

ITC Says Nintendo Wii Didn't Infringe Toy Wand Patent

By **Bill Donahue**

Law360, New York (July 25, 2013, 6:57 PM ET) -- The U.S. International Trade Commission's investigative staff said Thursday that Nintendo Co. Ltd.'s Wii gaming console doesn't infringe a small company's patents for a toy wand used in a live-action fantasy game, seconding the previous ruling of an administrative judge.

The ITC is currently reviewing Administrative Law Judge Charles E. Bullock's finding in May that Nintendo's Wii Remote and other controllers didn't rip off patents held by Rhode Island-based Creative Kingdoms LLC, and it asked the Office of Unfair Import Investigations to weigh in on the ruling.

The OUII operates as a third party on behalf of the public in Section 337 investigations and tenders nonbinding recommendations.

In a report released Thursday, the investigative staff confirmed Judge Bullock's decision that Nintendo didn't infringe Creative Kingdoms' U.S. Patent Number 7,500,917 or contribute to the infringement of the company's U.S. Patent Number 7,896,742.

"OUII submits that the [ruling] correctly determined that the accused products do not meet the 'toy wand' limitation of claim seven of the '917 patent under the commission's construction of the claim term 'toy wand,'" the staff said in reference to that patent.

The staff also found, however, that Judge Bullock had correctly ruled that Nintendo hadn't done enough to show that the '742 patent was obvious in light of prior art. None of the rulings are binding on the ITC, but provide an influential voice.

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.

That decision prompted the company to ask for the current review, which the ITC initiated earlier this month.

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 Jonathan Randles and Ryan Davis. Editing by Stephen Berg.