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Damages, Apportionment, and Lost Profits in Patent Cases

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Patent Damages – Statutory Basis

- 35 U.S.C. § 284:
  - Upon finding for the 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, together with interest and costs as fixed by the court.

Patent Damages – Two Theories

- **Reasonable Royalty**
  - Established royalty, if one exists; OR
  - Royalty to which the parties would have agreed in a hypothetical negotiation at the outset of infringement.
- **Lost Profits**
  - Profits lost due to the infringement.

Current Issues Impacting Damages

- Entire Market Value Rule (EMVR)
  - Smallest Salable Patent Practicing Unit (“SSPPU”)
  - Apportionment
- Non-Infringing Alternatives
- Comparable License Agreements

Apportionment

In determining patent damages associated with infringement, the patentee must *"give evidence tending to separate or apportion the [infringer]'s profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative."*

Garretson v. Clark, 111 U.S. 120, 121 (1884)

Apportionment: Case History

- ***Rite-Hite v. Kelly* (1995)** – EMVR: "We have held that the entire market value rule permits recovery of damages based on the value of a patentee's entire apparatus containing several features when the patent related feature is the 'basis for customer demand.'"
- ***Lucent v Gateway* (2009)** – EMVR: "There is nothing inherently wrong with using the market value of the entire product, especially when there is no established market value for the infringing component or feature, so long as the multiplier accounts for the proportion of the base represented by the infringing component or feature."
- ***LaserDynamics v. Quanta Computer* (2012)** – SSPPU: "Thus, it is generally required that royalties be based not on the entire product, but instead on the 'smallest salable patent-practicing unit.' *Cornell Univ. v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279, 283, 287-88 (N.D.N.Y. 2009)"

Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538, 1549 (Fed. Cir. 1995)
Lucent Technologies, Inc. v. Gateway, Inc., 580 F.3d 1301, 1325 (Fed. Cir. 2009)
LaserDynamics, Inc. v. Quanta Comput., Inc., 694 F.3d 51, 67–68 (Fed. Cir. 2012)

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