recall you discussing anything  
 22 about a lump-sum royalty. Did you do that?  
 23 A. I'm sorry. What is your question? You mean here?  
 24 Q. Did you consider, in coming up with your opinions  
 25 for this jury, the notion of a one-time payment instead

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1 of a running royalty?  
 2 A. Did I consider it in my analysis?  
 3 Q. Yes, sir.  
 4 A. Yes, I did.  
 5 Q. Okay. And you recognize that that is something  
 6 that would come up in a negotiation -- is it going to be  
 7 a running royalty, is it going to be lump sum, or is it  
 8 going to be a running royalty with a cap? That's  
 9 another possibility, isn't it?  
 10 A. Or annual minimums with running royalties.  
 11 Q. Yes, sir.  
 12 A. There's lots of combinations.  
 13 Q. And you could have combinations of -- you could  
 14 start off at 5 percent, and you can go down with volume.  
 15 The more volume there is, the lower it gets. All of  
 16 these are possible ways to do it, are they not?  
 17 A. Sure. But they're possibilities to be considered.  
 18 Q. All right. And, in fact, in different cases where  
 19 you testified under the circumstances, you have found  
 20 that those may be the appropriate way to do it.  
 21 A. Depending on the circumstance. That's right. It's  
 22 very -- excuse me. I'm sorry. It's very fact-specific  
 23 to the specific case at hand.  
 24 Q. Now, we talked a lot about a number of different  
 25 reports that you read reports of; but I want to talk to

1 A. No, they haven't; but they intended to manufacture  
 2 product to the point where Mr. Tyler was traveling to  
 3 China with drawings of controllers to have them made.  
 4 So, they planned on manufacturing. That's why they  
 5 wanted Sony patents.  
 6 Q. Would you agree that the fact that Mr. Tyler,  
 7 Mr. Armstrong, and Anascape were willing to take a lump  
 8 sum of 10 million for another patent -- not our  
 9 patent -- would be some indication that they are  
 10 receptive to lump-sum payments?  
 11 A. I would agree that it would be some indication, but  
 12 you'd have to consider the facts and circumstances of  
 13 how and why they negotiated that transaction in 2004  
 14 versus what would have happened in June, 2005, in our  
 15 hypothetical negotiation for the '700 patent.  
 16 Q. And do you agree that it would be some indication  
 17 that Sony preferred the lump-sum method?  
 18 A. Well, Sony definitely preferred a lump sum. That's  
 19 what they settled for.  
 20 Q. Okay. Now, at the time of this negotiation with  
 21 Sony -- that's in 2004 -- as you understand it, was  
 22 Anascape saying to Sony, "Hey, you're infringing our  
 23 patents, including the '700 patent. We want to sit down  
 24 and talk with you and come up with a solution"?  
 25 A. No. That's not true at all. They couldn't have

1 you about this Sony license which you mentioned.  
 2 A. All right.  
 3 Q. Now, you've told us, I believe -- and we heard  
 4 Mr. Tyler say -- that under the Sony license, there was  
 5 \$10 million paid; but it was paid for the '606 patent,  
 6 which is not the one that's involved in this case.  
 7 A. That's correct. It was an exclusive license for  
 8 \$10 million.  
 9 Q. Yes, sir. And in terms of the patent involved in  
 10 this case, what you had was Mr. Armstrong giving Sony  
 11 the application for the '700 which had been approved  
 12 plus some other patents; and, in return, he got some  
 13 patents back from Sony.  
 14 A. There was a cross-license. That's correct, between  
 15 both parties.  
 16 Q. So, in terms of cash, Mr. Armstrong did not get any  
 17 cash -- or Anascape did not get any cash for the '700  
 18 application.  
 19 A. For the -- that is correct. They did not get any  
 20 cash for what was an application at that time; although,  
 21 they did get valuable patent rights from Sony.  
 22 Q. They got some cross-rights.  
 23 A. Right. But they -- Anascape considered them to be  
 24 very valuable patent rights.  
 25 Q. Although they haven't used them yet.

1 infringed the '700 patent in 2004. It hadn't issued.  
 2 Q. Do you think that they were saying to Sony that  
 3 "You're infringing our patents and you may be infringing  
 4 our '700 application once it gets approved and it's  
 5 about to get approved"?  
 6 A. I don't know how to answer that question. You  
 7 can't infringe an application. Your question suggests  
 8 that you can infringe an application.  
 9 Q. Do you think that Mr. Armstrong, at the time he was  
 10 negotiating, was thinking to himself, "Gosh, I have the  
 11 '700 application that's already been approved. I have  
 12 this valuable application which when it gets approved  
 13 will let me say to Sony, 'You're infringing my patent'?"  
 14 A. The valuable patent.  
 15 Q. Yes.  
 16 A. The one that you said was a valuable patent  
 17 application which became a valuable patent, yes. I'm  
 18 sure he would have considered that.  
 19 Q. He would have believed, I presume, that once he got  
 20 that '700, it was going to be valuable.  
 21 A. Yes.  
 22 Q. Okay. So, he knows, when he's sitting there in  
 23 2004 dealing with Sony --  
 24 A. Yes.  
 25 Q. -- that he's got an application that's already been

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1 approved -- although, you're right, it's not an official  
2 license yet; but it's already approved -- and once he  
3 gets it, he's going to have a very big case to make  
4 against Sony.  
5 A. And your question is would he likely have? I don't  
6 know. I assume so, but I don't know for sure.  
7 Q. Okay.  
8 A. I didn't ask him about that.  
9 Q. But his mind-set would be that he has something  
10 valuable in that '700 application which he knows has  
11 already been approved.  
12 A. Yeah. But he also knows there is a risk that even  
13 though it's been approved, it may not be issued. There  
14 is always the possibility it could be withdrawn.  
15 Q. Sony at that time was the biggest company in the  
16 field by far, right?  
17 A. Still are.  
18 Q. They were over 50 percent at that time?  
19 A. 50, 55 percent, yeah, market share of installed  
20 console base.  
21 Q. I have some references that -- well, did you read  
22 Mr. Armstrong's deposition?  
23 A. Yes.  
24 Q. You did?  
25 A. Well, I'm not sure which one you're asking about.

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1 I did read one of his depositions.  
2 Q. Did you read the Tyler deposition, Mr. Tyler's  
3 deposition?  
4 A. I believe so, but I'm not sure how many times he  
5 was deposed.  
6 Q. Do you recall, without me going through this, that  
7 they both indicated that they thought that Sony was  
8 infringing what was going to be the '700 patent?  
9 A. They may have said that. I don't recall.  
10 Q. All right.  
11 A. Wouldn't surprise me, but I don't recall  
12 specifically.  
13 Q. Now, in 2005 -- that's one year later, correct?  
14 A. Yes.  
15 Q. That's the hypothetical question?  
16 A. The hypothetical negotiation occurred --  
17 Q. Yes, sir.  
18 A. -- on --  
19 Q. That's the hypothetical negotiation, and that's  
20 when we assume they sit down with Nintendo and decide  
21 how much should we get for our '700 --  
22 A. Well, what they'll do is at the time of -- the  
23 hypothetical negotiation would have occurred on or about  
24 the time of the issuance of the patent in June, 2005.  
25 Q. Yes, sir. So, my only point was that's only about

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1 a year after they were willing to walk away from their  
2 application for the '700 with no cash at all.  
3 A. Well, I don't know what you mean "willing to walk  
4 away from" the '700 application.  
5 Q. Well, I mean, they ended the negotiation with Sony;  
6 and at the end of the deal, they got no cash for the  
7 '700.  
8 A. No, but they got valuable Sony patents which they  
9 considered to be very valuable in this country for them  
10 to manufacture a controller.  
11 Q. But they got no cash for that patent --  
12 A. Well --  
13 Q. -- and they're going to sit down -- just to try to  
14 walk this through, they're going to be sitting down to  
15 talk with Nintendo a year later and saying, "But we want  
16 you to pay 50 million."  
17 A. Well, sure; but nobody's going to pay for an  
18 application. That's the problem. It wasn't a patent  
19 when they negotiated with Sony. They didn't have the  
20 right to enforce it, again. So --  
21 Q. And --  
22 A. I'm sorry. And the fact that they didn't pay cash  
23 doesn't mean that the consideration they got from Sony,  
24 the three Sony patents, were not considered to be  
25 valuable to Sony -- to Anascape, which they were.

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1 Q. Anascape would have had the option in '04 to say --  
2 A. I'm sorry?  
3 Q. Anascape would have had the option in 2004 to say  
4 to Sony, "We're not going to include this application.  
5 If you're not going to give us any money for it, we're  
6 not going to include that and we'll come back and sue  
7 you next year once we get it"?  
8 They could have done it, couldn't they?  
9 A. Right. But they also could have said, "Give us  
10 some patents, and we'll give you the application," which  
11 is what happened.  
12 Q. So, they chose to take a deal without any cash that  
13 may or may not result in a benefit to them?  
14 A. A benefit to whom?  
15 Q. To Mr. Armstrong and Mr. Tyler and Anascape. In  
16 other words, the patents that they got back from Sony,  
17 we don't yet know, do we, whether that's going to be any  
18 benefit to them?  
19 A. Well, the issue is what they perceived to be the  
20 benefit at the time because that's the time you  
21 negotiate. Just like in our hypothetical negotiation,  
22 you have to look to what you expect to benefit from the  
23 value of the '700 patent. And they perceived that the  
24 '700 application was something they were willing to put  
25 on the negotiation table because they believed that they



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1 were getting three very important patents back from Sony  
2 and that no cash would change hands but they would get  
3 three important patents from Sony which would enable  
4 them to get in the controller-making business.  
5 Q. And, of course, they would have known at that very  
6 moment that it was uncertain whether those patents would  
7 end up being a value to them or not.  
8 A. No. That's not true. I understand from my  
9 interviews of Mr. Tyler and Mr. Armstrong that that's  
10 why they negotiated the '700 patent application, to put  
11 that into the cross-license, because they were getting  
12 three patents that they considered to be very valuable  
13 from Sony to allow them to get into the business of  
14 making controllers.  
15 Q. Yes, sir. And my question was: At that moment,  
16 though, they wouldn't have any way of knowing, back in  
17 '04, whether that would all work out that way.  
18 A. No. That's not true. You get to evaluate patents  
19 right there and then. You know what the patents are.  
20 The three Sony patents weren't applications; they were  
21 issued. Everybody knew what the terms in the claims  
22 were.  
23 Q. I assume you're like Mr. Armstrong, and you're  
24 going by the language of the agreement -- and I'm  
25 talking about the Sony agreement -- when you answer

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1 these questions.  
2 A. Yes. I'm looking at the actual language of the  
3 agreement.  
4 Q. And as you may recall from earlier, the language of  
5 the agreement was the parties said there was uncertainty  
6 as to whether there was any value in these  
7 cross-licenses.  
8 A. That's right, as to the patents. That's right.  
9 But that's --  
10 Q. Okay.  
11 A. That's what was written in the agreement, but  
12 Anascape's perspective was that they were willing to  
13 give the '700 patent application in exchange for three  
14 Sony patents that they wanted to have to get into  
15 manufacturing controllers.  
16 Q. I'm going to switch now to the -- a couple of the  
17 licenses you talked about.  
18 A. Yes.  
19 Q. One of them you mentioned and I think was up on  
20 your little summary was 6 degree of freedom and Mad Catz  
21 license.  
22 A. Yes.  
23 Q. And I believe that was a license that involved Mad  
24 Catz at a time when Mr. Tyler owned it.  
25 A. Yes.

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1 Q. And --  
2 A. But the actual agreement wasn't with Mad Catz. It  
3 was with Mr. Tyler individually.  
4 Q. And I believe you put on your slide -- I don't see  
5 it right here, but I think you had that listed up there  
6 as something that showed as 4 to 5 percent.  
7 A. Right.  
8 Q. Do you remember that?  
9 A. Yes.  
10 Q. Now, that agreement was sort of interesting, wasn't  
11 it, in the sense that it had several different royalty  
12 rates in it but it also had a cap for Toys-R-Us?  
13 A. Only for Toys-R-Us.  
14 Q. Yes, sir. And just so the jury understands --  
15 A. But that's not all it had.  
16 Q. Yes, sir. It had some other things, but let's talk  
17 about Toys-R-Us.  
18 What it said was you got 4 percent on some  
19 things, 5 percent on some others. But as to anything  
20 for Toys-R-Us, there would be no royalty paid at all  
21 after this 300,000-dollar cap.  
22 A. Correct.  
23 Q. And --  
24 A. That was only for Toys-R-Us -- it didn't say  
25 Toys-R-Us. It said any Tyler-branded product. So,

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1 Mr. Tyler was branding a product he was selling to  
2 Toys-R-Us, which was the Mad Catz product.  
3 Q. Right. And we know from Mr. Tyler's testimony  
4 earlier that Toys-R-Us was his biggest paying customer.  
5 A. No, he didn't say "biggest"; he said "main."  
6 Q. He said "main." You're right.  
7 A. That doesn't mean it's more than 50 percent. It  
8 just means it's the largest account.  
9 Q. Do you know how big it was?  
10 A. No. But he picked up a lot of customers.  
11 Remember, they became the second largest company in the  
12 industry two years after they executed the 6 DOF  
13 license.  
14 Q. Did you do a calculation to see, if you added in --  
15 took the original license amount and then you factored  
16 in the number of sales that he was going to be making to  
17 Toys-R-Us that are going to be capped at 300,000 -- did  
18 you do the calculation to figure out, then, what the  
19 effective average royalty rate was?  
20 A. No, because you would also have to add the 150,000  
21 up-front payment as well into the calculation.  
22 Q. Yes, sir. So -- but you didn't do that --  
23 A. No.  
24 Q. -- calculation?  
25 So, you can't tell us whether it would be

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1 5 percent or 4 percent or who knows.  
2 A. Well, I can't tell you. I don't have the  
3 information.  
4 Q. All right. You talked about, I believe, a couple  
5 of Immersion licenses. Are you with me on that?  
6 A. Yes.  
7 Q. And you talked about Immersion being pretty  
8 significant because their president said that "We always  
9 get 5 percent," et cetera, et cetera.  
10 A. No, that's not why I said they were significant. I  
11 mean, every time you turn around in the controller  
12 industry, you run into Immersion. They're a major  
13 player in the controller industry for games.  
14 Q. Did you --  
15 A. That's why I say they're significant.  
16 Q. I'm sorry.  
17 In terms of all of those licenses for  
18 Immersion, did you actually study any of them to see --  
19 A. No.  
20 Q. -- what they provided?  
21 A. No. I didn't have the specific license agreements.  
22 Q. Well, don't we have a couple on the 1996? Isn't  
23 that what you have in one of your exhibits?  
24 A. I'm sorry?  
25 Q. Don't you have the license agreement on the 1996

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1 license? It was in your chart. It says:  
2 Immersion/Logitech Agreement, 1996.  
3 A. No, I don't have the license agreement. I actually  
4 did some research and independently found the  
5 Immersion/Logitech license agreements and I found that  
6 there were two agreements and the range of royalties  
7 were from 3 to 7 percent. But I didn't actually have  
8 the agreements because they weren't published.  
9 Q. But the royalty ranged from 5 percent down to 3  
10 percent?  
11 A. And up to 7 percent. There was a second agreement  
12 which was from 5 to 7 percent.  
13 Q. And you also learned from your investigation, did  
14 you not, that that was not a simple royalty agreement?  
15 A. I don't know what you mean by "simple" --  
16 Q. It was not a simple license agreement. It had  
17 technology. It had trademarks --  
18 A. That's right.  
19 Q. It had know-how.  
20 A. That's right.  
21 Q. So, all things being equal, if they had to -- if  
22 they only got 5 percent for the license and all of their  
23 technology and trademarks and know-how, presumably if  
24 you only had one license, it would be something less.  
25 A. No, not necessarily.

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1 Q. Okay.  
2 A. Particularly in the Sony -- Immersion/Logitech  
3 licenses and any of the other Immersion licenses, the  
4 information I had, none of those other agreements ever  
5 specified that the Immersion patents would be deemed to  
6 be valid and infringed, which would have a big impact on  
7 whether or not you would add more value to the patent as  
8 opposed to other things thrown in a license.  
9 Q. Did you study that agreement to see whether or not  
10 the value that the licensee was getting included  
11 significant value from the technology and the know-how,  
12 et cetera?  
13 A. Well, as I told you, that agreement is not  
14 available for anybody for inspection; and there is no  
15 indication as to anything other than there was a bundle  
16 of IP, including patent rights, licensed.  
17 Q. And actually those agreements included a long  
18 bundle of patents, didn't it -- 15, 20, or so?  
19 A. A patent portfolio, that's right.  
20 Q. Yes, sir. Now, generally speaking, if you're going  
21 to get 5 percent for 20 licenses -- 20 patents, wouldn't  
22 you think that if there was only one patent, it might be  
23 a little less?  
24 A. No. IBM is a classic example. IBM at 1 percent --  
25 they'll charge you 3 percent royalty for one patent. If

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1 you want to pay 5 percent, you'll get all 22,000 patents  
2 in their patent portfolio.  
3 Q. Yes, sir. That's an example, but in general --  
4 A. Well, they're the biggest patent company in the  
5 world. They have more patents than anyone else.  
6 Q. In general, wouldn't it be a true proposition that  
7 the more licenses you had to offer, the more money you  
8 could demand?  
9 A. No. That's not the case at all in the real world  
10 or in a hypothetical negotiation.  
11 Q. Okay. You told the jury a little bit about some  
12 Immersion licenses and I think some Sony licenses.  
13 A. Yes.  
14 Q. And you got those out of what I believe was called  
15 the "Wagner report"?  
16 A. Correct.  
17 Q. Just to be clear, the Wagner report was a report  
18 done by an expert -- I presume someone like yourself  
19 that's an expert in economics or accounting -- that  
20 testified in another case?  
21 A. Correct.  
22 Q. And in connection with that testimony, he did kind  
23 of what you've done. He worked up a report, and he  
24 included some information in that report.  
25 A. A lot of information.

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1 Q. All right. And, again, you didn't give us, in your  
2 report, any recommended number for a lump sum, did you?  
3 A. No. That's correct. I do not believe a lump sum  
4 is appropriate in this case.  
5 Q. Now let's talk briefly about the hypothetical  
6 question; and we'll be about through, I believe.  
7 A. Okay.  
8 Q. Hypothetical negotiations.  
9 A. All right.  
10 Q. Past practice is very important to that, is it not?  
11 A. I'm sorry. What do you mean?  
12 Q. Past practice. What the parties have done in the  
13 past in terms of their licensing practices.  
14 A. That's something that would be considered. But, of  
15 course, Ms. Story, the representative from Nintendo,  
16 said it depends on the totality of the circumstances as  
17 to how you do a deal.  
18 Q. Okay. At the time of the hypothetical negotiation  
19 in '05 --  
20 A. Yes.  
21 Q. -- was the GameCube successful or kind of going  
22 downhill, or how would you describe it at that point?  
23 A. In '05?  
24 Q. Yes, sir.  
25 A. In June, '05, it was a successful product; but it

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1 was on its downward life cycle. So, Nintendo was  
2 working on the next generation, which became the Wii.  
3 Q. And at that point the Wii was not out.  
4 A. No. That's correct.  
5 Q. And, in fact, it didn't come out for a year and a  
6 half?  
7 A. Almost a year and a half. November, '06.  
8 Q. So, at the time that they are talking --  
9 Mr. Armstrong, Mr. Tyler are talking to Nintendo, the  
10 hypothetical time, we're looking at Nintendo with one  
11 product going down and another product that's just on  
12 the drawing boards.  
13 A. Well, I don't know if it was on the drawing boards.  
14 I mean, obviously --  
15 Q. Hopefully it's beyond there a little bit.  
16 A. I hope so.  
17 Q. But we don't know because it wasn't out on the  
18 market, right?  
19 A. Not until November, '06. But they clearly were  
20 working on it; so, that would have been known at the  
21 hypothetical negotiation.  
22 Q. At that time, in '05, both parties, of course,  
23 would have been very aware of the Sony deal, would they  
24 not?  
25 A. Yes.

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1 Q. And you said that this is a very competitive  
2 market.  
3 A. Right.  
4 Q. In other words, I think you said that if Sony got  
5 the license to this technology, then Nintendo needed it.  
6 A. Well, Nintendo would have recognized that everybody  
7 in the industry is licensed except for Nintendo; and it  
8 would be at a competitive disadvantage if the patent is  
9 assumed to be valid and infringed.  
10 Q. So, Nintendo would be very conscious of what Sony  
11 did?  
12 A. Very.  
13 Q. Okay. And when Nintendo -- from Nintendo's point  
14 of view, they would have said, "Well, let's see,  
15 Mr. Armstrong and Mr. Tyler. A year ago you sold this  
16 patent for a few cross-licenses -- you sold this  
17 application which became a patent for a few  
18 cross-licenses."  
19 They would have had that in their mind,  
20 wouldn't they?  
21 A. That would have been known. That's right.  
22 Q. And that would certainly be something that would  
23 affect Nintendo, would it not?  
24 A. Well, no, because we're dealing now with a  
25 hypothetical negotiation with a valid and issued patent.

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1 The Nintendo license agreement was only for the '606  
2 patent and made no specific references to the validity  
3 and infringement of the '700 patent which at that time  
4 was an application.  
5 Q. I think you misspoke. But in any event, Nintendo  
6 in '05 would know that Sony in '04 ended up getting the  
7 '700 --  
8 A. The rights to the '700 patent.  
9 Q. The rights to the 700 --  
10 A. Correct.  
11 Q. -- without paying any cash.  
12 A. Correct. And they would have known about it under  
13 a cross-license.  
14 Q. And they would know that Mr. Tyler and  
15 Mr. Armstrong were willing to take a lump sum?  
16 A. Well, they -- under the Sony arrangement. And they  
17 would have known the reasons why Anascape was willing to  
18 take a lump sum, as testified to by Mr. Armstrong and by  
19 Mr. Tyler.  
20 Q. Nintendo would have known in '05, at the time of  
21 the hypothetical negotiation, that whatever their  
22 royalty base was going to be -- you know, because the  
23 Wii wasn't out; and the GameCube was declining. But  
24 whatever it was going to be, it was going to be less  
25 than Sony's.

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1 A. No. That's not necessarily true. Nintendo has  
2 climbed up in their sales of console systems. They're  
3 now Number 2. They've eclipsed Microsoft.  
4 Q. They -- at the time of the hypothetical  
5 negotiation, they would have known that at that time  
6 Sony was much bigger.  
7 A. Yes. They would have known that Sony and Microsoft  
8 were bigger.  
9 Q. Okay.  
10 A. And that they would have been at a competitive  
11 disadvantage by not taking the patent license.  
12 Q. And Microsoft is going to want to stay even with  
13 Sony if they can?  
14 THE COURT: Now, wait a minute. Who?  
15 MR. GERMER: I'm sorry. We got off on  
16 Microsoft.  
17 BY MR. GERMER:  
18 Q. Nintendo is going to want to stay even with Sony if  
19 they can?  
20 A. Well, what do you mean "even"?  
21 Q. They want to get the same deal if they can.  
22 A. Well, if they can. But the terms and circumstances  
23 would have been different in 2005 for Nintendo than they  
24 were when Sony voluntarily negotiated a license in 2004.  
25 Very different circumstances, different playing field.

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1 Q. And according to the numbers we're looking at, a  
2 very different result, in your opinion, from no cash to  
3 50 million.  
4 A. Not a different result at all. I mean, the fact is  
5 they would negotiate -- the Sony deal for the '606  
6 patent was a very different situation, and the '700  
7 patent hadn't issued when the Sony contract was  
8 negotiated; whereas, as of June, 2005, we have an issued  
9 patent. It's deemed to be valid and infringed for  
10 purposes of the hypothetical negotiation.  
11 Q. Correct. And you, of course, are making that  
12 assumption.  
13 A. What's that?  
14 Q. That it's valid and infringed.  
15 A. Yes. I'm required to make that assumption.  
16 Q. And if the jury decides that the patent is not  
17 infringed, then, of course, there would be no damages.  
18 A. Oh, that's correct.  
19 Q. And if the jury decides that the patent was not  
20 valid, there would be no damages.  
21 A. That's true.  
22 Q. Thanks. Thank you very much.  
23 MR. PARKER: Just a couple, your Honor.  
24  
25

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1 REDIRECT EXAMINATION OF WALT BRATIC  
2 BY MR. PARKER:  
3 Q. All these questions about lump sum versus  
4 reasonable royalty, this jury is going to have an  
5 opportunity in a couple of days to make a lump-sum  
6 award, aren't they?  
7 A. Yes.  
8 Q. But that lump-sum award will have to represent a  
9 reasonable royalty on sales that have occurred to date,  
10 correct?  
11 A. That is true.  
12 Q. And has your opinion about what that amount should  
13 be changed in any way after having listened to  
14 cross-examination?  
15 A. No, it hasn't. My opinion is the royalty rate  
16 should be at least 5 percent; and, therefore, the  
17 minimum amount of damages are 50.3 million.  
18 Q. Thank you, sir.  
19 MR. PARKER: I have no further questions.  
20 MR. GERMER: No further questions, your  
21 Honor.  
22 THE COURT: Just for the record and so there  
23 is no confusion later on lump sum, would you tell the  
24 jury what is the difference between a lump sum and a  
25 running royalty? I don't want confusion later on.

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1 THE WITNESS: Okay. A lump sum would be --  
2 using the Sony/Anascape example, where Sony, for the  
3 '606 patent, got an exclusive right to practice the '606  
4 patent, put it in its products, and they wrote a check  
5 for \$10 million. That means they were no longer  
6 accountable, "they" Sony, to Anascape for any sales.  
7 They could sell zero, or they could sell billions of  
8 dollars of product. They wouldn't have to pay them a  
9 penny more. They get one check.  
10 A running royalty is -- if you negotiate  
11 up-front a running royalty, then a running royalty is if  
12 you sell product, you pay royalties. If you don't sell  
13 product, you don't pay royalties. So, one of the  
14 advantages of a running royalty is if you're not sure  
15 how much product you're going to sell or if you're going  
16 to sell it at all, you agree to a running royalty  
17 because then you don't have to pay anything if you don't  
18 sell anything. There's no downside.  
19 THE COURT: Any further questions from  
20 plaintiff?  
21 MR. PARKER: No, sir.  
22 THE COURT: From defendant?  
23 MR. GERMER: No, your Honor.  
24 THE COURT: All right. You may step down,  
25 sir.

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1 Q. Now, in the Wii controller products, a user can't  
2 use the Wii Nunchuk controller if it's not connected to  
3 the Wii Remote controller; isn't that right?  
4 A. That's correct. It has no way to communicate  
5 otherwise.  
6 Q. Okay. And in the same way, a user can't use the  
7 Wii Classic Controller if it's not connected to the Wii  
8 Remote controller.  
9 A. Correct. Again, for communication.  
10 Q. Okay. And the Wii Remote controller -- we've heard  
11 quite a bit about -- has an accelerometer in it,  
12 correct?  
13 A. Correct.  
14 Q. And that accelerometer in the Wii Remote provides  
15 three separate signals representing acceleration along  
16 three different axes; isn't that right?  
17 A. Correct.  
18 Q. And you would agree with me, wouldn't you, that the  
19 use of those three outputs is up to the game designer?  
20 A. Yes.  
21 Q. So, just so we understand what that means, although  
22 Nintendo has the popular games that we've seen, do other  
23 people write games for the Nintendo console?  
24 A. Yes.  
25 Q. And I guess Nintendo licenses them to be able to do

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1 that?  
2 A. Yes.  
3 Q. So, if someone wanted to start a company and came  
4 to Nintendo and made their proposal and agreed to pay a  
5 licensing fee to Nintendo, that person could start  
6 designing their own games for the Wii, for example,  
7 true?  
8 A. I'm not that familiar with the business  
9 relationship side of how we agree on those license  
10 agreements, but we do license other companies to write  
11 software for our machines.  
12 Q. Okay. But you do know, don't you, that if a  
13 company like that decides that they want to write  
14 software to make a Wii-compatible game, they can decide  
15 how to use the outputs of the controller in their game?  
16 A. Yes. As I testified, that's the -- you know, why  
17 they have evolved. Right.  
18 Q. Okay. Thank you, Mr. Pederson.  
19 MR. CAWLEY: That's all the questions I have,  
20 your Honor.  
21 REDIRECT EXAMINATION OF JOHN PEDERSON  
22 BY MR. GUNTHER:  
23 Q. Mr. Pederson, I just want to ask you about one  
24 thing; and that's the vibration motor that Mr. Cawley  
25 asked you some questions about.

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1 A. Uh-huh.  
2 Q. I just want to make sure I'm clear on this. Do you  
3 know, sir -- because you testified you haven't taken one  
4 apart.  
5 A. Right.  
6 Q. Do you know whether or not the offset weight is  
7 connected to the shaft? Do you know that?  
8 A. I don't, because I haven't had one apart.  
9 MR. GUNTHER: No further questions, your  
10 Honor.  
11 THE COURT: Do you have anything?  
12 MR. CAWLEY: No, your Honor. I'm sorry.  
13 THE COURT: Okay. You may step down, sir.  
14 Does anybody object to this witness being  
15 excused? In the meantime, start calling your next  
16 witness.  
17 MR. GUNTHER: Not for Nintendo, your Honor.  
18 MR. CAWLEY: No objection, your Honor.  
19 THE COURT: All right. Then, sir, you are  
20 excused, which means you can leave or not leave as you  
21 wish. But don't discuss the testimony in this case or  
22 your -- your testimony with anybody except the lawyers  
23 until the trial is over. Once the trial is over, you  
24 can talk to anybody you want. And like I say, you can  
25 stay if you wish; or you're free to leave. Thank you,

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1 sir.  
2 THE WITNESS: Thank you.  
3 THE COURT: Who's next?  
4 MR. PRESTA: Your Honor, Nintendo calls  
5 Mr. Robert Dezmelyk.  
6 THE COURT: Step forward, sir.  
7 MR. PRESTA: And before I start, I'd like to  
8 request the court if I could do an interim statement.  
9 THE COURT: Sure.  
10 MR. PRESTA: And also hand out some  
11 notebooks.  
12 THE COURT: Sure.  
13 (The oath is administered.)  
14 MR. PRESTA: May it please the court?  
15 Ladies and gentlemen, the next witness is  
16 Mr. Robert Dezmelyk. He is an expert. He'll tell you  
17 about his qualifications. He's an expert in the field  
18 of controller design and manufacturing, and I'll let him  
19 explain his qualifications to you.  
20 I'm going to be calling him for several  
21 different reasons. There's numerous issues in the case.  
22 One of the very important issues in the case involves  
23 whether the claims that were filed in 2002, after  
24 Mr. Armstrong learned about the GameCube controller that  
25 Nintendo had -- whether those games are supported by a

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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

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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.

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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

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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,

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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

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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

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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

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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

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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;

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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

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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.

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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



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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

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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.

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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.

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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