

**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

JURY TRIAL REQUESTED

**ANASCAPE, LTD.'S MOTIONS FOR (1) PREJUDGMENT INTEREST; (2)
POSTJUDGMENT INTEREST; AND (3) COSTS**

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Based on the jury's finding of infringement, and its awarding of a royalty, Anascape requests prejudgment interest, postjudgment interest, and costs.

I. The Court Should Award Anascape Pre-Judgment Interest

Supreme Court and Federal Circuit case law recognize that pre-judgment interest is appropriate in patent cases. *See General Motors v. Devex Corp.*, 461 U.S. 648, 657 (1983) (stating that prejudgment interest “should be awarded absent some justification for withholding such an award); *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1564 (Fed. Cir. 1983) (“Prejudgment interest is typically included . . . to insure compliance with the statutory mandate of 35 U.S.C. § 284 that damages be adequate to compensate for the infringement.”). In fact, the Federal Circuit has recognized that “prejudgment interest in patent cases is withheld only under exceptional circumstances.” *Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1574 (Fed. Cir. 1996). Anascape requests prejudgment interest to compensate it for the time value of money from the date of infringement to the date of judgment.

Pre-judgment interest should be awarded at the prime rate. Both the prime rate and the state statutory rate have been recognized as appropriate interest rates for pre-judgment infringement in patent cases.¹ Generally, the prime rate and the Texas state statutory rate are equal. *See* Tex. Finance Code § 304.003 (stating that the Texas statutory rate is equal to the prime rate, subject to a 15% ceiling and a 5% floor). The prime rate is recognized as a “market-based estimate” which represents the rate banks charge for short-term unsecured loans to credit-worthy customers. *See In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1332 (7th Cir. 1992).

¹ *See, e.g., z4 Techs., Inc. v. Microsoft Corp.*, No. 6:06-CV-142, 2006 U.S. Dist. LEXIS 58374, at *83 (E.D. Tex. Aug. 18, 2006) (Davis, J.) (prime rate); *Paice LLC v. Toyota Motor Corp.*, No. 2:04-CV-211, 2006 U.S. Dist. LEXIS 61600, at *19 (E.D. Tex. Aug. 16, 2006) (Folsom, J.) (prime rate); *Insituform Techs., Inc. v. CAT Contracting, Inc.*, No. H-90-1690, 1999 U.S. Dist. LEXIS 23372, at *101-102 (S.D. Tex. Aug. 30, 1999) (state statutory rate); *but see Nat'l Instruments, Corp. v. The Mathworks, Inc.*, No. 2:01-CV-11, 2006 U.S. Dist. LEXIS 25863, at *13 (E.D. Tex. June 23, 2003) (Ward, J.) (average 90-day commercial paper rate).

Some courts use the prevailing prime rate throughout the period of infringement,² while other courts use an “average” prime rate, or use the prevailing prime rate for compound interest calculations.³ Courts also differ in whether to compound the interest, and what period to use in compounding.⁴ “It has been recognized that an award of compound rather than simple interest assures the patent owner is fully compensated.” *See Rite-Hite Corp. v. Kelly Co.*, 56 F.3d 1538, 1555 (Fed. Cir. 1995).

In light of the facts underlying this lawsuit, calculating interest at the prime rate is proper. The court in the *Amoco Cadiz* case recognized the potential windfall to defendants by using a lower rate:

Tortfeasors who choose to reinvest their money in their business (as Amoco has done) rather than create a trust fund must believe that the returns in their enterprise exceed the market rate. Having earned this higher rate of return for the duration of the litigation, they are in no position to complain when called on to pay prejudgment interest. An injurer allowed to keep the return on this money has profited by the wrong. . . .

To return to the trust fund example, if the market rate were 12% it would be unthinkable to set a prejudgment rate of interest at 7.5%, order Amoco to turn \$154 million to the victims (the value of \$60 million invested at 7.5% compound interest for 13 years) and authorize Amoco to retain the other \$108 million.

954 F.2d at 1332. (holding that interest should be charged at the prime rate rather than the 52-week T-bill rate). Although, ideally, the Court would determine the rate of return Nintendo could have received on its borrowed royalties during the period of infringement, absent specific

² *See* z4, 2006 U.S. Dist. LEXIS 58374, at *83.

³ *See Applera Corp. v. MJ Research, Inc.*, No. 3:98-CV-1201, 2005 U.S. Dist. LEXIS 36589, at *7 (D. Conn. Aug. 29, 2005) (using monthly compounding to “more precisely capture the frequent changes in the prime rate”); *IPPV Enters., LLC v. Echostar Communic’ns Corp.*, No. 99-577, 2003 U.S. Dist. LEXIS 3530, at *11 (D. Del. Feb. 27, 2003) (average of the prime rate for the period the “hypothetical” license would have encompassed); *see also* Ex. 22 (showing that the prime rate has varied between 5.00% and 8.25% during the pendency of the lawsuit).

⁴ *See* z4, 2006 U.S. Dist. LEXIS 58374, at *83 (monthly); *Philips Elecs. N. Am. Corp. v. Contec Corp.*, No. 02-123, 2004 U.S. Dist. LEXIS 13455, at *9 (D. Del. July 12, 2004) (annually); *Paice*, 2006 U.S. Dist. LEXIS 61600, at *19 (annually).

evidence or analysis, the prime rate is a reasonable proxy. *See id.* at 1332 (suggesting that borrowing rates specific to the company, as those shown by company-specific notes and debentures, are preferred in computing pre-judgment interest, but that the prime rate is a reasonable estimate of a company-specific rate). The Fifth Circuit has recognized that using the prime rate is reasonable in estimating the value of delayed payment to a business. *See Alberti v. Klevenhagen*, 896 F.2d 927, 938 (5th Cir. 1990) (“[T]he appropriate rate of interest to be used in computing a delay in payment adjustment is the cost of borrowing money, the prime rate.”); *see also Studiengesellschaft Kohle v. Dart Indus., Inc.*, 862 F.2d 1564, 1579-80 (Fed. Cir. 1998) (approving the use of the prime rate, but recognizing that the Court need not award the prime rate “as a matter of course”).⁵

The Court has discretion to determine the appropriate rate and structure of prejudgment interest. *See Applera*, 2005 U.S. Dist. LEXIS 36589, at *4. Here, the jury did not award a set rate tied to revenue, instead, the jury awarded a set amount to compensate Anascape for all infringement between July 2006 and the date of the verdict, for multiple products that were introduced at different times. Because of this, a fair amount of estimation would be required to tie any specific portion of that royalty to any specific period of infringing sales, as would be helpful for compounding interest. As a result, Anascape suggests that the Court award simple interest at the current prime rate for the entire verdict since the filing of the lawsuit. This results

⁵ Some courts consider how the plaintiff would have used the royalty had it received the royalty during the period of infringement. *See Mars Inc. v. Coin Acceptors, Inc.*, 513 F. Supp. 2d 128, 133 (D.N.J. 2007) (“[T]he Court must determine whether [the plaintiff] would have used the money to invest, or to avoid borrowing, determine the percentage yield that Mars either would have earned, or avoided paying, and then charge that rate to Coinco as prejudgment interest.”); *see also Micro Motion Inc. v. Exac Corp.*, 761 F. Supp. 1420, 1436 (N.D. Cal. 1991) (rejecting the T-bill rate because the patent holder received a higher rate in his investment accounts). As with the monies received from the Sony license, the royalty payments would likely have passed through Anascape, and inured to the benefit, primarily, of Kelly Tyler and Brad Armstrong. *See Ex. 1*. During the period of infringement, neither Mr. Armstrong nor Mr. Tyler were in a financial position such that either invested in instruments that received as low a return as T-bills. *See Ex. 1; Ex. 2*. Thus, the Court should not penalize plaintiffs by imposing that low interest rate.

in an award of \$2,068,356.16.⁶ If the Court would like to take a more granular approach, Anascape has attached further calculations, at Ex. 5,⁷ that compute a prejudgment interest rate by (1) imputing a royalty rate by dividing the jury verdict by Bratic's royalty base, (2) imputing a revenue flow by dividing the total infringing revenue into a daily revenue, and (3) computing and compounding interest monthly, depending on the prime interest rate applicable for that month. Anascape's calculations result in an award of \$1,660,854.15. Of course, further interest should be added at a daily rate until the Court enters its judgment.⁸

Once the Court structures the prejudgment interest calculations, the parties can meet and confer to agree on calculations based on that structure.

II. The Court Should Award Anascape Post-Judgment Interest

Anascape is entitled to post-judgment interest, as a matter of right, pursuant to 28 U.S.C. § 1961.⁹ Anascape asks the Court to award post-judgment interest pursuant to that statute.

III. The Court Should Award Anascape Costs

Finally, Anascape requests costs, pursuant to Rule 54(d)(1). *See* Fed. R. Civ. P. 54(d)(1) (“Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.”). The jury awarded a monetary verdict to Anascape based on Nintendo’s infringement, upheld the validity of the patent, and Anascape should be considered the prevailing party in this matter. *See Philips*, 2004 U.S. Dist.

⁶ The current yearly prime rate is 5.00%. Over 719 days (the number of days between and including July 31, 2006, and July 18, 2008), \$21,000,000 would earn \$2,068,356.16 in simple interest ($\$21,000,000 * (0.05/365) * 719$).

⁷ Ex. 21 includes an Excel spreadsheet, as well as a narrative of the procedure used to create the spreadsheet.

⁸ A simple daily rate could be computed as $(\$21,000,000 + [\text{prejudgment interest award}]) * (0.05/366)$.

⁹ Under this section, interest is computed daily, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment, and shall be compounded annually.

LEXIS 13455, at *19 (awarding costs). On an award of costs, Anascape will submit those costs to the Clerk of Court.

IV. Conclusion

Anascape respectfully requests that the Court (1) award prejudgment interest; (2) award postjudgment interest; and (3) award costs.

DATED: July 2, 2008

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 July 2, 2008. As such, this motion was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ Anthony M. Garza

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CERTIFICATE OF CONFERENCE

On Monday, June 30, 2008, I corresponded with Jim Blank and was informed that Nintendo opposed the relief requested in this motion.

/s/ Anthony M. Garza

Anthony M. Garza

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JURY TRIAL REQUESTED

ORDER

Before the Court is Anascape, Ltd.'s Motions for Prejudgment Interest, Postjudgment interest, and Costs. The Court **GRANTS** the Motions. The Court **ORDERS** Defendant Nintendo of America, Inc. ("Nintendo"), to pay \$2,068,356.16 in prejudgment interest to Anascape. The Court **ORDERS** Nintendo to pay postjudgment interest, as provided by 28 U.S.C. § 1961. The Court awards Anascape costs. The Court **ORDERS** Anascape to submit a bill of costs to the clerk of court within 30 days of the date of this Order.