

Hearing on Post-Trial Motions

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

ANASCAPE, LTD.		DOCKET 9:06CV158
VS.		JULY 18, 2008
		9:00 A.M.
MICROSOFT CORP., ET AL		BEAUMONT, TEXAS

VOLUME 1 OF 1, PAGES 1 THROUGH 156

REPORTER'S TRANSCRIPT OF HEARING ON POST-TRIAL MOTIONS

BEFORE THE HON. RON CLARK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	DOUGLAS A. CAWLEY
	ANTHONY M. GARZA
	STEVEN CALLAHAN
	CHRISTOPHER BOVENKAMP
	MCKOOL SMITH - DALLAS
	300 CRESCENT COURT
	SUITE 1200
	DALLAS, TEXAS 75201
	ROBERT M. PARKER
	ROBERT CHRISTOPHER BUNT
	PARKER, BUNT & AINSWORTH
	100 E. FERGUSON
	SUITE 1114
	TYLER, TEXAS 75702

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FOR THE DEFENDANT NINTENDO OF AMERICA:

ROBERT J. GUNTHER, JR.
WILMER HALE - NEW YORK
399 PARK AVENUE
NEW YORK, NEW YORK 10022

LAWRENCE LOUIS GERMER
CHARLES W. GOEHRINGER, JR.
GERMER GERTZ
550 FANNIN
SUITE 500
BEAUMONT, TEXAS 77701

JAMES S. BLANK
LATHAM & WATKINS
885 THIRD AVENUE
NEW YORK, NEW YORK 10022

COURT REPORTER:

CHRISTINA L. BICKHAM, CRR, RMR
FEDERAL OFFICIAL REPORTER
300 WILLOW, SUITE 221
BEAUMONT, TEXAS 77701

PROCEEDINGS REPORTED USING COMPUTERIZED STENOTYPE;
TRANSCRIPT PRODUCED VIA COMPUTER-AIDED TRANSCRIPTION.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

PAGE

DIRECT EXAMINATION OF KELLY TYLER	25
CROSS-EXAMINATION OF KELLY TYLER	36
DIRECT EXAMINATION OF BRAD ARMSTRONG	43
CROSS-EXAMINATION OF BRAD ARMSTRONG	72

1 (REPORTER'S NOTES ANASCAPE VS. MICROSOFT,
2 7-18-08, POST-TRIAL MOTIONS, 9:00 A.M., FRIDAY,
3 07/18/2008, BEAUMONT, TEXAS, HON. RON CLARK PRESIDING.)

4 (OPEN COURT, ALL PARTIES PRESENT.)

5 THE COURT: All right. I call Anascape versus
6 Nintendo, Number 9:06cv158.

7 Is plaintiff ready?

8 MR. CAWLEY: Good morning, your Honor.
9 Douglas Cawley for Anascape. We are ready.

10 If I could also tell the court to respond to
11 various motions that the court may want to hear argument
12 about --

13 THE COURT: Okay.

14 MR. CAWLEY: -- if the court does, Mr. Anthony
15 Garza, Mr. Bunt, Steve Callahan; and, of course, this is
16 Mr. Brad Armstrong for Anascape.

17 With the court's permission, I'd also like to
18 introduce two law students that we have with us here
19 today. Actually, that's Judge Parker there, not a law
20 student.

21 THE COURT: And where are you going to school,
22 young man?

23 MR. CAWLEY: Anthony Veccioni and Daniel
24 Pearson.

25 THE COURT: Good morning.

1 MR. CAWLEY: It turns out that they know a lot
2 more about video games than all the rest of us; so, we
3 brought them today.

4 THE COURT: Bring them up in front of the bar
5 and let them tell us what this is about.

6 Where do you go to school?

7 UNIDENTIFIED SPEAKER: Southern Methodist
8 University.

9 THE COURT: Both?

10 UNIDENTIFIED SPEAKER: Same, yes, your Honor.

11 MR. CAWLEY: So, Anascape is ready to proceed,
12 your Honor.

13 THE COURT: Very good.

14 And is defendant ready?

15 MR. GUNTHER: Yes, your Honor. Good morning.
16 Bob Gunther for Nintendo. With me for the same reasons
17 is Jim Blank and Mr. Germer.

18 We also have here today -- I'm not sure you've
19 met him; but Nintendo's senior vice-president and general
20 counsel, Richard Flamm, is with us, as well.

21 THE COURT: Very good.

22 And somebody is on the phone; I can hear.

23 MR. CAWLEY: Yes, your Honor. I'm sorry.
24 That's Mr. Kelly Tyler, who is on a Boy Scout camping
25 trip --

1 THE COURT: Okay.

2 MR. CAWLEY: -- in Camp Pendleton, California.

3 THE COURT: Why are you wasting your time with
4 this, Mr. Tyler?

5 MR. TYLER: I was wondering the same thing,
6 but I'm here.

7 THE COURT: Believe me, if I could be at
8 Pendleton or the Canoe Base or almost any one of those --
9 Philmont, I would not be doing this.

10 MR. TYLER: I hear you.

11 THE COURT: All right. We have several issues
12 to take up. One of them, I believe, is whether or not
13 there should be an injunction, if not an injunction, then
14 should there be some kind of ongoing royalty or not.

15 Then we have the slightly easier issues, I
16 guess, of the prejudgment interest and postjudgment
17 interest.

18 And then, finally, I think we have the -- how
19 to handle it procedurally, whether to sever or to just
20 enter an order under the rules that there's no reason to
21 not make this portion of the judgment final.

22 (Discussion off the record between the court
23 and law clerk.)

24 THE COURT: That ties in with whether there
25 should be an injunction or not. There were some

1 objections as to witnesses.

2 So, why don't we start, then, with the --
3 whether there should be an injunction and/or royalty
4 and/or neither.

5 MR. CAWLEY: Thank you, your Honor. If I
6 might make a suggestion, your Honor -- and we've
7 consulted with the defendants about this. We're going to
8 handle -- Anascape is going to call two witnesses,
9 Mr. Tyler, which is why he's on the phone pursuant to the
10 court's order allowing us to do that, and Mr. Armstrong.
11 That total testimony will probably be about 30 minutes
12 and is a predicate for both the injunctive relief and the
13 amount of an ongoing royalty.

14 With the court's permission, we would propose
15 to put those two witnesses on first so we could get that
16 out of the way and, incidentally, let Mr. Tyler go back
17 to Boy Scouting and then proceed to argue the two motions
18 that the court has just asked about.

19 THE COURT: All right. Any objection to that?

20 MR. GUNTHER: No, your Honor. There is no
21 objection.

22 I just wanted to remind the court -- this is
23 something that we had mentioned to Ms. Chen -- that
24 Dr. Ugone, who is, as you know, our damages expert, is
25 actually in northern California in Judge Alsup's court

1 testifying before a jury today. We have put in his full
2 direct testimony via a declaration --

3 THE COURT: Right.

4 MR. GUNTHER: -- that's been submitted to the
5 court. Anascape has informed us that they have no
6 cross-examination of him. The only issue is whether the
7 court has any questions with respect to Mr. Ugone; and
8 it's a timing issue, your Honor. Given that he's on the
9 stand today, he is available until about 9:40 this
10 morning and then after 3:00 p.m. our time this afternoon,
11 but, otherwise, will be in court testifying. And, of
12 course, it depends on whether --

13 THE COURT: Well, since it's until -- is it
14 9:40 our time?

15 MR. GUNTHER: Yes, sir.

16 THE COURT: Then let me -- I guess the
17 question I had -- and this goes -- it may be jumping --
18 going through this in my mind. One of the problems I see
19 with an ongoing royalty is I'm not sure the issue has
20 been fully joined as to the damages, by either side.

21 On the other hand, one of the problems of --
22 if I'm -- well, it comes up both ways. Let's say I grant
23 the injunction. Very typically a motion is then made to
24 stay, and some royalty is placed in escrow so that the
25 company -- you know, it can go up on appeal. Sometimes

1 that motion is made up to the Court of Appeals. And, so,
2 one way or the other -- or frequently, I guess out of a
3 thought of avoiding a feeling of total arrogance, there
4 is something done along that line.

5 But it seems to me that -- and plaintiff
6 mentioned the idea of, well, if the injunction wasn't
7 granted, plaintiff might prefer to just let it sit and
8 let the parties decide whether they're going to sue again
9 or work it out between each other.

10 Now, it was -- of course, there was also a
11 good deal of briefing on you wanted a -- you know, you
12 didn't want a royalty. But I did notice that in there,
13 that you argued that it wasn't proper because that didn't
14 give you your chance to either fully negotiate or fully
15 fight it out. So, let me hear, I guess, first from
16 plaintiffs. If I grant the injunction, what do we do
17 about the royalty? If I don't grant the injunction, do
18 you think that the royalty issues have actually fully
19 been joined on the papers I have?

20 I'm not trying to teach either side what to
21 do, but it just appears to me from looking at both sets
22 of what I've got on royalty -- there seems to me to be
23 some things missing. On the other hand, if you take the
24 total experience on both sides here, collectively each
25 side has a great deal more experience than I have; so,

1 I'm assuming you're probably doing a correct job. But
2 I'm sure seeing some places where it's not complete. So,
3 let me hear from Mr. Cawley.

4 MR. CAWLEY: Thank you, your Honor.

5 I think, first of all, it's helpful to put the
6 controversy into procedural context about how we even
7 came to be arguing about this. We never had hearings
8 like this before two years ago, before the eBay decision;
9 and now, of course, the court is faced with them
10 regularly. So, I think it might be helpful to remind
11 ourselves about the procedural posture of the matter.

12 Before eBay, it was basically the Federal
13 Circuit rule that an injunction was virtually automatic;
14 and now we know, after eBay, that the injunction is not
15 automatic and that the court has to look to the
16 traditional four factors of injunctive relief to
17 determine whether or not there's going to be a permanent
18 injunction.

19 Of the four factors in a case like this,
20 public interest -- obviously, the parties feel compelled
21 to put that in their briefs and to argue about it; but
22 let's face it. This is video games. It's not medical
23 devices or shutting down a school system as I know
24 your Honor has a case that it was alleged that
25 institutions of higher learning would -- this is video

1 games; so, it's hard to get very excited about the public
2 interest.

3 Balancing of the hardships. Well, yeah,
4 people always argue, "We've invested a lot of money on
5 Nintendo's side to get this product up and running and
6 it's a terrible hardship on us." And then the plaintiff
7 always says, "Yeah, but there is a policy in favor of
8 promoting intellectual property rights; and how are we to
9 be deprived" --

10 So, it's hard for me to seriously suggest to
11 the court that balancing of the hardship really shifts
12 one way or the other; so, what it comes down to, as it
13 usually does, is is there irreparable harm and is there
14 an inadequate remedy at law. In the instances both
15 before your Honor and other courts through the Eastern
16 District and around the country who have, therefore,
17 grappled with this issue, many of them have said, "Well,
18 okay. I'm not going to grant an injunction on the facts
19 of this particular case because I think that money alone
20 is sufficient compensation and that there doesn't,
21 therefore, need to be an injunction."

22 Now, we don't agree in this case -- for
23 reasons that I can get into when we argue about that
24 subject, we don't agree that that's true in this case.
25 But procedurally what happens is that the court says,

1 "Okay. I think that money alone is sufficient. But you
2 know what? It seems kind of unfair that I just make that
3 pronouncement that money alone is insufficient [sic] when
4 we don't know that the plaintiff is actually going to
5 come up with the money." Therefore, the court will go
6 ahead and set a rate for an ongoing royalty and condition
7 the granting of the injunction on the defendant paying
8 that amount on an ongoing basis.

9 But, of course, the keystone of all of that
10 structure is that the plaintiff has asked for an
11 injunction in the first place. If the plaintiff at any
12 point in the litigation decides, "You know what? We
13 don't want an injunction," then the whole issue of
14 irreparable harm becomes irrelevant and the court's
15 requirement of the payment of an ongoing royalty as a
16 condition for not granting an injunction becomes
17 irrelevant.

18 Therefore, it's Anascape's view that, yes, we
19 think that the court should grant an injunction here.
20 But if the court determines that money alone is an
21 adequate compensation at law and that there's no
22 irreparable injury, no inadequate remedy at law if
23 Nintendo pays but Anascape, with respect, doesn't like
24 the payment and doesn't believe that it's reasonable and
25 believes that it can do better in front of a jury, then

1 Anascape can say, "Okay. You know what? Forget the
2 injunction. We withdraw our request for an injunction.
3 You don't need to enjoin them. They can go ahead and
4 sell their now admittedly infringing product. We want to
5 file additional litigation to recover for the independent
6 acts of infringement that occur thereafter."

7 THE COURT: And this is why you're known as
8 such a good lawyer. I like that. Have my cake and eat
9 it, too.

10 Okay. I guess this is what brings up some
11 concern I have about what is in front of me so far. I
12 don't -- I don't think what I have in front of me in
13 terms of damages and royalty is, in fact, the proper
14 remedy at law. I think that there are a number of
15 factors there that could have been presented to me or
16 maybe they would be presented in front of a jury. But,
17 for example, it is not just what the royalty is, amount.
18 There's been a lot of fight on each side in terms of what
19 is the royalty, 4 percent, 1 percent, whatever. Perhaps
20 I missed it, but I saw very little on what the base
21 should be.

22 MR. CAWLEY: Well, I think that -- there's a
23 dispute about that. But I --

24 THE COURT: Right.

25 MR. CAWLEY: -- do think it's been briefed. I

1 don't think there's any dispute that all future Wavebirds
2 are in the base. I don't think there is any dispute that
3 all future GameCubes are in the base. I don't think
4 there is a dispute that all future Classic Controllers
5 are in the base. But there is a dispute about how many
6 Remotes should be in the base. We think it should be all
7 of them at a lower royalty rate.

8 THE COURT: They think it should be less or
9 whatever.

10 MR. CAWLEY: They think it should be less than
11 that --

12 THE COURT: I've seen -- well -- all right. I
13 don't want to try to educate people who raise issues, but
14 I see nothing about convoyed sales on the games. I
15 thought I heard some testimony that in this industry a
16 big effort was made to sell the platforms, the systems,
17 sometimes at a lower rate so that once you've got the
18 people who have bought them, then the game revenue comes
19 in --

20 MR. CAWLEY: That's true, your Honor; however,
21 to simplify matters, we are not seeking damages on an
22 ongoing basis on convoyed sales for the console or for
23 the games. That's why you haven't seen that.

24 What we are saying is that the fact that the
25 infringing controller drives the sale of the games and of

1 the console potentially enhances the value of that
2 product for the purpose of enhancing the royalty. And,
3 second, we are saying that there is a conveyed sale in
4 the Remotes; but that's back to the issue of how many
5 Remotes do you include in the base for purposes of the
6 Classic Controller.

7 THE COURT: But then you also bring up -- and
8 this may be the testimony that we need to -- you're going
9 to get into -- is the loss of opportunity of Anascape of
10 developing or entering the market.

11 MR. CAWLEY: Yes, your Honor.

12 THE COURT: I mean, one of the --

13 MR. CAWLEY: That --

14 THE COURT: You seem to recognize that under
15 the analysis of many courts, the fact that a company is
16 not in the business itself right now tends to weigh
17 against it to some degree because it's --

18 MR. CAWLEY: Yes.

19 THE COURT: And then you're talking about the
20 lost opportunity cost, which is a legitimate argument.

21 And, again, very difficult to quantify that with what I
22 have --

23 MR. CAWLEY: Thank you, your Honor.

24 THE COURT: -- before me.

25 MR. CAWLEY: Exactly our point.

1 THE COURT: Well, and that's --

2 MR. CAWLEY: In fact, we believe that it's
3 unquantifiable; and, therefore, there is no adequate
4 remedy at law. That's our point on saying that we want
5 to get into the business. We're not asking the court to
6 award us some kind of quantified ongoing damage --

7 THE COURT: Well, it's not that it's
8 unquantifiable. It's difficult to quantify based upon
9 the evidence that I have before me because -- like I'm
10 saying, I went through this; and I kept thinking some of
11 these issues don't seem to be joined very well. I mean,
12 I have some conclusory remarks on one side, some
13 conclusory remarks on the other side. But lost
14 opportunity costs or loss of business, loss of future
15 profits are the kinds of things that are very typically
16 given to a jury in all kinds of cases.

17 MR. CAWLEY: Well --

18 THE COURT: And I guess what I'm weighing is
19 the evidence I would have -- let's say I -- if I don't --
20 I don't like the idea, I guess, just as a matter of
21 procedure, of saying I'll come up with a decision but
22 then one side or the other can just opt out. That just
23 doesn't seem to be a proper procedure. I'm either going
24 to do it, or I'm not.

25 However, the argument that there are -- I

1 mean, that's almost an advisory -- well, that is an
2 advisory opinion.

3 MR. CAWLEY: Well, is it, your Honor? If the
4 court will excuse my arguing with that for a few seconds.

5 Let's just suppose that hypothetically the
6 court says, "Okay. I find that an injunction would be
7 proper but that the remedy at law is closely adequate
8 but -- therefore, I'm going to grant an injunction; but
9 I'm going to make it conditional on Nintendo paying a
10 5 percent royalty for all these products. That's my
11 decision. And if they don't pay -- they have an option.
12 If they don't pay, they are enjoined."

13 Why would it be improper, in any circumstance
14 in which there is an injunction, for the plaintiff who
15 sought that injunction to say, "You know what?
16 Circumstances have changed. We now no longer want that
17 injunctive relief"?

18 THE COURT: Why should I spend the time and
19 judicial resources going through all that analysis with
20 the idea that it wouldn't be binding on one side; it
21 would just be if you like it, you like it and if you
22 don't, you don't? I mean, that's kind of what one of the
23 whole concepts of what the advisory opinion is.

24 MR. CAWLEY: Because --

25 THE COURT: What I would be more likely to

1 do -- and I think this was done in the -- let's see. Was
2 it the Verizon and Vonage where there was an amount, and
3 then the final determination was made when it came back?

4 Yeah. In other words, there is another
5 possibility in that I pick some amount -- 5 percent,
6 6 percent, 10 percent -- that I'm quite sure will cover
7 whatever the final judgment is. It went up on appeal, as
8 I understand it, and then came back; and then the court
9 made the final determination out of what was going to be
10 in the escrow fund. That would be another possibility.

11 MR. CAWLEY: Well, that's an alternative, your
12 Honor; but the reason that I think it is not improper for
13 us to ask the court for this relief is we think we're
14 entitled to an injunction and we think we're entitled to
15 an injunction that is not conditional on the payment of
16 an ongoing royalty.

17 And if that seems offensive to the court, I'd
18 simply ask: What circumstances can we imagine, in any
19 kind of case, in which a party would seek an injunction
20 and get it and then come back to the court and say,
21 "Things have changed now. We no longer want the
22 injunction" and the court would say, "Well, sorry. You
23 asked for it; and now I'm going to stick this injunction
24 to the defendant whether the plaintiff still wants it or
25 not"? I mean --

1 THE COURT: Well, maybe the case where there
2 has already been the resources expended by both sides to
3 the tune of what I understand may be 2 to \$3 million on
4 each side and the resources of the court in going through
5 a full jury trial, attempting to present a case up to the
6 Court of Appeals and typically one would think now there
7 is just the matter of injunction or ongoing royalty or
8 let the parties work it out among themselves.

9 I mean, it is an interesting argument that you
10 raise; but I have some real concerns about that as a
11 procedurally proper way to do it in terms of I give an
12 idea -- I mean, I suppose then when you say, no, you're
13 going to -- what if I raise it an extra percent and we
14 get into a bargaining situation? Clearly a Federal court
15 can't be doing that -- well, I suppose a Federal court
16 can do what it wishes; but that wouldn't seem --

17 Let me hear from Mr. Gunther. What is your
18 thought on this?

19 MR. GUNTHER: Not surprisingly, your Honor,
20 I'm with you on this. And the reason I'm in that
21 position is this. It's that what they are doing is
22 they've asked for an injunction; and if you look at what
23 they've requested, they haven't requested what Mr. Cawley
24 just posited to you, which was an injunction contingent
25 on us paying something; in other words, we can get out of

1 the injunction by paying.

2 What they've said is, "We want an injunction,
3 and we want an ongoing royalty on any sales that occur
4 until that injunction actually takes effect."

5 THE COURT: Well, they wouldn't have to ask
6 for "We want an injunction" -- they wouldn't have to ask
7 for the stay. Normally you would ask for the stay.

8 MR. GUNTHER: That's correct.

9 THE COURT: That's when that would come up.

10 MR. GUNTHER: That's correct. But, your
11 Honor, here's, I think, the bottom line on it, is that
12 what it does, your Honor, is it allows them to basically
13 say -- to take a free pass, to get a freebee. "Judge,
14 let's go through a whole proceeding and make a
15 determination, A, as to whether or not there should be an
16 injunction and, B, what any continuing royalty should be;
17 and then we'll see if we like it. If we like it, great;
18 we'll stick with it. If we don't like it, we'll undo the
19 whole thing and file a new lawsuit."

20 And your Honor used the term "advisory
21 opinion," and I think that that's correct. In a sense
22 what you would be doing in that context is you would be
23 giving them a choice as to whether or not to take what
24 you've given them or to basically say, "No, we're not
25 going to take that and we want to start over and we

1 want" -- you know, the court used the phrase "have its
2 cake and eat it, too." I think that's exactly right.
3 There is not one case -- they have not cited to you one
4 case -- and we're not aware of any -- that would allow us
5 to be put in that predicament or -- and maybe for the
6 court's purposes more pertinently the court to be put in
7 that predicament.

8 What it really means, your Honor -- it's sort
9 of like we have been -- and, your Honor, I'm going to be
10 a little bit of an advocate here. But it's sort of like,
11 "Hey, judge, you know what we're going to do? We're
12 going to hold you hostage. You've got to make this
13 decision because we've asked for equitable relief, and
14 then we're going to decide whether we like it or not."

15 THE COURT: Well, let me ask from your point
16 of view, I guess, the more pertinent, one, the idea that
17 something is being done new -- since eBay as near as I
18 can tell, I've issued two or three judgments that were
19 new and doing things that I couldn't find any real
20 authority for; but based on what I was trying to read out
21 of the cases, that seemed to be what the court was going
22 for. And until we get higher or get -- these cases work
23 their way up on appeal and the higher courts have time to
24 think about it, consider what all the various judges have
25 done, and then determine what they think is the best,

1 we're never really going to know.

2 But let me ask this. Let's say I go ahead and
3 grant the injunction. Then I -- I mean, I don't know if
4 you're going to -- well, as a factual matter, as I
5 understand it, there are some number of the items that --
6 is it the GameCube? There are 70-some thousand or
7 something that are in the warehouse; and no more are
8 being made, right?

9 MR. GUNTHER: Yes, sir.

10 THE COURT: What about the Wavebird?

11 MR. GUNTHER: The Wavebird, none have been
12 made in quite some time and there are none in the
13 warehouse and Nintendo hasn't sold any since, I believe,
14 February of 2007, has no intention of going back into
15 that business.

16 THE COURT: And, so, then we have the Wii
17 Classic which is still in production and there seem to be
18 a number of games that are still using it; and then this
19 issue about these Remotes which could be used with the
20 Wii Classic but which could also be used with the -- and
21 are maybe mostly sold with the Nunchuk, but there is
22 still some issue there.

23 Why shouldn't I just say to both sides --
24 well, there's a lot of issues here. If I put it back,
25 there is a risk that they may ask for more damages,

1 coming back with another suit. There's the risk to both
2 sides of having to gear up for a suit again. Obviously,
3 if money damages is what it's going to be, you've got --
4 I mean, they can wait to see how much sales develop. You
5 know, what -- I'm presuming you're not wanting an
6 injunction; although, on the other hand, maybe an
7 injunction with some kind of a stay and a royalty in
8 escrow solves some of your problems. What do you think
9 is the best thing from your client's point of -- I mean
10 other than just denying them all relief.

11 MR. GUNTHER: Right.

12 THE COURT: What do you think is the
13 preferable way to go for your client?

14 MR. GUNTHER: Let me say this, your Honor. If
15 the court were -- and you know we think an injunction
16 would be entirely inappropriate here. But let's say the
17 court disagreed with us and said, "I want to enter an
18 injunction." Then I think the appropriate thing for the
19 court to do would be to stay the injunction pending
20 appeal and for us to see if we could work out some type
21 of escrow payment that would basically make sure there
22 was a pool of money available for further proceedings if
23 necessary in the event that the injunction were reversed
24 on appeal. I think that would be probably an appropriate
25 thing. Certainly, your Honor, we believe that this is a

1 case that if an injunction were to be ordered by the
2 court, that it should be stayed pending appeal.

3 Your Honor, if the court were to decide that
4 an injunction is inappropriate in this case, which we
5 believe is the case, then the court really, I think, at
6 that point has two choices. It can determine whether or
7 not -- equitably award an ongoing royalty; or it can
8 basically say, "I'm going to defer and not do anything.
9 I don't have a clear enough record in front of me." And
10 basically the parties can do what they want.

11 Now, your Honor, in that instance -- if the
12 court were to determine that no injunction is
13 appropriate, I think probably that would be the best
14 course of action, to defer doing anything further. Let
15 them, if they want, to file a new case. They can, as you
16 said, see what sales look like. We've projected over the
17 next fiscal year for the Classic sales approximately
18 1.5 million, which pales in comparison to the Remotes and
19 Nunchuks that we sell.

20 And, your Honor, what's going to happen if
21 they do that? We're going to go up on appeal; and
22 certainly if they tried to press that case forward during
23 appeal, we would ask the court in that instance to stay
24 further proceedings until the appeal is decided.

25 And it seems to me, your Honor, that is one

1 way of getting to a result if -- and, again, if the court
2 determines that an injunction is inappropriate and the
3 court is concerned that it doesn't have enough of a
4 record, let them do what they're going to do. We'll do
5 what we're going to do on appeal. And then if we win the
6 appeal, the issue goes away. If we lose the appeal, they
7 get to come down and prosecute the suit. And then the
8 record could be fully developed.

9 THE COURT: But to just -- all right. Does --

10 MR. GUNTHER: Did I answer your question, your
11 Honor?

12 THE COURT: Well, partly. And I guess by this
13 time, Dr. Ugone is already in court; so, there's no point
14 in talking about him.

15 Why don't we go ahead and let Mr. Tyler get
16 his testimony in so that he can get on back to the young
17 men he's working with, and then we'll go from there.

18 THE WITNESS: Thank you, your Honor.

19 (The oath is administered.)

20 DIRECT EXAMINATION OF KELLY TYLER

21 CALLED ON BEHALF OF THE PLAINTIFF

22 BY MR. GARZA:

23 Q. Hi, Mr. Tyler. This is Anthony Garza with McKool
24 Smith. How are you?

25 A. I'm doing good.

1 Q. Could you go ahead and introduce yourself to the
2 court?

3 A. My name is Kelly Tyler. I live in San Diego
4 County, California; and I'm 47 years old.

5 Q. And if you would, please remind the court who you
6 are.

7 A. I am an owner in another entity of about
8 36 percent as a limited partner of Anascape.

9 Q. Okay. Mr. Tyler, if Nintendo were enjoined from
10 producing GameCube controllers, Wavebird wireless
11 controllers, and Wii Classics, would Anascape, in your
12 view, be able to begin producing competing products?

13 A. I think that we could probably do that anyway; but
14 with Nintendo enjoined, it would be a lot easier entering
15 the market. There would be a hole that would be left, a
16 vacancy that I think we could step in and fill.

17 Q. All right. Well, let's step back one second. How
18 do you know that it's even possible to create third-party
19 controllers?

20 A. Well, as the president of Mad Catz -- that's what
21 we did for quite a long time. We made quite a few
22 controllers for different systems, and we -- you know, I
23 think that there's a competing product for the Wii being
24 produced right now.

25 Q. Now, you said you think there are some third-party

1 products being produced right now. What did you mean by
2 that?

3 A. Just talking with some people in the industry,
4 I've heard that there is a Wii Remote being produced in
5 Asia. I've heard that there is some type of wireless
6 Nunchuk available here in the United States.

7 THE COURT: Let me ask a question there.
8 Doesn't that raise the problem -- and if they're being
9 produced now and presumably the patent is still in
10 effect -- oh, wait a minute. You said Asia. Never mind.
11 Go ahead.

12 BY MR. GARZA:

13 Q. Mr. Tyler, are you aware if any third-party
14 products are being produced for the GameCube controller?

15 A. There's quite a few controllers that are being
16 made for the GameCube.

17 Q. Are any of them made by Mad Catz?

18 A. Yes, uh-huh.

19 THE COURT: Where?

20 THE WITNESS: They're made in Asia.

21 THE COURT: Okay. Go ahead.

22 BY MR. GARZA:

23 Q. Mr. Tyler, would an injunction against Nintendo
24 make it more likely that Anascape would enter the video
25 game accessory market?

1 MR. GUNTHER: Your Honor, I'm going to object.
2 It calls for speculation.

3 THE COURT: Overruled.

4 A. It's much more likely. Right now it seems that
5 there is, you know, quite a few people in the industry;
6 and this would create a void that -- we would seriously
7 consider, you know, entering into the market. We've
8 looked at it before and we've talked to people, started
9 going down that road. We haven't made that step; but if
10 there was an injunction, there would be a void that I
11 think we could step in and fill.

12 BY MR. GARZA:

13 Q. Mr. Tyler, if Nintendo were enjoined, would
14 customers that normally prefer first-party products from
15 the manufacturer of a console be forced to consider
16 third-party products from other companies?

17 A. Yeah. I mean, the retailers are going to want to
18 have the product; and they're going to -- if it's not
19 available from the first party, they will look to other
20 sources, I believe.

21 Q. Mr. Tyler, what do you plan on doing if the court
22 enters the injunction requested by Anascape?

23 A. Well, we would immediately look into getting
24 office space, look into making a prototype, hiring --
25 look into hiring an engineer to do the inside and look

1 into getting the tooling made for the plastic injection
2 case and everything for the product.

3 Q. How fast could Anascape bring such products to
4 market?

5 A. The very fastest would probably be three to four
6 months. It would probably be more like six months, and
7 that would be -- you know, we haven't been in the
8 business for a while -- or I haven't been in the business
9 for a while; so, it will take a little bit of time. But
10 I think probably six months would be pretty fast, and I
11 think that's possible.

12 Q. Mr. Tyler, would Anascape qualify for outside
13 financing to help with its ventures?

14 A. I think they probably would. It would be a lot
15 easier if we had, you know, an initial product in the
16 retail chain before we asked for financing. But I don't
17 even think we would seek financing initially. I mean, we
18 have the money to go ahead without seeking financing.

19 Q. All right. So, just so I'm clear there, you're
20 saying that Anascape would have the resources to start
21 exploring market opportunities even if Anascape were, for
22 whatever reason, not to qualify for outside financing; is
23 that correct?

24 A. That's correct. Most of the money that's come
25 through Anascape has flowed through Brad Armstrong or

1 myself. We would probably just re-fund -- put money into
2 Anascape again and use that money for the ongoing
3 development of the product.

4 Q. Okay. Now, if Anascape were to start selling
5 products compatible with Nintendo consoles, would it stop
6 there?

7 A. No. We wouldn't want to enter the market just for
8 one product. We would use that as probably a springboard
9 to get into other products for other consoles and -- once
10 you're in the retail chain, it's much more likely that
11 that retail chain will purchase additional product from
12 you.

13 Q. Okay. Now, Mr. Tyler, at the trial in this case
14 we talked about the Sony license. Do you remember that?

15 A. Yes.

16 Q. When you were negotiating that license with Sony,
17 did you negotiate for access to some of their
18 intellectual property?

19 A. Yes. There was a cross-license for some patents;
20 and also there was some know-how, as far as I remember.

21 Q. Now, why did you do that?

22 A. It's always easier to have that intellectual
23 property. It makes it a lot easier and we were
24 interested in being in the marketplace and that's why we
25 negotiated for it.

1 Q. All right. So, you said it would make it easier.
2 What exactly would access to Sony's intellectual property
3 make it easier for you to do?

4 A. Well, like to make the controller -- the
5 engineering would be easier. We wouldn't have to -- you
6 know, like if somebody tells you what the protocol is,
7 you know, how the controllers and everything communicate,
8 then you don't have to go find out how to do it yourself.

9 Q. Now, have you negotiated for access to any other
10 company's intellectual property on behalf of Anascape?

11 A. Yes. We were negotiating with Microsoft for that.

12 Q. Now, was that in the context of this litigation?

13 A. Yes. That was in the settlement. We actually
14 settled with Microsoft and that was not actually in the
15 final settlement agreement, but we were negotiating for
16 it.

17 Q. Okay. So, you're saying that during the
18 negotiations with Microsoft for the settlement agreement
19 in this case, you negotiated for access to some of
20 Microsoft's intellectual property but ultimately it
21 wasn't included in the settlement agreement; is that
22 correct?

23 A. That's correct.

24 Q. Now, Mr. Tyler, if Anascape were to try and enter
25 the video game accessory market, could you guarantee

1 success?

2 A. No. There's no guarantees. We would, you know,
3 give it our best effort. We would look into it, make
4 sure it was feasible before we got going. But there is
5 no guarantees.

6 Q. Now, why hasn't Anascape started selling
7 controllers?

8 A. Up until now, you know, we've looked into it a
9 couple of times. I've started some preliminary contacts
10 with some of the people that I've known in the industry;
11 and, you know, we've been involved in the lawsuit. We've
12 been trying to license. The market's been pretty full.
13 There are several reasons, but that's what we've done
14 right now.

15 Q. Mr. Tyler, if the court refuses to enter an
16 injunction, would Anascape attempt to enter the market
17 anyway?

18 A. It would be a lot less likely. I mean, I wouldn't
19 say we absolutely won't because we've been considering
20 that; but it's a lot less likely.

21 Q. Okay. So, to be clear, with Nintendo in the
22 market, the opportunities just aren't as attractive for
23 Anascape; is that correct?

24 A. That's correct.

25 Q. All right. I just have a couple of questions

1 about your experience at Mad Catz. During your time at
2 Mad Catz --

3 THE COURT: Does either side mind if -- I
4 mean, are these questions -- I presume I'm allowed to
5 recall what he said at trial, right? Defendants have no
6 objection to that, do you?

7 MR. GUNTHER: No, sir.

8 THE COURT: Plaintiffs?

9 MR. CAWLEY: No, your Honor.

10 THE COURT: If these are some additional
11 questions, go ahead. I remember the testimony, and I
12 have a transcript. If there are some additional
13 questions, go ahead; but you don't need to go back over
14 everything that was said at trial.

15 MR. GARZA: Yeah. We just have a few more --

16 THE COURT: Go ahead.

17 MR. GARZA: -- additional questions, your
18 Honor --

19 THE COURT: Go right ahead.

20 MR. GARZA: -- in addition to what was said at
21 trial.

22 BY MR. GARZA:

23 Q. Mr. Tyler, during your time at Mad Catz, how many
24 different types of controllers did you produce for
25 established video game consoles?

1 A. I don't recall the exact number, but it was
2 probably 20 to 30 different controllers.

3 Q. Now, do companies who make established consoles
4 ever make it difficult for third parties to make
5 controllers that work with their consoles?

6 A. I don't know if it's intentional or it just
7 happens; but, yeah, it seems that way.

8 Q. What kind of obstacles come up when third parties
9 try to make controllers for other companies' consoles?

10 A. Well, there's the protocol. There might be some
11 proprietary chips that the company will put in. There
12 might be access to some of the internal parts, that the
13 first party is, you know, purchasing all that are
14 available from a certain source. There might be IP
15 issues.

16 Q. Now, do you expect similar problems if Anascape
17 attempts to make products that are compatible with the
18 Wii console?

19 A. Yeah. I think that there would be obstacles --
20 probably pretty big obstacles that we would have to
21 overcome.

22 Q. Now, do you think that these obstacles could be
23 overcome?

24 A. Right now --

25 MR. GUNTHER: Objection.

1 A. -- I think they --

2 MR. GUNTHER: That calls for speculation.

3 THE COURT: Overruled.

4 A. I haven't studied it extensively, but I think they
5 could be.

6 BY MR. GARZA:

7 Q. We had a little bit of back-and-forth in the
8 courtroom. Do you mind if I ask you that question again,
9 Mr. Tyler?

10 A. Go ahead.

11 Q. All right. Do you think that these problems we're
12 talking about could be overcome?

13 A. I think they could be. I mean, I haven't reviewed
14 it extensively just right now; but I think that -- from
15 past experience, I think they could be.

16 Q. Is there any other reasons that make you think
17 that these obstacles could be overcome?

18 A. Just that there is some product being manufactured
19 right now; so, I -- that I think is compatible with the
20 Wii; and, so, that leads me to believe that, yes, it
21 could be overcome.

22 Q. All right. So, you're saying that because other
23 companies have done it, you don't see a reason why
24 Anascape couldn't?

25 MR. GUNTHER: Objection --

1 A. That's correct.

2 MR. GUNTHER: -- Leading.

3 THE COURT: Overruled.

4 BY MR. GARZA:

5 Q. Just a couple more questions, Mr. Tyler. Now,
6 you're aware there's been a protective order entered in
7 this case, right?

8 A. Yes.

9 Q. And under that protective order, you're not
10 allowed to see documents that Nintendo designated as
11 proprietary or confidential, right?

12 A. That's correct.

13 Q. All right.

14 MR. GARZA: I have no further questions. I
15 pass the witness.

16 THE COURT: Any cross?

17 MR. GUNTHER: Yes, sir.

18 THE COURT: Okay. Be sure to speak into the
19 microphone. Otherwise, he won't be able to hear you.

20 MR. GUNTHER: Yes, your Honor.

21 CROSS-EXAMINATION OF KELLY TYLER

22 BY MR. GUNTHER:

23 Q. Mr. Tyler, this is Bob Gunther. Can you hear me?

24 A. I can hear you. How are you doing, Mr. Gunther?

25 Q. And you'll recall I'm one of Nintendo's attorneys,

1 and we actually talked during the trial.

2 A. Yes, I recall.

3 Q. Mr. Tyler, I want to bring you back to the first
4 answer that you gave Mr. --

5 MR. GARZA: Garza.

6 MR. GUNTHER: I'm sorry, Mr. Garza.

7 BY MR. GUNTHER:

8 Q. -- on your direct examination. He asked you about
9 whether or not, if Nintendo were enjoined, Anascape would
10 enter the market; and you answered, sir -- I just want to
11 make sure I'm clear on this. You answered that Anascape
12 would probably do it anyway, correct?

13 A. I answered that -- we're considering it anyway. I
14 don't know exactly what I said but we have been
15 considering it and I think that it is -- even if Nintendo
16 was not enjoined, we are still considering it. It would
17 be much more likely if they were enjoined.

18 Q. Now, sir, you testified about a lot of things that
19 you would do if an injunction were entered, including
20 getting office space, making a prototype, hiring an
21 engineer, making tooling, et cetera. My question is --

22 A. I think I said we would look into it and there was
23 no guarantees on that but we would do our best to --

24 Q. Have you done any of those things to date?

25 A. No, just preliminary. No actual hiring or getting

1 office space.

2 Q. Now, sir, you said that you think that it would
3 probably be on the order of six months before you could
4 begin manufacturing Nintendo-compatible controllers.

5 But, sir, do you know, sir, whether or not Nintendo has
6 an encryption system between communications between
7 controllers in the Wii and the console?

8 A. I'm not a hundred percent sure. I imagine there
9 is some type of encryption.

10 Q. Okay. And, sir, I believe Mr. Garza told -- asked
11 you whether or not you were aware of any of the specifics
12 of that encryption system; and your answer was no; is
13 that correct?

14 A. That's correct.

15 Q. Now, sir --

16 A. Well, I don't know if he asked it or not; but I'm
17 not aware of it right now.

18 Q. Prior to this issue coming up on the injunction,
19 sir, did you even know whether Nintendo had an encryption
20 system?

21 A. I'm not -- no. I haven't studied the issue, no.

22 Q. And, sir, has Anascape undertaken any study to
23 determine whether it could manufacture a compatible
24 cartridge for the Wii, free and clear of Nintendo's
25 patent rights and other IP rights?

1 A. No, we haven't done a detailed study. The only
2 thing that I'm aware of is that other -- another Asian
3 company, from what I understand, is manufacturing a
4 Wii-compatible remote.

5 Q. And, sir, in terms of -- one of the things you
6 testified to is you said that, "Well, one of the reasons
7 I think we could get into the market is because others
8 have gotten into the market." Do you know whether or not
9 those others have been licensed by Nintendo?

10 A. I do not.

11 Q. Do you know, sir, how long it took any of those
12 others to do any of the work that needed to be done to
13 defeat any encryption system in order to enter the
14 market?

15 A. I do not.

16 Q. So, sir, as you sit here today with respect to
17 your six months estimate, that is without any knowledge
18 of Nintendo's encryption system or what would be needed
19 to do to reverse engineer it or defeat it, if that could
20 be done, correct?

21 A. Yeah. I haven't looked into the encryption
22 system. That's correct.

23 Q. Now, sir, has a determination been made as to
24 which kind of controller that Anascape would want to sell
25 for the Wii system?

1 A. No, we haven't made that determination.

2 Q. And, sir, have you sat down with anyone at this
3 juncture to determine whether it would be technically
4 feasible, without a license from Nintendo, for Anascape
5 to make a compatible controller for the Wii system?

6 A. Had some very high-level discussions with -- but
7 it's all preliminary. We haven't had anything concrete.

8 Q. There's nothing detailed at this point, correct?

9 A. That's correct.

10 Q. So, what you're asking -- and I just want to make
11 sure we're clear about this. You're asking for Nintendo
12 to be enjoined from selling a product so that Anascape
13 can explore whether it might want to get into the
14 business for that product. Isn't that true?

15 A. We would do our best to get into the market if
16 Nintendo was enjoined.

17 Q. I'm sorry, sir. I didn't hear your response.

18 A. I said, "We would do our best to get into the
19 market, to explore that, if Nintendo were enjoined."

20 Q. Right. So, what you're going to do is -- you're
21 saying, "Enjoin Nintendo so we can explore whether we can
22 come into the market"; isn't that correct?

23 A. That could be a way to put it. We would -- much
24 more likely that we would enter the market if Nintendo
25 were enjoined. But there is no concrete plans; and, you

1 know, we might discover something that would not -- that
2 we would say, "Wow, that's insurmountable." But right
3 now, from past experience, we would try and get into the
4 market.

5 Q. But that's all based on your general past
6 experience and not with respect to any specific
7 investigation, either technical or marketingwise, that
8 you've made with respect to the Wii, correct?

9 A. That's correct.

10 Q. And, Mr. Tyler, finally, Anascape has been in
11 business since 1999, correct?

12 A. I think December of '99, yes.

13 Q. And Anascape has had the ability, if it so chose,
14 to enter the market for video game controllers anytime
15 since its forming, correct?

16 A. I'm sorry. You were cutting out. Could you
17 restate the question?

18 Q. Yes. Anascape has had the ability, if it so
19 choose, to explore entering the video game market at any
20 time after it was formed, correct?

21 A. That's correct.

22 Q. And, sir, Anascape also in 2004 obtained IP patent
23 rights from Sony that would allow it, in its judgment, to
24 help it enter the market, correct, for video game
25 controllers, right?

1 A. That's correct.

2 Q. And after -- from 1999 to 2004, no entry into the
3 market, correct?

4 A. Correct.

5 Q. In 2004 -- from 2004, after those IP rights were
6 obtained from Sony, to today, no entry into the market,
7 right?

8 A. That's correct.

9 MR. GUNTHER: Pass the witness.

10 THE COURT: Anything else?

11 MR. GARZA: We have no further questions, your
12 Honor.

13 THE COURT: Any objection to Mr. Tyler being
14 excused? Defendant?

15 MR. GUNTHER: No, sir.

16 THE COURT: Plaintiff?

17 MR. CAWLEY: No, your Honor.

18 THE COURT: All right, sir. Thank you so much
19 for being here with us, and I hope you enjoy the rest of
20 the camp.

21 THE WITNESS: All right. Thank you, your
22 Honor.

23 THE COURT: What's next?

24 MR. CAWLEY: Your Honor, next we would call
25 Mr. Brad Armstrong to the stand.

1 (The oath is administered.)

2 DIRECT EXAMINATION OF BRAD ARMSTRONG

3 CALLED ON BEHALF OF THE PLAINTIFF

4 BY MR. CAWLEY:

5 Q. Would you please introduce yourself, sir?

6 A. My name is Brad Armstrong. I live in Tyler,
7 Texas.

8 Q. And would you just remind us briefly who you are?

9 A. I'm the sole named inventor on the patent at
10 issue.

11 Q. Let me ask you quickly some questions that are
12 sort of an overview of some things that I'd like you to
13 explore further and even demonstrate for us. But, first,
14 is the Wii Classic Controller compatible with multiple
15 Wii Remotes?

16 A. Yes, sir, it is.

17 Q. Can the Nintendo Wii game system recognize which
18 controller is being used with the system?

19 A. Yes, sir, it can.

20 Q. Are there existing third-party products that are
21 compatible with the Wii console?

22 A. Yes, sir, there are.

23 Q. And, in fact, are there actually some Nintendo
24 games that could be played on the Wii that instruct the
25 user to use the Classic Controller?

1 A. Yes, sir.

2 Q. All right. Let me ask in a little more detail
3 first about the interchangeability of Wii Remotes and
4 Classics. Now, have you set up a demonstration to
5 demonstrate for Judge Clark today that
6 interchangeability?

7 A. Yes, sir, I have.

8 MR. CAWLEY: Your Honor, could I ask that the
9 witness step down here where the system and the
10 controllers are?

11 THE COURT: Please.

12 BY MR. CAWLEY:

13 Q. Mr. Armstrong, do you have a Wii console here in
14 the courtroom?

15 A. Yes, sir, I do.

16 Q. And is there a game on that console?

17 A. Yes, sir.

18 Q. And what is that game?

19 A. This game is Super Smash Bros. Brawl.

20 Q. And do you have more than one Remote attached to
21 the game?

22 THE COURT: Excuse me a minute.

23 (Brief discussion off the record).

24 BY MR. CAWLEY:

25 Q. Let me start over. Let me ask you the question

1 again.

2 How many Remotes do you have connected with
3 the console in order to play the game?

4 A. There are four Wii Remotes connected to this game
5 at this time.

6 Q. And can each one of those four Wii Remotes be used
7 to play the game simultaneously?

8 A. Yes, sir, they can.

9 Q. And for the ease of demonstration, have you marked
10 some Remotes and the Classic Controller with colored
11 stickers?

12 A. Yes, sir. They have colored tape on them.

13 Q. And do you have a different color for each of the
14 four Wii Remotes?

15 A. Yes, sir, I do.

16 THE COURT: Let me just ask a question. Is
17 that the kind of game that four people might play at
18 once; so, each would have to have its own Remote?

19 THE WITNESS: Yes, sir.

20 THE COURT: Now, does the system sometimes set
21 up that -- I mean, according to my law clerks, you can't
22 buy these things now on the market. You're on a waiting
23 list for months; so, we haven't had an opportunity to
24 actually look at one. But can more than one person hook
25 up to one Remote and play it that way, or does each

1 player have to have their own Remote?

2 THE WITNESS: Each player has their own Remote
3 for this game.

4 THE COURT: And is that your understanding,
5 that the games are set up so that each player has to come
6 over to somebody's house with a Remote; or whoever is at
7 the house has to have a bunch of Remotes?

8 MR. GUNTHER: That is my understanding, your
9 Honor.

10 THE COURT: Okay. All right. Go ahead.

11 BY MR. CAWLEY:

12 Q. Now -- so, you have that arrangement set up at
13 this point where of you have four Remotes that are all
14 connected to the console and can play the game, correct?

15 A. Yes, sir.

16 Q. All right. Now, can you show us -- or explain to
17 the judge the controller system that you have in your
18 hands?

19 A. Yes. In my hand I have the blue marked Wii Remote
20 and blue tape marked Nintendo Classic Controller plugged
21 into it.

22 Q. Okay. So, can you now show us your control of the
23 game using that blue marked Remote and the blue marked
24 Classic Controller?

25 A. Yes. (Demonstrating) Here we have four characters

1 shown. The one on the right, Character Number 1, is
2 moving to the left. Now he's moving to the right, to the
3 left. He's jumping up. And I'm inputting those controls
4 with the Classic Controller.

5 Q. With the blue Classic and the blue Remote,
6 correct?

7 A. Yes.

8 Q. Now, can you disconnect the blue Classic from the
9 blue Remote?

10 A. Yes.

11 I've done that.

12 Q. Now, can you connect that blue Classic to another
13 color of Remote?

14 A. Yes. I could connect it to any of the Remotes.
15 I've connected it to the red one, for example.

16 Q. All right. And now having connected the blue
17 Classic to the red Remote, can you still play the game?

18 A. Yes, sir, I can.

19 (Demonstrating) Now I'm inputting to the
20 Classic Controller again; and I'm controlling the
21 character on the left, over to the right, moving to the
22 left, right, jumping up.

23 Q. Okay. So, could -- just to save time so that we
24 don't have to demonstrate every one of them, could that
25 same blue Classic be connected to any one of the four

1 Remotes and be used to play the game?

2 A. Yes, sir. It can be connected to any Remote.

3 Q. So, does the Wii Classic work with any Wii Remote?

4 A. Yes, sir, it does.

5 Q. And, conversely, will any Wii Remote work with any
6 Wii Classic?

7 A. Yes, sir.

8 THE COURT: Just for my own -- just to help me
9 out here, how -- if the controller doesn't decide which
10 of the characters it's going to play, how is that input?
11 You seem to have the Remotes connected to or assigned to
12 a different character. Was that something you fed in
13 earlier?

14 THE WITNESS: Yes, sir, your Honor. When we
15 set this up, we have the four Remotes; and they are set
16 up as Player Number 1, 2, 3, and 4. And you see above
17 the characters there is a --

18 THE COURT: Where is that input into the
19 Remote, Player 1, 2, 3, and 4 on those Remotes? How is
20 that input? Through the controller or through the Remote
21 itself? How does the red Remote know that it's handling
22 Player 4?

23 THE WITNESS: When you set the system up and
24 you sign the controllers onto the system, the first one
25 to sign in is going to be Controller Number 1; and then

1 you can sign the second one --

2 THE COURT: And as long as it's set up, it
3 keeps that. Presumably when it's all shut down, the next
4 time you show up with that Remote, you could sign up in a
5 different order.

6 THE WITNESS: Yes.

7 THE COURT: Okay. Go ahead.

8 BY MR. CAWLEY:

9 Q. All right. Now let's move on to a little bit of a
10 different subject; but stay right there, if you would,
11 because I want you to continue to demonstrate to us. Can
12 this game that you have set up here recognize what
13 controller and controller attachments are being used to
14 play the game?

15 A. Yes, sir, it can.

16 Q. Can you demonstrate that for us?

17 A. Yes.

18 (Demonstrating) I've just placed it into
19 "pause" mode by pressing a button here on the Classic
20 Controller. Now, you see in the lower left-hand corner
21 there is an icon that looks like the Classic Controller
22 icon?

23 Q. Are you talking about the thing that looks like a
24 flattened oval that's tilted at a 45-degree angle?

25 A. Right.

1 Q. Okay.

2 A. Yes, sir.

3 And if I unplug the Classic Controller from
4 the Wii Remote, that will change. (Demonstrating) So,
5 I've just unplugged it; and that changed to a Wii Remote
6 icon. So, right now the Wii Remote alone is controlling
7 that character. Now, if I plug the Classic Controller
8 back into it, you'll see that icon change again to --

9 (Demonstrating) There it just changed to the
10 Classic Controller icon, which means that the Classic
11 Controller is controlling the character now.

12 Q. That means that the game and the system is able to
13 detect what type of controller you're using?

14 A. Yes, sir, that's correct.

15 Q. In addition to being able to detect the Remote and
16 the Classic, is this game and controller able to detect
17 other types of controllers that are -- excuse me. Is
18 this console able to detect other types of controllers
19 that are hooked up to it?

20 A. Yes, sir, it is.

21 Q. Could you demonstrate that for us?

22 A. Yes, sir. (Demonstrating) I'll unplug this
23 Classic Controller; so, now we're back to just the Wii
24 Remote. And I'll plug in a Wii Nunchuk controller; and
25 we'll see the icon change. I'm plugging it in now. The

1 icon just changed to a Wii Remote with a Nunchuk.

2 Q. So, the game and console are able to discriminate
3 between at least those three types of controllers,
4 correct?

5 A. Yes, sir.

6 Q. All right. Let me ask you a few more questions.
7 And you might want to retake the stand; although, I'm
8 going to ask you to step down one more time. But go
9 ahead and take the stand again if you would.

10 THE COURT: What happens if a third-party
11 Remote is plugged in? Does the icon change or --

12 MR. CAWLEY: Well, that's my very next line of
13 questions, your Honor.

14 BY MR. CAWLEY:

15 Q. Mr. Armstrong, to get into the question that the
16 judge just asked, could Anascape produce third-party
17 products that are compatible with the Wii console?

18 A. I believe so, yes, sir.

19 Q. And what leads you to that conclusion?

20 A. Other companies do it.

21 Q. And how do you know that?

22 A. I purchased a few of their products.

23 Q. What type of substitute controllers did you
24 purchase or do you have in your possession today?

25 A. I purchased a GameCube-compatible controller; and

1 I purchased what's called a "Kama controller," which is a
2 Nunchuk-compatible controller.

3 Q. And you have another third-party controller, as
4 well?

5 A. Yes, sir, I do. That one I didn't personally
6 purchase, but it was purchased for me. And that is a
7 Classic -- Wii Classic-compatible controller.

8 MR. CAWLEY: May I approach, your Honor?

9 THE COURT: You may.

10 BY MR. CAWLEY:

11 Q. First of all, can you hold up the one that you
12 have in your hand there right now?

13 A. Yes, sir.

14 Q. Tell us what that is.

15 A. This is a GameCube-compatible controller. It's
16 branded with the GameStop brand.

17 Q. Now, that's not a product made by Nintendo, is it?

18 A. I believe it's made by Electro Source.

19 Q. And is it compatible with the Wii console?

20 A. Yes, sir, it is.

21 Q. Have you actually hooked it up to the Wii console
22 to make sure that it works with the Wii?

23 A. Yes, sir, I have.

24 Q. Okay. Since that one's got to be wired, I don't
25 want to take the time right now -- unless the judge wants

1 to see it later -- to connect that one up because there
2 are some easier ones to connect up.

3 Show us the Kama product.

4 THE COURT: Let me just ask: When that one is
5 hooked up, what icon shows up?

6 THE WITNESS: The next one?

7 THE COURT: No. The one you just had.

8 THE WITNESS: It shows up with an icon that
9 looks very much like the controller. It looks like the
10 GameCube controller.

11 THE COURT: So, it doesn't look like the
12 Classic? It's got another -- a way of --

13 THE WITNESS: That's the best of my --

14 THE COURT: -- identifying a different --

15 THE WITNESS: -- recollection, yes, sir.

16 THE COURT: -- icon?

17 MR. CAWLEY: Yes, your Honor. We can show you
18 that right now.

19 THE COURT: Go ahead.

20 MR. CAWLEY: May the witness step down again,
21 your Honor?

22 THE COURT: Please.

23 BY MR. CAWLEY:

24 Q. Take the -- leave that one there and bring down
25 with you, Mr. Armstrong, the Kama and the third-party

1 Classic.

2 THE COURT: While you're setting that up --
3 we've been going for about an hour now; so, we're going
4 to take a recess for ten minutes. I'll ask you to be
5 back at 25 past.

6 (Recess, 10:17 a.m. to 10:27 a.m.)

7 (Open court, all parties present.)

8 THE COURT: You can operate it from down there
9 or up here, however you have it set up.

10 THE WITNESS: Okay.

11 BY MR. CAWLEY:

12 Q. If you could stay down here, Mr. Armstrong.

13 Mr. Armstrong, let's back up one step. During
14 the break we took the opportunity to go ahead and wire up
15 the GameCube third-party substitute controller to respond
16 to the judge's question about how the icon looked for the
17 GameCube. So, could you show us that?

18 A. Yes, sir.

19 THE COURT: All right. Let me interrupt,
20 then. There was some discussion about the possibility of
21 various kinds of encryption and so forth. I'm not sure
22 how sophisticated the computer -- the processing units in
23 these things are, but I've got to -- I mean, are these --
24 I don't know -- these third-party -- I'm not going to
25 call them necessarily "knockoffs" or "pirates." Are they

1 licensed?

2 MR. GUNTHER: Your Honor, my understanding is
3 that both of the products he has right now are
4 unlicensed.

5 THE COURT: Well, then, how do they show up
6 with a different icon on the machine?

7 MR. GUNTHER: Let me explain that. The one
8 that he's got plugged in now is wired in. Remember,
9 there's two ways to hook controllers up to the Wii
10 console. One way is to do it wirelessly through the Wii
11 Remote, if you have a controller that will work that way;
12 and then the other thing that you can do is the Wii
13 console actually has four outlets on it to plug in
14 GameCube controllers, the prior generation system.

15 Now, as I understand it, your Honor, there is
16 no encryption -- because you would have a problem if you
17 wanted to use your old GameCube controller. There is no
18 encryption if you --

19 THE COURT: Well, "as you understand it." I
20 want to know. Do you have someone here who can tell me
21 this one way or the other?

22 MR. GUNTHER: Oh, I'm -- do you want somebody
23 to testify with respect to it?

24 THE COURT: Well, I don't -- I mean, I want an
25 answer, not a guess.

1 MR. GUNTHER: I'm not guessing. I'm not
2 guessi ng.

3 THE COURT: So, you're not saying "I
4 understand"; you're saying this is the way it is.

5 MR. GUNTHER: This is the way it is.

6 THE COURT: Okay. When you said "I
7 understand," it made it sound like a lawyer was thinking
8 it.

9 MR. GUNTHER: No. And, your Honor, I'm a
10 lawyer. I'm sorry.

11 THE COURT: No.

12 MR. GUNTHER: But I'm trying to tell you what
13 the facts are.

14 THE COURT: Okay. All right.

15 MR. GUNTHER: And I apologize for that.

16 THE COURT: Okay.

17 MR. GUNTHER: The facts are that there's four
18 outlets on the Wii Remote for use of GameCube
19 controllers -- not the Remote, the console -- for use of
20 GameCube controllers.

21 THE COURT: So, what is showing up there is
22 the Nintendo GameCube controller --

23 MR. GUNTHER: Yes.

24 THE COURT: -- that just happens to look like
25 this thing.

1 MR. GUNTHER: Exactly. Exactly.

2 THE COURT: Okay.

3 MR. GUNTHER: And then on the encryption
4 point, your Honor, again, as a matter of fact, if you do
5 the wire version and plug it right into the GameCube
6 outlet, there is no encryption there. But where there is
7 encryption -- and this is the key in terms of their
8 request for an injunction against the Classic. There is
9 encryption on all of the wireless communications that
10 flow through the Remote to the console and back.

11 THE COURT: Okay.

12 MR. GUNTHER: Okay?

13 THE COURT: So, for example, if someone built
14 something with the same input buttons but instead of
15 looking like that handle thing, it looked like, I don't
16 know, a ball or a cube or whatever, that same icon would
17 come up because that's what it's recognizing as the
18 input, not -- it's not so sophisticated that it can
19 actually read -- I didn't think it could be, but I --

20 MR. GUNTHER: No.

21 THE COURT: -- just wondered.

22 MR. GUNTHER: You are exactly right. What
23 it's saying is I know something is plugged into the
24 GameCube socket; so, I'm going to put a GameCube icon up.

25 THE COURT: All right. That's what I needed

1 to know. Go ahead.

2 MR. CAWLEY: Thank you.

3 BY MR. CAWLEY:

4 Q. So, Mr. Armstrong, you've showed us now the
5 GameCube. Let's move on to the third-party substitute
6 for the Nunchuk. What did you say that's called?

7 A. The Kama.

8 Q. The Kama. Can you plug the Kama into a Remote and
9 show us what the game does in terms of telling us about
10 the controller attached when you use the third-party Kama
11 product?

12 A. Yes, sir.

13 (Demonstrating) So, right now the Nintendo Wii
14 Remote icon is showing and I have in my hand a
15 third-party Kama made by NYKO and I'm going to plug it
16 into the Remote. And, so, I'm plugging it in; and there
17 it shows the Nintendo Wii Remote with the Nintendo
18 Nunchuk.

19 Q. All right. And can you actually use that
20 third-party Kama product to play this game?

21 A. Yes, I can.

22 THE COURT: Now let me interrupt again. Is
23 this one also an unlicensed product?

24 MR. GUNTHER: This is unlicensed. Nintendo is
25 suing NYKO in the Western District of Wisconsin for

1 infringement of its intellectual property rights based on
2 this product.

3 THE COURT: Okay. But somehow they managed to
4 get past the encryption because it is wireless?

5 MR. GUNTHER: Your Honor, they did something
6 to get past the encryption. We don't know how long it
7 took.

8 THE COURT: Okay. That's all I --

9 MR. GUNTHER: And, your Honor, we suspect that
10 it took them well over a year to do that.

11 THE COURT: Go ahead.

12 MR. CAWLEY: Thank you, your Honor.

13 BY MR. CAWLEY:

14 Q. So, just so the record is clear, this product,
15 this Kama product, is not made by Nintendo, correct?

16 A. Yes, sir.

17 Q. And, in fact, I was going to ask you as far as you
18 know, it's not licensed; but you just heard that verified
19 by Nintendo's own lawyer. It's not licensed?

20 A. That's what Mr. Gunther said, yes, sir.

21 Q. And, in fact, this company has been sued by
22 Nintendo, correct?

23 A. That's what Mr. Gunther just said, I believe.
24 I've also seen the --

25 Q. Have you looked at that complaint?

1 A. I have seen the complaint.

2 Q. Are you aware that Nintendo has sued the company
3 that makes the Kama for trademark infringement and for
4 infringement of the design patent?

5 A. That's my understanding.

6 Q. And are you aware that a design patent basically
7 protects the way something looks?

8 A. Yes, sir. It's like the shape of the case, the
9 industrial design.

10 Q. Is there any suggestion in that lawsuit that's
11 been filed by Nintendo against the company that made the
12 Kama that they have some proprietary rights in the
13 encryption that's used to communicate from the handheld
14 device to the console?

15 A. There's none that I know of, no, sir.

16 Q. Okay. If you put that down now, let's do the same
17 exercise for the third third-party substitute product
18 that you've brought with you, the substitute --

19 A. Okay.

20 Q. -- for the Classic Controller.

21 A. Okay. (Demonstrating) I'm unplugging the Kama,
22 and we see the icon just went back to the Nintendo Wii
23 Remote. And I take this --

24 Q. Okay. Let me slow you down. What is it that
25 you've just picked up? Could you show that to the court?

1 A. What I've just picked up is called the "Blazepro."
2 It's a third-party product that is a Nintendo Classic
3 Controller emulator or Classic Controller type of
4 controller.

5 Q. All right. And where did that come from?

6 A. I believe it's made in China. It was purchased
7 off the Internet by my team.

8 Q. Okay. Can you show us --

9 THE COURT: For record purposes, are you going
10 to mark as an exhibit and include in the record a
11 photograph of each of these?

12 MR. CAWLEY: I'd be glad to, your Honor.

13 THE COURT: Well, I'm just thinking if this is
14 going to be reviewed -- I'm sitting here watching it.
15 It's going to be very difficult for someone else to
16 realize exactly what's being talked about even though
17 you're being very careful on the words.

18 MR. CAWLEY: I understand, your Honor.

19 Then --

20 THE COURT: We can handle the actual numbering
21 of the exhibits later, but I'm trying to make this easy
22 for someone to understand what I saw and what I made my
23 decision based upon and --

24 MR. CAWLEY: I understand.

25 THE COURT: Obviously, both sides are going to

1 want to have their record should they decide to go up on
2 this.

3 MR. CAWLEY: Okay. Just since I'll forget it
4 later, then, if I pick Number 500, is that safe so that
5 we don't duplicate it with another exhibit?

6 THE COURT: Let me ask: Faith Ann, do you
7 have the exhibit list?

8 DEPUTY CLERK: I'll pull it up momentarily.

9 THE COURT: We'll come up with a number in a
10 moment. Keep going.

11 MR. CAWLEY: Okay. Thank you, your Honor.

12 BY MR. CAWLEY:

13 Q. Can you show us what happens when you plug in this
14 third-party substitute for a Classic Controller?

15 A. Yes, sir. (Demonstrating) I'm plugging it in now.
16 There it's plugged in, and the icon just changed from the
17 Nintendo Wii Remote icon to the Nintendo Classic
18 Controller icon.

19 Q. And now can you use this Blazepro substitute for
20 the Classic Controller to play the game?

21 A. Yes, sir, I can.

22 (Demonstrating) So, right now the character
23 there on the right -- he's moving to the right. He's
24 moving to the left. I'm doing these inputs with this
25 third-party Classic-compatible controller. There he's

1 jumping up. So, I'm controlling this character with this
2 third-party controller.

3 Q. All right, sir. And I think it's obvious, but
4 just so the record will be clear -- I'm not sure if I
5 asked the question. Nintendo doesn't make this Blazepro
6 controller, does it?

7 A. To the best of my knowledge, they don't. And I
8 think that that's what Mr. Gunther just represented,
9 also.

10 Q. Now, Mr. Armstrong, on a slightly different
11 subject, we saw in paper some discussion by Mr. Ikeda
12 about the encryption. He also represented to the court
13 that if someone were to attempt to come up with a
14 third-party unauthorized controller, that it might damage
15 the Wii console or damage the games. Have you used these
16 three controllers with the Wii console?

17 A. Yes, sir, I have.

18 Q. Has there been any damage suffered?

19 A. No, sir, there has not.

20 Q. Has there been any damage suffered to any of the
21 games that you've played as a result of your use of these
22 three third-party unauthorized Wii controllers?

23 A. They all play great.

24 Q. Now let me ask you about one more subject, whether
25 the Nintendo system itself sometimes directs users to use

1 the Classic with the Wii console. Does that ever occur?

2 A. Yes, sir, it does.

3 Q. Can you demonstrate?

4 A. Yes, sir.

5 Q. And why don't we -- just to keep things -- well,
6 go ahead. Sorry.

7 A. (Demonstrating) Right now I'm going to the Wii
8 Menu.

9 So, the -- this is the main menu for Wii; and
10 in the upper left-hand corner is a box that shows a Super
11 Smash Bros. Brawl, which was the game we were just in.

12 Q. Okay. So, are all these rectangles that we see
13 different games?

14 A. Not all of them are; but some of them are, yes.

15 Q. Okay. Some of them are.

16 And what is the game or the thing that we see
17 in the rectangle on the lower left of the screen?

18 A. This (indicating) is the paper Mario game. It's a
19 game that was a Nintendo 64 game.

20 THE COURT: Let me interrupt for a second.

21 Now, this, you say, is the menu that comes up.
22 Is it loaded in the console? Is this menu loaded in the
23 console, or does it depend on what games you've loaded
24 in?

25 THE WITNESS: Well, your Honor, the format is

1 a standard.

2 THE COURT: Right.

3 THE WITNESS: But the games themselves that
4 fill the boxes have been -- several of these have been
5 downloaded.

6 THE COURT: Okay. So, I buy a new -- I have a
7 system, buy a new game. There might be a different --
8 one of the blocks might be filled in with a different
9 game?

10 THE WITNESS: Yes, your Honor. When you --
11 well, if you buy a game on disk and put it in, it will
12 show up in the upper left-hand corner; and then there are
13 other boxes. Like, for instance, you might see there
14 down diagonally is one called the "News Channel." And
15 then these other boxes here on the bottom like this
16 (indicating) Paper Mario is a downloaded game that was a
17 legacy game from Nintendo 64 that can be played on this
18 system. So, that wouldn't be filled if you --

19 THE COURT: Well, let's cut through this. Let
20 me just ask defendant: When the console is sold, does it
21 have a certain number of preloaded games so that when you
22 pull up you get them and then there are ways to add more
23 games over time as new games are produced?

24 MR. GUNTHER: What it is is there is a set --
25 when you get the console, there is a set number of

1 channels that will come up as part of the software that's
2 inside the console. Some of those never change, like the
3 weather channel, the Mii which is -- you know, you can
4 use that to create characters that look like people.
5 There's a whole bunch of those, judge.

6 And then, as Mr. Armstrong said, if you
7 actually put in a disk or in some instances download a
8 game, they can then plug into that existing format in the
9 console that's already there, but just as an icon so that
10 you can select a game.

11 THE COURT: Okay. Go ahead, Mr. Armstrong.

12 BY MR. CAWLEY:

13 Q. Now, Mr. Armstrong, let me re-orient us here. So,
14 this is a menu on the Wii console that show us some games
15 that are on disk such as Super Smash Bros. Brawl that's
16 set up and ready to play, correct?

17 A. Yes, sir.

18 Q. But it also shows some games that have been
19 downloaded from the Internet to the console and can be
20 played on the console, correct?

21 A. Yes, sir, that's correct.

22 Q. All right. Now, is the game in the lower
23 left-hand rectangle -- what's the name of that game?

24 A. That's Paper Mario.

25 Q. And is that a game that has been downloaded to

1 this particular Wii console?

2 A. Yes, sir, that's correct.

3 Q. It's a Nintendo game; is that correct?

4 A. Yes, sir, it is.

5 Q. What game system was it originally intended to be
6 played on?

7 A. It was originally intended to be played on the
8 Nintendo 64.

9 Q. Okay. Now let me ask you to do this. Let me ask
10 you to disconnect the third-party Wii Classic Controller
11 from the Remote.

12 A. Okay. I just did that.

13 Q. Okay. So that we have no Classic Controller,
14 either Nintendo or third-party, attached to the Remote.
15 Now show us what happens if you attempt to play Paper
16 Mario without the Classic.

17 A. Okay. (Demonstrating) I'm clicking on that. I'm
18 clicking the start button. So, now I've attempted to
19 start the Paper Mario button; and it's telling me that I
20 am going to need a Classic Controller.

21 Q. All right. So, does this direction that you need
22 a Classic Controller actually come from the game and the
23 console itself?

24 A. Yes, sir, it does.

25 Q. And then after it's told you that you need the

1 Classic Controller, can you read the additional
2 instruction that it gives?

3 A. Right. A second message came up that says:
4 Connect a class Classic Controller or press the A button.

5 Q. Well, no, read literally what it says.

6 A. (Reading) Connect Classic Controller to the P1 Wi i
7 Remote or press the A button to return to the Wii Menu.

8 Q. All right, sir.

9 A. So, returning to the Wii Menu means that I don't
10 get to play the game.

11 Q. So, is there any way that you can start or play
12 this game without connecting the Classic Controller?

13 A. You have to connect the Classic Controller.

14 Q. Now get rid of that third-party controller because
15 I don't want to --

16 A. Okay.

17 Q. Show us what happens now when you follow the
18 directions of the game and you connect the Classic
19 Controller to the Remote.

20 A. Okay. (Demonstrating) So, I'm plugging the
21 Classic Controller in; and the game has started now.

22 Q. Okay. And is this game also compatible with some
23 other controllers?

24 A. Yes. You can also play this game with the
25 GameCube controller.

1 Q. But can you play it with the Remote alone?

2 A. No, you cannot.

3 Q. Now, in addition to this game, are there other
4 current games that use the Classic with the Wii?

5 A. Yes, sir, there are.

6 Q. First of all, are there other Virtual Console
7 games like the one we just saw that can be downloaded to
8 the Wii that use the Classic Controller?

9 A. Yes, sir, there are.

10 Q. Are you familiar with a game Super Smash Bros.
11 Brawl?

12 A. Yes. That's one we earlier demonstrated, yes.

13 Q. Can that be played with the Classic Controller?

14 A. Yes, it can.

15 Q. Are you familiar with the game Super [sic] Mario
16 Kart Wii?

17 A. Yes, sir.

18 Q. Is that a Nintendo game?

19 A. Yes, it is.

20 Q. Is it played with the Classic Controller?

21 A. It can be, yes, sir.

22 Q. Have you looked for other games that are currently
23 available to buy on disk that can be played with the
24 Classic Controller or with the GameCube controller?

25 A. Yes, sir. My team has come up with a number that

1 are here on the corner of the table.

2 Q. Can you show the judge those games?

3 A. These -- judge, these five games here, they can
4 all be used --

5 Q. Can you read us their titles, please?

6 A. There's NiGHTS: Journey of Dreams; Geometry
7 Galaxies [sic]; Resident Evil, Wii Edition; Guilty Gear;
8 and Metal Slug. And they all can be played with the
9 Classic --

10 Q. I'm sorry. Is that S-L-U-G, slug?

11 A. S-L-U-G, yes --

12 Q. Okay. Thank you.

13 A. -- Anthology.

14 THE COURT: Are those licensed, in other
15 words, put out by Nintendo or licensed by Nintendo; or
16 are those pirate games? Do you know?

17 MR. GUNTHER: Can I take a look, your Honor?

18 THE COURT: Sure.

19 MR. GUNTHER: And can I have one moment?

20 THE COURT: Certainly.

21 MR. GUNTHER: Your Honor, the answer is that
22 these five are third-party games that are licensed by
23 Nintendo, including Metal Slug.

24 THE COURT: And I believe that I heard some
25 testimony that there's actually quite a lot of that, that

1 you set it up so that the -- isn't there some -- I may be
2 confusing lawsuits now. But there was somebody out of
3 Austin perhaps who did a lot of games, but they would be
4 licensed to do this because they maybe had the creativity
5 to come up with new games?

6 MR. GUNTHER: That's right, your Honor. What
7 it is is there is -- Nintendo, obviously, makes the
8 console and the hardware; and then Nintendo makes a
9 number of the software disks for -- and has developed
10 them themselves. Like, for example, Super Smash Bros. is
11 a Nintendo-owned game. Then it actually licenses and
12 gives access to the system to other companies --
13 third-party companies that paid a license fee in order to
14 make games that are compatible with the system.

15 THE COURT: Okay.

16 BY MR. CAWLEY:

17 Q. And so the record is also clear, Mr. Armstrong, in
18 addition to Super Smash Bros. Brawl, is Super Mario Kart
19 Wii also a Nintendo game?

20 A. Yes, sir. I believe it is.

21 Q. All right. And is this list of games that you've
22 shown the court an exhaustive list of all of the
23 Wii-compatible games that are played using the Classic
24 Controller?

25 A. No, sir, it's not.

1 Q. That's just what you happened to be able to find
2 in one game store on one particular day?

3 A. That's my understanding, yes, sir.

4 Q. All right.

5 MR. CAWLEY: Thank you, your Honor. I'll pass
6 the witness.

7 THE COURT: You can go ahead and sit down,
8 sir.

9 Mr. Gunther, any questions?

10 MR. GUNTHER: Yes, sir.

11 CROSS-EXAMINATION OF BRAD ARMSTRONG

12 BY MR. GUNTHER:

13 Q. Mr. Armstrong, you showed the court at the
14 beginning of your direct testimony the Super Smash Bros.
15 game and the Wii Classic-Remote combination. You showed
16 that being used to control one of the characters in that
17 game, correct?

18 A. Yes, sir.

19 Q. Now, sir, do you have to use the Wii Classic with
20 Super Smash Bros.? Is that required?

21 A. I don't believe so, no, sir.

22 Q. So, in fact, sir, someone can play Super Smash
23 Bros. without using the Wii Classic, correct?

24 A. Yes, sir.

25 Q. And, sir -- let's go to the next one that you

1 talked about, which was Super Mario Kart Wii. Sir, that
2 game can be played with the Classic and the Remote,
3 correct?

4 A. Yes, sir.

5 Q. But it doesn't have to be. It can also be played
6 just with the Remote alone, right?

7 A. Yes, sir.

8 Q. And so --

9 THE COURT: I'd be glad if you just -- I mean,
10 I think I understand that. If you want to list for the
11 record the ones that can be done both -- there was only
12 one example I saw that could only be done one way but --

13 MR. GUNTHER: Right. And, your Honor, on that
14 one -- your Honor, for the record -- and Mr. Armstrong
15 can dispute this if he wants to. But for the record, all
16 five of those can be used with the Remote -- can be used
17 with the Remote-Classic --

18 THE COURT: The five on the desk.

19 MR. GUNTHER: The five on the desk.

20 THE COURT: But what about that one where he
21 brought the instruction up and it said connect the Wii
22 Classic?

23 MR. GUNTHER: Yes, your Honor. Paper Mario --
24 that's (indicating) this one, your Honor. We've
25 submitted a declaration from Mr. Clark, who was involved

1 in the Wii. Exhibit 2, page 7 of his declaration, he
2 went through and categorized each of the Wii games that
3 were either from the Virtual Console or the Wii store and
4 said which controllers can be used with them. Paper
5 Mario is listed on page 7 of Exhibit 2 of his
6 declaration. That can be used with the Classic
7 Controller, the GameCube controller, or the Wavebird
8 controller; so --

9 THE COURT: Okay. The three old-model --

10 MR. GUNTHER: All three old-model.

11 But, your Honor, the point is in terms of with
12 respect to the Classic, which was the focus here, there
13 was testimony that it had to use the Classic Controller;
14 and as a matter of fact --

15 THE COURT: Well, that's what it said. But
16 what you're saying is that you could -- and I think
17 during trial you established pretty well that the Classic
18 was very similar to -- maybe not exactly but looked like,
19 had the same buttons, almost the same functionality as
20 the GameCube and the Wavebird. I've written on this at
21 least twice already, about that -- about that.

22 MR. GUNTHER: Right.

23 THE COURT: But it doesn't use the Wii
24 Nunchuk.

25 MR. GUNTHER: That one does not use the Wii

1 Nunchuk. That's correct, your Honor.

2 THE COURT: All right.

3 MR. GUNTHER: That's the one game that was
4 talked about in Mr. Armstrong's testimony that you would
5 need to use one of the three -- what you called the three
6 "old controllers."

7 THE COURT: Well, actually, I think -- I'm
8 gathering that from the testimony of your very good
9 witness from Japan who developed the Wii Nunchuk. I
10 mean, it was -- the other was the old line or the old
11 school or --

12 MR. GUNTHER: Right.

13 THE COURT: I mean, there were different
14 phrases used.

15 Mr. Cawley, do you want to add something?

16 MR. CAWLEY: I actually want to lodge an
17 objection. Mr. Gunther just referred to one of the
18 declarations of one of his witnesses who had not been
19 previously disclosed, which we have objected to; so --

20 THE COURT: And I haven't ruled on that yet
21 and I'm not going to take it for granted that -- or
22 accept it as evidence because Mr. Clark said it.

23 No relation to me, just for the record.

24 But do you have any objection as to the truth
25 that -- and it actually makes sense -- if you can wire in

1 the Wii Classic, you could also probably wire in some of
2 those old models which are just about the same?

3 MR. CAWLEY: That's not objectionable, your
4 Honor.

5 THE COURT: Okay. I'll take it for that
6 purpose, that you can't use the new generation Wii
7 Nunchuk; you can use the old generation Classic,
8 GameCube, Wavebird, and evidently some of these pirate
9 unlicensed copies, too.

10 MR. GUNTHER: In some instances, your Honor.

11 THE COURT: Right, if they can -- well, that
12 one you said was not encrypted because it's directly
13 wired in. It's the old school.

14 MR. GUNTHER: The old school, right.

15 THE COURT: Okay. Go ahead.

16 MR. GUNTHER: Your Honor -- with your Honor's
17 permission, I have a few questions for Mr. Armstrong
18 about the demonstration he did.

19 THE COURT: Sure.

20 BY MR. GUNTHER:

21 Q. Would you mind stepping down, Mr. Armstrong, back
22 to the Remotes?

23 THE COURT: And we don't have a jury here; so,
24 if there is something you want to demonstrate -- I mean,
25 it doesn't have to be a surprise. I'm just trying to --

1 MR. GUNTHER: Is that okay? And, your Honor,
2 if I share a mic with him, maybe it will be a little bit
3 more -- is that okay if I walk over?

4 THE COURT: Sure, unless there is an objection
5 from Mr. Cawley.

6 MR. CAWLEY: No.

7 THE COURT: We don't have a jury, and I don't
8 think there are going to be any big surprises here or --
9 it's very unlikely that either lawyer is going to make me
10 gasp with surprise and say, "Oh, that's the case?"

11 MR. GUNTHER: I've never been accused of being
12 Perry Mason, your Honor.

13 Your Honor, let me --

14 BY MR. GUNTHER:

15 Q. Well, Mr. Armstrong, let me ask you this: I'm
16 holding up -- did you refer to this as the "blue
17 combination"? It's the blue --

18 A. Yes, sir --

19 Q. -- Remote --

20 A. -- I did.

21 Q. -- and the blue Classic.

22 And they're plugged in right now, right?

23 A. Yes, sir.

24 Q. And how many Classics can you plug into a Remote
25 at any one time?

1 A. You can plug one Classic Controller into one Wii
2 Remote at one time.

3 Q. And that's because there is only one port, right?
4 There is only one expansion point in the Remote that will
5 allow a connection of one and only one Classic, right?

6 A. Yes, sir.

7 Q. Now, sir, it's your understanding that the jury
8 verdict in this case was that this combination infringes,
9 correct? And when I say "this combination," I'm talking
10 about the Classic when it is connected to the Remote.
11 Right?

12 A. Yes, sir. My understanding is that when the
13 Classic is connected to any Remote, that that would be an
14 infringing device.

15 Q. Okay. And then -- but, sir, you agreed with me
16 because -- and this was a matter that was not even in
17 contest in the trial -- that the Classic by itself does
18 not -- sorry -- the Remote by itself does not infringe,
19 right?

20 A. That's my understanding, yes, sir.

21 Q. All right. So, when I connect this -- again,
22 according to the jury verdict in this case -- that's an
23 infringement, right?

24 A. It does now, yes.

25 Q. Okay. Now, when I disconnect it, there is no

1 infringement, right?

2 A. (Pausing.)

3 Q. And let me be very specific. When I'm -- in its
4 disconnected state -- and I'm going to focus on the
5 Remote. In its disconnected state, it doesn't infringe,
6 right?

7 THE COURT: "It" being the Remote?

8 MR. GUNTHER: Yes, sir.

9 A. I think the Remote alone does not infringe the
10 claims that were at issue.

11 BY MR. GUNTHER:

12 Q. Okay. So, let's now -- you talked about four
13 different colored Remotes that you identified because
14 there's four different possibilities. You can connect a
15 total of four Remotes to a single Wii console, right?

16 A. Yes, at any one time. Yes, sir.

17 Q. Okay. So, let me do this. I'm taking off the
18 Nunchuk that was connected to the red; so, now we've got
19 two of them. We've got a blue one, a blue Remote, and a
20 red Remote, right --

21 A. Yes, sir.

22 Q. -- that you've labeled?

23 Now, sir, I want to take the Classic because
24 we've only got one Classic here. First, these two as I'm
25 holding them here in my hands, they don't infringe,

1 right?

2 A. I believe that the individual Remote does not
3 infringe the claims.

4 Q. Okay. So, I've got two of them in my hands.
5 Neither of these infringe as I'm holding them in front of
6 you right now, right?

7 A. That's my understanding.

8 Q. Okay. Now I hook up -- because it only takes one.
9 It will only accept one Classic, right, the Remote,
10 correct?

11 A. At a time.

12 Q. At a time.

13 So, now I've got an infringement here
14 according to the jury verdict, right, because I've now
15 hooked up the blue Classic to the blue Remote, right?

16 A. Yes, sir.

17 Q. But this guy over here, the red Remote, doesn't
18 infringe, right?

19 A. Not at this time.

20 Q. Okay. Now, I disconnect the Classic from the blue
21 Remote and I plug the Classic into the red Remote.

22 A. Right.

23 Q. Now, the red Remote combination with the Classic
24 infringes, right?

25 A. Yes, sir.

1 Q. But the blue Remote that I've now disconnected
2 doesn't infringe, right?

3 A. Yes, sir.

4 Q. So, sir -- and I could go down the line. I could
5 go down with all four that you talked about that were
6 hooked up. Each time we take the Classic and move it
7 from one to the other, there is an infringing combination
8 created when that actual connection is made with the
9 specific Remote; but each time the other one is
10 disconnected, there is no more infringement with that
11 Remote in its disconnected state, right?

12 A. I think that the individual Wii Remote by itself
13 does not infringe the claim but --

14 Q. So, the answer to my question -- so, the answer to
15 my question is as you go down the line -- you could line
16 up a hundred of these things, a hundred Remotes, and you
17 have one Classic and you could just -- if I wanted to go
18 through that exercise and the judge would let me, I would
19 go down. Remote Number 1, I plug in the Classic.
20 Infringement.

21 A. Right.

22 Q. The other 99, no infringement, right?

23 A. Not when they're not plugged in.

24 Q. Right. Unplug. I move over, and I go to
25 Remote 2. Plug in.

1 A. Right.

2 Q. That one infringes now because it's part of the
3 infringing combination. But all the ones to the right
4 don't infringe because they're not hooked up; and the one
5 to the left that I just plugged in doesn't infringe
6 anymore, right?

7 A. Well, that's your rationale. My understanding is
8 that all of them are infringing at one time.

9 Q. You've got to answer my question.

10 THE COURT: Well, counsel, I think I
11 understand the point you're trying to make. And I think
12 he's admitted that the Remote sitting by itself does not
13 infringe; and once it's hooked up, it does infringe.

14 But keep in mind when I'm thinking in terms of
15 either injunction or ongoing royalty or injunction stayed
16 with ongoing royalty or no injunction and an ongoing
17 royalty, I've got to look at the facts after the jury
18 verdict. And this is what I mentioned before, is I'm not
19 sure the parties have completely joined -- and this is
20 the problem as I went through it -- what's really
21 involved here in potential damages.

22 I mean, there's these conclusions, well, it's
23 only 1 percent; and they're saying 5 percent. It's true
24 that the Remotes themselves -- and we're looking at
25 Georgia-Pacific-type factors as opposed to -- I mean,

1 we're past infringement now. We've already got that.

2 MR. GUNTHER: Could I just --

3 THE COURT: What I'm looking at is how, then,
4 do I craft -- since the businesspeople don't seem to want
5 to do it, which I think is a mistake in this case. How
6 do I then craft and take into account the fact that the
7 Remotes have -- I mean, there's -- the concept of
8 convoyed sales comes in there.

9 Now, I think there was some testimony that
10 normally the way they are packaged in the United States
11 nowadays -- although, no one can be sure since the
12 waiting list is so long, no one has seen one in months as
13 far as I can find out, at least a new one that was
14 packaged -- they're sold with a Nunchuk or maybe two
15 Nunchuks and the Remote.

16 MR. GUNTHER: One and one, your Honor. One
17 Nunchuk, one Remote, never sold with a Classic.

18 THE COURT: Okay. But the Classics are out
19 there; and, so -- and at trial, if I recall right,
20 defendant didn't choose to put on -- I mean, there wasn't
21 much discussion about what part the Wii Remote played in
22 the overall damage model.

23 And, so, it's fine to say it by itself doesn't
24 infringe; but when it's connected, it does. And, so,
25 what gives me some guidance as how to figure out -- maybe

1 it should be less than the full royalty; but other than
2 pick a number out of the air, what do I do?

3 MR. GUNTHER: Well, here's what I think you
4 do, your Honor -- and there was evidence on this at the
5 trial; and it was put in by Mr. Bratic, who is, by the
6 way, not here now. But what was Mr. Bratic's testimony
7 at the trial, and what did he put in his expert report?
8 He said that because the Wii Remote is not infringing on
9 its own, that -- and remember he was looking, again, not
10 just at the Classics but the Classics and the Nunchuks.
11 His damage model, your Honor, capped the number of
12 Remotes that would be included in the royalty base at the
13 number of Nunchuks that had been sold. Now, Nunchuks
14 have been found not to be infringing in combination with
15 the Remote. But his logic makes perfect sense.

16 What he was saying, your Honor, in essence, is
17 that if you include more than one Nunchuk -- and now I'll
18 switch it to Classic because that's what we're talking
19 about here. If you add more than one Remote per Classic
20 into the base, you are now charging a royalty on
21 noninfringing product. So, his damage model, your
22 Honor -- and this is what he did when he testified to the
23 jury. He capped the number of Remotes at Nunchuks. And
24 what we're saying, your Honor, and what I was trying to
25 maybe sort of inartfully suggest to the court by my

1 examination of Mr. Armstrong is that that should be
2 exactly the case here in the post-verdict world.

3 THE COURT: So, you think in the ongoing
4 royalty, it ought to be whatever rate is set against the
5 number -- in effect, for example, if we set, say,
6 5 percent -- just pick 5, whatever number -- on the
7 number of Wii Classics, then I just take whatever number
8 there is and say, okay, 5 percent of the -- whatever of
9 the number of Remotes that are sold; and that gives a
10 good rough approximation of what the total royalty ought
11 to be? You don't like 5 percent, I know, but --

12 MR. GUNTHER: Yeah. Well, and remember, your
13 Honor -- your Honor is correct because you're separating
14 the two issues out, the base and the rate. And I think
15 what I'm talking about now is the base.

16 THE COURT: All right.

17 MR. GUNTHER: And what I'm saying is that the
18 way to do it is the way that Mr. Bratic did it at trial,
19 which is a one for one; and that's the only way -- and,
20 in fact, that gives them quite a bend, your Honor,
21 because the Remote costs twice as much as the Classic.
22 So, if you include those things even one for one in the
23 base, they're getting a pretty pumped-up number.

24 But anything -- and this is what Mr. Bratic
25 said and testified to at the trial, that anything above

1 one for one doesn't account for the fact that Remotes on
2 their own do not infringe.

3 So, your Honor, I appreciate this is not an
4 easy issue, your Honor; but I also think that we are not
5 left -- the court is not left without guidance. There is
6 guidance, and it's from their expert --

7 THE COURT: All right.

8 MR. GUNTHER: -- who they have chosen not to
9 put forward in the post-trial proceedings.

10 THE COURT: Okay. Go ahead if you have any
11 other questions.

12 MR. GUNTHER: Yes, sir. Thank you.

13 BY MR. GUNTHER:

14 Q. Mr. Armstrong, I want to sort of switch --

15 THE COURT: Do you want to sit down now,
16 Mr. Armstrong?

17 BY MR. GUNTHER:

18 Q. And I apologize. You can sit down, Mr. Armstrong.

19 THE COURT: Go ahead.

20 BY MR. GUNTHER:

21 Q. Mr. Armstrong, in terms of the combination of the
22 Wii Remote and the Wii Classic that were found to
23 infringe in the case, in terms of the claims, rumble was
24 a feature of those claims that were asserted, correct?

25 A. Yes, sir.

1 Q. Now, the Super Smash Bros. that you demonstrated
2 to the court -- is rumble ever used during game play when
3 you use the Wii Classic with the Wii Remote to play Super
4 Smash Bros.?

5 A. I haven't looked into that.

6 Q. All right. Do you know, sir, whether it does?
7 There's been testimony submitted to the court by Nintendo
8 in connection with the post-trial motions that it is
9 not -- rumble is not used in game play with any games
10 that utilized Wii Classic connected to the Remote. Let
11 me ask you this: Do you have any basis to dispute that?

12 A. I haven't looked into that issue.

13 Q. Okay. So, you have no basis to dispute it?

14 A. I have no basis at this time.

15 Q. Okay. Now, sir, you showed the court about how,
16 when certain things are plugged in like the Remote -- or
17 when the Classic is plugged into the Remote, an icon will
18 show up on the screen showing what's been plugged in. Do
19 you remember making that demonstration?

20 A. Yes, sir.

21 Q. Okay. Now, sir, do you know what in the Wii
22 system actually makes that determination?

23 A. The internals of the Wii system, no, sir.

24 Q. Okay. Do you know, sir -- there's been testimony
25 from Mr. Ikeda, who submitted a declaration on the

1 post-trial motions, to the effect that the Wii Remote
2 cannot itself recognize what's been plugged into it but
3 can only pass that information through to the console.

4 Do you have any basis to dispute that?

5 A. No, sir.

6 Q. Okay. Now, sir, there is a third-party -- I think
7 you've demonstrated. There is a third-party Classic
8 Controller on the market now that's basically a Classic
9 substitute, right?

10 A. Yes, sir.

11 Q. And that company was able to introduce that
12 product in spite of the fact that Nintendo has not been
13 enjoined from selling Wii Classic Controllers, correct?

14 A. Yes, sir. I -- I think their penetration is
15 probably very, very small.

16 Q. Do you know that, sir?

17 A. No, sir.

18 Q. Have you made any study on that?

19 A. I haven't seen any on store shelves.

20 Q. Have you or your team made any study of that?

21 A. Not a study, no, sir.

22 Q. Okay.

23 THE COURT: Well, isn't the point there that
24 they would be infringing, also?

25 MR. GUNTHER: Your Honor, the claim that's

1 been brought, as I understand it, is against the NYCO
2 Kama controller, which is the Nunchuk substitute that --
3 THE COURT: No. I'm talking about the
4 GameCube -- I don't know if you said there was a Classic
5 or a --

6 MR. GUNTHER: The Classic substitute.

7 THE COURT: Right.

8 MR. GUNTHER: Right. Right. Nintendo has not
9 brought a claim, as far as I know --

10 THE COURT: Well, not Nintendo. I'm saying --
11 assuming the jury is correct in this case --

12 MR. GUNTHER: Yes, sir.

13 THE COURT: -- then very likely this
14 third-party is also infringing Mr. Armstrong's patent.

15 MR. GUNTHER: Well, your Honor, apart from
16 that point, apart from that point -- I understand what
17 the court is saying. But apart -- well, maybe let me
18 inquire.

19 BY MR. GUNTHER:

20 Q. Have you made any efforts to stop this company
21 from any infringement?

22 A. No, sir.

23 Q. Have you written them any letters?

24 A. No, sir.

25 Q. Okay.

1 MR. GUNTHER: So, your Honor, my point on this
2 is that, you know, maybe at some point in the future they
3 will or will not do something with respect to this
4 company in terms of a claim for infringement. But the
5 point that I'm trying to make is as a market matter,
6 others have been able to get into this market despite the
7 fact that Nintendo is in the market currently. One of
8 the things they're saying is Nintendo is clogging in the
9 market by being in the market for the Classic
10 controllers. Well, if that's the case --

11 THE COURT: That seems a little bizarre given
12 that the whole purpose of the patent is the right to
13 exclude, and now you're saying -- I mean, it's -- tell me
14 why someone could not understand your argument as, "Yeah,
15 we're infringing. The jury's said we're infringing. But
16 so what? Other people have been allowed to cheat, also."

17 MR. GUNTHER: No. No, your Honor. That's not
18 my argument at all.

19 THE COURT: Okay.

20 MR. GUNTHER: My argument -- and I apologize.
21 I'm not being clear, obviously. But what I'm trying to
22 say is -- I'm looking at a situation apart from the issue
23 of infringement of can others enter; as a practical
24 matter, can others enter, as a matter of marketing, as a
25 matter of doing those types of things, as a matter of

1 building the product.

2 And what I'm saying is if Nintendo is either
3 in the market or out of the market, what I think that
4 this suggests is that it doesn't make any difference to
5 whether or not people can enter or not. That's my only
6 point. And I'm obviously not --

7 THE COURT: That sounds very subtle to me
8 because if they're in there and the jury is correct
9 that -- you know, we've got a jury verdict that the
10 product infringes -- that the Nintendo product infringes.
11 Somebody else has a third-party pirate, in effect, or
12 they're making it in Asia. Once it comes into this
13 country, it's infringing. Then --

14 MR. GUNTHER: Your Honor, what --

15 THE COURT: Although, I guess they are not
16 estopped by the decision in this case, they run a real
17 risk of willfulness if they're -- once they're on notice
18 of the verdict. I don't see how that --

19 MR. GUNTHER: Well, they might; or they might
20 not. But that's separate and apart from whether or not
21 others chose to do it despite the fact that Nintendo is
22 in the market.

23 THE COURT: Well, that also goes to whether or
24 not Mr. Tyler, who developed Mad Catz and has shown
25 himself capable of doing this, could do this, also.

1 MR. GUNTHER: Well --

2 THE COURT: He doesn't have other barriers to
3 entry. I mean, your argument originally seemed to be,
4 "Well, there's huge barriers to entry anyway; so, these
5 are just patent trolls who can't get into the market."
6 I'm exaggerating the extent of your argument, but that's
7 one of the classic -- no injunction because these don't
8 market, they don't make, they can't, they're just trolls.
9 That's the typical, I mean, spoofed-up argument that is
10 used. And what you're saying is is, well, actually not
11 only can they do it but there's pirates out in Asia who
12 are doing it right now.

13 MR. GUNTHER: Well, your Honor, first of all,
14 with respect to whether they're pirates or not, I have no
15 idea whether or not they're pirates. My only point --

16 THE COURT: You're right. There may not be
17 patent protection over there; but once they bring it in
18 here, into this country --

19 MR. GUNTHER: If, your Honor -- and I'll tell
20 you I haven't made a study of it. If, in fact, that
21 thing infringes -- I don't know whether it does or not.
22 But the only point, your Honor -- and I'm obviously not
23 getting any traction with it; so, maybe I ought to move
24 on to something that might get me some traction.

25 But what I'm saying is this. We don't know

1 how long it took them. There's no evidence with respect
2 to that. They haven't studied any of that. So, there's
3 all of those barriers; and there is the encryption in all
4 of that.

5 But what I'm saying sort of a little bit on
6 the flip side is that in terms of whether or not Nintendo
7 is blocking the ability for others to be in the market
8 because Nintendo is in the market -- and that's my only
9 point, is that others -- and you could look at this not
10 just with respect to the Classic but with respect to any
11 Nintendo product or controller. There is Mad Catz.
12 There is all kinds of third-party controller companies
13 that have been able to get into the market despite the
14 fact that Nintendo and Sony and Microsoft are all making
15 their own controllers.

16 So, let me make a broader point, your Honor --
17 that's my only point there. What they've told you they
18 want to do is they want to get into the Wii
19 Classic-compatible marketed, and I agree. I think there
20 are huge barriers; and I think that to the extent that
21 they are saying "But we might want to explore it at some
22 point in the future," they haven't done anything,
23 certainly nothing that would justify enjoining us on the
24 basis of irreparable harm.

25 THE COURT: Go ahead.

1 BY MR. GUNTHER:

2 Q. Let me just finish with this, Mr. Armstrong. With
3 respect to the controllers that you've demonstrated, the
4 third-party unlicensed controllers, do you know how long
5 they took to develop?

6 A. I do not.

7 Q. Do you know how much engineering work they did?

8 A. No, sir.

9 Q. Do you know what, if anything, they had to do to
10 overcome Nintendo's security system?

11 A. No, sir.

12 Q. Do you know what, if anything, they did to try to
13 make themselves square with Nintendo's intellectual
14 property rights?

15 A. No, sir.

16 Q. So, as far as you know, sir, these guys could have
17 been working on these things for much longer than six
18 months. Isn't that possible?

19 A. I have no personal knowledge of that.

20 MR. GUNTHER: Okay. Your Honor, I pass the
21 witness.

22 THE COURT: Anything else?

23 MR. CAWLEY: Nothing on redirect, your Honor.

24 THE COURT: Okay. You may step down, sir.

25 MR. CAWLEY: That's the last live witness we

1 have. I guess with the court's permission -- we've sort
2 of been arguing as we go along here.

3 THE COURT: Right.

4 MR. CAWLEY: But if the court would like to
5 hear further argument on the issue of injunction and
6 royalty, I've probably got about 15 minutes to try and
7 tie that stuff together.

8 THE COURT: Well, let me see if there is any
9 rebuttal from defendant.

10 MR. GUNTHER: Rebuttal in terms of...

11 THE COURT: Evidence.

12 MR. GUNTHER: Your Honor, again, we've
13 submitted our declarations. They're all before the
14 court. Anascape has already informed us that they have
15 no questions for any of those witnesses. And I think the
16 only one that we had an issue with was with respect to
17 Mr. Ugone if the court has questions.

18 THE COURT: Let me just note for the record --
19 Ms. Chen just reminded me. I had earlier cited or talked
20 about the Verizon versus Vonage case; and actually what I
21 meant to or should have said was the Amado versus
22 Microsoft Corporation, 517 F.3d 1353, the case where the
23 court set an amount to be placed in escrow and then later
24 determined, after further proceedings, how much the
25 ongoing royalty should be.

1 What I'm going to do is take a recess for ten
2 minutes, and then we'll come back and finish up any last
3 argument and then come up with a decision.

4 (Recess, 11:15 a.m. to 11:26 a.m.)

5 (Open court, all parties present.)

6 THE COURT: All right. Mr. Cawley, you said
7 you had some argument or some other points to make?

8 MR. CAWLEY: Yes, your Honor, with the court's
9 indulgence. I think, as I said, we've sort of argued
10 this thing as we've gone along; so, I certainly don't
11 want to repeat myself. But I do think that it's useful
12 to put the struggle that the court is faced with here in
13 crafting an appropriate remedy in a little bit of
14 context.

15 It's only been two years since eBay was
16 decided, and there's probably been a good bit of folklore
17 that has grown up around it. Most people in this area
18 pretty well take the view that a nonpracticing entity is
19 not going to get a permanent injunction. But it's worth
20 remembering, of course --

21 THE COURT: No. I'm past that. I don't
22 believe that. I don't believe that at all. I think some
23 do; some don't.

24 MR. CAWLEY: Right. So, that leaves us with
25 the factors. As I've already said, I don't think that

1 public interest is particularly interesting here.

2 The balance of the hardships is not
3 particularly interesting.

4 So, as usual, we're left with irreparable
5 injury and inadequate remedy. Since eBay suggests that
6 an inventor who does not intend to practice may still
7 satisfy the factors, I'd suggest that the evidence both
8 at the trial and in this proceeding suggests to the court
9 that Anascape is in an even stronger position than a
10 nonpracticing entity because there is credible evidence
11 on which the court can find that Anascape has the
12 intention and the ability to get into the business.

13 THE COURT: Well, Mr. Tyler has the ability.
14 He's proven that.

15 MR. CAWLEY: Well, Mr. Armstrong, I guess,
16 hasn't proven he has the ability; but he's proven that he
17 has the desire. The court can recall from the trial
18 testimony that Mr. Armstrong developed a product, that he
19 sold, as I'm recalling, no more than -- was it a hundred,
20 maybe less, units of it. That's not particularly
21 compelling in terms of the ability, but it certainly
22 demonstrates that his desire to get into the business is
23 not something that was dreamed up merely for this
24 proceeding.

25 Mr. Tyler, as the court observes, has not only

1 the interest that he expressed today but the demonstrated
2 track record of being able to do it.

3 The court was also reminded that during the
4 course of the Sony negotiation, Anascape negotiated and
5 obtained a license to certain Sony controller patents.
6 The reason that they did that is to enhance their ability
7 to get into the business.

8 And the court heard that during the
9 negotiations in this case with Microsoft, Anascape also
10 negotiated for a license to Microsoft controller patents.
11 And even though that didn't happen, the fact that they
12 were actively negotiating for that is further evidence of
13 the legitimacy of their express desire to get into this
14 business if they can.

15 So, what's the opportunity that would be
16 presented if they obtain their patent right to exclude
17 infringing Nintendo competition? First of all, Nintendo
18 would have to cease infringement, creating an opportunity
19 in the marketplace.

20 Anascape, under those circumstances, is not
21 just any third party who would like to get into the
22 business; they have proven intellectual property that
23 should enhance their ability to market their legitimate
24 product. They have the business experience and
25 capitalization necessary to do so. And, as Mr. Tyler

1 explained, they could use the ability to sell a
2 Nintendo-compatible controller as a springboard for other
3 accessories.

4 So, the court, then, is faced with the
5 question that the court has already posed several times
6 in this proceeding: What's the value of this lost
7 opportunity? How can we put a dollar value on Anascape
8 not being able to unclog the channel, not being able to
9 go into the marketplace with the only legitimate product,
10 not being able to try and use that as a springboard for
11 other products?

12 Now, as the court observed, it's not unusual
13 that parties attempt to prove damages in the form of lost
14 profits or lost business opportunities. But the typical
15 result of that effort, in my experience, is that it comes
16 to naught because one of the axiomatic requirements is
17 that you show your lost profits with reasonable precision
18 and without speculation. We don't think it can be done
19 in this case, and that's the reason why money damages are
20 inadequate to compensate Anascape for this ongoing
21 infringement.

22 Now, in answer to this, we've heard from
23 Nintendo through the form of their declarations that
24 there are various technical impediments. They filed a
25 declaration with this court saying, "Well, it couldn't be

1 done because we use encryption." Well, the court just
2 saw in court today that other people have done it. And
3 if other people have done it, there is no reason Anascape
4 couldn't do it.

5 They filed a declaration telling your Honor,
6 "Well, it might damage the console if anybody tried to
7 make a third-party controller that was unauthorized."
8 You've seen in court today there are such controllers.
9 There is no credible evidence that there is any damage to
10 the console.

11 They've argued that disabling the Classic, as
12 we have requested the court enter injunctive relief
13 requiring since the console has the ability to recognize
14 exactly what controller is hooked up to it -- to disable
15 the Classic from being used with the Wii Remote. And
16 they say, "Well, it would disable everybody's
17 controller." But there's no reason to believe that
18 that's true. There's no reason to believe that in this
19 sophisticated environment, that that can't be done on a
20 discriminating basis.

21 Finally, they say, "Well, there's blocking
22 Nintendo intellectual property. We have IP; and,
23 therefore, nobody else can get into the business." Well,
24 it hasn't stopped these third-party companies; but that's
25 not a very good answer since some of them could

1 potentially be infringing Nintendo IP. But what IP is
2 this? What has the court seen? What is the real
3 evidence about this?

4 To the extent that Nintendo has copyright
5 protection in its communication protocol, that's not
6 going to be protection. In the Fifth Circuit there is a
7 case, Alcatel versus DGI, which holds that it is
8 copyright misuse to attempt to use copyright to obtain a
9 monopoly on a peripheral.

10 It's a little ironic, and I can't help but
11 take a moment to observe that's a business of an
12 incestuous citation. It just so happens that I tried and
13 argued that case. Mr. Melsheimer, who I know that the
14 court has been involved with over the last few days, was
15 on the other side; and Judge Parker wrote the opinion.
16 So, between us, we're reasonably familiar with that
17 authority. But as I say, it basically says Nintendo
18 can't use its copyright in its communication protocol to
19 obtain a monopoly.

20 For those reasons, your Honor, we believe that
21 the court should enter a preliminary injunction in this
22 case. If, however, for all or part of the products that
23 are involved the court determines that it will enter
24 injunction but condition that on the payment of an
25 ongoing royalty or some other permutation of relief like

1 that, then the court is faced with determining how much
2 that royalty should be.

3 The court has already referred to the Amado
4 versus Microsoft case that essentially suggests that
5 logic dictates that that amount be somewhere between what
6 the jury found and what the parties may advocate for
7 enhancement. In this case the only evidence that the
8 jury heard was that an appropriate royalty was 5 percent.
9 The only rational interpretation that I've seen of the
10 jury's verdict is that they took that 5 percent; and when
11 they determined that the Nunchuk did not infringe, they
12 deducted from the total sales in Mr. Bratic's exhibit all
13 of the Nunchuks and an equal amount for the Remotes and
14 applied 5 percent to the rest. It seems clear, then,
15 that both the evidence and the jury's verdict support at
16 least an ongoing royalty of 5 percent.

17 THE COURT: Isn't that, I think, what
18 Mr. Gunther was saying about the Remotes, that it should
19 be limited to the number of Wii Classics?

20 MR. CAWLEY: That's what he says.

21 THE COURT: And isn't that what you just said,
22 too, as a minimum?

23 MR. CAWLEY: No. As a minimum -- I don't
24 think so. I mean, that's --

25 THE COURT: Okay. I --

1 MR. CAWLEY: The jury deducted an equal number
2 of -- an equal amount of Remote damages from -- equal to
3 the Nunchuk damages; but they weren't asked about this
4 question, of course. My only point there is that they
5 apparently applied a 5 percent rate.

6 THE COURT: All right. Go ahead.

7 MR. CAWLEY: Okay. So, we believe that the
8 issue before the court is should the postjudgment rate,
9 if the court applies one, be higher than what the jury
10 found. And, of course, in the Paice versus Toyota case,
11 Judge Rader in a concurring opinion reminded us that the
12 postjudgment acts of infringement are distinct and may
13 warrant a different royalty rate than what the jury
14 found.

15 And we would submit that there are a number of
16 changed factors as a result of recent events and as a
17 result of the verdict that should mandate a rate higher
18 than 5 percent.

19 First, there is the Microsoft license. The
20 court will remember the testimony that there basically
21 are three giants in this industry -- Sony, Microsoft, and
22 Nintendo. With the Microsoft license, Nintendo is now
23 the only entity that lacks a license to this technology.
24 That would have an upward effect on the rate that they
25 should be willing to pay or required to pay to be able to

1 match the competition of Microsoft and Sony.

2 Second, there obviously will be collateral
3 estoppel between the parties in future litigation, which
4 will eliminate the ability of Nintendo to contend for
5 future infringing products that this patent is invalid.

6 Third, there is evidence of continued
7 successful infringement by Nintendo. They haven't
8 indicated that they intend to stop infringing. To the
9 contrary, every indication is they intend to continue
10 infringing unless this court stops them.

11 We've heard that the game, for example, that
12 can be used with the Classic, the Super Smash Bros.
13 Brawl -- what the court hasn't heard but is the case is
14 that's the fifth most successful Wii game of all time.

15 Another game that's compatible with the
16 Classic, Super Mario Kart Wii, was the most successful
17 Wii game in March of 2008.

18 The fact that Nintendo continues to offer the
19 Classic Controller undercuts their protestations that
20 nobody cares about this. They continue to offer
21 important and vital products using that controller.

22 Yet another change factor which we believe
23 justifies the court departing upward from the 5 percent
24 is the fact that Nintendo's continued infringement is
25 likely willful. Now, this court has previously heard and

1 rejected the argument that because the ongoing
2 infringement is willful, the rates should be trebled.
3 We're not suggesting that. But what we are suggesting is
4 that there should be some penalty attendant to a party
5 simply choosing to conduct ongoing infringement, knowing
6 that it has been found to be the infringer of a valid
7 patent and that the doctrine of willful infringement
8 should have an upward effect on the rate.

9 And, finally, the noninfringement finding of
10 the Nunchuk, which Nintendo relies on extensively in
11 their briefing, affects the base, obviously -- there's
12 not going to be Nunchuks in it -- but it doesn't affect
13 the rate.

14 Furthermore, in addition to these changed
15 factors, the evidence in this case supports a higher
16 royalty. The court will recall that Mr. Bratic testified
17 that the Immersion licenses for game controllers which
18 include licenses of up to 7 percent rather than five.

19 The court will recall that Mr. Bratic
20 testified in his deposition -- although, the jury did not
21 hear this evidence -- that he believed that a rate of up
22 to 8 percent would be reasonable.

23 Both Nintendo witnesses in the forms of
24 Mr. Takeda and Sony witnesses in the form of Ms. Panico
25 testified about the importance of the features in the

1 Classic Controller, specifically of the rumble feature.

2 And, once again, there is evidence that the
3 infringing Classic drives game sales, including the
4 ongoing sales of Classic games, including games like
5 Super Smash Bros. and Mario Kart Wii that can be played
6 with the Classic Controller.

7 In light of this evidence and of these changed
8 factors, we believe that it's appropriate that if the
9 court conditions an injunction on an ongoing royalty,
10 that the ongoing royalty for the Wavebird, GameCube, and
11 Classic be 8 percent.

12 We also believe that all the Wii Remotes
13 should be included in the base but at a lower royalty
14 rate due to the fact that not all of them are likely to
15 be infringing at any given time. Remember, though, the
16 evidence has shown that every Remote can be used to
17 infringe. Unless Nintendo chooses to reprogram its
18 Remotes or console software to eliminate the possibility
19 that Remotes can be used with the Classic, then Nintendo
20 has chosen to continue to offer a product that can be
21 used to infringe and is used to infringe.

22 Now, Nintendo relies heavily on the District
23 Court case of Oak Industries versus Zenith. That's a
24 case in which the facts showed that certain products that
25 might be included in base could not, under any

1 circumstances infringe. But this circumstance is very
2 different, as Mr. Gunther just eloquently illustrated in
3 Mr. Armstrong's examination. If you have a hundred
4 Remotes, any one of those hundred can be used to
5 infringe; and every one of those hundred could infringe
6 if you hook it up to a Classic.

7 The console itself, as the court has seen, can
8 be used with four Remotes.

9 And postjudgment Remotes could be used with
10 pre-injunction Classics.

11 The bottom line, your Honor, is that there is
12 no way to know whether these conveyed sales of Remotes
13 which are in the Classic conveyed sale used in
14 association with the infringing product -- there is no
15 way to know how many or which ones are going to be used
16 in an infringing configuration at any time.

17 Therefore, we concede that the 8 percent
18 royalty rate should be lower for the Remotes and request
19 a 5 percent royalty rate for all Wii Remotes. Thank you,
20 your Honor.

21 THE COURT: Mr. Gunther -- and let me ask a
22 question. Is there any evidence as to the numbers of Wii
23 Classics versus Wii Remote and Nunchuk sales? In other
24 words, do we have any numbers?

25 MR. GUNTHER: Yes, sir.

1 THE COURT: I mean, I saw it in here
2 someplace; but I can't put my hand on it.

3 MR. GUNTHER: Yes, sir. It's in the
4 declaration of Terrance Bask, and he has -- Mr. Bask has
5 a chart that he attaches. He also -- he puts the raw
6 numbers; but he also has a chart that's attached to his
7 declaration that sets forth the cumulative numbers, your
8 Honor. And what it shows is that there are -- let me
9 just get to this.

10 Your Honor, for the period November, 2006,
11 which is just before the lawsuit was filed, through June
12 of 2008, Nintendo of America has sold approximately
13 29.5 million Wii Remotes and about 2.5 million Wii
14 Classics.

15 And, your Honor, we anticipate -- Mr. Bask
16 also testifies in his declaration that for the next
17 fiscal year that will run from April of 2008 to March of
18 2009, that Nintendo is currently forecasting
19 approximately 1.5 million sales of Classics. So, the
20 trend, your Honor, with respect to the difference in
21 sales between Remotes and Classics, is expected to
22 continue.

23 Remember, the Remote and the Nunchuk are
24 packed in with every Wii console that's sold. They're
25 also available separately. So, your Honor, if you look

1 at that chart at the back of Mr. Bask's declaration, the
2 number of cumulative Wii Remotes is just gigantically --
3 more than ten to one of Wii Classics.

4 And, so, one of our fundamental points, your
5 Honor, is that given that the Remote is not infringing in
6 and of itself, that saying, "Well, we want a royalty on
7 every Remote despite the fact that there is only one in
8 ten or less than one in ten Classic Remotes" just doesn't
9 make any sense and, your Honor, really is inconsistent
10 with the evidence that they presented at trial through
11 Mr. Bratic, which is that he said the way to do this, to
12 take account for the fact that the Remotes themselves
13 don't infringe is to do a 1:1 ratio. So, now they have
14 kind of thrown that out. Mr. Bratic doesn't come in her
15 in the post-trial session. And they say, "Let's have a
16 royalty on everything."

17 Your Honor, that, again, is against the very
18 methodology they offered at trial; and the methodology
19 they offered at trial was right for a reason. It took
20 account of the fact that Wii Remotes by themselves do not
21 infringe, and it also took account of the fact that many
22 more Wii Remotes are sold than Classics and even
23 Nunchuks. So, now they want to walk away from that, your
24 Honor; but they shouldn't be allowed to do that.
25 Remember this is their burden.

1 THE COURT: Well, I mean, keep in mind also
2 that a damage expert can take a very conservative
3 approach because he thinks it's more credible. And I
4 asked this before. There seemed to be no attempt to try
5 to gin up the bill with convoyed sales of games and so
6 forth or all the other peripherals and packaging and
7 stuff like that. I mean, I've got to say when I was
8 defending cases, I just loved it if a plaintiff tried to
9 run up the bill a little bit too high because that's the
10 first thing the jury is going to look at is these guys
11 are just greedy and out they go with a zero.

12 So, the fact that an expert tones down isn't
13 completely binding because I also have to recognize that
14 as a possible trial tactic. So, it's something I'll
15 consider; but --

16 MR. GUNTHER: But it --

17 THE COURT: -- for purposes of analysis, there
18 were other ways it could have been done that would have
19 resulted in a higher number. It's something that has to
20 be factored in, but I don't think it's absolutely
21 binding.

22 MR. GUNTHER: Your Honor, whether or not it's
23 binding; the question is is it correct. Is it correct
24 that --

25 THE COURT: That's --

1 MR. GUNTHER: Right? And, so, what I'm saying
2 is they put that forward for a reason, because they had
3 an issue. It's an issue that they recognized; and it's
4 an issue that they attempted to deal with, which is the
5 Wii Remote by itself does not infringe. So, how do we
6 deal with it?

7 The way they dealt with it -- the way he dealt
8 with it was to do it one to one. And the reason why you
9 can't have any more than one to one is because of the --
10 because look at what they are now asking, your Honor.
11 They're asking for a 5 percent royalty on -- in going
12 forward but on cumulative past sales. Just look at
13 what's going to -- and this is going to continue in the
14 future. There is no question about this -- is that the
15 Remote is going to continue to outsell the Classic ten to
16 one or better.

17 And, so, what they are now saying is, well,
18 give us -- we want a royalty on every one of those things
19 despite the fact -- and, your Honor, this is critical.
20 If the Classic -- if the Remote had two ports or three
21 ports on it that you could connect two or three Classics
22 to it, then they might have a point. But the fact of the
23 matter is you can only use one Remote with one Classic at
24 a time; and, your Honor, that's the infringing
25 combination. And that's what the jury found to be the

1 infringing combination, as well, so that every time one
2 is unplugged or -- that is no longer part of an
3 infringing combination.

4 THE COURT: How do I deal with the problem
5 of -- let's say I'm going to craft an injunction; and,
6 so, I say, "All right. X percent -- 5, 6, whatever --
7 for Classic, GameCube, Wavebird, and whatever." In your
8 scenario I think you said -- didn't your briefing suggest
9 1 percent?

10 MR. GUNTHER: We suggested on a going-forward
11 basis -- one to one base and then 1 percent on the --

12 THE COURT: Remotes.

13 MR. GUNTHER: -- on the Remotes -- sorry. No,
14 your Honor. Just to be clear, 1 percent on the Classic
15 and then half a percent on the Remote given that --

16 THE COURT: All right.

17 MR. GUNTHER: -- the Remote is twice as
18 expensive.

19 THE COURT: Well, let's say I come up with
20 something like that. And then the first thing I'm faced
21 with is you use the GameCubes, the Classics, whatever as
22 loss leaders or as add-ons; so, technically the amount
23 coming in to them is zero. It just so happens the
24 consoles have an extra \$40 added to them.

25 I mean, I don't really want to get into

1 endless finagling; but smart businesspeople and smart
2 lawyers can get into that very quickly in terms of, well,
3 we've only got 70,000 -- one of the devices I think you
4 had 70,000 of them on the shelf.

5 MR. GUNTHER: That's the GameCube.

6 THE COURT: Right.

7 MR. GUNTHER: Right.

8 THE COURT: So, you've got 70,000 GameCubes.
9 Well, a good-faith effort to sell them; and they would
10 wind up with whatever percent I would put on it. But
11 what if you just decide, okay, buy a console; get one of
12 these things free? And suddenly it's a zero; and someone
13 back at Nintendo headquarters is kind of laughing about,
14 well, we tricked them and we tricked that judge
15 because -- and, for that matter, you could do it with the
16 Classic. You could easily say, you know, the console or
17 game package will now have a Classic; but we'll just --
18 and, actually, we'll give a coupon for free with that or
19 something like that.

20 Very hard to craft an injunction that is
21 enforceable. Not that I'm saying anyone is going to act
22 in bad faith; but, you know, salespeople have all kinds
23 of ideas of how to run up sales in a down economy. And
24 then we wind up with the other side getting less than
25 they're supposed to. Whereas, the Remotes, we know

1 they're being sold.

2 MR. GUNTHER: Well, we know they're being
3 sold; but we also know that they, on their own, don't
4 infringe. And, so, to try to take a royalty, you know,
5 on a ten to one basis and say everything should be
6 included in the royalty base despite the fact that there
7 is only one port and you can only hook these things up
8 one at a time, your Honor, that, to me is just -- you
9 know, again, why did Mr. Bratic do what he did? Whether
10 it's binding or not, he was taking into account as an
11 economic matter how to deal with the fact that Wii
12 Remotes don't infringe on their own.

13 And so, your Honor, again, I come back to this
14 analogy. If you could hook up more than one Remote to a
15 Classic, okay, maybe. But you can't do that. And, so,
16 they're trying to take more than one to one. Mr. Bratic
17 did it right. He did the economic analysis right and
18 took account of the fact that Wii Remotes by themselves
19 don't infringe.

20 Now, your Honor, if you award a royalty on the
21 Classic, an ongoing royalty on the Classic, and a one for
22 one on the Remote -- you know, remember, your Honor --
23 and I'm not suggesting that Nintendo would do anything.
24 There's no evidence that Nintendo has any plans to, you
25 know, sort of offer a free Classic or anything like that.

1 But, your Honor, remember this. Even on a one-to-one
2 basis, even on a one-to-one basis, the cost of the
3 Remote, what's going to go into that royalty base, is
4 over \$30. And the cost of the Classic is about 14.50.
5 So, every time you do a one for one, you're already
6 including twice as much value with respect to the Remote
7 as the Classic.

8 And, your Honor, look, the fact of the matter
9 is the reason why there was an infringement determination
10 by the jury is that the Remote has the rumble feature;
11 but everything else is in the Classic. The Classic is
12 the key part of this. And I suppose, your Honor, if we
13 did something to try to evade your order with respect to
14 an ongoing royalty, that they would have a basis to come
15 back and complain about it. But, of course, that's total
16 speculation. We haven't done anything like that. We've
17 continued to sell post-verdict the Classics just as we
18 sold them pre-verdict. So, on that point, your Honor, we
19 just don't think that there is any basis to include more
20 than one to one in the royalty base.

21 Your Honor, on that point -- that's an
22 extremely important point. Do you have any other
23 questions for me?

24 THE COURT: No. Go ahead.

25 MR. GUNTHER: Your Honor, I want to switch

1 back to the injunction point for a moment; and I want to
2 talk about -- you know, Mr. Cawley talked about -- let me
3 just switch over here, if I can.

4 Your Honor, Mr. Cawley talked about
5 irreparable harm and whether money damages was
6 sufficient, you know, adequacy of remedies at law; and he
7 basically said that's where all this is at. When you
8 focus on irreparable harm as a nonpracticing patent
9 owner, what they state their claim in terms of showing
10 irreparable harm is that "We want to get into this
11 business."

12 But, your Honor, what did Mr. -- and, look,
13 Mr. Tyler is a very good businessman. He started Mad
14 Catz. Presumptively if he decided that he wanted to sort
15 of, you know, kind of come out of semi retirement after
16 nine years and start a business over again, he could do
17 that perhaps. But, your Honor, what did he say? And
18 this is crucial. "Enjoin Nintendo. Enter an injunction
19 so that we can" -- and this was the last question I asked
20 him on cross-examination -- "so that we can explore
21 whether we want to enter the market." That's what he
22 said, not -- "Enter an injunction. Stop them now. We've
23 done nothing to prepare. We don't even know whether
24 we're going to enter. We'd like to, but we have a bunch
25 of work to do. Stop them now so that we can begin to

1 explore whether we should do it."

2 And he says that, "Well, we could be in the
3 market in six months." But, your Honor, where is the
4 evidence of that other than his general knowledge? That
5 is not specific at all to whether or not they could make
6 a Wii Classic substitute. They've done nothing in terms
7 of determining what kind of product they would want to
8 make, whether they could make it compatible, whether they
9 could defeat the encryption system, and whether or not
10 others have, how long it would take.

11 So, your Honor, suppose it took them a year;
12 or suppose they couldn't do it all. So, then we are
13 enjoined so that they can try to get into the market or
14 explore whether they want to get into the market. And
15 then what happens if they never enter? Then we've been
16 incredibly -- flip to the balance of hardships. We've
17 been incredibly harmed; and they haven't done anything.
18 They haven't come to market.

19 So, where we're sitting right now, your Honor,
20 is that they're basically saying, "We've met the
21 irreparable harm standard because we have an intention to
22 think about entering and explore entering if an
23 injunction is entered."

24 I know of no case, your Honor -- and I
25 recognize eBay is relatively new law. But I know of no

1 case that has ever entered an injunction and found
2 irreparable injury on the basis that somebody might want
3 to explore entering the market after an injunction is
4 entered. We think that's totally inappropriate and
5 unfair to Nintendo.

6 In terms of whether money damages is
7 sufficient, they've taken licenses from Microsoft.
8 They've taken licenses from Sony. They have offered
9 licenses over the years to Nintendo, Atari, Intec. Their
10 business, your Honor, from 1999 until today has been
11 offering licenses and taking money -- asking for money in
12 return or taking money in return. So, they have already
13 established by the way they conduct their business that
14 money damages is a sufficient remedy.

15 So, your Honor, we think on two fundamental
16 points of the injunction, they haven't come close to
17 showing you what's necessary in order to satisfy either
18 irreparable injury or whether or not money damages would
19 be sufficient.

20 Your Honor, on the royalty, I've talked about
21 the base point. I don't think the court has any further
22 questions for me. One thing that I want to say, your
23 Honor -- and this is extremely important. The term
24 "convoyed sales" has been bandied about pretty loosely
25 here in this courtroom. And I think, your Honor, when

1 you look at the cases -- look at the American Seating
2 case they cite in their briefs that cites back to the
3 seminal Rite-Hite case. What does that talk about in
4 terms of convoyed sales? It talks about convoyed sales
5 when you have a patented product and you are selling with
6 that, either together or separately, an unpatented
7 product that have a functional relationship.

8 Your Honor, the reason that convoyed sales
9 does not apply here at all as a legal concept is that the
10 Wii Classic by itself is not a patented product. The Wii
11 Remote by itself is not a patented product. The only
12 time there is infringement and the patent is covered and
13 it is a patented product is the combination of the two,
14 one Wii Remote and one Wii Classic.

15 So, your Honor, this just doesn't fall within
16 the convoyed sales cases. There is no patented product
17 that is driving sales of an unpatented product. The
18 products together are used for what the jury found to be
19 an infringing combination. So, convoyed sales just
20 doesn't apply in this situation. And that's another
21 reason why, your Honor, there is no basis for going
22 anywhere beyond one to one in terms of the royalty base.

23 Your Honor, on the rate, we've put it in front
24 of you. We've put Mr. Ugone's declaration in front of
25 you as to why all the various pre-verdict factors would

1 depress the rate. It's not our burden on that issue;
2 it's their burden of proof. What do they come back with,
3 your Honor? Where's Mr. Bratic? Where's Mr. Bratic to
4 testify about what the rate ought to be? He's gone.
5 They make the rates up themselves. It's lawyer argument,
6 your Honor.

7 And if you look at the burdens of proof, we've
8 basically said -- despite our burden, we've shown you why
9 that royalty rate would go; and they haven't done a thing
10 in terms of an evidentiary basis to show why the royalty
11 rate should somehow go up, despite the fact that the main
12 product at issue here was found not to infringe and what
13 we're dealing with, in the court's words in the
14 remittitur decision and Mr. Ikeda's words from the
15 witness stand, are "old school products."

16 Your Honor, at the end of the day what is
17 this? With respect to both the injunction and with
18 respect to the royalty, having lost the bulk of the case
19 at trial, this is an overreaching attempt to get back
20 into the game, both on the injunction and on the
21 reasonable royalty.

22 Your Honor, I respectfully request that the
23 court not allow them to overreach in this way and to
24 confine the damages in this case to be consistent with
25 what the jury found with respect to the old school

1 products. Thank you very much.

2 THE COURT: All right. I think the case law
3 is set out fairly clearly as to the court's authority and
4 jurisdiction to deal with an injunction. We start off
5 with the statute. 35 USC, Section 283, states that the
6 courts having jurisdiction may grant injunctions in
7 accordance with the principles of equity.

8 And, of course, we all know that for a long
9 time that was almost a given in these cases once
10 infringement was found. And then the eBay versus
11 MercExchange case at 547 U.S. 388 and 126 Supreme Court
12 1837, decided 2006, changed that; and the Supreme Court
13 made sure that we all understood it had to be done in
14 accordance with the traditional notions of equity. That
15 is, the prevailing plaintiff must demonstrate irreparable
16 injury; that the remedies available at law such as
17 monetary damages are inadequate; that the balance of
18 hardships between plaintiff and defendant, the remedy in
19 equity is warranted; and the public interest would not be
20 disserved by a permanent injunction.

21 And then Justice Kennedy in his concurrence --
22 and it's been sometimes referred to as a possible fifth
23 factor -- talks about the potential vagueness and suspect
24 validity of the patent. I'll address that one first.

25 We had, I think, a very well-presented case by

1 both sides. We had a jury that took a good deal of time,
2 over two days, a jury that paid a good deal of attention.
3 And I've mentioned this before in previous orders. And
4 it quite clearly was not swayed by either side and, in
5 fact, seemed to try very hard, granted a finding of
6 injunction on three products but still went with
7 defendant on the main thrust of their case.

8 And it was quite clear that, as I watched the
9 witnesses, that basically what defendant was saying was
10 plaintiff -- Mr. Armstrong copied our products with his
11 patent. And that is a valid trial tactic. I tried over
12 a hundred jury cases. In every single one of them, I
13 tried to get the jury on my side by showing something the
14 other side had done wrong. The classic writers talk
15 about it being a hook; you need a jury to bring the jury
16 in.

17 In this case it didn't work completely, or
18 maybe not at all; but on the other hand, it pretty much
19 established that -- the infringement case. I think it
20 would be very difficult to overturn on that basis. And I
21 understand that the higher court is going to look at many
22 of the legal rulings I made, and obviously there's room
23 there. They'll have more time; and they're obviously
24 more experienced, as are their staff attorneys and clerks
25 more experienced. So, I've got no illusion about that.

1 But in terms of potential vagueness or suspect
2 validity and so forth, I think on that factor, if it is
3 one, the verdict is fairly strong.

4 So, then I take a look at the irreparable
5 harm. And I guess it would be easy to look at eBay in
6 terms of, well, if they're nonproducing people, then
7 obviously there can be no irreparable harm. But that's
8 not exactly what eBay says. And when I have the chief
9 justice, Justice Roberts, along with Justice Scalia --
10 frequently thought of as being at one philosophical wing
11 of the court -- joined by Justice Ginsburg -- thought of
12 as being at the other philosophical wing of the court --
13 all saying that although there is not a per se rule,
14 which is what the Fed Circuit used to say, there is --
15 the court's discretion needs to be exercised in light of
16 previous cases.

17 And I think the quote that the concurring
18 opinion states is: At the same time, there is a
19 difference between exercising equitable discretion
20 pursuant to the established four-factor test and writing
21 on an entirely clean slate. Discretion is not whim, and
22 limiting discretion according to legal standards helps
23 promote the basic principles of justice that like cases
24 should be decided alike. And then they even mention the
25 quote of "a page of history is worth a volume of logic."

1 So, there can be no per se rule; and, so, we
2 take a look at the irreparable harm here. We have an
3 inventor who has produced this invention and partner,
4 Mr. Tyler, who has proven that he has the ability to go
5 into this business.

6 Now, I agree with -- and actually have in my
7 notes here some of the same comments that Mr. Gunther
8 mentioned, that he doesn't say he would; he said he could
9 but -- or they might or they would carefully consider it.
10 But there's two factors here. One, patent rights include
11 the right to exclude and the right to license. And to
12 say, "Well, you haven't done it" or "You who have the
13 ability to do so might not or have not yet because you've
14 been involved in this patent litigation; therefore, you
15 lose your right to exclude" is not a good argument.

16 They have, in fact, licensed to two other
17 major competitors; and now we have evidence that there is
18 this group of third-party marketers. I don't know how
19 many, but two or three companies were mentioned there who
20 were out there producing. And they, too, might be
21 willing to take a license, especially if there was an
22 injunction.

23 It does seem that there is, in fact, some
24 irreparable harm here in that what the plaintiffs are
25 being denied -- the plaintiff company is being denied is

1 basically the opportunity to go forward. And I don't
2 think the opportunity to go forward has to be based upon
3 proof that they have gone forward. That's something to
4 weigh in perhaps. And I think that also may weigh into
5 the remedies available and whether they are sufficient.
6 But in and of itself, given that Congress has decided to
7 give them this right to exclude and the infringement does
8 take it away, and especially with Nintendo's market
9 position takes it away pretty solidly, I think there is
10 irreparable harm.

11 Now, Nintendo brings up, "Well, it would be
12 very difficult for you to make these products because we
13 have secret codes that would stop you from using the Wii
14 Classic with the Wii Remote," in other words, producing
15 Wii -- third-party Wii Classics. I think that's a
16 dangerous argument for defendant. It basically is, "It's
17 okay if we infringe as long as we incorporate some secret
18 technology that stops the patent holder from making the
19 product or using the product. We've put in some
20 encryption in there that would stop you from taking
21 advantage of your product; and not only are we not going
22 to pay you for it, but we're not going to enjoin and
23 we're going to go ahead and market against you."

24 That's kind of a double-sided argument there.
25 I mean, I understand the way, Mr. Gunther, you phrased

1 your argument; but I think there is a flip side that can
2 be looked at on that.

3 When we take a look at the remedies available
4 at law, of course, the jury has already had the judgment
5 in full in the past; and we're going to get to
6 prejudgment interest, costs of court, postjudgment
7 interest. But then we have the damages in the future.

8 And we have the testimony and the graphs that,
9 you know, Wii Classics are not a tremendous portion of
10 the sales; but it is also true that we have every Wii
11 Remote can be used. We have every Classic could hook up
12 to every Wii Remote. And I guess it would be possible to
13 come up with some numbers.

14 I found it interesting. I don't recall a lot
15 of discussion about a dollars and cents per item as
16 opposed to a percentage, which might be more difficult to
17 calculate. It might be possible. But what's not being
18 considered here, I think, is again what I've referred to
19 as "opportunity cost," which is, in classic economic
20 theory, something that should be considered. Not in
21 every case perhaps. In the classic patent troll that has
22 no ability, has never done anything, he or she still has
23 the right to exclude; but there is not a lot of lost
24 opportunity cost here.

25 Here we have evidence that there are these

1 third-party marketers. They may be pirates. They may be
2 making them in the United States. But when they come
3 into this country, very likely they are infringing this
4 patent. They may be also infringing Nintendo's
5 intellectual property to some extent or copyright
6 property or something. But if there is no injunction
7 issued, the chances of -- I mean, there is some lost
8 opportunity in Anascape going to them and saying, "You
9 need to take a license, or we're going to block you.
10 We've already got a judgment out of the Eastern
11 District."

12 Finally, there's the lost opportunity of going
13 forward with this and then, as was mentioned, developing
14 other add-ons, the peripherals. As I recall from the Mad
15 Catz testimony -- or, I'm sorry, the testimony of
16 Mr. Tyler about Mad Catz, when he first came back with
17 his duffle bag full of products, there were the
18 controllers; but there were also supposedly the neat
19 little cases that went with the controllers. There were
20 other things that got people excited about buying these
21 things, which is why he was such a success.

22 So, it's not clear that it would be possible
23 at this point to craft a remedy at law; and in this
24 business, in this area, if we wait a year or two until
25 the Court of Appeals comes back and then say, "Okay. Now

1 you can go ahead and file your suit" -- which, again,
2 would probably have attorneys' fees of 2 to \$3 million on
3 plaintiff's side, maybe another 2 to 3 million on
4 defendant's side. Not much money compared to Nintendo's
5 total, but 2 to \$3 million versus the numbers that I've
6 heard that Anascape -- or even Mad Catz made is a huge
7 cost. And Congress has made it clear to the courts that
8 rules in the courts are to be administered -- this is
9 Rule of Civil Procedure 1, I believe also in the rules of
10 evidence -- that we're to be looking for justice,
11 efficiency, and keeping down costs.

12 And, so, again, is it really an adequate
13 remedy to say, "Well, if you want to risk a couple
14 million dollars to sue us against, you go right ahead.
15 The total dollars you're likely to win is probably in the
16 range of 20 to 30 million after several years of
17 litigation and an appeal"?

18 The opportunity to have a lawsuit is not -- in
19 this kind of case, given the time and the money involved
20 in it, is not the best remedy under these circumstances
21 given the facts. I'm not saying it can never be a
22 remedy. Obviously, a remedy at law can be a lawsuit in
23 many cases. But given also by the time all that
24 happened, we're likely to be in the next generation of
25 games anyway; and, so, by that time it's all over. So,

1 again, the court does not find that a remedy -- there is
2 a fully adequate remedy at law to the plaintiffs in this
3 case.

4 The balance of the hardships. Obviously,
5 there is some hardship in enjoining Nintendo; but as they
6 have pointed out many times, the sales of the Nintendo
7 Remote with the Wii Nunchuk -- I'm sorry -- yeah, the
8 Remote, the Nunchuk, and so forth is far more than the
9 sales of everything else combined and probably going to
10 go on in the future.

11 As far as one of the products, there's -- two
12 of the products they're not making anymore at all. They
13 are using the Classic, but they seem to indicate that
14 it's a fairly small percentage of their sales. So,
15 there's not a huge hardship there; although, we've got to
16 recognize there is some. There could be some redesign.

17 There is a ripple effect on accessories and so
18 forth, and they -- there was some evidence in the file, I
19 think Exhibit 8 of Anascape's motion, showing the
20 accessories on that. But, of course, that accessories --
21 it goes back to one of the earlier factors I talked about
22 is in terms of the lost possibility of plaintiff being
23 involved in that accessory market.

24 On balance, there's probably not a great
25 hardship to the plaintiff in getting money instead of

1 having to start up a business. I think you've got to
2 recognize from the testimony Mr. Tyler. He had indicated
3 that -- and he's obviously a very successful businessman
4 and has the ability. Does he really want to? So, in
5 terms of balance of hardship, it probably is relatively
6 neutral.

7 Public interest. We have a public interest in
8 enforcing patents and in protecting patent rights. There
9 is a strong public interest there. It's easy to discount
10 the public interest in video games. But given the use of
11 these games -- I mean, just in part, bedridden people,
12 elderly people and so forth -- I'm not going to just
13 discount that there is a public interest there in these
14 games; and there is a public interest in a good strong
15 market, innovation going forward.

16 I don't think there is any doubt at all that
17 the fact that young people have used these games have had
18 a huge impact on the transportation controllers that they
19 use, the weapons controllers that the military uses.
20 There's all kinds of modern technology that governs our
21 everyday life, that the children who use these various
22 game controllers in some way or another may wind up
23 having some advantages or some, in effect, practice
24 skills in, for example, the various controllers that are
25 used for all kinds of modern weapons systems, all kinds

1 of aviation and traffic systems. So, to say there is no
2 public interest in video games, I think, is not correct;
3 but there's interest going both ways. I think that
4 balances out.

5 So, based on all that, I believe that in this
6 case an injunction is appropriate. I also believe -- and
7 I'm taking a queue here from the Amado case -- that given
8 what I have before me and also probably given the
9 possibilities of an appeal, that it would make a good
10 deal of sense to stay the injunction and order some
11 amount -- or condition the injunction or stay the
12 injunction on the deposit of some amount into an escrow
13 account that would be sufficient to then adequately
14 compensate the plaintiff for the use, sale, and so forth
15 of these products during the time that the stay is in
16 effect, which would presumably be until we reach the --
17 or go through the appeals.

18 I am also -- along that line, let me ask this:
19 Knowing that this is going to go into an escrow, knowing
20 that a final decision will have to be made later and I
21 think both sides will be making their arguments -- I know
22 there's been some discussion about royalty, and there
23 hasn't been an agreement yet. I am wondering if counsel
24 believes it would be possible to come up with some amount
25 that plaintiff thinks would be adequate should they win

1 that would cover them and defendant would agree that, you
2 know, it's not going to cripple them if it's going into
3 an escrow account. I mean, there's got to be -- it's a
4 little bit different than me deciding right now.

5 For example, in that Amado case, if I recall,
6 when it came back, the court actually wound up going with
7 a lower number than it had originally set; and that's
8 what I would be intent to do. It's similar to sometimes
9 when bonds are set in certain admiralty cases. You set
10 the bond to all possible damages plus a year's interest
11 plus -- you know, you set enough there to make sure it is
12 adequate to cover what the judgment is going to be.

13 I've mentioned several times I am a little
14 concerned about -- I mean, I can do it; but I'm a little
15 concerned that the evidence before me from either side is
16 such to make it easy to come up with a royalty amount.
17 I've mentioned that before and I'm sure both sides are
18 confident that they can come up with a number and I
19 should easily be able to follow them and do so.

20 But let me hear from counsel. Do you think
21 there is a possibility of coming up with an agreement of
22 what should go into the escrow to solve that problem as
23 it goes forward?

24 MR. GUNTHER: Your Honor, I think here is
25 going to -- this is where the rubber is going to meet the

1 road on this. We're going to get into a fight in terms
2 of the escrow, I believe, as whether or not all the
3 Remotes have to be included in the escrow account or just
4 a one for one on the Remotes. If we were able to agree
5 on a one for one Remote, I think we would probably be
6 able to, I think, agree on an appropriate amount to
7 escrow.

8 What I'm wondering, your Honor -- and this is
9 a wonder at this point, not anything more than that -- is
10 that if the court were inclined to basically put the
11 issue of a continuing royalty for another day after
12 appeal and we have to do something to protect the -- sort
13 of the plaintiff's ability, assuming their judgment
14 survives appeal, to collect later -- what I'm wondering
15 is whether or not we could bond this rather than put it
16 into an escrow because Nintendo, I believe -- and,
17 your Honor, now I am saying I understand, I believe,
18 because that's something we would need to explore. I
19 believe that Nintendo would be able to bond -- to get a
20 bond given, you know, their business --

21 THE COURT: Or -- and I understand neither
22 side may want to commit itself to an order that says it's
23 this much or that much, but surely there is an amount of
24 money that would protect you one way or the other.

25 MR. CAWLEY: There is, your Honor. I'm sure

1 that's true. However, pursuant to the court's earlier
2 order, the parties have attempted to negotiate this issue
3 and were unable to do so because we couldn't agree on the
4 rate and we couldn't agree on the base. And,
5 unfortunately, there's not much else left that we can
6 reach agreement on.

7 THE COURT: But, of course, at that time it
8 would seem to me the negotiating positions were a little
9 bit different in that both sides were concerned about
10 coming up with an agreement which then might influence me
11 as I'm coming up. And, so, I guess what I'm saying is --
12 rather than come back to me that we're going to do it on
13 this rate or that rate which then you're afraid the court
14 might say, "Aha, you've already agreed that this is the
15 rate" and you want it to go much lower and you want it to
16 go much higher -- is have you talked about, you know,
17 just an absolute number or an absolute bond of some kind
18 that would cover the range of contingencies and then you
19 would still have the ability to -- and, plus, I think
20 it's going to take some additional evidence, probably
21 some additional testimony from people, to establish a
22 proper evidentiary basis.

23 I mean, the courts have made it pretty clear
24 that they don't like judges just coming up with, "Well,
25 1 percent sounds plenty good" or something like that.

1 And when I've done this in the past, I've avoided that.
2 I go through the Georgia-Pacific factors and I try to
3 come up with some economic analysis and it is difficult
4 in this case with what I've got. I'm not saying I
5 couldn't do it but the amount of time and work that would
6 be involved would be huge and I probably would need some
7 more testimony.

8 And, so, what I'm wondering is is it not
9 possible to come up with, I don't know, just an absolute
10 number that would then -- per year or per whatever that
11 would then cover -- you know, give you adequate
12 protection, given the fact that even if I should come up
13 with more, unless Nintendo goes -- I mean, they're not an
14 oil company and they're not a bank. I haven't heard
15 about them going down the drain recently. You know,
16 obviously there would be some leeway to get more from
17 them should it be more than that.

18 MR. CAWLEY: Well, if what your Honor is
19 suggesting is that an injunction either be entered or
20 indicated but stayed by virtue of Nintendo agreeing to
21 put up some fund, essentially, in whatever form that
22 guarantees the payment of what might later be
23 adjudicated, then my suggestion would be -- we don't know
24 how much or how little that's likely to be; but we do
25 have a real good idea it can't be any more than 8 percent

1 of Wavebird, GameCube, and Classic and 5 percent on all
2 Remotes because that's all we've asked for.

3 Presumably this fund would be at interest; so,
4 if what happens at the end of the day, that Nintendo
5 never ends up, for whatever reason, paying anything,
6 there's very little harm to them. So, due to the
7 unfortunate fact that the parties have been unable to
8 agree on what the base should be or what the rate would
9 be, if the court's going to do this, we would request
10 that, much like a supersedeas bond, that basically the
11 court require the establishment of an escrow fund which
12 will guarantee the payment of what Anascape is asking
13 for. And at the end of the day if that's adjudicated,
14 that's fine; and if something less is adjudicated, then
15 we won't get all of that fund.

16 THE COURT: And you were suggesting actually
17 doing it in the nature of a supersedeas bond, right?

18 MR. GUNTHER: Well, I was. But, your Honor, I
19 guess what I would say is that --

20 THE COURT: I don't know the finances of -- I
21 know bonds are pretty expensive; and, so, that's why I
22 don't know what --

23 MR. GUNTHER: And part of it is, your Honor, I
24 haven't looked into the issue. So, I'll be perfectly
25 frank with the court. I don't know how much a bond will

1 cost.

2 But one of the things that I can say -- and
3 this is an area where things are problematic -- is that,
4 you know, it's sort of easy to say, "Just bond or put up
5 escrow for the full amount that they have asked for."
6 But, your Honor, this is a situation where we've got
7 radically different approaches to how -- and it's not so
8 much the rate, I don't think. I mean, the rate is
9 obviously an issue here. But it's the base.

10 And they're sort of saying, you know, put up
11 some type of fund that's going to compensate -- that's
12 going to basically put in a royalty at 5 percent for all
13 Remotes going forward; and we're just sitting here
14 saying, you know -- and, look, you're going to make the
15 decision --

16 THE COURT: All right. Well, I can make the
17 decision, then. I mean, I'll go ahead and set out what I
18 think is adequate; and this is, again, in the nature of
19 what I think is adequate to protect the parties and
20 protect plaintiff, keeping in mind that this is not
21 necessarily a high end because I believe that Nintendo is
22 in position to satisfy even a greater judgment should
23 future evidence decide it.

24 What that is going to be is that there will be
25 a -- whether you do it by a bond, if that can be done, or

1 you do it by escrow, the amount we're going to talk about
2 here is 7 percent of the sales of the GameCube, the
3 Wavebird, and the Wii Classic and 5 percent of the sales
4 of the number of Wii Remotes, which is two times the
5 number of Wii Classics. In other words, if a hundred Wii
6 Classics are sold, then 5 percent of the sales of 200 Wii
7 Remotes will be there.

8 My thought there is going to be that it's
9 probably not going to be every single one. I haven't
10 decided that yet. I do think it winds up being more than
11 one-to-one relationship, from what I've seen in the
12 evidence. But, again, I think that a lot more needs to
13 be done on that; and, again, I'm also looking at a way
14 of -- because, quite bluntly, I think we need another day
15 or two of trial to come up with a proper -- at least
16 another day to come up with a proper presentation of the
17 damages on both sides.

18 And I also believe that since we're talking
19 about something in the future, we have this problem of
20 guessing as opposed to at the end of two years, we'll
21 have a much better idea of what is the effect of these
22 other licenses; what is the effect of this third-party
23 market which hasn't been looked at very closely, I don't
24 think; what are the actual sales that come out of this.

25 So, that is going to be the fund -- or the

1 amount of the fund. But I'll expressly note that that
2 doesn't necessarily set an upper limit because I think
3 that Nintendo has the ability to satisfy a higher limit
4 should eventually we find out what that is. And this
5 also then, I think, ameliorates the -- or gives Nintendo
6 an opportunity to ameliorate the hardship -- and we're
7 looking at the balance of hardships. They have a way
8 that, given their resources, they can ameliorate this for
9 the time it is on the appeal. It gives, if they are
10 going to appeal, a good incentive to move quickly rather
11 than asking for frequent and lengthy extensions of
12 briefing schedules and so forth.

13 And in terms of the remedies, because the
14 plaintiffs in their attempts to license to others can
15 point out that, yes, an injunction had been, in fact,
16 entered, their rights have been, in fact, protected --
17 and even though it was stayed, it is stayed subject to
18 the imposition of this money. And that hopefully will
19 help reduce harm to them during this period of time.

20 And, again, should Nintendo choose to take
21 advantage of this, then we have, again, amelioration of
22 any harm to the public interest in not having the
23 products available. Whatever that interest is would be a
24 way of ameliorating it.

25 And I'll note that in terms of the 7 percent,

1 Mr. Bratic -- and the testimony we had at trial was
2 5 percent, and I'm taking into consideration the fact
3 that clearly infringement going forward from this time on
4 would be willful. We have the upward pressure on the
5 Georgia-Pacific factors that would be or could be
6 generated by the fact of this finding and the fact that
7 the other two major competitors have a license. So,
8 there seems to be some upward pressure there.

9 I'm not at this point committing to that's all
10 the upward pressure there is; but that's to give a higher
11 court some explanation of how I'm coming up with these
12 numbers. They're not just being dragged out of the air.
13 I'm, in effect, trying to be sure there is a sufficient
14 fund so that, as in that Amado case, Amado versus
15 Microsoft, there is a way of coming back.

16 And I suppose if economic circumstances of
17 Nintendo or the economy or the business change, there is
18 always a possibility of -- and I'm not inviting this --
19 but a review of is the fund, the escrow, the bond,
20 however it's handled, sufficient.

21 Any question about the numbers as I've set
22 them out? I tried to set them out fairly clearly.

23 MR. CAWLEY: Could I just repeat them back,
24 your Honor, to make sure I understood it? I think I
25 heard the court say 7 percent of the sales of GameCube,

1 Wavebird, and Classic.

2 THE COURT: Right.

3 MR. CAWLEY: Then 5 percent of the sales of
4 Remotes equal to -- the number of Remotes to be twice the
5 number of Classics sold.

6 THE COURT: Right.

7 MR. CAWLEY: Okay. Now, are we talking about
8 doing this on an ongoing basis, a periodic basis? I
9 mean, if they're going to post a bond, then that implies
10 that there is some kind of --

11 THE COURT: Well, as a practical matter, it
12 seems a little difficult to come up with these numbers
13 until later in the quarter after the sales are made. I
14 mean, you're not going to know them on a daily basis.

15 So, let me hear from Mr. Gunther. What is a
16 practical and good-faith way of handling it in terms of
17 these numbers?

18 MR. GUNTHER: I see two ways, your Honor; and
19 I'd like to have the flexibility to explore both of them.
20 The first way would be actually to put it up in escrow on
21 a quarterly basis, which may be the easy way in terms of
22 just, you know, accounting and things like that.

23 The other thing that we might do -- and again,
24 your Honor, it would depend on cost -- would be to
25 project. You know, Nintendo projects what its sales are

1 going to be for the next, for example, fiscal year.
2 We've already given you a projection with respect to
3 sales of Classics. We're not projecting any sales of
4 Wavebird. We're not really projecting any sales of
5 GameCube. We've got the 74,000 that are sitting in the
6 warehouse.

7 But basically, your Honor -- one thing that
8 you could do based on the projection that's already been
9 provided to the court and to counsel for Anascape would
10 be to utilize that to calculate the numbers and then
11 explore whether or not Nintendo, by way of a letter of
12 credit or bond, could do that cheaper than actually
13 putting the money into escrow --

14 THE COURT: Well --

15 MR. GUNTHER: -- but without in any way
16 prejudicing their ability to collect.

17 THE COURT: You're saying "you." I'm not
18 going to make all those calculations right now.

19 MR. GUNTHER: Oh --

20 THE COURT: If you meant "one" could do all
21 those things, you're correct.

22 But what I'd like you to do, then, if you --
23 it has been a while since I have been involved in
24 examining the bond that one of my opponents was trying to
25 put up. I remember that it was quite expensive. In

1 fact, I was surprised at just how proud bonding companies
2 are of their bonds. So, it's going to take me a little
3 while to go ahead and get the actual judgment and order
4 of injunction out, obviously, a couple of days; and, so,
5 I could add that in.

6 What I'm going to ask is that you consult with
7 Mr. Cawley. If an agreement can be made that, yes, this
8 bonding company is AAA rated or whatever -- you might
9 want to check today's financial page to see if they still
10 are -- and this amount is good based on future
11 projections, then -- you know, if that kind of agreement
12 can be made, that's fine. Otherwise, it would seem to me
13 a quarterly basis -- you know, in the quarter following
14 the sales, you would have the actual figures and could
15 post it that way. Do you see any other --

16 MR. CAWLEY: I think that's the way to
17 proceed, your Honor. The quarterly escrow is simple and
18 self-enforcing. Now, certainly if they want to propose
19 something different, we're certainly willing to listen to
20 it. But it gets into issues about the projection and who
21 believes the projection and so --

22 THE COURT: Well, and, of course, the
23 projection wouldn't -- I mean, I wouldn't want to go out
24 more than a year. I mean, you would have to put up a
25 new -- if the appeal takes two years, you would be

1 putting up one for this year and one for the next year;
2 so, there's got to be some limits there. But my guess is
3 that bond could be real expensive and --

4 MR. GUNTHER: And, your Honor, if it turns out
5 to be the case that it's too expensive, then it's just
6 wasting everybody's time; but I'd like to at least
7 explore it.

8 THE COURT: Take a look at it and -- what I'm
9 going to want, though, is an indication or a response
10 from counsel, say by Monday, so I can start seeing how
11 I'm going to plug it into the order. A little difficult
12 over the weekend. But we need to find out, you know,
13 what's in there.

14 MR. GUNTHER: Your Honor, could I just ask --
15 and I'm not trying to prolong this at all. But given
16 that it is Friday, could we have Monday to do that and
17 inform the court in the morning on Tuesday? If I make a
18 determination earlier than that --

19 THE COURT: Yeah. I don't mind it on Tuesday.
20 I would guess you could call a bonding company, find out
21 some costs. I don't know if you've done this a great
22 deal. I can remember -- all I'm saying is I remember
23 just being shocked at what they charge, and it was --
24 now, Nintendo may have access to much different companies
25 than the people I was dealing with and my opponents had;

1 but they were -- I mean, it caused a big problem in the
2 cases I handled back then.

3 Okay. So, we know the numbers. The next
4 issues that come up are prejudgment and postjudgment
5 interest. I understand that both parties agree that on
6 postjudgment interest, it should be the -- as set out by
7 statute, 28 USC, Section 1961. For the week of July 11
8 this was, I believe, 2.22. Any objection to that being
9 the postjudgment interest rate from plaintiff?

10 MR. GARZA: I'm willing to check if you'd
11 like, but that sounds about right.

12 THE COURT: And from defendant?

13 MR. BLANK: No objection, your Honor.

14 THE COURT: Okay. Then we have the
15 prejudgment interest rate. And, again, Section 284 in
16 case law authorizes award of prejudgment interest, cases
17 such as General Motors versus Devex Corporation, 461 U.S.
18 648 at pages 655 to 656 in 1983, set that out. The cases
19 also indicate there is a wide latitude there. A number
20 of cases talk about prime rate, the Z4 Techs, Inc.,
21 versus Microsoft Corporation at 2006 WestLaw 2401099 at
22 star 27. That's Eastern District of Texas, August 18,
23 2006.

24 And then there's T-bill rate; and that's the
25 Datascope Corporation versus SMEC, Inc., 879 F.2d 820,

1 page 829, Fed Circuit 1989. And the difference seems to
2 be -- or the easy way it has been described is that the
3 prime rate is the cost of borrowing money. The T-bill
4 rate represents the rate of return on investing money, of
5 course, the rate of return on investing money at a very,
6 very safe investment. And one of the arguments against
7 it is it is almost so safe, especially in an era of very
8 low interest rates, as to be -- well, arguments have been
9 made that the prudent person would not put all their
10 money into T-bill if they were investing, that they would
11 pick a mixed basket. If they were a prudent person
12 investing under the fiduciary rule, they would not just
13 use the T-bill. Of course, someone who didn't in a
14 recent stock market might wind up being sued for breach
15 of fiduciary responsibility; so, all these theoretical
16 statements are sometimes not the most help in the world.

17 What I'm going to look at is that the purpose
18 of awarding prejudgment interest is to ensure that the
19 patent owner is placed in as good a position as he would
20 have been in had the infringer entered into a reasonable
21 royalty agreement. And we see that in the *In re Seagate*,
22 497 F.3d 1360, at page 1380.

23 Now, in this particular case, we would have
24 had the payments made and the opportunity then for those
25 persons to make the investments. Both parties have in

1 this case agreed to calculate using simple interest. The
2 difference between the two calculations -- Anascape's
3 calculation using the prime at simple interest would be
4 about 2 million, and then I think the other would be --
5 and this would be Nintendo's using the T-bill rate.
6 Again the simple interest would be \$982,363. Anascape's
7 would have been \$2,068,356.16.

8 Looking at this in the idea that the prudent
9 person would be wanting some very -- especially in the
10 market over the last two years -- would be willing to
11 take some at a low rate and then be looking to balance
12 that off with some higher rate and also looking at that
13 simple interest is not generally what the prudent
14 businessperson would be using, they would be in something
15 that would be compounding more, the court finds that in
16 this particular case, given the absolute numbers
17 involved, given the factors here, the T-bill rate by
18 itself at simple interest is just too low to accomplish
19 the result of putting the owner in as good a position as
20 he would have been in had the infringer entered into a
21 reasonable royalty agreement. They would have had the
22 opportunity to earn more, and I don't think it takes
23 absolute proof to show they would have earned more. That
24 safest of investments, I think, in classic damages or
25 economic theory is not considered -- I mean, I don't

1 think there is any doubt that a prudent person can get
2 more than that. On the other hand, the prime rate
3 compounded monthly or quarterly or even daily is,
4 obviously, too much.

5 So, the court finds that the prime rate,
6 which -- the prime rate calculated at simple interest
7 would be appropriate; and that would be prejudgment
8 interest in the amount of \$2,068,356 -- will be the
9 prejudgment interest.

10 Now, we had this final issue, motion to sever.
11 And I'm not sure why there is this big difference here
12 between the parties. I mean, traditionally I've seen
13 these cases. You know, severing is one way of getting
14 rid of it. Why is there really a jurisdictional issue?
15 I mean, I suppose theoretically there could be; but who's
16 going to be jumping up and down to take this case away
17 from you?

18 MR. CALLAHAN: Your Honor, Steve Callahan for
19 Anascape. I think Nintendo -- Anascape was concerned
20 that there may be a jurisdictional issue given some of
21 the what I'll call "loose language" coming out of the
22 Supreme Court in terms of the filing of a Notice of
23 Appeal divested the District Court from jurisdiction over
24 those matters related to the appeal.

25 The concern, of course, is with the three

1 stayed patents in this instance. And given that the
2 three stayed patents all relate to Mr. Armstrong's video
3 game controller technology, we thought that Nintendo
4 might make some arguments that the Federal Circuit's
5 decision as to the '700 patent and the '525 patent could
6 have some bearing on those other three stayed patents.
7 So, that's why we thought to sort of end any arguable
8 dispute, it would be best for the court to proceed under
9 Rule 21 when, of course, the court could proceed under
10 54(b); but we thought --

11 THE COURT: Well, let me ask Mr. Gunther
12 why -- I mean, the flip side of the question. It seems
13 to come up with the same result. What's wrong with
14 severing it? What possible harm could that do to you?

15 MR. GUNTHER: You know, your Honor, you may be
16 right that this is sort of a tempest in a teapot. When
17 we looked at the case law, we found at least one District
18 Court case which we presented to your Honor that said
19 Rule 21 isn't the right way to do it; it should be
20 Rule 54(b).

21 Now, I think, your Honor, that if you think
22 about this in terms of this was filed as one case -- it
23 was really originally filed as a 12-patent case and the
24 fact of the matter is they wanted it to be a single case
25 and now they want to split it up. I don't think at the

1 end of the day it's the end of the world if the court
2 does that; but if you look at it, this is the typical
3 kind of poster child for 54(b).

4 Your Honor, the notion that you don't have
5 jurisdiction or that I might contend that you don't have
6 jurisdiction over the stayed patents in the very unlikely
7 event they came out of reexam before the appeal was
8 decided, I'm not going to argue that, A; and, B, we cited
9 case law to you that it's not the case. I mean, 54(b)
10 would be a pretty dumb rule if at the end of the day you
11 said, "Okay. I'm going to enter a partial judgment" and,
12 bingo, you lose control over everything else that was
13 before you. Then it would make no sense.

14 I guess what I'm saying to you is this. At
15 the end of the day if you sever the cases under 21, we'll
16 all live. I don't think it's going to be any huge deal.
17 But on the other hand -- but as I look at it, your Honor,
18 and look at kind of what 54(b) is all about, it seems
19 like that's the right route. And there's one court in
20 this district that said just that.

21 MR. CALLAHAN: Your Honor, if I may briefly
22 respond to that. I believe the case Mr. Gunther is
23 referring to is not actually in this district; it was a
24 Northern District case, the Benton (phonetic spelling)
25 case.

1 MR. GUNTHER: I apologize, your Honor.

2 MR. CALLAHAN: That case wasn't a patent case.
3 It didn't involve stayed patents; it didn't involve stay
4 of any claims related to --

5 THE COURT: I've read that case.

6 MR. CALLAHAN: Okay.

7 THE COURT: I've read the case.

8 I guess because of the timing issues and we
9 don't know what's going to happen to the cases that are
10 being stayed or when they're going to come back down or
11 what all will happen and what would happen if they came
12 back and the other case is still on appeal and so
13 forth -- and I guess I could deal with it at that time.
14 The safest thing to do is I'll go ahead and order a
15 severance. There seems to be no reason for the issues
16 that have been tried and the patents that have been tried
17 not to go up on a full appeal, get a full and final
18 judgment dealing with them and it be done and over with;
19 and the issues can be presented on appeal one way or the
20 other.

21 And, so, I'll direct that they go on forward
22 under the present number so as to avoid confusion. And
23 what will happen is the other ones -- I'll lift the stay
24 for the purpose of severing them out and assigning them a
25 new number -- I'll check with the clerk -- perhaps 158A,

1 or she may want a completely different number. If I can
2 have it somehow related to the old number, we'll do that.
3 But I'll grant that.

4 Okay. Any other issues that should be or
5 would be helpful to or need to be taken up from point of
6 view of plaintiff?

7 (Discussion off the record between the court
8 and law clerk.)

9 THE COURT: Ms. Chen reminded me there is an
10 argument over costs. I don't think there is any question
11 that plaintiff is the prevailing party in this case. The
12 fact that some of the rules -- I mean, some of the claims
13 were -- they lost on some of the claims does not mean
14 they are not a prevailing party. And they're actually --
15 the claims in question, the validity was upheld. There
16 was a monetary verdict. The entire patents were not
17 declared invalid. I mean, I recognize there is this
18 problem of each claim being a separate invention; but the
19 fact is each claim is a separate invention.

20 And while the extent of success is something
21 that's frequently looked at in terms of an award of
22 attorney's fees, it does seem that the better reasoned
23 decision in a case such as this, when you have a verdict
24 such as this one as to several claims on the '700 patent
25 as against three accused infringing products and a

1 verdict of \$21 million, there's no way, I think, that it
2 could be reasonably argued that they did not prevail; so,
3 I will award them costs pursuant to the statute.

4 And, of course, counsel, you're well aware
5 that in the Fifth Circuit, the statute is followed fairly
6 closely; so, there is no point in asking for things that
7 go on beyond. And I would ask that when the objections
8 are made, they be discussed in good faith before they
9 come to me for a ruling because in the last couple of
10 cases I've -- I start to rule and then finally somebody
11 on the plaintiff's side says, "Oh, I guess we're really
12 not entitled to those." Well, then why are we wasting
13 time with them? You know, the statute's there. The
14 cases are there. If there is a conflict, I don't mind
15 dealing with it; but the Fifth Circuit is fairly
16 straightforward.

17 Okay. Anything else from plaintiff's point of
18 view?

19 MR. PARKER: Would the court like for us to
20 provide the court with a calculation of prejudgment
21 interest on a daily basis which the court could use then,
22 or does the court want to do the calculation?

23 THE COURT: I'm not sure what that number was.
24 I'd forgotten -- up to what date was that calculation
25 that we had? Do you know?

1 I think the calculation I read off was the
2 calculation up to today; so --

3 MR. PARKER: Okay.

4 THE COURT: -- since I won't be signing the
5 judgment until Monday, I guess there will be a few extra
6 dollars in there.

7 If perhaps you could go ahead and provide that
8 so that mathematically or arithmetically defendant agrees
9 that you've figured it out, my intent would be -- well,
10 let's see, I'm giving you until Tuesday. So, if you
11 could give it to me -- let's make it as of Wednesday.
12 That will give me the chance to take what you've said,
13 finish up the judgment, fill in the number; and we'll do
14 it from there. That way you have a number rather than
15 arguments over percentages.

16 All right. Anything to be taken up from --
17 I'm sorry. Was there something else from here?

18 MR. CAWLEY: No, nothing else, your Honor.

19 THE COURT: All right. Anything else that
20 needs to be taken up or that would be helpful to be taken
21 up from defendant's point of view?

22 MR. GUNTHER: Your Honor, this is something I
23 just thought of.

24 THE COURT: Okay.

25 MR. GUNTHER: And if I'm wrong, I'm happy to

1 be wrong. But in terms of -- we're now severing the two
2 cases; so, let's focus on the case that we want to get
3 appeal ready. We've got two patents. The '700 patent,
4 everything has been disposed of; all claims and expenses
5 are done.

6 '525, we -- the claim for infringement has
7 been decided; but I think that we had counterclaims.
8 And, again, I'm just thinking about this in terms of
9 making sure that it's appeal ready. So, I'm thinking
10 that we probably need to -- I think the court may need to
11 include in any judgment that we have dismissed any
12 further counterclaims with respect to '525 without
13 prejudice.

14 THE COURT: I think that order is already on
15 file, isn't it?

16 MR. GUNTHER: That part of it?

17 THE COURT: What you just said. I thought I
18 had already --

19 MR. GUNTHER: Again, your Honor, it --

20 THE COURT: Okay.

21 MR. GUNTHER: -- just hit me; and I'm not
22 sure.

23 THE COURT: Why don't you check; and if it's
24 not there, I'll be glad to go ahead and dismiss the
25 counterclaims for invalidity on '525 without prejudice.

1 I thought I had done that, but...

2 Right. There was a motion for summary
3 judgment on the -- defendant's motion for summary
4 judgment on infringement was granted. I don't know why
5 in the back of my mind -- it might have been in another
6 case that I had granted such an order. Check it out, and
7 if I haven't --

8 MR. GUNTHER: We'll check it out, and we'll
9 let you know.

10 THE COURT: Okay.

11 MR. GUNTHER: Thank you, your Honor.

12 THE COURT: Anything else from defendant's
13 point of view?

14 MR. GUNTHER: No, sir.

15 THE COURT: All right. In that case you are
16 excused, and the court is adjourned.

17 (Proceedings concluded, 12:56 p.m.)

18 COURT REPORTER'S CERTIFICATION

19 I HEREBY CERTIFY THAT ON THIS DATE, AUGUST 4,
20 2008, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
21 RECORD OF PROCEEDINGS.

22 
23 CHRISTINA L. BICKHAM, CRR, RMR

24

25