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ABSTRACT

ADDRESSING THE UNPREDICTABILITY OF REASONABLE ROYALTY DAMAGES

Current law encourages patentees and defendants in a patent infringement suit to make the most widely varying arguments for reasonable royalty damages. The parties have so much discretion in presenting calculations for reasonable royalty damages that it is not uncommon for the patentee to request damages 80-100 times greater than the infringer’s proposed damages. Permitting so much discretion makes it highly unlikely that the resulting damages will be reasonable, and thus fails to achieve the goal of determining a reasonable royalty.

The problem is simple. Patents are difficult to value. When a third party decision-maker, such as a jury, cannot accurately assess value, the decision-maker often splits the difference as a compromise. If a litigating party knows that the decision-maker is simply going to split the difference, then that party has the incentive to argue for damages as far away from their opposing party as possible. This tactic allows the party to skew the midpoint of the resulting split to their side as much as possible. This misaligned incentive is the root cause of the unpredictability in patent damages and other proposals have failed to address it.

The solution is also simple. The incentive for parties to make the most widely varying damages arguments possible must be replaced with an incentive to make the most reasonable argument for damages. This could be accomplished by requiring the jury choose the more reasonable of the proposed royalty rates as the basis for determining the reasonable royalty. Using this solution along with some other proposals in the Article, I illustrate how the range of damages argued by the parties in a recent case could have been dramatically reduced from a factor of 100 to a factor of 2.5. When a jury must decide between proposals that are only off by a factor of 2.5 it is much more likely that a “reasonable” royalty will be achieved.