

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

Anascape, Ltd.,

Plaintiff,

v.

Microsoft Corp., and
Nintendo of America, Inc.,

Defendants.

Civil Action No. 9:06-cv-158-RC

**ANASCAPE'S SUR-REPLY TO NINTENDO'S MOTION FOR REMITTITUR
OR, IN THE ALTERNATIVE, A NEW TRIAL ON DAMAGES**

Anascape, Ltd. (“Anascape”) files its sur-reply to Nintendo of America, Inc.’s (“Nintendo”) Motion for Remittitur or, in the Alternative, a New Trial on Damages (the “Motion”), and respectfully shows as follows:

I. THE JURY WAS ENTITLED TO INCLUDE WII REMOTES IN THE ROYALTY BASE

The jury found that the Wii Classic connected to the Wii Remote infringed claims 19, 22, and 23 of the ‘700 patent.¹ The Wii Remote is required to infringe those claims, as the Wii Classic alone cannot communicate with the Wii console and the Wii Classic alone does not have a “rumble” feature. (Tr. 434:3-436:16.) Thus, the jury could properly consider the Wii Remote as part of the royalty base as a patented product, and not a mere conveyed or derivative sale. *See Am. Seating Co. v. USSC Group*, 514 F.3d 1262, 1268 (Fed. Cir. 2008) (“A ‘conveyed sale’ refers to the relationship between a patented product and a functionally associated non-patented product.”).²

The size of the royalty base is a question of fact for the jury. The maximum royalty base would include all sales of Wii Remotes, Wii Classics, GameCube controllers, and Wavebird wireless controllers—which would result in a base of approximately \$700 million. Nintendo argues that the only Wii Remotes that could “conceivably” be included in the royalty

¹ The jury found that the Wii Classic connected to the Wii Remote infringed the ‘700 patent, and made no finding of non-infringement as to any particular subset of Wii Remotes, despite Nintendo’s argument to the contrary. *Compare* Docket No. 333 with Reply at 4 (“Anything in excess of such number of units would constitute Wii Remotes that the jury found to be non-infringing[.]”).

² Even still, the fact that the Wii Classic cannot function without the Wii Remote would support the inclusion of Wii Remotes in the royalty base as conveyed or derivative sales, as a reasonable jury could conclude that users purchase Wii Remotes in order to use Wii Classics. This certainly qualifies as a “functional relationship” between Wii Classics and Wii Remotes.

base would be “an amount equal to the number of units of Wii Classics sold in the damages period.” To the contrary, the evidence does not require the royalty base to be so limited. The jury heard evidence that the Wii Classic was compatible with Wii Remotes—not only compatible with a single Wii Remote (i.e., the evidence did not show that any given Wii Classic was *only* compatible with *one* Wii Remote). Although Mr. Bratic testified that, in *his* analysis, he matched a single Wii Remote to a single Wii Nunchuk (*see* Tr. 757:15-758:10), the jury is not confined to the specific ratio advocated by a party’s expert. *See, e.g., SmithKline Diags., Inc. v. Helena Labs. Corp.*, 926 F.2d 1161, 1167 (Fed. Cir. 1991). Based on the Wii Remotes’ compatibility with the Wii Classic, and/or its contribution to the infringing combination, a reasonable jury could include all Wii Remotes, or a subset thereof, in the royalty base. Therefore, the jury’s \$21 million award is supported by the evidence.

II. THE SONY LICENSE AGREEMENT SUPPORTS THE JURY’S VERDICT

Without citing any authority, Nintendo argues that the Sony License Agreement “does not and cannot support any damages award.” (Reply at 7.) Anascape’s Response, however, explained why the Sony License Agreement supports the jury’s award and, at minimum, a \$10 million award. (Response at 8-10, 12.) The License Agreement provided Sony with a license to a patent with similar technology to the ‘700 patent. It also licensed the patent application that matured into the ‘700 patent. Trial testimony indicated that this was a “sweetheart deal” for Sony, and that Anascape received valuable rights from Sony through a cross-license of three Sony patents and related technology. Based on these facts, under *Georgia-Pacific* and this Court’s jury instructions, a reasonable jury could conclude that \$21 million was a reasonable royalty for the relevant infringement period considering that it was not a sweetheart

deal, did not involve any cross-license or technology rights, and would have been negotiated with an assumption of validity and infringement.

III. NINTENDO HAS NOT MET ITS REMITTITUR BURDEN

In an effort to meet its arduous remittitur burden, Nintendo (i) attempts to lower its remittitur burden, (ii) violates a stipulation entered into by the parties and relies on an e-mail sent after the jury's verdict as allegedly being "part of the record," and (iii) claims an exhibit which was sent back to the jury room is not evidence. These arguments and tactics are without merit.

Nintendo cites *Oiness v. Walgreen Co.*, 88 F.3d 1025, 1031 (Fed. Cir. 1996) for the alleged proposition that a court "upholds a jury's damages award unless grossly excessive or monstrous, clearly not supported by evidence, *or* based on speculation or guesswork." (Reply at 4 (emphasis in Reply).) Nintendo, however, omits the key word "only" from the quoted sentence's last clause, which actually reads: "or based *only* on speculation or guesswork." *Oiness*, 88 F.3d at 1031 (emphasis added). The omitted word is meaningful, and Nintendo, by omitting it, has attempted to lower its remittitur burden.³

Nintendo tacitly acknowledges that Wii Remotes should be included in the royalty base (Reply at 3-4 & n.3), but claims that the record is "devoid of" any evidence as to the number of units of Wii Classics that should be paired with an equal number of Wii Remotes (Reply at 7). This is incorrect for two reasons. First, as explained in Anascape's Response,

³ This is not the first time Nintendo has manipulated text to further its arguments. See Memorandum Opinion and Order Construing Claim Terms of United States Patent Nos. 6,222,525 and 6,906,700 - Part I, Docket No. 182 at 14 ("Nintendo's brief quoted the same section of the '525 patent and then cleverly substituted 'on' for 'along' in its discussion of the term, as though the specification itself used 'on' and not 'along' when referring to linear movement. Microsoft took the same approach - quickly define 'on' as 'along,' hope that the court would not notice, and then state that 'common sense' tells us that 'on' means 'along.'").

testimony and evidence before the jury indicates that the Wii Remotes are approximately 2.206 times as expensive as Wii Classics (i.e., the Wii Classic sold for an average price of \$14.347 and the Wii Remote for \$31.657). Using these figures, it is possible to calculate a 1:1 ratio between units of Wii Remotes and Wii Classics, resulting in \$72,302,685 worth of sales of Wii Remotes being added to the royalty base. (Response at 12 n.11.) Nintendo claims that PX 215, a Nintendo document showing units to revenue information for Wii Classics and Wii Nunchuks, is not part of the record. This Court’s records, however, show that the exhibit is indeed part of the record, and was therefore provided to the jury in the jury room:⁴

| PLT NO. | DEF NO. | DATE OFFERED | MARKED | ADMITTED | DESCRIPTION |
|---------|---------|--------------|--------|----------|--|
| PX 215 | | 5/7/08 | X | X | 04/01/2001 - 09/30/2007 Breakdown of NCL Financial Information About Sales by NCL to NOA Expressed in Yen (Meader Deposition 11/8/2007, Ex. 245) [NCA00043408 - NCA00043413] |

(Docket No. 335 at 13.)⁵

⁴ Nintendo’s Reply represents that Docket No. 335 does not list PX 215. (Reply at 8.) This is incorrect. Docket No. 335, filed by the Court’s clerk (not by Anascape), is the official record of exhibits admitted at trial and that the jury received in the jury room. (Tr. 1645:15-18 (“Now, when you retire to the jury room to deliberate on your verdict, you will take the charge with you as well as the exhibits which the court has admitted into evidence.”).) Although PX 215 may not have been specifically mentioned by the parties at trial, it nevertheless was admitted into evidence and sent back to the jury room without objection. As such, the jury could properly have used it to award damages.

⁵ Despite arguing that a trial exhibit marked as admitted by the Court’s clerk and sent back to the jury room with the jury *is not part of the record*, Nintendo urges that an e-mail sent by Anascape’s expert Walt Bratic to Nintendo’s counsel immediately *after* the jury’s verdict is somehow “part of the record that the Court can and should consider in deciding the motion.” (Reply at 9 n.7.) This post-verdict e-mail is obviously not evidence or part of the record, and is irrelevant in deciding Nintendo’s Motion. Additionally, Nintendo has violated a stipulation entered into between the parties that states “work product . . . generated by experts . . . in connection with this litigation shall be considered undiscoverable and inadmissible, as will any litigation-related communications . . . between counsel for the parties and their experts[.]” (Reply, Ex. B.)

Second, even without PX 215, the jury would be justified in including \$72,302,685 of Wii Remote sales in the royalty base. The undisputed evidence before the jury indicates that the Wii Remote is 2.206 times as expensive as the Wii Nunchuk. (Response at 12 n.11.) The Wii Nunchuk, like the Wii Classic, is an extension of the Wii Remote, and will not work without the Wii Remote. (Tr. 434:3-10; 435:15-19; 1029:1-9.) Because of these similarities between the Wii Nunchuk and Wii Classic, the jury could find that they were sold (as they are sold) for substantially the same price, and that, therefore, the Wii Remote is 2.206 times more expensive than the Wii Classic.⁶ See, e.g., *Lindemann Maschinenfabrik GmbH v. Am. Hoist & Derrick Co.*, 895 F.2d 1403, 1407 (Fed. Cir. 1990) (“When a ‘reasonable royalty’ is the measure . . . there is room for exercise of a common-sense estimation of what the evidence shows would be a ‘reasonable’ award.”).

IV. CONCLUSION

For these reasons, as well as those articulated in its Response, Anascape respectfully requests that this Court deny Nintendo’s Motion.

Likewise, the *QPSX* decision cited by Nintendo has no bearing on the remittitur inquiry. In that case, Judge Ward sustained an objection to a question posed to Mr. Bratic at trial because Mr. Bratic’s expert report apparently did not discuss a 3.5% royalty rate. Later, Judge Ward granted a remittitur request stating simply that “[a]fter considering the evidence as a whole, the court agrees with Nortel that the jury’s award of \$28 million was against the great weight of the evidence.” 2008 WL 728201, at *3. Nortel had put forth four separate arguments in support of its remittitur request—one relating to lack of evidentiary support, two relating to the royalty base, and one relating to excessiveness. *Id.* It is unclear which argument persuaded Judge Ward, and Judge Ward certainly did not state that his decision had anything to do with Mr. Bratic’s testimony.

⁶ The jury would also have been justified in assuming a 1:1 *sales* ratio between Wii Classics and Wii Remotes, which would add \$32,775,469 to the royalty base.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a) on June 6, 2008. As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ Steven Callahan
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