

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

FILED

EXMS 5-13 2008
DAVID J. MALAND, CLERK
U.S. DISTRICT COURT

By _____
DEPUTY

ANASCAPE, LTD.

Plaintiff

v.

NINTENDO OF AMERICA, INC.

Defendant

§
§
§
§
§
§
§
§

Civil Action No. 9:06-CV-158

JUDGE RON CLARK

JURY INSTRUCTIONS

You have heard the evidence in this case. I will now instruct you on the law that you must apply. It is your duty to follow the law as I give it to you. On the other hand, you, the jury, are the judges of the facts. Do not consider any statement that I have made in the course of trial or make in these instructions as an indication that I have any opinion about the facts of this case.

After I instruct you on the law, the attorneys will have an opportunity to make their closing arguments. Statements and arguments of the attorneys are not evidence and are not instructions on the law. They are intended only to assist the jury in understanding the evidence and the parties' contentions.

It is my duty as Judge to explain what some of the words used in the patent claims mean. Attached as Appendix A to this charge are the claim terms I have

defined for you. These are the same definitions use in your juror notebook. You must accept as correct the definitions contained in Appendix A.

The claim language of the patent I have not defined for you in Appendix A is to be given its ordinary and accustomed meaning as understood by one of ordinary skill in the art, in the context of the patent specifications and prosecution history. A person of “ordinary skill in the art” covered by the patent-in-suit is someone with the equivalent of a “four-year” degree from an accredited institution (usually denoted in this country as a B.S. degree) in mechanical or electrical engineering, and at least three years of experience designing, developing or improving electronic systems that include sensors and/or controllers for computers, robotics, video games or other electronic devices. He or she should have some familiarity with pressure-sensitive variable conductance material. Extensive experience and technical training might substitute for educational requirements, while advanced degrees might substitute for some of the experience.

When words are used in these instructions in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning. The other words in these instructions, and in the definitions I have provided to you, have the meaning commonly understood.

Answer each question from the facts as you find them. Do not decide who you think should win and then answer the questions accordingly. Your answers and your verdict must be unanimous.

I. What is and What is not Evidence

You will be instructed to answer some questions based upon a **“preponderance of the evidence.”** This means you must be persuaded by the evidence that the claim is more probably true than not true. You will be instructed to answer other questions by **“clear and convincing evidence.”** This is a higher burden than by a preponderance of the evidence, but it does not require proof beyond a reasonable doubt. Clear and convincing evidence is evidence that shows something is highly probable. In deciding whether any fact has been proved in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

In determining the weight to give to the testimony of a witness, you should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact, or whether there was evidence that at some other time the witness said or did something, or failed to say or do something, that was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he remembers it, because people may forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was an intentional falsehood or simply an innocent lapse of memory; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

In making up your mind and reaching your verdict, do not make your decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. The testimony of a single witness may be sufficient to prove any fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw, from the facts that have been established by the testimony and evidence in the case.

There are two types of evidence that you may consider in properly finding the truth as to the facts in the case. One is direct evidence – such as testimony of an eyewitness. The other is indirect or circumstantial evidence – the proof of a chain of circumstances that indicates the existence or nonexistence of certain other facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

During the trial, I sustained objections to certain questions. You must disregard those questions entirely. Do not speculate as to what the witness would have said if permitted to answer the question.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instruction to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

If you have taken notes they are to be used only as aids to your memory, and if your memory should be different from your notes, you should rely on your memory and not on your notes. If you did not take notes, rely on your own independent memory of the testimony. Do not be unduly influenced by the notes

of other jurors. A juror's notes are not entitled to any greater weight than the recollection of each juror concerning the testimony.

If scientific, technical, or other specialized knowledge may be helpful to the jury, a witness with special training or experience may testify and state an opinion concerning such matters. However, you are not required to accept that opinion. You should judge such testimony like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, and all other evidence in the case.

In deciding whether to accept or rely upon the opinion of such a witness, you may consider any bias of the witness, including any bias you may infer from evidence that the witness has been or will be paid for reviewing the case and testifying, or from evidence that he testifies regularly.

II. The Nature of the Action, the Parties, and the Contentions

The patent involved in this case is referred to as the '700 patent. The Plaintiff, Anascape, Ltd., contends that the Defendant, Nintendo of America, Inc., infringes claims 14, 16, 19, 22 and 23 of this patent by making, using, offering to sell, or selling within the United States or importing into the United States certain video game controllers. The specific game controllers Anascape says are

infringing are called the “accused” game controllers. Anascape states that it is entitled to damages for the alleged infringement, in the form of a reasonable royalty rate.

Nintendo denies that it is infringing any of the claims of this patent. Nintendo also contends that all asserted claims of the patent are invalid. Invalidity is a defense to infringement. Therefore, even though the PTO Examiner has allowed the claims of the patent, you, the jury, have the responsibility for deciding whether the claims of the patent are valid. Nintendo denies that Anascape is entitled to any damages.

III. Claims and Claim Interpretation

To decide the questions of infringement and invalidity, you must first understand what the claims of the patent cover, that is, what they prevent anyone else from doing. This is called “claim interpretation.” You must use the same claim interpretation for both your decision on infringement and your decision on invalidity. I instructed you earlier on the definitions you must use in interpreting claims.

The patent claims are numbered sentences at the end of each patent. Each claim describes a separate invention. The claims are divided into parts called “limitations.” These limitations also may be referred to as “elements.” The claims

are “word pictures” intended to define, in words, the boundaries of the inventions. Only the claims of the patent can be infringed. Neither the written description, sometimes called the specification, nor the drawings of a patent can be infringed. Each of the claims must be considered individually.

In this case, there are five claims, namely claims 14, 16, 19, 22 and 23. The preamble to claims 14, 16 and 19 use the words “**comprises**” or “**comprising.**” These terms mean “including the following but not excluding others.” Comprising claims are open-ended. Therefore, if you find that an accused video game controller includes all of the elements of such a claim, the fact that the game controller might include additional features, functions, or elements would not avoid infringement of that claim.

There is one clause used in claim 19 of the '700 patent in a special form called a “means-plus-function” clause. This type of clause in a claim does not cover all possible structures that perform the recited function, but covers only the structures described in the patent specification and drawings that perform the respective function, or an equivalent of that structure. For the means-plus-function clause in issue, I have determined the corresponding structures in the patent specification that performs that function. I have provided that for you at the end

of Appendix A. You must use my interpretation of the means-plus-function elements in your deliberations regarding infringement and validity.

Patent claims may exist in two forms, referred to as independent claims and dependent claims. An independent claim does not refer to any other claim of the patent. Thus it is not necessary to look at any other claim to determine what an independent claim covers. Claims 14, 16 and 19 are independent claims. Claims 22 and 23 are dependent claims.

A dependent claim refers to at least one other claim in the patent. A dependent claim includes each of the limitations of the other claim or claims to which it refers, as well as the additional limitations recited in the dependent claim itself. Therefore, to determine what a dependent claim covers, it is necessary to look at both the dependent claim and the other claim or claims to which it refers.

IV. Infringement

To prevail, Anascape must establish literal infringement of one or more claims of the patent. To prove “literal infringement” of a claim, Anascape must prove by a preponderance of the evidence that during the time the '700 patent is in force, Nintendo has made, used, offered to sell or sold within the United States or imported into the United States a video game controller that incorporates all of the elements of that claim and has done so without the permission of the patent

holder. You must compare each accused Nintendo game controller with each and every one of the elements of that claim of the '700 patent to determine whether Anascape has proved, by a preponderance of the evidence, that each element of that claim is present.

Someone can infringe a patent without knowing that what they are doing is an infringement of the patent. They also may infringe even though they believe in good faith that what they are doing is not an infringement of any patent. On the other hand, someone does not infringe by inventing a new and different way of accomplishing the same result - that is, to create a video game controller that does not incorporate all of the limitations of any claim of the patent.

However, the mere fact that elements of an accused game controller are covered by one or more of Nintendo's patents does not protect the accused controller from infringing the '700 patent.

V. Invalidity

Only a valid patent may be infringed. A patent cannot take away from people their right to use what was known or what would have been obvious when the invention was made. Therefore, you the jury have the responsibility for deciding whether each claim in question is valid.

For a patent to be valid, the invention claimed in the patent must be new and non-obvious in light of what came before. That which came before is referred to as the “prior art.” Nintendo contends that the claims in the ’700 patent are not valid because they are described in one or more prior art references. Nintendo must prove invalidity by clear and convincing evidence.

There are three ways in which Nintendo contends that the invention described in a particular claim is invalid. These ways, sometimes called “anticipation,” “obviousness,” and “written description” are described below. You must consider each of these separately as to each claim, and decide whether Nintendo has proven any of them by clear and convincing evidence.

Date of Invention

Nintendo is relying on several items of prior art. In order to rely on these items of prior art, Nintendo must prove by clear and convincing evidence that these items fall within one or more of the different categories of prior art recognized by the patent laws. These categories include:

- (1) anything that was publicly known or used in the United States by someone other than the inventor before the inventor made the invention;
- (2) anything that was sold or on sale in the United States more than one year before the effective filing date of the ’700 patent;

- (3) anything that was patented or described in a printed publication anywhere in the world before the inventor made the invention, or more than one year before the effective filing date of the '700 patent; and
- (4) anything that was invented by another person in this country before the inventor made the invention, if the other person did not abandon, suppress or conceal his or her prior invention.

Two of the different categories of prior art refer to the date on which the inventor made the invention. This is called the "date of invention." For purposes of this case the "date of the invention" for a particular claim is the same as the "effective filing date," which is referred to in the other two categories of prior art.

The effective filing date of a claim of the '700 patent is the date the application was filed (November 16, 2000), or the date on which the earlier patent application was filed (July 5, 1996), if that earlier application discloses the invention in that claim in the later patent.

Anascape asserts that the claims of the '700 patent are entitled to an effective filing date of July 5, 1996. Nintendo asserts that the claims of the '700 patent are not entitled to the 1996 effective filing date, but rather they have the effective filing date of November 16, 2000.

In the patent application process, the applicant may change the claims between the time the patent application is first filed and the time a patent is finally

granted. As long as an application is pending, an applicant may amend the claims or add new claims. An applicant may add new patent claims in a new application that are intended to cover another's product about which the applicant learned of during the prosecution of the application. However, for any new claim to be entitled to the July 5, 1996 filing date, the July 5, 1996 application must disclose the invention of the new claim with all of its limitations.

The question is not whether a claimed invention is an obvious variant of that which is disclosed in the specification. Rather, the 1996 application itself must describe the invention in the claim, and do so in sufficient detail that one skilled in the art can clearly conclude that the inventor invented the claimed invention as of July 5, 1996. A disclosure in the application that merely renders the claim obvious is not sufficient to meet this written description requirement; the disclosure must describe the claim of the '700 patent with all its limitations.

This written description requirement may be satisfied by the words, structures, figures, diagrams, formulas, etc., in the patent application, and any combination of them, as understood by one of ordinary skill in the field of the technology of the invention. A requirement in a claim need not be expressly disclosed in the patent application as originally filed; provided persons of ordinary

skill in the field of technology of the invention would have understood that the missing requirement is inherent in the written description in the patent application.

Nintendo can meet its burden of proving that the 1996 application fails to satisfy the written description requirement for a particular claim of the '700 patent, (and thus establish that claim is not entitled to the July 5, 1996 effective filing date) by showing by clear and convincing evidence that, the entirety of the specification of the 1996 application would clearly indicate to a person of ordinary skill in the art that the invention described in that application is of a narrower scope than the invention of that particular claim of the '700 patent.

I will now list the categories of prior art you may consider. Later, I will list the specific items of prior art upon which Nintendo is relying to establish that the claims of the '700 patent are invalid.

Prior Art: Prior Use or Knowledge

Knowledge or use in the United States of a game controller can be prior art to the patent claims. The knowledge or use will be prior art if it meets the following requirements:

- (1) The knowledge or use must be by someone other than the inventor;
- (2) The knowledge or use must be before the effective filing date of the claim;

- (3) The knowledge or use must be in the United States. Prior knowledge or use outside the United States cannot be relied upon to invalidate a patent claim; and
- (4) The knowledge or use must have been public. Private or secret knowledge or use by someone other than the inventor is not prior art.

Prior Art: Prior Sale or Offered for Sale

The sale or offer for sale in the United States of a game controller may be prior art to a patent claim if sold or offered for sale before the effective filing date of the claim. The sale or offer for sale of the system or method must be public.

In order for there to be an offer for sale, two requirements must be met. First, the invention must have been the subject of a commercial offer for sale. Second, the invention must be "ready for patenting."

Even a single offer for sale to a single customer may be a commercial offer, even if the customer does not accept the offer.

An invention is ready for patenting if the system offered for sale has been developed to the point where there was reason to expect that it would work for its intended purpose. The invention may be ready for patenting even if it is not ready for commercial production, or has not been technically perfected.

Prior Art: Prior Printed Publication

A printed publication in this or another country, or a foreign patent, may be prior art. A printed publication must be reasonably accessible to those members of the public who would be interested in its contents. It is not necessary that the printed publication be available to every member of the public.

So long as the printed publication was available to the public, the form in which the information was recorded is unimportant. The information must, however, have been maintained in some permanent form, such as printed or typewritten pages, or photocopies.

Prior Art: Prior Invention

An invention made in the United States by another person may be prior art as to a claim of the '700 patent if it was made before the date of invention of that claim of the '700 patent, and that person did not abandon, suppress, or conceal the invention.

In this regard, Nintendo must show by clear and convincing evidence *either* that before the date of invention of a claim, of the '700 patent, another person or company made that invention in this country and that such person or company exercised reasonable diligence in later reducing that invention to practice. In addition, Nintendo must show that the invention was sufficiently developed that

one skilled in the art would have recognized that it would work for its intended purpose. However, it is not necessary that Mr. Armstrong had knowledge of that prior invention.

Anticipation

A patent claim is invalid if the claimed invention is not new. For the claim to be invalid because it is not new, all of its requirements must have existed in a single item of prior art as described above. If a patent claim is not new we say it is “anticipated” by a prior art reference.

Nintendo is relying upon the following prior art references as anticipating prior art:

- (1) Claim 19 is anticipated by the Sony Dual Shock controller;
- (2) Claims 14, 19, 22 and 23 are anticipated by the Sony Dual Shock 2 controller; and
- ~~(3) Claim 19 is anticipated by the Goto patent (European Patent Application No. EP 0 867 212 A1).~~

For a prior art reference to anticipate a claim of the '700 patent, each element in the claim must actually be present in that item of prior art. Of course, you must first decide whether Nintendo has shown by clear and convincing evidence that these references are “prior art” as defined above.

Obviousness

Nintendo also contends that claim 16 of the '700 patent is invalid because the claimed subject matter was obvious to one of ordinary skill in the art at the time the invention was made. To be patentable, an invention must not have been obvious to a person of ordinary skill in the pertinent art at the time the invention was made.

Obviousness may be shown by considering more than one item of prior art in combination with each other. Nintendo contends that claim 16 of the '700 patent would have been obvious to a person of ordinary skill in the field of the invention at the time the invention was made in light of the following prior art references:

- (1) The Goto patent (European Patent Application No. EP 0 867 212 A1); and
 - (2) the Sony Dual Shock 2 controller.
-

Again, you must first determine whether Nintendo has shown by clear and convincing evidence that these references are “prior art” as defined above.

The next question is, would it have been obvious to those skilled in the art who knew of these items of prior art to make the invention described in a claim? If the answer to that question is “yes”, then that patent claim is invalid. Nintendo

has the burden of proving by clear and convincing evidence that claim 16 of the '700 patent is invalid for obviousness.

Obviousness is determined from the perspective of a person of ordinary skill in the field of the invention. The issue is not whether the claimed invention would have been obvious to you, to me as a Judge, or to a genius in the field of the invention. Rather, the question is whether or not the invention would have been obvious to a person of ordinary skill in the field of the invention.

You must not use hindsight when comparing the prior art to the invention for obviousness. In making a determination of obviousness or non-obviousness, you must consider only what was known before the invention was made. You may not judge the invention in light of present day knowledge.

In determining whether or not these claims would have been obvious, you should make the following determinations from the perspective of a person of ordinary skill in the art, as I have previously defined it for you, in light of the scope and content of the prior art:

First, are there any **material differences** between the **scope and content** of the prior art and each asserted claim of the '700 patent?

Second, are there any **objective indications** of non-obviousness?

a. Scope and Content

Determining the scope and content of the prior art means that you should determine what is disclosed in the prior art relied upon by Nintendo. You must decide whether this prior art was reasonably relevant to the particular problem the inventor faced in making the invention covered by the patent claims. Such relevant prior art includes prior art in the field of the invention, and also prior art from other fields that a person of ordinary skill would look to when attempting to solve the problem.

b. Material Difference

In determining whether there are any material differences between the invention covered by the patent claims and the prior art, you should not look at the individual differences in isolation. You must consider the claimed invention as a whole and determine whether or not it would have been obvious in light of all the prior art.

If you conclude that the prior art discloses all the steps or elements of the claimed invention, but those steps or elements are in separate items, you may consider whether or not it would have been obvious to combine those items. A claim is not obvious merely because all of the steps or elements of that claim already existed.

In deciding whether to combine what is described in various items of prior art, you should consider whether or not there was some motivation or suggestion for a skilled person to make the combination covered by the patent claims. You should also consider whether or not someone reading the prior art would have been discouraged from following the path taken by the inventor.

It is common sense that familiar items may have been obvious beyond their primary purposes, and a person of ordinary skill often will be able to fit the teachings of multiple patents together like pieces of a puzzle. Multiple references in the prior art can be combined to show that a claim is obvious. Any need or problem known in the field and addressed by the patent can provide a reason for combining the elements in the manner claimed. To determine whether there was an apparent reason to combine the known elements in the way a patent claims, you can look to interrelated teachings of multiple patents, to the effects of demands known to the community or present in the marketplace, and to the background knowledge possessed by a person of ordinary skill in the art. Neither the particular motivation of the person of ordinary skill in the art nor the alleged purpose of the patentee controls. One of ordinary skill in the art is not confined only to prior art that attempts to solve the same problem as the patent claim.

c. Objective Indications

You also must consider what are referred to as objective indications of non-obviousness. Some of these indications of non-obviousness are:

- (1) Long-felt and unmet need in the art for the invention;
- (2) Failure of others to achieve the results of the invention;
- (3) Commercial success of the invention;
- (4) Praise of the invention by those in the field;
- (5) Expression of disbelief or skepticism by those skilled in the art;
- (6) Invention proceeded in a direction contrary to accepted wisdom in the field; and
- (7) Invention achieved any unexpected results.

These objective indications are only relevant to obviousness if there is a connection, or nexus, between them and the invention covered by the patent claims. For example, commercial success is relevant to obviousness only if the success of the product is related to a feature of the patent claims. If the commercial success is the result of something else, such as innovative marketing, and not to a patented feature, then you should not consider it to be an indication of non-obviousness.

Again, you must compare separately each of the claims of the patent asserted by Anascape with the prior art references to determine whether Nintendo

has proved by clear and convincing evidence that one or more of the claims was obvious.

Written Description

To be valid, a patent must meet the “written description” requirement. In order to meet this written description requirement, the description of the invention in the specification portion of the '700 patent must be detailed enough to describe the invention that is claimed in the claims of the '700 patent. Nintendo may also establish that a patent claim of the '700 patent is invalid by showing, by clear and convincing evidence, that the written description of the invention in the '700 patent itself is not adequate. In the patent application process, the applicant may change the claims between the time the patent application is first filed and the time a patent is finally granted. An applicant may amend the claims or add new claims. These changes may narrow or broaden the scope of the claims. The purpose of the written description requirement is to ensure that the '700 patent provides an adequate description of the invention and to ensure that the scope of the claims that are eventually issued remain within the scope of the written description of the invention that was provided with the application for the '700 patent.

This written description requirement for a particular claim is satisfied if the person of ordinary skill reading the specification of the '700 patent would recognize that it describes the invention with all of its limitations.

The written description requirement may be satisfied by the words, structures, figures, diagrams, formulas, etc., in the patent, and any combination of them, as understood by one of ordinary skill in the field of the technology of the invention. A requirement in a claim need not be expressly disclosed in the specification; provided persons of ordinary skill in the field of technology of the invention would have understood that the missing requirement is inherent in the written description of the specification.

VI. Damages

If you find by a preponderance of evidence that a claim has been infringed and you do not find by clear and convincing evidence that the same claim is invalid, then Anascape is entitled to an award of damages adequate to compensate for the infringement. You should not interpret the fact that I have given instructions about damages as an indication in any way that I believe that Anascape should, or should not, win this case. It is your task first to decide whether Nintendo is liable. I am instructing you on damages only so that you will have guidance in the event you decide that Nintendo is liable and that Anascape is entitled to recover money from Nintendo.

You may award Anascape damages for any infringement you have found starting July 31, 2006. The amount of those damages must be adequate to compensate Anascape for the infringement. Your damages award, if you reach this

issue, should put the patent holder in approximately the same financial position that it would have been in had the infringement not occurred, but in no event may the damages award be less than a reasonable royalty.

Anascape has the burden to establish the amount of its damages by a preponderance of the evidence. Damages are limited to acts of infringement in the United States. You should award only those damages that Anascape establishes that it more likely than not suffered. Anascape is not entitled to damages that are remote or speculative or based on guesswork. While Anascape is not required to prove its damages with mathematical precision, it must prove them with reasonable certainty.

In this case, Anascape is seeking damages in the form of a reasonable royalty. A royalty is the amount of money a licensee pays to a patent owner for use made of the invention under the patent. A reasonable royalty is the amount of money a willing patent owner and a willing prospective licensee would have agreed upon at the time of the infringement for a license to make use of the invention. It is the royalty that would have resulted from an arm's-length negotiation on or about June 14, 2005 between a willing licensor and a willing licensee, assuming that both parties believed the claims in question to be valid and infringed and that the licensee would respect the patent. In making your

determination of the amount of a reasonable royalty, it is important that you focus on the time period when the infringer first infringed the patent and the facts that existed at that time. Your determination does not depend on the actual willingness of the parties to this lawsuit to engage in such negotiations. Your focus should be on what the parties' expectations would have been had they entered negotiations at the time the infringing activity began and the facts that existed at the time.

In determining the reasonable royalty, you should consider all the facts known and available to the parties at the time infringement began. Some of the kinds of factors that you may consider in making your determination are:

- (1) whether the patent holder had an established royalty for the invention; in the absence of such a licensing history, any royalty arrangements that were generally used and recognized in the particular industry at that time. In this connection, when evaluating evidence about amounts paid under other licenses and agreements, you should consider whether such licenses and to what extent the license was comparable -- that is, was the technology exchanged and the terms of the agreement similar in terms and scope to the technology of the patent-in-suit and the bare license for the patent in the hypothetical negotiation;
- (2) the nature of the commercial relationship between the patent owner and the licensee such as whether they were competitors or whether their relationship was that of an inventor and a promoter;
- (3) the established profitability of the patented method or system, its commercial success and its popularity at the time;

- (4) whether the patent owner had an established policy of granting licenses or retaining the patented invention as its exclusive right, or whether the patent holder had a policy of granting licenses under special conditions designed to preserve its exclusivity;
- (5) the size of the anticipated market for the invention at the time the infringement began;
- (6) the duration of the patent and of the license, as well as the terms and scope of the license, such as whether it is exclusive or nonexclusive or subject to territorial restrictions;
- (7) the rates paid by the licensee for the use of other patents comparable to the plaintiff's patent;
- (8) whether the licensee's sales of the patented invention promote sales of its other methods or systems and whether the invention generates sales to the inventor of his nonpatented items;
- (9) the utility and advantages of the patent property over the old methods or systems, if any, that had been used for working out similar results;
- (10) the extent to which the infringer used the invention, and any evidence probative of the value of such use;

- (11) the portion of the profits in the particular business that are customarily attributable to the use of the invention or analogous inventions;
- (12) the portion of the profits that should be credited to the invention as distinguished from nonpatented elements, the manufacturing process, business risks or significant features or improvements added by the infringer;
- (13) the opinion and testimony of qualified experts and of the patent holder;

- (14) any other factors which, in your mind, would have increased or decreased the royalty the infringer would have been willing to pay and the patent owner would have been willing to accept, acting as normally prudent business people;
- (15) the amount that a licensor and a licensee would have agreed upon just before the patent-in-suit was issued if both had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee who desired, as a business proposition, to obtain a license to use a particular system or method embodying the patented invention would have been willing to pay as a royalty and still be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license.

VII. Instructions for Deliberations

It is your sworn duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case, do not hesitate to re-examine your own opinion and change your mind if you become convinced that you are wrong. However, do not give up your honest beliefs solely because the others think differently, or merely to finish the case.

Remember that in a very real way you are the judges—judges of the facts. Your only interest is to seek the truth from the evidence in the case.

Do not let bias, prejudice or sympathy play any part in your deliberations. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual and should be treated as such. The law is no respecter of persons; all persons, including corporations and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice.

When you retire to the jury room to deliberate on your verdict, you will take this charge with you as well as exhibits which the Court has admitted into evidence. When you go to the jury room, the first thing that you should do is

select one of your number as your Foreperson, who will help to guide your deliberations and will speak for you here in the courtroom. The Foreperson should read, or have another juror read, these instructions to the jury. You should then begin your deliberations. If you recess during your deliberations, follow all of the instructions that the Court has given you on your conduct during the trial. Do not discuss the case unless all jurors are present in the jury room. After you have reached your unanimous verdict, your Foreperson must fill in your answers to the written questions and initial and date the verdict form. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me. You must never disclose to anyone, not even to me, your numerical division on any question. If you want to communicate with me at any time, please give a written message or question to the court security officer, who will bring it to me. I will then respond as promptly as possible either in writing or by having you brought into the courtroom so that I can address you orally.

The presiding juror or any other juror who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

After you have reached a verdict, you are not required to talk with anyone

about the case unless the Court orders otherwise. You may now retire to the jury room to conduct your deliberations.

SIGNED May 17, 2008.

A handwritten signature in cursive script, appearing to read "Ron Clark", is written above a horizontal line.

Judge Ron Clark
United States District Judge

APPENDIX A

CLAIM TERM, PHRASE, OR CLAUSE	DEFINITION	CLAIM(S) WHERE USED
3-D graphics controller	<p><i>controller</i>: a device held in the user's hand that allows hand or finger inputs to be converted into electrical signals for manipulation of images (graphics) on a display device, which are capable of being perceived by a human</p> <p><i>3-D</i>: capable of movement in six degrees of freedom</p>	Claims 14
hand operated controller	<p><i>controller</i>: a device held in the user's hand that allows hand or finger inputs to be converted into electrical signals for manipulation of images (graphics) on a display device, which are capable of being perceived by a human</p>	Claims 19, 22-23
movable on two axes	capable of two degrees of freedom of movement	Claim 14
movable on two mutually perpendicular axes	capable of two degrees of freedom of movement on axes that intersect at a ninety degree angle	Claims 19
detectable by the user	capable of being perceived by the hand or ear of a user of the controller	Claims 16, 19
navigating a viewpoint	positioning or orienting a user's view	Claim 19
tactile feedback means for providing vibration	<p>Function: Providing electro-mechanical created vibration to the user.</p> <p>Structure: Motor having a shaft with an offset weight, and equivalents thereof</p>	Claim 19