Duty of Jury to Find Facts and Follow Law

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law that applies to this case.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. Also, you must not read into these instructions or into anything the court may have said or done as giving any suggestion as to what verdict you should return - that is a matter entirely up to you.

[You should not worry about memorizing or writing down all of the instructions as I state them, because I will send into the jury room a written copy of my instructions. However, you must know that the law is as I will give it to you from the bench; the written copy is merely a guide to assist you.]

What Is Evidence

The evidence from which you are able to decide what the facts are consists of:

1. the sworn testimony of witnesses;

2. the exhibits which have been received into evidence; and

3. any facts to which the lawyers have agreed or stipulated.

What Is Not Evidence

Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their openings statements and closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eye witness. Circumstantial evidence is proof of one or more facts from which you could find another fact.

You should consider both kinds of evidence. As a general rule, the law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Direct evidence can prove a material fact by itself. It does not require any other evidence. It does not require you to draw any inferences. A witness's testimony is direct evidence when the witness testifies to what she saw, heard, or felt. In other words, when a witness testifies about what is known from her own personal knowledge by virtue of her own senses, what she sees, touches, or hears–that is direct evidence. The only question is whether you believe the witness's testimony. A document or physical object may also be direct evidence when it can prove a material fact by itself, without any other evidence or inference. You may, of course, have to determine the genuineness of the document or object.

Circumstantial evidence is the opposite of direct evidence. It cannot prove a material fact by itself. Rather, it is evidence that tends to prove a material fact when considered together with

other evidence and by drawing inferences. There is a simple example of circumstantial evidence that I used at the beginning of this trial that you may recall.

Assume that when you got up this morning it was a nice, sunny day. But when you looked around you noticed that the streets and sidewalks were very wet. You had no direct evidence that it rained during the night. But, on the combination of facts that I have asked you to assume, it would be reasonable and logical for you to infer that it had rained during the night.

Not all circumstantial evidence presents such a clear compelling inference; the strength of the inferences arising from circumstantial evidence is for you to determine. It is for you to decide how much weight to give to any evidence.

Inference from circumstantial evidence may be drawn on the basis of reason, experience, and common sense. Inferences may not, however, be drawn by guesswork, speculation, or conjecture.

The law does not require a party to introduce direct evidence. A party may prove a fact entirely on circumstantial evidence or upon a combination of direct and circumstantial evidence. Circumstantial evidence is not less valuable than direct evidence.

You are to consider all the evidence in the case, both direct and circumstantial, in determining what the facts are, and in arriving at your verdict.

Deposition Testimony

During the trial, you have heard reference to the terms "examination under oath" and "deposition," and you have heard several witnesses testify through videotaped deposition or deposition read into the record. As it applies in this case, these terms mean sworn testimony, under oath, given by a witness before this trial began. You may give such deposition testimony the same credibility or weight as live witness testimony, if any, as you think it may deserve.

Credibility of Witnesses

In deciding the facts of this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it at all. In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness's memory;
3. the witness's manner while testifying;
4. the witness's interest in the outcome of the case and any bias or prejudice the witness may have;
5. whether other evidence contradicted the witness's testimony; and
6. the reasonableness of the witness's testimony in light of all the evidence.

Witness - Impeachment - Prior Statements

In assessing the credibility of a witness, you may also consider whether, on some prior occasion, the witness made statements that contradict the testimony he or she gave at the time of trial. If you conclude that a witness did, at some prior time, make statements that were materially different from what the witness said during this trial, you may take this into account in assessing the credibility of such witness, or determining the weight that you will give to such witness's testimony.

Witnesses - Number - Weight of Testimony

In evaluating the testimonial evidence, remember that you are not required to believe something to be a fact simply because a witness has stated it to be a fact and no one has contradicted what that witness said. If, in the light of all of the evidence, you believe that the witness is mistaken or has testified falsely or that he or she is proposing something that is inherently impossible or unworthy of belief, you may disregard that witness' testimony even in the absence of any contradictory evidence.

You should also bear in mind that it is not the number of witnesses testifying on either side of a particular issue that determines where the weight of the evidence lies. Rather, it is the quality of the witnesses' testimony that counts.

Thus, just because one witness testifies on one side of an issue and one witness testifies on the other side does not necessarily mean that you must consider the evidence evenly balanced. If you feel that one of the witnesses was more credible than the other, for whatever reason, you may find that the weight of the evidence lies on the side of that witness.

Similarly, just because there may be more witnesses testifying on one side of an issue than on the other does not mean that the weight of the evidence lies in favor of the greater number of witnesses. Once again, it is the credibility or quality of the testimony that determines where the weight of the evidence lies.

Witnesses - Expert Witnesses

During this trial, you have heard testimony from a witness who claims to have specialized knowledge in a technical field. Such persons are sometimes referred to as expert witnesses. Because of their specialized knowledge, they are permitted to express opinions which may be helpful to you in determining the facts.

Since they do have specialized knowledge, the opinions of expert witnesses, whether expressed personally or in documents which have been admitted into evidence, should not be disregarded lightly.

On the other hand, you are not required to accept such opinions just because the witnesses have specialized knowledge.

In determining what weight to give to the testimony of a so-called expert witness, you should apply the same tests of credibility that apply to the testimony of any other witness. That is to say, you should consider such things as the witness's:

-- opportunity to have observed the facts about which he or she testified; and

-- apparent candor or lack of candor.

In addition, you should take into account the witness's:

-- qualifications, especially in comparison to the qualifications of expert witnesses who may have expressed contrary opinions; and

-- the accuracy of the facts upon which the witness's opinions were based.

In short, you should carefully consider the opinions of expert witnesses, but they are not necessarily conclusive.

Corporations

The law makes no distinction between corporations and private individuals, nor does it distinguish between the size or type of business in which a corporation engages. All persons, including corporations, stand equal before the law and are to be dealt with as equals in this case. The corporate defendant in this case is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

At all times, you should consider treating this matter as an action between persons of equal standing in the community, of equal worth and holding the same or similar stations in life or in the community. Corporations act through their agents and employees.

Burden of Proof

The law imposes on the Plaintiff the responsibility or burden of proving her claim. It is not up to the Defendant to disprove the claim. First, with regard to the issues of damages, the Plaintiff must prove damages by what is called a fair preponderance of the evidence. After you have dealt with the issue of damages, you will turn to the question of whether Hasbro's infringement was willful. In order to prevail on this claim, Plaintiff Bowling must prove his claim by clear and convincing evidence - a higher burden than preponderance of the evidence.

Burden of Proof - Fair Preponderance

I have just told you that the burden of proof in this case regarding damages is what the law refers to as "a fair preponderance of the evidence." This is another way of saying that the Plaintiff must prove them by "the greater weight of the evidence."

To put it another way, you must be satisfied that the evidence shows that what the party making a claim is claiming is "more probably true than not."

Do not confuse the burden of proving something by a fair preponderance of the evidence or by clear and convincing evidence with the burden of proving something beyond a reasonable doubt. As most of you probably know or have heard, in a criminal case the prosecution must prove the defendant is guilty beyond a reasonable doubt. That is a very stringent standard of proof. However, this is not a criminal case. Therefore, in order to prevail, the Plaintiff need not prove his claim beyond a reasonable doubt; he need only prove the damages question by a fair preponderance of the evidence; and the willfulness question by clear and convincing evidence.

Perhaps the best way to explain what is meant by a fair preponderance of the evidence is to ask you to visualize an old fashioned scale with two counter balancing arms and use it to

mentally weigh the evidence with respect to the claim being made by the Plaintiff.

If, after you have heard all the evidence relevant to the claim, you determine that the scale tips in favor of the Plaintiff, no matter how slightly it may tip, then the Plaintiff has sustained her burden of proving that particular claim to you by a fair preponderance of the evidence because she has made the scale tip in her favor.

If, on the other hand, you determine that the scale tips in favor of the Defendant, or that the scale is so evenly balanced that you cannot say whether it tips one way or the other, then the Plaintiff has failed to prove her claim by a fair preponderance of the evidence because she has not made the scale tip in her favor.

With respect to the clear and convincing standard, which applies to the willfulness question, the evidence must do more than tip the scales - rather it must leave you with a clear conviction that what the Plaintiff says is true.

Summary of Issues:

I will now summarize the issues that you must decide and for which I will provide instructions to guide your deliberations. You must decide the following main issues:

1. What amount of damages Bowling has suffered.

2. Whether Bowling has proved by a preponderance of the evidence that he complied with the patent marking statute throughout the period of August 17, 1999 to November 10, 1999.

3. Whether Bowling proved by clear and convincing evidence that Hasbro engaged in willful acts of infringement with respect to its infringing dice.

Damages - Introductory

I will now turn to the question of damages. In discussing damages, I do not, in any way, mean to suggest an opinion that the Defendant is legally responsible or liable for the damages being claimed. The amount of damages is a matter for you to decide.

You may make an award for damages only to the extent that you find damages have been proven by the evidence. You may not base an award of damages or the amount of any such award on speculation or guess. You must base any award of damages on the evidence presented and on what you consider to be fair and adequate compensation for such damages as you find have been proven.

Damages - Generally

Because Hasbro's dice infringe the claims of Bowling's patent, and these claims are valid, you must determine the amount of damages to be awarded to Bowling for the infringement. The amount of those damages must be adequate to compensate Bowling for the infringement. Your damage award should put Bowling in approximately the financial position he would have been in had the infringement not occurred; but in no event may the damage award be less than a reasonable royalty. You must consider the amount of injury suffered by Bowling without regard to Hasbro's gain or losses from the infringement. You may not add anything to the amount of damages to punish the infringer or to set an example. Bowling has the burden of proving each element of its damages by a preponderance of the evidence.

Date Damages Begin

You are to begin calculating damages from the date that Bowling first gave notice to Hasbro of its patent. The parties do not agree on when Bowling first gave that notice to Hasbro, so it is up to you to determine what that date is. Bowling has the burden to prove the date it gave notice by a preponderance of the evidence. Bowling can give notice in two ways. The first way is to give notice to the public in general. Bowling can do this by placing the word "patent" or the abbreviation "PAT" with the number of the 5,938,197 patent on substantially all the products and/or their packaging he sold that included the dice at issue. The law allows Bowling some discretion to decide how to mark his dice. It is up to you, the jury, to decide whether marking the dice (instead of the packaging) was practical or feasible in light of all of the circumstances.

This type of notice is effective from the date Bowling began to mark substantially all of his products or their packaging that use the patented invention with the patent number. You must decide whether Bowling continuously marked substantially all of his dice by marking their packaging from August 17, 1999 to November 10, 1999 and whether he took reasonable steps to insure his retailers and distributors substantially complied with the marking requirements. If Bowling did not mark substantially all of his products that used

the patented invention or their packaging with the patent number throughout this period, then Bowling did not provide notice in this way.

Bowling contends that he gave notice to the public by properly and continuously marking substantially all of the packaging of his dice as patented and by taking reasonable steps to insure his retailers and distributors substantially complied with the marking requirements. If you agree with Bowling, you must begin calculating his damages from the date he continuously and substantially marked his products or their packaging, but not before August 17, 1999.

The second way Bowling can provide notice of his patent is to communicate to Hasbro a specific charge that it was selling dice that infringed the '197 patent. This type of notice is effective from the time it is given. Bowling contends that he gave notice to the public, and Hasbro, through his marking. Hasbro contends that Bowling's marking was inadequate and that damages start on November 10, 1999, the date Bowling gave actual notice to Hasbro of its infringement. If you find that Bowling, before filing this lawsuit, did not properly mark the packaging of his products then Bowling can only recover damages for infringement that occurred after he notified Hasbro of the infringement on November 10, 1999.

Reasonable Royalty

In this case, Bowling seeks damages adequate to compensate him for infringement, but in no event less than the amount of a reasonable royalty for Hasbro's infringement. The patent law specifically provides that the amount of damages that Hasbro must pay Bowling for infringing Bowling's patent may not be less than a reasonable royalty for the use that Hasbro made of Bowling's invention. A reasonable royalty is not necessarily the actual measure of damages, but is merely the floor below which damages should not fall. Bowling is entitled to a reasonable royalty for all infringing sales.

Reasonable Royalty - Definition

A royalty is a payment made to the owner of a patent by a non-owner in exchange for rights to make, use, or sell the claimed invention. A reasonable royalty is the royalty that would have resulted from a willing, hypothetical negotiation between Bowling and a company in the position of Hasbro taking place just before the infringement began, which is August 17, 1999. You should also assume that both parties to that negotiation understood the patent to be valid and infringed and that the licensee would respect the patent.

Reasonable Royalty - Relevant Factors

In determining the value of a reasonable royalty, you may consider evidence on any of the following factors:

1. Any royalties received by Bowling for the licensing of the patent-in-suit, proving or tending to prove an established royalty.
2. The rates paid by Hasbro to license other patents comparable to the ‘197 patent.
3. The nature and scope of the license, as exclusive or non-exclusive; or as restricted or non-restricted in terms of its territory or with respect to whom the manufactured product may be sold.
4. Bowling’s established policy and marketing program to maintain his right to exclude others from using the patented invention by not licensing others to use the invention, or by granting licenses under special conditions designed to preserve that exclusivity.
5. The commercial relationship between the licensor and the licensee, such as whether or not they are competitors in the same territory in the same line of business.
6. The effect of selling the patented product in promoting sales of other products of the licensee; the existing value of the invention to the licensor as a generator of sales of

his non-patented items; and the extent of such collateral sales.

7. The duration of the '197 patent and the term of the license.

8. The established profitability of the product made under the '197 patent; its commercial success; and its current popularity.

9. The utility and advantages of the patented invention over the old modes or devices, if any, that had been used for achieving similar results.

10. The nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefits to those who have used the invention.

11. The extent to which Hasbro has made use of the invention; and any evidence that shows the value of that use.

12. The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions.

13. The portion of the profit that arises from the patented invention itself as opposed to profit arising from unpatented features, such as the manufacturing process,

business risks, or significant features or improvements added by the accused infringer.

14. The opinion testimony of qualified experts.

15. The amount that a licensor such as Bowling and a licensee such as Hasbro would have agreed upon (at the time the infringement began) if both sides had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee--who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention--would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a patentee who was willing to grant a license.

16. Any other economic factor that a normally prudent business person would, under similar circumstances, take into consideration in negotiating the hypothetical license.

Reasonable Royalty - Timing

Although the relevant date for the hypothetical reasonable royalty negotiation is just before the infringement began, you may consider in your determination of reasonable royalty damages any actual profits by Hasbro after that time and any commercial success of the patented invention in the form of sales of the patented or infringing products after that time. You may only consider this information, however, if it was foreseeable at the time that the infringement began.

Willful Infringement

The next issue you will have to decide is whether Hasbro's infringement was willful. In this case, Bowling argues that Hasbro infringed willfully. Willfulness requires you to determine three things: first, that Hasbro was aware of the '197 patent; second whether Hasbro acted despite an objectively high likelihood that its actions infringed a valid patent; and, third, that this objectively high risk was either known or so obvious that it should have been known to Hasbro. To prove willful infringement, Bowling must establish that Hasbro willfully infringed by clear and convincing evidence. That is Bowling must prove willfulness in such a way that you have been left with a clear conviction that the infringement was willful.

In deciding whether or not Hasbro committed willful infringement, you must consider all of the facts, which include but are not limited to:

1. Whether or not Hasbro intentionally copied a product of Bowling that is covered by the '197 patent;

2. Whether or not Hasbro possessed a reasonable basis to believe that it had a substantial defense to infringement and reasonably believed that the defense would be successful if litigated;

3. Whether or not Hasbro made a good faith effort to avoid infringing the patent, for example Hasbro took remedial action upon learning of the patent by ceasing infringing activity or attempting to design around the patent;

4. Whether or not Hasbro tried to cover up its infringement.

Selection of Foreman and Duty to Deliberate

When you begin your deliberations, you should elect one member of the jury as your foreperson. The foreperson will preside over the deliberations and speak for you here in court. You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous. Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion during the course of the deliberations if the discussion persuades you that should. Do not come to a decision simply because other jurors think it is right.

Communications with the Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.

Return of Verdict

A verdict form has been prepared for you by the Court. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the Court that you are ready to return to the courtroom.

Verdict - Unanimity Required

In order to return a verdict in this case, all of you must agree as to what that verdict will be. You cannot return a verdict for either party unless your decision is unanimous.

Therefore there are two things that you should keep in mind during the course of your deliberations.

On the one hand, you should listen carefully as to what your fellow jurors have to say and should be open minded enough to change your opinion if you become convinced that it was incorrect.

On the other hand, you must recognize that each of you has an individual responsibility to vote for the verdict that you believe is the correct one based on the evidence that has been presented and the law as I have explained it. Accordingly, you should have the courage to stick to your opinion even though some or all of the other jurors may disagree as long as you have listened to their views with an open mind.

Jury Recollection Controls – Rehearing Testimony

If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Occasionally, juries want to rehear testimony. Understand that in a short trial, generally, your collective recollection should be sufficient for you to be able to deliberate effectively. However, if you feel that you need to rehear testimony, I will consider your request. However keep in mind that this is a time-consuming and difficult process, so if you think you need this, consider your request carefully and be as specific as possible.

Copy of Instructions

I have instructed you on the law that governs your deliberations. [As I mentioned at the beginning,] I will send into the jury room a written copy of my instructions. You are reminded, however, that the law is as I have given it to you from the bench; and the written copy is merely a guide to assist you.