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

ANASCAPE, LTD.	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 9:06-CV-158
v.	§	
	§	
NINTENDO OF AMERICA, INC.	§	JUDGE RON CLARK
	§	
Defendant.	§	
	§	

ORDER DENYING DEFENDANT'S MOTION FOR REMITTITUR OR, IN THE ALTERNATIVE, A NEW TRIAL ON DAMAGES

Plaintiff Anascape, Ltd. sought $50.3 million for infringement of a patent relating to video game controllers. After trial by jury, Defendant Nintendo of America, Inc. was found to infringe all of the asserted claims of the patent with three of four accused products produced by Nintendo. [Doc. #333]. Nintendo did not call an expert witness on damages at trial, or rebut Anascape's evidence on overall sales of the accused products. The jury awarded Anascape $21 million in damages for patent infringement.

Nintendo asserts that the remittitur is appropriate because the jury's damages award is unsupported by any record evidence. The court finds that the damages award is neither excessive nor against the greater weight of the evidence. Nintendo's motion is denied.

I. PROCEDURAL HISTORY

On July 31, 2006, Anascape filed suit against Nintendo alleging infringement of United States Patent No. 6,906,700 ("the '700 patent"). Issues concerning claims 14, 16, 18,

22 and 23 of the '700 patent were tried to a jury from May 5, 2008 - May 14, 2008.[1] After deliberating for about eight and a half hours over the course of two days, the jury returned a verdict finding the patents valid and infringed by Nintendo's GameCube controller, GameCube Wavebird wireless controller, and Wii Classic controller connected to the Wii Remote controller. The jury awarded Anascape damages in the amount of $21 million.

Defendant now moves the court for remittitur or, in the alternative, a new trial on damages.

II. STANDARD AND SCOPE OF REVIEW

Remittitur for excessive damages is a procedural issue, not unique to patent law. *Imonex Services, Inc. v. W.H. Munzprufer Dietmar Trenner GMBH,* 408 F.3d 1374, 1380 (Fed. Cir. 2005). Therefore, the law of the Fifth Circuit governs this issue.

Under Fifth Circuit law, there is a "strong presumption in favor of affirming a jury award of damages." *Giles v. General Elec. Co.,* 245 F.3d 474, 488 (5th Cir. 2001). The jury's award "is not to be disturbed unless it is entirely disproportionate to the injury sustained." *Caldarera v. E. Airlines, Inc.,* 705 F.2d 778, 784 (5th Cir. 1983). Only if the court is "left with the perception that the verdict is clearly excessive" should deference to the jury be abandoned. *Giles,* 245 F.3d at 488. To grant remittitur, the damages award must be "excessive or so large as to appear contrary to right reason." *Laxton v. Gap, Inc.,* 333 F.3d 572, 586 (5th Cir. 2003). The size of the remitted award is determined by the "maximum

[1]Anascape accused Nintendo's Wii Remote controller connected to the Wii Nunchuk controller of infringing claim 19, Nintendo's Wii Classic controller connected to the Wii Remote of infringing claims 19, 22 and 23, Nintendo's GameCube controller of infringing claims 14, 16, 19, 22 and 23, and Nintendo's GameCube Wavebird wireless controller of infringing claim 14.

recovery rule," reducing damages to the maximum amount a reasonable jury could have been awarded. *Giles,* 245 F.3d at 488-89; *see also Shockley v. Arcan, Inc.,* 248 F.3d 1349, 1362 (Fed. Cir. 2001).

A new trial may be granted on all or some of the issues after a jury trial. Fed. R. Civ. P. 59(a)(1)(A)(2008). Such a motion "may invoke the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving . . ." *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251 (1940). A new trial is the proper remedy when a jury verdict results from passion or prejudice. *DP Solutions, Inc. v. Rollins, Inc.,* 353 F.3d 421, 431 (5th Cir. 2003). The verdict must be against the great, and not merely the greater, weight of the evidence. *International Ins. Co. v. RSR Corp.,* 426 F.3d 281, 300 (5th Cir. 2005).

III. ANALYSIS

As to the motion for new trial, there is no indication that the jury's verdict was the result of passion or prejudice. The jury deliberated for more than eight hours over two days. Nintendo spent much, if not most, of its time trying to convince the jury that the Wii Nunchuk with Remote was significantly different than its other products and, because of the accelerometer, not infringing. The jury obviously knew that the Wii Nunchuk was the big money-maker, but nevertheless agreed with Nintendo's infringement position, which is hardly an indication of passion or prejudice.

On the other hand, Nintendo hammered on its theme that the patentee wrote claims specifically to cover its Gamecube controller. Tr. at 363:21 - 365:21. As the jury was instructed, writing claims to cover a product is perfectly legal. Jury Instructions, [Doc. #350,

p. 13]; Tr. at 1569:12 - 20. It is not surprising that the jury would find infringement as to the Gamecube. The Wavebird and the Wii Classic are very similar to the Gamecube. Minor enhancements and additions to an infringing product do not constitute a design-around that avoids infringement.

Nintendo's choice to emphasize that the patentee had "copied" the Gamecube was a legitimate trial tactic to try and turn the jury against him. However, that perfectly legitimate trial tactic was a double-edged sword, and leaves Nintendo with no room to complain of passion, prejudice, or a lack of evidence to support the infringement findings.

As to damages, there is likewise no basis to find that the jury's verdict was the result of passion or prejudice. The verdict is less than half of the amount Anascape requested. Nintendo has not pointed to prejudicial error that affected damages. Weighing all the evidence, the court does not find that the verdict on damages is against the great weight of the evidence. A new trial on damages is not appropriate.

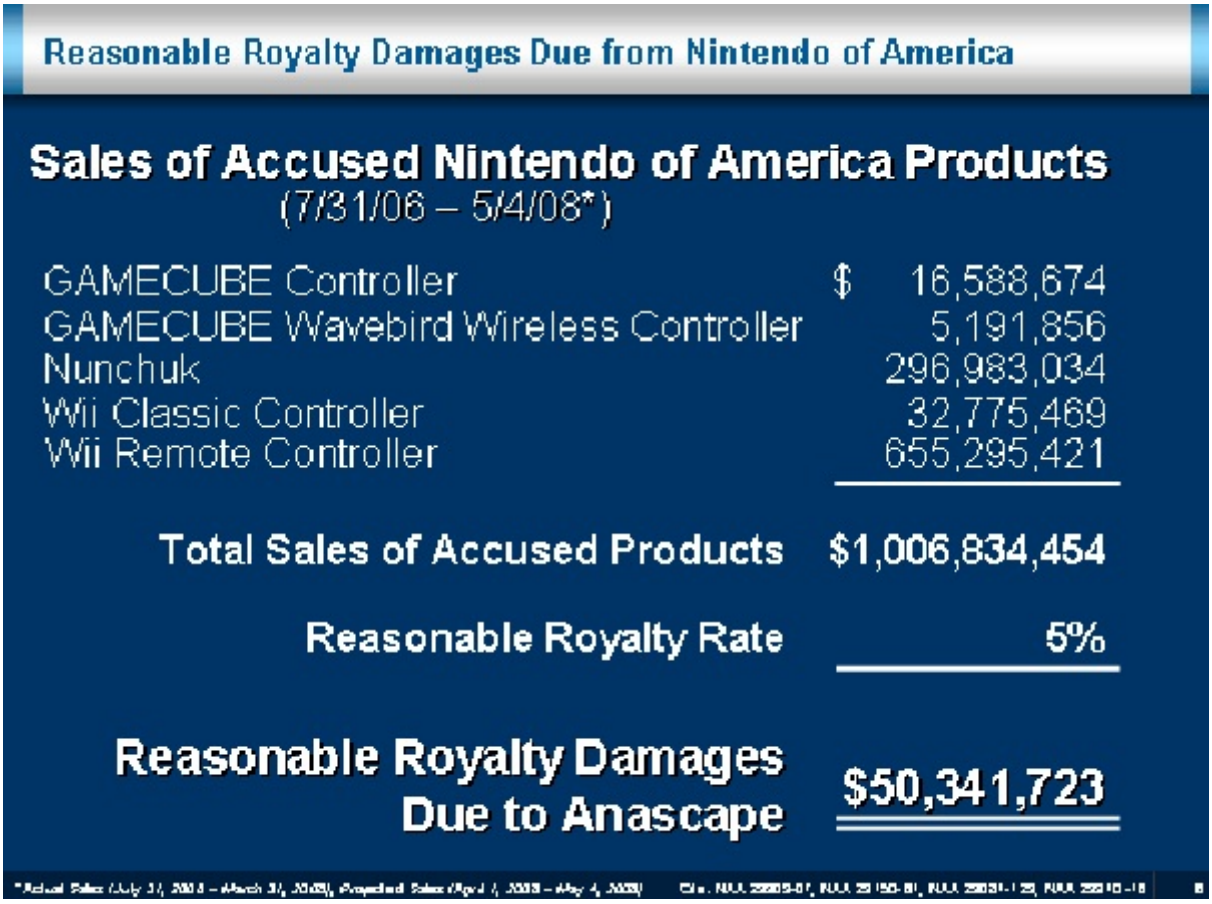
As discussed above, a decision on remittitur is governed by a different standard than that for a new trial. Nintendo argues that the jury's $21 million damages award for sales of the three products it found to infringe is excessive. In particular, Nintendo contends that the maximum amount that a reasonable jury could award with respect to the GameCube, Wavebird wireless, and Wii Classic controllers is $2,727,799.95.

Damages for patent infringement must be "adequate to compensate for the infringement, but in no event less than a reasonable royalty[.]" 35 U.S.C. § 284. This is the amount that Congress has set as a floor—not a ceiling or a mid-point. The infringer is in no position to argue that all it owes is what would have been paid had it acted lawfully in the first

place. The law does not require that a corporation be permitted to make, or retain, profits from its infringing activity. *Monsanto Co. v. Ralph*, 382 F.3d 1374, 1384 (Fed. Cir. 2004).

"The determination of the amount of damages based on a reasonable royalty is an issue of fact." *Unisplay, S.A. v. Am. Elec. Sign Co., Inc.,* 69 F.3d 512, 517 (Fed. Cir. 1995). Deciding how much to award as damages in a patent infringement case "is not an exact science." *Kalman v. Berlyn Corp.,* 914 F.2d 1473, 1482 (Fed. Cir. 1990). The Federal Circuit has stated that it does "not hold that a jury may only arrive at a royalty specifically articulated by the parties during trial." *Unisplay S.A.,* 69 F.3d at 1167. Instead, "a jury's choice simply must be within the range encompassed by the record as a whole." *Id.*

Here, the jury was instructed on the reasonable royalty inquiry and on all of the *Georgia-Pacific* factors. Jury Instructions [Doc. #350 at 24 - 28]; Tr. at 1582:17 - 1582: 14; *See Georgia-Pacific Corp. v. Plywood corp.,* 318 F.Supp. 1116, 1120 (S.D.N.Y. 1970). At trial, Anascape's expert on damages, Mr. Walt Bratic, presented the following slide to summarize his opinion on damages.



Nintendo did not dispute the royalty bases presented by Mr. Bratic at trial and does not dispute them now. Mr. Bratic gave examples of royalties for products in the same general product field ranging from three to seven percent. Tr. at 733:23 - 734:9; 809:3 - 12. He testified that, at a minimum, the parties would have agreed to a 5% royalty rate. Tr. at 729:5 - 10; 753:19 - 754:8; 826:12 - 17. Mr. Bratic also presented evidence that other companies have licenses for joystick or other video game controller technology for a minimum royalty rate of 5%. Tr. at 731:15 - 21; 808:10 - 13.

At trial, evidence was presented that the Wii Classic must be used with a Wii Remote so, to some extent, sales are associated. Tr. at 434:24 - 435:9. There was uncontradicted evidence that the Wii Remote Controller had generated revenue for Nintendo of $655,295,421

from sales in the United States. It may be true that there was not an exact breakdown of the precise number of Wii Remote sales associated with sales of the Wii Classic, but whose fault is that? Nintendo chose not to present an expert on damages or to explain to the jurors how to best segregate sales of Wii Remotes with the Wii Nunchuk should they choose to do so. This cleverly avoided setting a floor for damages for the Gamecube etc., but waived the opportunity to present contravening evidence on damages.

As the jury was instructed, damages do not have to be proven with mathematical precision. Since they were also instructed to consider Mr. Bratic's testimony and the financial information in light of the "hypothetical negotiation" and the Georgia-Pacific factors, it can not be said that their verdict is unsupported by the evidence.

It appears to the court that Nintendo made some skillfully calculated decisions regarding trial tactics to protect the Wii Nunchuk with Remote. Sales revenue to date from the Wii Nunchuk totals more than the revenue from the other three products combined. In terms of an on-going royalty or compulsory license, that is where substantial future damages would have been. Having virtually admitted that three "old school" products infringe, and having made no serious attempt to rebut Anascape's damage calculations, Nintendo is not in a good position to argue that the jury's verdict is the result of passion or prejudice, or even that it is disproportionate to the injury sustained. The court finds that the jury's verdict on damages is not against the great, nor the greater weight of the evidence, and, to the contrary, finds that the verdict is supported by sufficient evidence.

IT IS THEREFORE ORDERED that Defendant's Motion for Remittitur or, in the Alternative, a New Trial on Damages [Doc. #337] is **DENIED.**

So **ORDERED** and **SIGNED** this **26** day of **June, 2008.**

Ron Clark, United States District Judge