

ITC To Review Nintendo Win In Patent Fight Over Wii Remote

By **Jonathan Randles**

Law360, New York (July 15, 2013, 1:26 PM ET) -- The U.S. International Trade Commission on Friday said it will review an administrative law judge's finding that Nintendo Co. Ltd.'s wireless remote control and accessories for its Wii gaming console do not infringe a company's patents for a toy wand used in a live-action fantasy game.

The ITC voted to review Chief Judge Charles E. Bullock's initial determination that Nintendo's Wii Remote, Wii MotionPlus and Nunchuck accessories do not infringe patents held by Rhode Island-based Creative Kingdoms LLC, according to a notice published in the Federal Register. The patents-in-suit relate to toy wands used in Creative Kingdoms' MagiQuest attraction, a live-action fantasy game.

The commission also granted Nintendo's request to review Judge Bullock's findings regarding the validity of the patents. Specifically, the ITC will review whether one of the patents, U.S. Patent Number 7,896,742, is made obvious in light of prior art.

Judge Bullock previously found that Nintendo had not done enough to show that claims in Creative Kingdom's patent were made obvious.

Creative Kingdoms brought its ITC complaint against Nintendo in 2011, alleging Nintendo's products infringed its patents by mimicking key features of its MagiQuest wands. The complaint, which was also brought on behalf of Oregon-based New Kingdoms LLC, alleged that the motion sensor technology in Wii's wireless game controller and related accessories facilitated an interactive play experience that "represents the core of Creative Kingdoms' flagship product, MagiQuest."

Creative Kingdoms holds numerous patents related to its motion-sensitive wand controller and the interactive elements of MagiQuest, which the company touts as the world's largest interactive live-action game. MagiQuest attractions are mostly located in the Eastern U.S., but there are also locations in Japan and Oregon.

Last August, Judge Bullock issued an initial determination that Nintendo had not violated U.S. trade law by importing the Wii products, determining that the Japanese video-game maker's popular Wii and 3DS video game systems do not infringe three Creative Kingdoms patents. Judge Bullock ruled at that time that the asserted claim in the '742 patent was invalid because it failed to satisfy the enablement requirement and written description requirement.

Following a subsequent review by the ITC, Judge Bullock issued a second opinion maintaining that

Nintendo was not violating the patents-in-suit.

In its petition for review, Nintendo suggested that it could not be found to infringe Creative Kingdoms' patents because its Wii remote does not have the same look or feel of the MagiQuest wand. The Wii remote is not a toy wand, nor does the company refer to it as one, Nintendo said.

Nintendo's petition for review also includes a side-by-side comparison of the toy wand described in the '742 patent and its Wii remote.

Ultimately, the ITC may issue cease-and-desist and limited-exclusion orders barring entry of the accused Nintendo products if they are found to infringe Creative Kingdoms' patents.

Attorneys representing Nintendo and Creative Kingdoms did not immediately return messages sent Monday seeking comment.

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 Sindhu Sundar and Ryan Davis. Editing by Richard McVay.