

ITC Rules Nintendo Didn't Infringe In Wii IP Row

By **David McAfee**

Law360, Los Angeles (September 12, 2013, 9:17 PM ET) -- The U.S. International Trade Commission on Thursday affirmed an administrative law judge's finding that Nintendo Co. Ltd.'s Wii gaming console does not infringe a small company's patents for a toy wand used in a live-action fantasy game, holding that Creative Kingdoms LLC's patents are invalid.

The notice comes after the Office of Unfair Import Investigations seconded Administrative Law Judge Charles E. Bullock's finding in May that Nintendo's Wii remote and other controllers did not rip off patents held by Rhode Island-based Creative Kingdoms. The OUII operates as a third party on behalf of the public in Section 337 investigations and tenders nonbinding recommendations.

But the ITC on Thursday filed its notice of commission determination finding no violation of Section 337 of the Tariff Act of 1930. The commission also affirmed Judge Bullock's finding that certain claims of U.S. Patent Numbers 7,500,917 and 7,896,742 are invalid.

"[T]he commission has determined to affirm, with modifications, the ALJ's finding that claim 7 of the '917 patent and claim 24 of the '742 patent are invalid for lack of enablement and for lack of written description, and that complainant has not shown that the domestic industry requirement is met with respect to the '917 and '742 patents," the ITC notice says.

Richard Medway, Nintendo of America's deputy general counsel, said the company is pleased with the commission's determination.

"Nintendo's track record demonstrates that we vigorously defend patent lawsuits when we believe we have not infringed another party's patent," Medway said in a statement Thursday. "Nintendo continues to develop unique and innovative products while respecting the intellectual property rights of others."

Creative Kingdoms **brought its ITC complaint** against Nintendo in 2011, alleging the company's products infringed its patents by mimicking key features of its MagiQuest wands.

The complaint claimed that the motion sensor technology in the Wii Remote, the Wii MotionPlus and the Wii Nunchuck facilitated an interactive play experience that "represents the core of Creative Kingdoms' flagship product, MagiQuest."

But in August 2012, **Judge Bullock ruled** that Nintendo's importation of the Wii and its wireless controllers did not violate Section 337 of the Tariff Act because the patents at issue were both not

infringed and invalid for lack of written description and enablement.

In November, the full ITC corrected part of Judge Bullock's claims construction for "toy wand" and ordered him to reconsider his decisions in regard to infringement of the '917 patent and the '742 patent. He did so in May, but once again found that Nintendo hadn't run afoul of Creative Kingdom's patents.

The patents-in-suit are U.S. Patent Numbers 7,500,917; 7,850,527; and 7,896,742.

Creative Kingdoms is represented by Finnegan Henderson Farabow Garrett & Dunner LLP.

Nintendo is represented by Stephen C. Neal, Thomas J. Friel, Timothy S. Teter, Matthew J. Brigham and Stephen R. Smith of Cooley LLP.

The ITC case is In the Matter of Certain Video Game Systems and Wireless Controllers and Components Thereof, case number 337-TA-770, in the U.S. International Trade Commission.

--Additional reporting by Bill Donahue. Editing by Philip Shea.

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