

ONE PATENT, MULTIPLE VALUATIONS

The Increasing Disconnect Between Reasonable Royalty Damages and Real World Licensing Negotiations

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for the 2015 Fordham IP Conference
session on Patent Valuation,
April 9 Cambridge University, U.K.



KEY COMMERCIAL FACTORS USED IN THE TYPICAL *GEORGIA PACIFIC* DAMAGES ANALYSIS

- Royalties previously paid to license the patents under discussion.
- Royalties typically paid for licenses for patents in the relevant industry, e.g. printers, cell phones, semiconductors.
- Technical issues- validity and infringement, acceptable non-infringing substitutes, and useful life of patents.
- Definition of licensed products and royalty base, ease of calculation of royalty base, relationship of base to royalty rate.

THE “NEW” DAMAGES ANALYSIS EXEMPLIFIED BY THE *LASER* *DYNAMICS* CASE

- ~~Royalties typically paid for licenses to patents in the relevant industry.~~
- ~~Ease of calculation of royalty base.~~
- The only comparable licenses are those to the patents in suit.
- The Entire Market Value Rule means that the royalty base must be composed of the smallest saleable unit unless the patent owner can show that patents in suit are the “sole” basis of demand for the accused product.
- Commercially reasonable analyses and evidence can’t be considered by the jury.

THE RATIONALE BEHIND *LASER DYNAMICS*

- Effort to tame jury damages awards by restricting the patentee's proofs.
- Difficulty in dealing with a claim against a finished product seemingly removed from the value of the patent in suit.
- There must be a way to mathematically calculate a royalty.

THE FLAWS IN THE ANALYSIS

- Fear of juries cannot be used as a basis for substantive restriction on a patent owners statutory right to damages.
- The decision encourages a reasonable royalty award of zero.
- The smallest salable unit calculation will likely be so confusing and technical that it will confuse the finder of fact and enhance the likelihood of mistake.

THE FLAWS IN THE ANALYSIS

- It is impossible to prove that any feature is the sole basis for demand in a technology product.
- Application of the rules of *Laser Dynamics* will seriously and unnecessarily devalue patents.

GOING FORWARD

- Courts should permit juries to make the same judgments they do on other issues.
- Courts should stop excluding evidence that is typically used in a commercial negotiation.
- Defendants need to focus more on classic evidence of the contribution of other technology to the demand for the accused product. Examples are patents covering the product at issue and any royalties paid for the patents of third parties.

FOR ADDITIONAL MATERIAL ON THIS SUBJECT

- Please see *One Patent, Multiple Valuations*, by Patricia A. Martone, at <http://fordhamipconference.com/papers/>

THANK YOU

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