

Patent Damages: Principles and Current Problems

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First Principles

- “[I]t is one of the legal beauties of the system that what is given by the people through their government—the patent right—is valued automatically by what is given by the patentee. His patent has value directly related to the value of his invention, as determined by the marketplace.”
 - Judge Rich, *Application of Kirk* (1967)

Informing Principles

- Administrability
- Account for external factors?
 - Privilege particular patent exploitation models
 - Golden (2008 draft)
- Encourage private bargaining
 - Certainty
 - Least expensive information provider
- Deterrence?
 - Role of stubborn competitors in weeding out invalid patents
- Flexibility for diverse technologies and markets, and to allow application of future learning

Reasonable Royalties

- Perceived Problems
 - Dubious value of hypothetical value construct
 - The strident patent owner
 - Does not account for patent invalidity, unenforceability, noninfringement
 - Adjudicated infringer need not enjoy profits
 - *Mitutoyo*, 499 F.3d 1284 (Fed. Cir. 2007) (royalty=entirety of infringer's 29.2% profit margin)
 - *Monsanto v. McFarling*, 488 F.3d 973 (Fed. Cir. 2007) (royalty=140% of purchase price)
 - Publicly available royalty rates likely unrepresentative
 - Indeterminacy of Georgia Pacific factors
- Average Award = 13.13% (Lemley & Shapiro 2007)

Lost Profits

- Not available absent direct competition with adjudicated infringer
- Lost profits commonly exceed adjudicated infringer's gains due to impact of competition, consumer surplus
 - Tremendous impact upon public health system
- Too difficult for patent proprietors to make showing? (Lemley Draft 2008)

Apportionment

- Apportionment stands among Georgia Pacific factors—yet unevenly applied
 - Discounts claim scope
 - Greater emphasis on infringer's use than patent proprietor's contribution
- Entire Market Value Rule
 - Patented invention rarely, if ever, responsible for entire value of infringing product or process
 - If one patent proprietor recovers under this theory—no other patentee should recover damages at all
- Does not apply to lost profits

Reform Proposals in the 110th Congress

- Modest
- Base reasonable royalty damages on “economic value properly attributable to the patent’s specific contribution over the prior art.”
 - Account for other features that add value to the adjudicated infringement
 - Allows for Entire Market Value Rule
- Institutional competence

Future Inquiries

- Incompletely theorized
- Growing availability of empirical studies
 - Houston, Stanford
- Recognize structural limitations
 - Appellate deference
 - Litigant incentives
- Solutions may fall outside of modifications to remedies law
 - Claim drafting techniques