Proportionality in Patent Remedies
Invention Existed Long Before Patent Systems

Patent Systems Are, In Fact, An Invention Designed To Speed Up The Pace of Other Inventions

Modern Patent System (Venice Italy, 1474 AD)
All Patent Systems Share Common Roots And Common Objectives
(Maximize Innovation To Create Economic And Societal Goodness)

500—Greece: Exclusive rights for 1 year for winner of culinary competition

1331—England: 1st patent granted by King Edward III to John Kempe and his Flemish weavers

1421—Florence, Italy: 1st patent awarded for a marble carrying barge with hoisting gear

1474—Venice, Italy: First Patent Statute grants patents for “any new and ingenious device, not previously made.”


1877—Germany: First unified German Patent Act adopted

500 400 200 1200 1400 1600 1800 2000

BC AD
Early Products Practiced Only A Few Patents, Making The Product Essentially Equal To The Patent

Today’s High-Tech Products Are Very Different; They Practice Many Patents
As The Nature of Technology Has Evolved, Our Patent Systems Must Evolve Too

• The **concept of proportionality** is a critical aspect of modern patent systems, especially when dealing with today’s high-tech products.

• Both forms of infringement remedies—**injunctions** and **damages**—would benefit from embracing* proportionality principles.

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* To some extent U.S. Supreme Court case law has incorporated these concepts since the 1880s.
High-Tech Products Require Careful Consideration of Remedies Are Appropriate In a Given Case

Business Value of the patented technology

Potential Value awarded by an injunction

100% of all Profit
Injunctions Are An Appropriate Remedy In Some Cases, But Not In Every Case

Injunctions may be proper when a patent owner has a history of not licensing or when a patent is very significant.

But injunctions are not proper when sought merely to extract an unwarranted share of a product value’s by threatening full market exclusion.

To Honor The Proportionality Principle For Injunctions, Courts Must Decide If An Injunction Is A Proportional Remedy Based on the Facts of Each Case
High-Tech Products Also Require A More Careful Approach to Damages

- High-tech products include many technologies, both patented and unpatented.
- A single patent may contribute only a small part of the total product value.

Thousands of Technologies and Over 300 Industry Standards In a Laptop
Like With Injunctions, Damages Should Embrace Proportionality Concepts

- Courts must carefully separate the value contributed by the infringed patent from the value contributed by other things.

- Failure to do so gives patent holders an unjustified, \textit{and disproportionate}, windfall. This harms innovation by allowing a patent holder to capture value created by others.
In the U.S. We Can Better Honor The Proportionality Principle By Improving Jury Instructions on Damages

• The 15 *Georgia Pacific* factors are no longer an accurate valuation model for high-tech products.

• But neither is the answer to just throw everything to the jury and hope they figure it out.

• A simpler *ex ante*-focused valuation approach is needed.
The Federal Circuit Bar Association’s New Model Patent Jury Instructions Are A Good Start

B.6 Patent Damages

6.7 REASONABLE ROYALTY—RELEVANT FACTORS

In determining the reasonable royalty, you should consider all the facts known and available to the parties at the time the infringement began. Some of the kinds of factors that you may consider in making your determination are:

(1) The value that the claimed invention contributes to the accused product.

(2) The value that factors other than the claimed invention contribute to [the accused product].

(3) Comparable license agreements, such as those covering the use of the claimed invention or similar technology.