One Patent, Multiple Valuations.

The increasing disconnect between reasonable royalty patent damages analysis and real world patent license negotiations results in two incompatible standards for valuing the same property right. The analyses employed in commercial licensing transactions and patent damages determinations can and should be harmonized.

By Patricia A. Martone[1]

1. Summary

The Patent Act, 35 U.S.C. § 284, provides that "upon finding for claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer." For many years, the standard used most frequently to determine a reasonable royalty was the hypothetical negotiation of a voluntary patent license on the eve of infringement, governed principally by the fifteen factors to be considered in that negotiation as set forth in *Georgia-Pacific Corp.* v. *United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.NY. 1970).

The application of the *Georgia Pacific* factors has been sometimes problematic for both patentees and infringers. But the major advantage of the *Georgia Pacific* analysis is that its factors are based upon factors that licensing professionals routinely take into account in real world negotiations.

Using compatible analyses for valuing patents in transactions and litigation makes sense. A contrary approach sows doubt as to the meaning and purpose of valuation. Further, in the typical patent licensing transaction it is common for both parties to assess the risk of litigation and prospective damages as part of determining how they would like to structure the transaction.

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The advent of litigation brought by numerous non-practicing entities, an increased attention to *Daubert* [2]standards under which Courts can prevent expert testimony from going to a jury, and a line of Federal Circuit cases beginning with *Lucent Techs. Inc.* v. *Gateway Inc.,* 580 F.3rd 1301 (Fed. Cir. 2008), have led to damages decisions where the practical experience and analytical tools regularly employed by experienced licensing professionals is discredited in favor of ever more complex economic analysis seeking the elusive "true value" of the patent in suit. But the patent statute does not require the calculation of a perfect royalty. A royalty need only be "reasonable."

This purpose of this paper is to demonstrate that the traditional *Georgia-Pacific* factors, when properly and practically applied, are easier for experts to explain and the trier of fact to evaluate and can be used to arrive at a royalty for a damages award that is commercially fair and reasonable and predictable in a wide range of cases.

2. <u>Background Facts</u>

My perspective in writing this article has necessarily been shaped by my own experience. Over the course of my forty year career, I have handled major patent cases with significant damages claims, most notably taking a leading role for Polaroid in its case against Kodak which resulted in a damages award of almost $1 billion dollars. My interest in damages led me to include patent licensing engagements to my trial practice.

The large majority of the patent licensing transactions I have handled have been in the context of adversarial patent licensing where there has been a charge of infringement. Over the past twenty years, I have personally closed more than forty patent license agreements, and advised clients on many more agreements they negotiated. Many but not all were in the context of the settlement of patent infringement litigation. I have represented major patent holders in large licensing campaigns, including those of Plasma Physics and Solar Physics, Ronald Katz Technology Licensing, British Telecommunications Plc and Realtime Data LLC. In other license negotiations and litigation, I have represented both patent holders and alleged infringers.

[2] *Daubert v. Merrell Dow Pharm.,* 509 U.S. 579 (1993).

My experience has been largely but not exclusively with semiconductors, electronics, and telecommunications. I have been for and against companies of every size, from Global Fortune 500 companies to family businesses, and from many different countries including the United States, Great Britain, Germany, Denmark, Sweden, France, Taiwan, Japan and Korea. In litigation, I worked with and against damages experts who were economists as well as experts with experience as licensing professionals in companies such as Texas Instruments and IBM, where licensing patents is an important source of company revenue.

I learned much from my clients, experts and adversaries. This experience forms the basis for the views I express in this article.

3. THE *GEORGIA-PACIFIC* FACTORS MIRROR REAL WORLD NEGOTIATIONS

These are the fifteen *Georgia-Pacific* factors. The first thirteen are the same factors I have seen applied in numerous license negotiations. Each negotiation is different, and, based upon the situation, certain factors may be emphasized and others deemphasized by one or both sides.

1. The royalties received by [the patentee] for licensing the patent, proving or tending to prove an established royalty.
2. The rates paid by the licensee for the use of other similar patents.
3. The nature and scope of the license, such as whether it is exclusive or nonexclusive, restricted or nonrestricted in terms of territory or customers.
4. [The patentee's] policy of maintaining its patent monopoly by licensing the use of the invention only under special conditions designed to preserve the monopoly.
5. The commercial relationship between [the patentee] and licensees, such as whether they are competitors in the same territory in the same line of business or whether they are inventor and promoter.
6. The effect of selling the patented specialty in promoting sales of other [patentee] products; the existing value of the invention to [the patentee] as a generator of sales of nonpatented items; and the extent of such derivative or "convoyed" sales.
7. The duration of the patent and the term of the license.
8. The established profitability of the patented product, its commercial success and its current popularity.
9. The utility and advantages of the patent property over any old modes or devices that had been used.

10. The nature of the patented invention, its character in the commercial embodiment owned and produced by the licensor, and the benefits to those who used it.
11. The extent to which the infringer used the invention and any evidence probative of the value of that use.
12. The portion of the profit or selling price that is customary in the particular business or in comparable businesses.
13. The portion of the realizable profit that should be credited to the invention as distinguished from any nonpatented elements, manufacturing process, business risks or significant features or improvements added by the infringer.
14. The opinion testimony of qualified experts.
15. The amount that [the patentee] and a licensee would have agreed upon at the time the infringement began if they had reasonably and voluntarily tried to reach an agreement.[3]

In the real world, no matter what the patent owner wants to charge, there is no deal unless the patent owner and the licensee arrive at terms that both agree are fair. For that reason, no matter what calculations are done before and during negotiation, the final financial terms are what the market will bear.

In the real world, in a negotiation taking place in the absence of litigation, the parties do not have the same in-depth knowledge of facts relevant to these factors as would be available in a *Georgia Pacific* litigation analysis. But if both parties want to make a deal, they will use whatever information is available to them to arrive at a fair, if not a perfect result. In my view, this is a critical point. The goal of the reasonable royalty analysis for litigation should be the same as that for negotiation- a reasonable royalty, and not some impossible to achieve perfect royalty.

Negotiators routinely have less than perfect information during a negotiation and rely on their experience and judgment. For example, neither a patentee who uses the patent nor a potential licensee is going to disclose its profit margin. In litigations between competitors, the protective orders are so strict that the party negotiators may never know this information because certain competitive information will not be disclosed to them. Nonetheless, if the parties are in the same business, the parties will have a good sense of each other's margin. And, in

[3] 318 F.Supp. at 118-121.

some circumstances, meaningful information may be gained from the financial reports of public companies.

Another information issue arises where there are prior licenses to the patents offered for license. In that case, the royalty previously charged for the same patents is obviously relevant (factor one). While some patent owners publicly state their royalty terms, these can obviously be modified in negotiation. In my experience, every licensor and licensee wants the final agreement to be confidential, but every subsequent potential licensee wants to know the confidential financial terms of prior licenses. In situations where there will be numerous licensees, there are many ways to achieve reasonable fairness without disclosing specific prior terms, including volume discounts and most favored nations clauses given to the first licensee. Subsequent licensees will not know the precise terms of the earlier agreements, but they should know how they fit into the licensing program as a whole[4].

In addition, both sides will have very good knowledge of royalty rates typical for patents in the relevant industry. The clients will have an excellent grasp of the rates they have paid and charged historically. In addition, there are a number of reputable royalty rate surveys used by licensing professionals. Two that have I have used frequently as data points in negotiation are surveys provided to members of the Licensing Executive Society, and survey results reported in the December issue of the Licensing Economics Review. This latter, publication breaks the survey into fifteen industry groups, including Internet, Telecom (excluding media), Electrical & Electronics, Semiconductors, Computers and Office Equipment and Software.

In terms of technical information about the value of the technology, the parties frequently engage in extensive technical discussion before ever getting into financial terms. These discussions include issues of validity and infringement, prior art, possible opportunities to design around the patents, and the useful life of the technology covered by the patents. Engineers and scientists participate in these discussions, along with seasoned licensing professionals and, sometimes, legal counsel. No economists or financial analysts have ever been present in the

[4] Experienced licensors are also aware that no matter what the agreement says about confidentiality, future circumstances such as litigation or government required disclosure requirements can result in the mandated disclosure of otherwise confidential terms. Any erosion of the licensor's credibility resulting from such disclosure will make performance of the agreement and future negotiations more difficult.

negotiations I have participated in or been made aware of. Accountants have been present only to resolve royalty disputes in existing agreements.

Of course, the parties have to agree on a royalty base as well as a royalty rate. This is generally true even for lump sum licenses, although the resulting lump sum typically does not specify either a rate or a base. This is where factors 11 and 13 become relevant. But in my experience, instead of debating the "entire market value" rule, for a running royalty license both parties are or should be interested in arriving at a royalty calculation that is easy to administer and to audit, thereby minimizing royalty disputes. For both product and process patents, royalties are typically charged on the first sale of products sold to third parties. Ideally, this means that product sales by volume and price are taken from records kept in the ordinary course of business.

In order to keep the calculation simple but properly mirror the value of the patents being licensed, the parties have a number of options, including a) applying a fraction to the royalty base to segregate the portion of the product using the licensed patents from the remainder of the product and/or b) in cases where the royalty base is very large, charging a royalty rate expressed in a fraction of one percent.

Valuation experts will argue that the scenarios above cannot apply to large licensing transactions such as the licensing or sale of thousands of patents. But again, in my experience, clients who have negotiated major cross-license agreements involving hundreds if not thousands of patents have done so by both sides agreeing to limit the negotiation to a relatively small number of "proud patents" of either side, and using that as a basis for an agreement covering a far larger number of patents.

I do not doubt that someone can point to some circumstance where the approach I have laid out is not the best fit. My point is that patent licenses resulting from adversarial negotiations are, generally speaking, the actual transaction closest to the hypothetical negotiation set out in the *Georgia Pacific* case. Using factors employed in the real world results in an easily understood and reliable model for reasonable royalty determinations.

4. **Recent Federal Circuit Damages Decisions Applying *Georgia Pacific* Have Made the Determination of Damages Unnecessarily Complex And Less Predictable**

When I was in law school, it was frequently said that "hard cases make bad law." That is the case with recent Federal Circuit decisions applying the Georgia Pacific factors to determine reasonable royalty damages. Faced with reviewing large damages awards principally in cases brought by non-practicing entities, the Court has erected increasingly restrictive requirements for the evidence that patent owners may submit in support of a reasonable royalty damages award. As a result, if these cases are interpreted literally, factors and rationales that are useful in real world license negotiations can no longer be used in patent damages cases. The most dramatic impact of these cases relates to the standard for determining what license agreements are sufficiently comparable to be considered as evidence of the size of the royalty the parties would have agreed to for a license under the patents in suit, and the entire market value rule, which relates to the determination of the royalty base in the reasonable royalty calculation. I will discuss the cases one by one to demonstrate the trajectory of the path to the current reasonable royalty standards of proof.

Lucent

In *Lucent Techs. Inc*. v. *Gateway Inc.*, 580 F.3rd 1301 (Fed. Cir. 2009), Lucent was in the difficult position of trying to support a $356 million dollar lump sum royalty jury award when its expert had presented only a running royalty analysis. Lucent relied on eight license agreements it claimed were "comparable". However, only four provided for a lump sum royalty. Not surprisingly the Court found that the four running royalty agreements were not comparable to lump sum agreements. With respect to the four lump sum agreements, the Court found only inadequate "superficial" testimony of their relevance in the record. Id. at 1329.

In its application of the entire market value rule, the Court also found a similar lack of evidence justifying the use of the price of a computer in the royalty base when the patent covered only the "tiny" date picker feature in the Outlook software program installed in the computer. Id. at 1332. The Court ruled that the entire computer could be included in the royalty base only if the patented invention was "the basis for consumer demand." Id. at 1336. This ruling was softened by the Court's observation that even if the entire market value rule standard was not met, an entire product could be put in the base if the royalty rate was reduced to account for the contribution of the patent to the product as a whole. Commentators sought to divine what the Court meant by "*the* basis for demand" (emphasis added). Unfortunately, the facts of the case provided no guidance, because there was apparently *no* evidence on the extent to which the patented invention contributed to consumer demand for Outlook or the computers on which it was installed.

Standing alone, *Lucent* is not a major departure from prior case law or standard practices in adversarial patent licensing. Lump sum licenses would not be considered comparable to running royalty licenses without considerable explanation. The Court allowed the same flexibility in setting financial terms as used in the real world when it held that either the base or the rate could be modified to come to a total reasonable royalty. And the Court's requirement of specific proof of the value of the patent invention is hardly surprising. I cannot think of a case where I represented a patent owner where we did not offer evidence showing the importance of the patented feature in creating demand for the product. In *Polaroid v. Kodak*, we had ample evidence, including the extensive advertising of both parties and Kodak's own market research, which showed that customers who bought Kodak instant cameras did so primarily because they provided a photo instantly, and not because of other camera features. In other cases we relied on evidence including the infringer's advertising focusing on the patented features and internal documents of the infringer showing that engineers had identified the patented features as important to the functioning of the product in question.

Unfortunately, in later cases, the Court took an even more extreme view of facts that could be probative of a reasonable royalty.

ResqNet

In *ResQNet.com Inc.* v. *Lansa Inc.*, 594 F.3rd 860 (Fed. Cir. 2010), the Federal Circuit reversed and remanded a district court determination of a reasonable royalty. The Court in its opinion rejected all agreements relied on by the patent owner and instead held that the "most reliable license" was one contained in an agreement settling a prior action for infringement of the patents in suit. Id. at 872. This decision was particularly puzzling because as the Federal Circuit acknowledged, its prior decisions held that such settlement agreements were not probative of a reasonable royalty. Many district courts would not allow such agreements to be introduced into evidence.

In any event, the *ResQNet* opinion made clear that the Federal Circuit would not consider licenses to other patents comparable to the license being negotiated in the hypothetical negotiation unless there was evidence that the economic value of the licensed patents was comparable to that of the patents in suit. This meant that there could be no more reliance on the royalty rate surveys that were routinely used in negotiations and by damages experts. And the opinion provides no guidance as to how the patent owner was to prove "economic" comparability,[5] or what proofs the infringer should offer on lack of comparability. The Court's conclusion that only a prior license to the patents in suit was comparable did show that it was going to be very difficult to prove that any license to other patents was comparable.

LaserDynamics

ResQNet was followed by the Federal Circuit's decision in *LaserDynamics Inc*. v. *Quanta Computer Company*, 694 F.3rd 51 (Fed. Cir. 2012). In this case, the Federal Circuit was plainly bound and determined to reduce the size of the damages award below, and concluded that much of the evidence offered by the patent owner in District Court proceedings was inadmissible. In so doing, the Court rejected evidence and analyses commonly used in adversarial license negotiations and articulated stringent evidentiary standards for damages proofs by patent owners.

The record in the District Court

In *LaserDynamics*, there were large number of licenses to the patents in suit. All but one of the licenses was a lump sum license for less than a million dollars. But LaserDynamics was seeking a much larger award, and its expert, an experienced licensing professional, testified that the circumstances underlying the negotiations of these lump sum agreements had changed by the date of the hypothetical negotiation and that therefore these agreements should be disregarded.

LaserDynamics' expert relied principally on two DVD running royalty license programs and a 1997 Licensing Executives Society survey which spanned multiple industries and reported a range of royalty percentages that companies would enter into for three types of patents: minor improvements, major improvements and breakthroughs. The expert also took into account another license to the patent in suit, entered into on the eve of trial with a defendant, BenQ, who had already been sanctioned by the Court. This was also a lump sum license, but for a much larger sum of $6 million.

[5] Nor was there any guidance on what proofs the infringer should introduce. Indeed, the Court acknowledged that the infringer in that case had not introduced any evidence at all.

With respect to the proper royalty base, LaserDynamic’s expert contended that the base should be computers containing the patented optical disc drives. The expert relied on the testimony of other LaserDynamics witnesses to the effect that the patent in suit provided “an important and valuable function” present in all optical disc drives currently being made, and that the patented feature was a “prerequisite for any lap top computer to be successful in the marketplace.” Id at 10.

The expert ultimately testified that a reasonable royalty for the patented invention was 2 percent of the price of the computers containing the patented optical disk drives sold by defendants   This testimony was based on the expert’s conclusion that the royalty for optical disc drives would be 6 percent, and that a royalty for computers should be 1/3 of that amount. At this trial, the jury awarded Laser Dynamics $52 million in damages. Thereafter, the District Court vacated the award as excessive. In particular, the District Court held that the entire market value rule was not satisfied and that Laser Dynamics could not use the price of computers as a royalty base. The District Court ordered a new trial, and permitted Laser Dynamics expert to testify that a reasonable royalty was 6 percent of the price of optical to use at which the jury awarded $8.5 million in damages.

The Federal Circuit opinion

In a lengthy opinion, the Federal Circuit held, *inter alia*, that a) the District Court was correct in determining that the entire market value rule was not satisfied, b) the District Court should have not permitted the BenQ license to be admitted into evidence and c) the District Court should not have allowed Laser Dynamics’ expert to testify as to a 6 percent royalty.

Entire market value rule

With respect to the entire market value rule, the Court clarified what was meant by the requirement that the patent owner show that the patented feature was the basis for demand. The Court ruled that the submitted evidence was insufficient because “it is not enough to merely show that the disc discrimination method is viewed as valuable, important or even essential to the use of the lap top computer. Nor is it enough to show that a laptop computer without the ODD practicing the disc discrimination method would be commercially unviable.” Instead, the patent owner must prove that the patented feature “alone” drives the market for lap top computers. “It is this latter and higher degree of proof that must exist to support an entire market value rule theory.” Id. at 68.

The evidence submitted by LaserQuest and rejected by the Federal Circuit was exactly the type of information patent owners rely on in negotiation and until this case had been able to rely on in litigation.

The Court reaffirmed that in any case involving multi-component products where the entire value rule was not met the royalty base had to be the "smallest saleable patent-practicing unit." Id. at 67

The Court also ruled, contrary to *Lucent*, that this requirement "may not be avoided by the use of a very small royalty rate." Id. at 69. The Court's rationale was that "such disclosure cannot help but skew the damages horizon for the jury" because the claimed damages will be much smaller than total product revenue, thereby making a multi-million dollar damage award look small in comparison to multi-billion dollar revenues.

The Federal Circuit was also unmoved by the evidence that showed that using the price of the computer in the royalty base made sense because the defendant assembled and sold computers, not optical disc drives, and therefore did not track prices, revenues or profits associated with optical disc drives. Accordingly, if the smallest saleable unit is not the same as the product that was actually sold, the Federal Circuit expects the plaintiff to artificially construct revenues instead of using actual revenue.

Once again, this is a rejection of standard licensing practice, where the parties seek a running royalty that is both reasonable and straightforward to calculate, which can be accomplished either through the definition of the royalty base, the amount of the royalty, or both.

Inadmissibility of the BenQ settlement agreement

In ruling that the BenQ settlement agreement should not have been admitted, the Court acknowledged that its decision appeared to contradict the decision in *ResQ Net* where the Court held that a settlement agreement appeared to be the most comparable license. The court explained that in *ResQNet* it permitted the district court to consider the settlement agreement, but cautioned the district court to "consider the license in its proper context." Id. at 77. The *LaserDynamics* Court then went on to explain why the facts showed that in the case at bar, the BenQ license "appears to be the least reliable license by a wide margin." Id. at 77-78.

Exclusion of testimony about a 6 percent royalty

In this portion of the opinion, the court made clear that a comparable license agreement should be for a patent on the very same features covered by the patented invention. In other words, it was not enough to rely on patent licenses directed to DVD's or even optical disc drives. The Court rejected the DVD –related licensing programs because "no evidence shows that it (sic) even involves a disc discrimination method". Id. at 80. The Licensing Executives Society survey was rejected because it was not even related to a particular industry. The Court concluded that the "6 percent royalty rate was untethered from the patented technology at issue and the many licenses thereto and, as such, was arbitrary and speculative." Id. at 81.

Here again, the Court rejected standard licensing negotiation practice. In my experience, in discussing comparable rates, the parties typically do not try to analyze in detail how the patents in other license agreements compare to the patents being licensed.

Instead they look at the technology in other agreements in broader terms- optical disc drives for example, or even broader categories like electronics, where there are surveys to provide guidance. Like house buyers looking at recent sales in the neighborhood of the house they wish to buy, they do this to provide a bracketed range to set the boundaries for negotiation purposes. Then the parties look at the specific patents being licensed in an effort to set the appropriate royalty within that range. In so doing, they frequently do exactly what LaserDynamics's expert did and the Court refused to accept- categorize the patents in terms of their strength- breakthrough, major improvement or minor improvement. That is precisely the point of each side relying on a subset of their "proud patents" in a major cross license negotiation- to get a sense of whether one parties' portfolio is stronger than the portfolio of the other party and to what degree.

Of course, both parties begin the negotiation by taking different views of the appropriate range of comparable licenses, where the patents being licensed fit into the range and how strong the patents are. But in the end they reach agreement after relying on and debating the very information which the *LaserDynamics* Court rejected.

5. **The Standards of Proof Set Forth in *LaserDynamics* Are Unnecessarily Harsh and Unfairly Penalize Patent Owners Whose Patents Are Found Valid and Infringed.**

The *LaserDynamics* opinion is an effort to make the calculation of a reasonable royalty a quest for a single mathematically perfect royalty. There is no such thing. Previously, the *ResQNet* Court had remarked on the difficulty in determining a reasonable royalty. But, a reasonable royalty is no more difficult an issue than the liability issues in a patent case. The reasonable royalty determination in a patent case, like the royalty determination in a successful license negotiation, is arrived at through the exercise of judgment. The *Georgia Pacific* Court recognized that it had the discretion to exercise a broad range of judgment in weighing the factors to determine a reasonable royalty.

The Federal Circuit's desire for mathematical perfection is manifest by the Court's rule that the entire market value rule can only be satisfied by proof that the patented feature *alone* is the basis of demand. Given the complexity of modern electronics, it is impossible to conceive of a single feature that can solely drive demand. Even in the *Polaroid* case, where the patents covered historic breakthrough technology, market research showed that the instant feature was the leading but not sole reason why consumers bought Kodak instant cameras. And of course, historic market research is generally only available for consumer products. If market research were conducted specifically for litigation, I predict that the participants in the research would find it difficult to answer a question framed in terms of the sole reason why they purchased a particular product.

Recent commentators have suggested that the *Georgia Pacific* factors unfairly inflate damages awards to patentees and should be replaced by a different more "scientific" calculation. The late Chief Judge Markey of the Federal Circuit would disagree that the hypothetical negotiation favors patent owners. In the opinion in *Panduit Corp. v. Stahlin Bros Fibre Works, Inc.*, 575 F.2d 1152 (6th Cir. 1978) the Chief Judge wrote that "the setting of a reasonable royalty cannot be treated, as it was here, as the equivalent of ordinary royalty negotiations among truly "willing" patent owners and licensees. That view would constitute a pretense that infringement never happened. It would also make an election to infringe a handy means for competitors to impose a "compulsory license" policy on every patent owner." Id. at 1158.

The *Panduit* rationale is less compelling in a case where the parties are not competitors, and the plaintiff is a non-practicing entity whose goal is to license its patents. Nonetheless, while the plaintiff does have the burden of proof on damages, and Courts do have an appropriate gate keeping function, we need to keep in mind that there is a damages award only when the defendant is found to infringe a valid patent and is an adjudicated tortfeasor. Damages are to be "adequate to compensate" the patent owner. That means they need to be higher than the zero dollars which will be the result if a Court excludes all of a plaintiff's evidence and does not allow plaintiff to present its case to a jury. The situation is even more unfair when a defendant elects to provide no proof to contradict the plaintiff's proofs and instead relies on motions to exclude to evade a damages award.

The *LaserDynamics* Court appeared very uncomfortable with letting the jury decide the damages case. In both trials, based on the results, the jury plainly found the testimony of LaserDynamics' damages expert to be more persuasive than Quanta's expert. On the issue of infringement, juries frequently hear the testimony of two different experts applying two different tests and coming to contrary conclusions on infringement. Unless the test used by an infringement expert is plainly "junk science", Courts let juries decide which expert has the more persuasive position. The same should be true with damages. If the experts are relying on analyses routinely used in commercial negotiations, there is no sound ground to exclude it. It's up to the trier of fact to determine the weight to be accorded each expert's presentation. Juries perform this function all of the time.

Further while the *LaserDynamics* Court believed that hearing high revenue numbers for an infringer's sales of an accused product would sway the jury to a higher award, it is likely that in this information age, the average juror knows generally about the financial health of large technology companies. And if they don't know prior to trial, they can likely figure it out from other evidence in the record. For example, a public corporation's Annual Report is frequently in evidence at a patent trial. Finally, if juror confusion is a concern, requiring ever more complex and artificial proofs is not going to make the jury's job any easier, and will make it more likely that the jury does get confused.

Fortunately, in its 2014 decision in *Apple Inc.* v. *Motorola Inc*., 757 F.3rd 1286 (Fed. Cir. 2014), the Federal Circuit appeared to moderate the positions it took in *LaserDynamics* in the context of reversing a District Court decision which excluded almost all of the expert testimony on damages proferred by both sides. In so doing, the Federal Circuit stated that "estimating a 'reasonable royalty' is not an exact science. As such, the record may support a range of "reasonable" royalties, rather than a single value. Likewise there may be more than one reliable method for estimating a reasonable royalty." Id. at 1315. The Court went on to hold that the fact that one approach may better account for an aspect of a reasonable royalty determination does not make the other sides' approach inadmissible.

The *Apple* decision undertakes a detailed analysis of all of the excluded expert testimony, and determines that it is all admissible, with the exception of one expert who based his opinion on a range of rates in other license agreements without any evidence tying those agreements to the patented features at issue.

In sum, there should be a role in the reasonable royalty determination for taking into account the same factors and facts used in every day commercial negotiation. There is no legitimate reason for excluding as unreliable rationales commonly used by businesses large and small in agreeing to license patents. The fact that there is an additional level of proof required to apportion the contribution of the invention to the product included in the royalty base that may require additional testimony from an economist or accountant does not devalue the information routinely examined in license negotiations.

In particular, reliable surveys of royalty rates in different industries are useful in bracketing the likely range of a reasonable royalty, with additional evidence needed to determine where in the range the specific patented invention fits. And if it is easier to calculate royalties using a product that is not the smallest saleable unit, and adjusting the royalty rate or base to correctly apportion the value of the patented technology, then Courts should permit that analysis. The goal is arriving at a reasonable royalty adequate to compensate for infringement which correctly values the contribution of the patented technology. Courts should not be overly rigid in excluding proofs by either the patent owner or infringer, and, except in egregious circumstances, should let the finder of fact decide the weight to be given to an expert's testimony.

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