

## ITC To Review Parts Of Nintendo's Wii IP Win

By **Scott Flaherty**

*Law360, New York (November 7, 2012, 5:29 PM ET)* -- The U.S. International Trade Commission on Tuesday decided to review parts of an administrative law judge's determination that cleared Nintendo Co. Ltd. of allegations that imports of its Wii video game system infringed three Creative Kingdoms LLC patents.

The ITC said in an opinion that it would review parts of a ruling handed down in August by ITC Administrative Law Judge Charles E. Bullock, adding that it would also remand parts of the investigation in which the judge did not reach a finding. The judge issued a final initial determination that Nintendo's imports of the Wii and its wireless controllers did not violate Section 337 of the Tariff Act because the Creative Kingdom patents were either invalid, not infringed or both in some cases.

In Tuesday's opinion from the full commission, the ITC said it had already found a problem with Judge Bullock's construction of "toy wand," which is included in Creative Kingdoms' U.S. Patent Number 7,500,917. Because of the error in the claim construction, the ITC said it would ask Judge Bullock to reconsider his previous noninfringement ruling as part of the remand.

"The commission has ... determined to remand the investigation to the ALJ to determine whether the asserted claim of the '917 patent is directly infringed in light of the proper construction of the term 'toy wand,'" the ITC said.

The ITC also remanded some aspects of the investigation in which Judge Bullock did not make a finding. The commission asked the judge, among other things, to consider the potential obviousness of the asserted claims in the '917 patent and Creative Kingdom's U.S. Patent Number 7,896,742, and to determine whether sales of certain Nintendo controller accessories represented contributory infringement of the '917 and '742 patents.

The commission said it would conduct its own review of the judge's noninfringement and validity rulings with respect to the '917 and '742 patents, and whether the domestic industry requirement was met with regard to those two patents, among other pieces of the judge's determination. The review would take place after Judge Bullock issues a remand initial determination, the ITC said.

The case began in March 2011, when Creative Kingdoms alleged in an ITC complaint that Nintendo's popular Wii and 3DS video game systems infringed patents by mimicking a key feature in Creative Kingdoms' primary product, the MagiQuest video game.

The technology, the complaint said, "represents the core of Creative Kingdoms' flagship product," and the distinguishing feature is a motion-activated, portable wireless hand held device that "facilitates a physically interactive play experience for participants."

After Judge Bullock issued his final ruling, clearing Nintendo of the alleged Section 337 violation, Creative Kingdoms asked the full ITC to review portions of the determination. In a petition dated Sept. 17, Creative Kingdoms said the judge "committed reversible error" in part of his ruling.

The same day, Nintendo lodged a contingent petition for review, saying that the judge's ruling was "based on sound reasoning" and that "no review ... is warranted." But Nintendo also suggested portions of the judge's ruling the ITC could look at if it decided to take up a review.

An attorney for Creative Kingdoms, James Barney, said in a statement Wednesday that the company was happy with the ITC's review and remand decision.

"Creative Kingdoms is very pleased with the commission's decision and looks forward to resolving the remaining issues on remand," he said.

An attorney for Nintendo did not immediately respond to a request for comment Wednesday.

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

Creative Kingdoms is represented by James R. Barney, Paul C. Goulet, Michael A. Morin, Michael V. O'Shaughnessy and Elizabeth D. Ferrill of 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 Linda Chiem and Ryan Davis. Editing by Lindsay Naylor.