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Jan 04, 2011

Uniloc v. Microsoft: The CAFC Rejects the 25 Percent Rule

By Jason Rantanen

Uniloc USA, Inc. v. Microsoft Corp. (Fed. Cir. 2011)

Panel: Rader, Linn (author), Moore

Uniloc v. Microsoft involves a host of issues, although one stands out as particularly noteworthy. While "passively tolerat[ing]" the 25 percent 'rule of thumb' (a method for calculating a reasonable royalty for purposes of infringement damages) in past cases, the CAFC held today that the rule "is a fundamentally flawed tool for determining a baseline royalty rate in a hypothetical negotiation," thus precluding its use for damages calculations.

Uniloc is the owner of Patent No. 5,490,216, an early patent covering a mechanism for combating "casual copying" of software, where users install copies of a software program on multiple computers in violation of applicable software licenses. In general terms, the patented invention involves the creation of a registration number generated by the software on the user's computer. The number is sent to the vendor's system, which uses an identical algorithm to create a remote license ID. If the numbers match when the application boots, the program enters a "use mode;" if they do not, it enters a "demo mode."

In the suit against Microsoft, Uniloc alleged that the Product Activation feature for Microsoft's Word XP, Word 2003, and Windows XP software programs infringed the '216 patent. A jury agreed, finding that Microsoft not only infringed the patent, but did so willfully. The jury also rejected Microsoft's invalidity defenses and awarded Uniloc \$388 million in damages. Following the trial, the district court granted Microsoft's motion for JMOL of noninfringement and lack of willfulness (and in the alternative, ordered a new trial on these issues), but denied its request for a JMOL on invalidity. The court also ordered a new trial on the issue of damages. On appeal, Uniloc challenged the district court's noninfringement, willfulness, and damages rulings, while Microsoft cross-appealed the denial of its JMOL on invalidity. The Federal Circuit affirmed the district judge's rulings on willfulness, damages and invalidity, but reversed on the question of infringement, both with respect to JMOL and the grant of a new trial.

Damages

The damages section of the opinion is by far the most significant portion. At trial, the jury awarded Uniloc \$388 million in damages, relying on the testimony of Uniloc's expert, who opined that damages should be \$564,946,803 based on a hypothetical negotiation between Uniloc and Microsoft and the *Georgia-Pacific* factors. Using an internal Microsoft document relating to the value of product keys, the expert applied the 25 percent "rule of thumb" to the minimum value reported (\$10 each), obtaining a value of \$2.50 per key. After applying the *Georgia-Pacific* factors, which he concluded did not modify the base rate, he multiplied it by the number of new licenses to Office and Windows products, producing the \$565 million value. He confirmed his valuation by "checking" it against the total market value of sales of the Microsoft products (approximately \$19 billion, noting that it represented only 2.9% of the gross revenue of the products).

The 25 Percent Rule: On appeal, the CAFC first rejected the use of the 25 percent rule to calculate patent damages. "The 25 percent rule of thumb is a tool that has been used to approximate the reasonable royalty rate that the manufacturer of a patented product would be willing to offer to pay to the patentee during a hypothetical negotiation." Slip Op. at 36, citing Robert Goldscheider, John Jarosz and Carla Mulhern, USE OF THE 25 PERCENT RULE IN VALUING IP, 37 *les Nouvelles* 123, 123 (Dec. 2002). Under the rule, "licensees pay a royalty rate equivalent to 25 per cent of its expected profits for the product that incorporates the IP at issue." *Id.*, quoting Goldscheider et al. Included in the court's discussion of the rule is an extensive survey of the relevant literature (covering no less than nine articles), as well as an acknowledgement that the "court has passively tolerated its use where its acceptability has not been the focus of the case." Slip Op. at 39. However, the court recognized that it never squarely addressed the use of the rule.

Treating the issue as one of first principles, and after considering the relevant Supreme Court caselaw, the CAFC concluded that, as an abstract theory untied to particular factual circumstances of a given case, the 25 percent rule simply cannot be used for damages calculations:

This court now holds as a matter of Federal Circuit law that the 25 percent rule of thumb is a fundamentally flawed tool for determining a baseline royalty rate in a hypothetical negotiation. Evidence relying on the 25 percent rule of thumb is thus inadmissible under *Daubert* and the Federal Rules of Evidence, because it fails to tie a reasonable royalty base to the facts of the case at issue.

Slip Op. at 41. The court based its reasoning on the *Daubert* standard for expert testimony, concluding that general theories are only permissible if the expert adequately ties the theory to the specific facts of the case. Under *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) and *General Electric Co. v. Joiner*, 522 US 136 (1997), "one major determinant of whether an expert should be excluded under *Daubert* is whether he has justified the application of a general theory to the facts of the case." Slip Op. at 43.

Applying this principle, the CAFC criticized the application of the 25 percent rule because there was no link between the rule and the specific case:

The meaning of these cases is clear: there must be a basis in fact to associate the royalty rates used in prior licenses to the particular hypothetical negotiation at issue in the case. The 25 percent rule of thumb as an abstract and largely theoretical construct fails to satisfy this fundamental requirement. The rule does not say anything about a particular hypothetical negotiation or reasonable royalty involving any particular technology, industry, or party.

Slip Op. at 45. In addition, the court pointed to the lack of testimony by Uniloc's expert suggesting that the starting point of a 25 percent royalty had any relation to the facts of the case, and thus the use of the rule was "arbitrary, unreliable, and irrelevant," failing to pass muster under *Daubert* and tainting the jury's damages calculation. *Id.* at 47.

Entire Market Value Rule: The CAFC also rejected the expert's application of the entire market value rule, which he used as a check on the total damages. "The entire market value rule allows a patentee to assess damages based on the entire market value of the accused product only where the patented feature creates the 'basis for customer demand' or 'substantially create[s] the value of the component parts.'" Slip Op. at 48. Here, however, there was no evidence that the patented component created the basis for customer demand, as required by the rule: "This case provides a good example of the danger of admitting consideration of the entire market value of the accused where the patented component does not create the basis for customer demand." Slip Op. at 51.

Infringement

In opposing Uniloc's challenge on the issue of infringement, Microsoft argued that several grounds supported affirmance of the district court's grant of JMOL of noninfringement. The CAFC rejected each argument in turn, concluding that substantial evidence supported the jury's finding of infringement.

Standard of Review: One issue that sophisticated parties often dispute is the relevant standard that applies when reviewing jury verdicts. This appeal was no different - Microsoft contended that the jury verdict should be reviewed *de novo*, while Uniloc argued that it should be reviewed for substantial evidence. The CAFC responded by distinguishing situations where "the parties conceded that under one claim construction there was infringement and under the other there was none, and were arguing only over which claim construction was appropriate." Slip Op. at 15. In these cases, *de novo* review applies. On the other hand, where "the claim construction itself is not contested, but the application of that claim construction to the accused device is," the court applies the substantial evidence standard. *Id.*

Comment: This distinction reinforces a basic principle of Federal Circuit appellate practice: Parties challenging a jury verdict on the issue of infringement will likely want to frame the dispute on appeal as a question of claim construction; parties defending the verdict will likely want to frame it as a question of application of an accepted construction to the accused product or method. Of course, whether a party will be able to frame the question in a particular way depends largely on how the issue was set up in the district court - which itself is ideally part of counsel's long term strategic thinking.

Applying this standard, the Federal Circuit concluded that the jury's verdict of infringement was supported by substantial evidence, rejecting Microsoft's arguments to the contrary. The court also rejected Microsoft's argument that a critical "means-plus-function" limitation should be read narrowly. To the contrary, the court held, it should be read broadly, applying language from *IMS Tech., Inc. v. Haas Automation, Inc.*, 206 F.3d 1422, 1436 (Fed. Cir. 2000) stating that "when in a claimed 'means' limitation the disclosed physical structure is of little or no importance to the claimed invention, there may be a broader range of equivalent structures than if the physical characteristics of the structure are critical in performing the claimed function."

Expert Testimony, redux: Also of note is the court's ruling with respect to expert testimony as it pertains to infringement. Although the district court rejected the testimony of Uniloc's expert as "incomplete, oversimplified and frankly inappropriate," the CAFC concluded that this rejection was improper because the district court had already fulfilled its gatekeeping function under *Daubert* when it explicitly noted that the expert was "qualified." Thus, it was up to the jury "to evaluate the weight to be given to the testimony of dueling qualified experts." This application of *Daubert* seems to be somewhat in tension with the court's treatment of expert testimony in the damages context, which focused on the content of the testimony, not the qualifications of the person giving it.

Joint Infringement: The CAFC also rejected Microsoft's joint infringement argument. Rather than implicating joint conduct, the court ruled, Uniloc's claim was structured so as to capture infringement by a single party by focusing on one entity. "That other parties are necessary to complete the environment in which the claimed element functions does not necessarily divide the infringement between the necessary parties. For example, a

claim that reads "An algorithm incorporating means for receiving e-mails" may require two parties to function, but could nevertheless be infringed by the single party who uses an algorithm that receives e-mails." Slip Op. at 29.

Willful Infringement: On the issue of willfulness, the CAFC continued to apply its objective super-threshold for proving willfulness. "If the accused infringer's position is susceptible to a reasonable conclusion of no infringement, the first prong of Seagate cannot be met." Slip Op. at 32. Particularly obtuse is the court's triple-negative articulation of the factual holding: "Uniloc has not presented any evidence at trial or on appeal showing why Microsoft, at the time it began infringement, could not have reasonably determined that [Microsoft's algorithms] did not meet the "licensee unique ID generating means," "licensee unique ID," or "registration system"/"mode switching means" limitations."

Presumption of Validity: in addressing Microsoft's cross-appeal of the denial of its motion for JMOL and a new trial on invalidity, the court declined to back away from the "clear and convincing" standard for invalidity. Rejecting Microsoft's argument that its burden was to show invalidity simply by a preponderance of the evidence - as opposed to clear and convincing evidence - because the prior art reference was not before the PTO, the court continued to apply the higher standard. "Until changed by the Supreme Court or this court sitting en ban, this is still the law." Slip Op. at 55. Applying this standard, the court rejected Microsoft's argument that it was simply practicing the prior art, and thus a finding of infringement necessitated a finding of invalidity.

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Comments

Applying this standard, the court rejected Microsoft's argument that it was simply practicing the prior art, and thus a finding of infringement necessitated a finding of invalidity.

You know, in case it wasn't yet painfully obvious that having different standards of proof for validity and infringement is logically untenable.

Posted by: IANA E | [Jan 04, 2011 at 03:20 PM](#)

""This case provides a good example of the danger of admitting consideration of the entire market value of the accused where the patented component does not create the basis for customer demand.""

Indeed, here the "inventionlol" is the basis for customers not wanting the product I'm sure. They'd much rather have a product without this particular "inventionlol" incorporated.

Posted by: 6 | [Jan 04, 2011 at 03:42 PM](#)

They'd much rather have a product without this particular "inventionlol" incorporated.

Yes, but the only reason some of them demand the product at Microsoft's price at all is because they can't freely copy it.

The security feature may not create the desire to have the product, but it sure as heck creates the market demand and the market value.

Posted by: IANA E | [Jan 04, 2011 at 03:49 PM](#)

"Particularly obtuse is the court's triple-negative..."

Weza gots to be obtuse - weza need more than one word answers.

Posted by: ping | [Jan 04, 2011 at 04:05 PM](#)

The security feature may not create the desire to have the product, but it sure as heck creates the market demand and the market value.

No it doesn't. All the security feature does is artificially create scarcity, not create demand. Believe me, no customer is asking for such security features when they purchase MS's product. You're confusing supply with demand.

Posted by: Willton | [Jan 04, 2011 at 04:29 PM](#)

IMHO, this is a huge decision.

It may (MAY) represent one of the best decisions this court has ever reached, if (IF) the quality of the analysis matches the importance of the issues addressed.

I can't wait to read it in its entirety. Oh please...oh please...

Finally, a decision to write something good about?

Posted by: Inviting Body Punches | [Jan 04, 2011 at 04:32 PM](#)

Supply, demand, market value, market demand...these are all tertiary indicators of the secondary indicator "value to the infringer", which is but one secondary indicator of the primary indicator "reasonable royalty", which is but one indicator of the damages award.

You guys shouldn't get hung up on any particular indicator at the tertiary level.

Posted by: Inviting Body Punches | [Jan 04, 2011 at 04:40 PM](#)

You're confusing supply with demand.

You're confusing a general desire to have something with demand.

Demand (as a function of price) is a measure of how many people would pay a particular price for a particular product, which in turn is a measure of how much it is worth to people to purchase that product. It should be obvious enough that the availability of substitute goods (e.g. pirated versions of the very same software) reduces demand, and therefore the restriction of substitute goods increases demand.

Posted by: IANA E | [Jan 04, 2011 at 04:41 PM](#)

IBP: Supply, demand, market value, market demand...these are all tertiary indicators of the secondary indicator "value to the infringer", which is but one secondary indicator of the primary indicator "reasonable royalty", which is but one indicator of the damages award.

Reasonable royalty is more than "but one indicator of the damages award", it's the lower bound of the damages award. In other words, if the patentee can't prove better that's what he gets. That's a very important data point for the patentee to establish.

Also, I'm perfectly fine with using any means available to determine the perceived or actual monetary value of the invention to the patentee, and using that as a starting point for a reasonable royalty. Unless the infringer can show otherwise, let him pay the patentee a significant portion of what it was worth to him to incorporate the patented invention.

I don't even really mind the 25% rule. Sure, it wasn't particularized to the facts of the case, but it's prima facie reasonable that a patentee would happily pay 25% of the added value of any invention for the privilege of realizing the other 75%. Really, any amount significantly shy of the total value-added would be reasonable to pay as a royalty, unless the infringer can show otherwise.

Posted by: IANA E | [Jan 04, 2011 at 04:55 PM](#)

Supply, demand, market value, market demand...these are all tertiary indicators of the secondary indicator "value to the infringer",

If the value to the infringer is in fact negative does the patentee owe damages to the accused?

Posted by: 6 | [Jan 04, 2011 at 05:04 PM](#)

"The security feature may not create the desire to have the product, but it sure as heck creates the market demand and the market value."

Nah, it doesn't. Nobody goes out, buys only ONE of these, then is thwarted when they want to install it multiple times on various comps they own or use, and then thinks "o gee, you know what I'd really like to do? Go out and buy another copy!" I'll tell you what they do think tho: Cracks.am

If you think otherwise, you'll need evidence to establish that such a mythical beast might exist.

Posted by: 6 | [Jan 04, 2011 at 05:06 PM](#)

Although, I do note that it would be fitting for MS to get hit with a 100% royalty rate on this for visiting this nonsense upon legit users.

Posted by: 6 | [Jan 04, 2011 at 05:09 PM](#)

I note also that I never owned a legit version of windows XP. Looks like your security softwarez didn't help you any there did it MS?

Posted by: 6 | [Jan 04, 2011 at 05:15 PM](#)

I love means-plus-function elements!

Posted by: An Aristocrat | [Jan 04, 2011 at 05:30 PM](#)

IANAEE--

"Reasonable royalty" is one primary indicator of the damages award, another primary indicator being "lost profits".

Just laying out the paradigm, not saying anything about lower or upper bounds, co-extensive character, or anything like that.

My point was that the guiding principle in how one chooses to characterize and analyze any tertiary indicator is defined by the second indicator, something that seems to have been lost in the discussion on this thread.

Posted by: Inviting Body Punches | [Jan 04, 2011 at 05:50 PM](#)

Looks like the Feds are adopting the Rooklidge rule of thumb, if the patent owner cannot prove any damages, he gets nothing. He can prove infringement. He can prove the value (price) of the patented thing sold. But, now he is stuck. Without prior and similar licenses he may be left with NOTHING AT ALL. No RR. Not even one crumb from the plate.

I submit, this cannot be right. There has to be a default RR or else the patent owner might be left with nothing. Nothing seems to violate the statute:

§284. Damages

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.

Posted by: Ned Heller | [Jan 04, 2011 at 06:24 PM](#)

What is a reasonable royalty for an invention that cost effectively nothing to make and that would surely have been invented shortly after by a thousand people a hundred times over if the incredible geniuses at Uniloc hadn't come up with it first?

Posted by: Malcolm Mooney | [Jan 04, 2011 at 06:30 PM](#)

"Looks like the Feds are adopting the Rooklidge rule of thumb, if the patent owner cannot prove any damages, he gets nothing. He can prove infringement. He can prove the value (price) of the patented thing sold. But, now he is stuck. Without prior and similar licenses he may be left with NOTHING AT ALL. No RR. Not even one crumb from the plate. "

Sounds to me like he's getting a bargain. Just like trolls will be if that be the case here.

Look on the bright side, so far as I'm aware if the reasonable royalty calculation turns out to be negative, as here, I don't think patentees have to pay the accused anything.

"What is a reasonable royalty for an invention that cost effectively nothing to make and that would surely have been invented shortly after by a thousand people a hundred times over if the incredible geniuses at Uniloc hadn't come up with it first?"

I submit 100% of the gross sales. At least in this case. But probably 0% in other cases. lulz.

Posted by: 6 | [Jan 04, 2011 at 06:38 PM](#)

"Looks like the Feds are adopting the Rooklidge rule of thumb, if the patent owner cannot prove any damages, he gets nothing. He can prove infringement. He can prove the value (price) of the patented thing sold. But, now he is stuck. Without prior and similar licenses he may be left with NOTHING AT ALL. No RR. Not even one crumb from the plate. "

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I submit 100% of the gross sales. At least in this case. But probably 0% in other cases. lulz.

Posted by: [6](#) | [Jan 04, 2011 at 06:39 PM](#)

Also, I note Ned, that MS would probably have been willing to give them a crumb from Bill's table, as opposed to his personal plate.

Posted by: [6](#) | [Jan 04, 2011 at 06:40 PM](#)

"Demand (as a function of price) is a measure of how many people would pay a particular price for a particular product, which in turn is a measure of how much it is worth to people to purchase that product. It should be obvious enough that the availability of substitute goods (e.g. pirated versions of the very same software) reduces demand, and therefore the restriction of substitute goods increases demand."

Note that this software does not limit pirated versions. It only limits the use of legitimate versions. But you'd know that if you read anything in the case.

Posted by: [6](#) | [Jan 04, 2011 at 06:44 PM](#)

Looks like the Feds are adopting the Rooklidge rule of thumb, if the patent owner cannot prove any damages, he gets nothing. He can prove infringement. He can prove the value (price) of the patented thing sold. But, now he is stuck. Without prior and similar licenses he may be left with NOTHING AT ALL. No RR. Not even one crumb from the plate.

I submit, this cannot be right. There has to be a default RR or else the patent owner might be left with nothing.

Ned, scrapping the 25% rule is not a sign of the Apocalypse for the RR. You're engaging in a slippery slope argument. Take the decision for what it is worth, not for what you think will happen next.

Posted by: Willton | [Jan 04, 2011 at 07:51 PM](#)

It seems to me the even broader significance of this decision is requiring strict Daubert gate-BLOCKING of whatever the CAFC considers invalid evidence for royalties/damages in a specific case, with this potential for re-trial punishment for letting the damages expert testify beyond that!

The handwriting was on the wall for this. In particular, from *Lucent v. Gateway* (Fed. Cir. September 2009), plus two E.D. TX D.C. decisions in which Judge Randall Rader [now Fed. Cir. Chief Judge] sat by designation: *Cornell v. HP* (March 2009) and *IP Innovation v. Red Hat and Novell* (March 2010).

[Even Judge Ward has held his last-July jury award of \$52 million in *LaserDynamics v. Asus Computer International* to only \$6.2 million [11%], to be the largest amount properly supported by the evidence.

BTW, re "operating profits" or gross profits [if they are excluding capital costs, R&D, tooling, or other significant fixed costs]. Did that ever make sense anyway for, say, chip industries with huge capital costs for fab plants that have to be recouped by huge sales to make any real profit? Isn't the imaginary theoretical patent licensing negotiation taking place BEFORE the defendant makes any decision to make the infringing product, before knowledge of possible infringement?

Posted by: Paul F. Morgan | [Jan 04, 2011 at 07:59 PM](#)

6 "I note also that I never owned a legit version of windows XP. Looks like your security softwarez didn't help you any there did it MS?"

-- Have fun with the character and fitness test if you ever go to law school, graduate, then decide to take and pass a state bar.

Posted by: but what about | [Jan 04, 2011 at 11:10 PM](#)

So, an award of nothing is a "reasonable" royalty?

We need clearly need a default RR -- or an injunction. The injunction will test the actual value of the invention to the infringer. In this case, just how important is the product activation to Microsoft. I'll bet its worth a lot.

Posted by: Ned Heller | [Jan 05, 2011 at 07:27 AM](#)

"Have fun with the character and fitness test if you ever go to law school, graduate, then decide to take and pass a state bar."

I will. Is one of the questions on there about having owned a legit version of windows xp?

Posted by: [6](#) | [Jan 05, 2011 at 07:31 AM](#)

"So, an award of nothing is a "reasonable" royalty?"

Well an "award" is not really a royalty at all, it is an "award".

"We need clearly need a default RR "

Why is that? Is it so hard for you to honestly evaluate what the value your "inventionlol" is adding to the accused product etc. and then determine if you should sue or not based on that? And then present your reasoning to the court for verification? Is that so hard Ned?

"The injunction will test the actual value of the invention to the infringer. "

The injunction is also an equitable remedy not warranted in all cases. Also, an injunction tests not only the value of the inventionlol, but of the product being sold as a whole.

"In this case, just how important is the product activation to Microsoft. I'll bet its worth a lot. "

And I bet you're wrong. There are innumerable ways to accomplish nearly the exact same effect that do not infringe. Including, I note, putting a little note on the back of the box or front of the cd, or front of the seller's website that says "hey guys don't use this on more than one computer k? otherwise you'll be breakin' on our license and that's totally badz lol".

Posted by: [6](#) | [Jan 05, 2011 at 07:39 AM](#)

Well I would ask someone at MS a question like this:

How much of your profits are related to product activation?

But we can't even ask that question given the holding in this case concerning entire market value.

What Rader and his merry crew have done here is just a bit much.

Posted by: Ned Heller | [Jan 05, 2011 at 08:06 AM](#)

"How much of your profits are related to product activation?"

And they'd say, "surprisingly (to us retards in "sales") it turns out that the number you've requested is negative"

"But we can't even ask that question given the holding in this case concerning entire market value."

You can ask any question you like Ned.

Posted by: [6](#) | [Jan 05, 2011 at 08:12 AM](#)

This case reflects the trend since Lucent Technologies that the Federal Circuit is going to scrutinize large damage awards carefully to make sure the evidence supports the damages analysis for those awards. It also reflects that a key aspect of so-called "patent law reform" (control of large damage awards) is being done by the courts without the need of a legislative straitjacket.

Posted by: EG | [Jan 05, 2011 at 08:38 AM](#)

So, an award of nothing is a "reasonable" royalty?

We need clearly need a default RR -- or an injunction. The injunction will test the actual value of the invention to the infringer. In this case, just how important is the product activation to Microsoft. I'll bet its worth a lot.

Posted by: Ned Heller | [Jan 05, 2011 at 07:27 AM](#)

Indeed, and the double wammy is going to be the estensive discovery needed to prove out the damages case. This case is a great example: apparently you need to show the value of the copy protection system to the seller (MS) - obviously worth a great deal otherwise MS would have stopped.

Your point on the injunction is well informed - the injunction forces the infringer (who is the best position) to determine the 'true' market value of continuing to use the infringing operation.

Q: Now that title and infringement have been proved out to a final judgment - and absent any statute overriding the common law (because the code is silent)- should damages going forward at this point be under an equity theory of unjust enrichment? Paice v. ? on remand ("compulsory license" damages is not just an extension of legal damages).

But absent the injunction (the violation of which a court could, should, might impose civil fines for contempt). You end up back in the "discretion" lap of the lower court as to whether to do a new trial on infringing product 2.0 or a contempt (the unjust enrichment hearing?). If its the former are you then are stuck once again with only legal damages under the statute?

Posted by: iwasthere | [Jan 05, 2011 at 09:56 AM](#)

Ned: *There has to be a default RR or else the patent owner might be left with nothing. Nothing seems to violate the statute:*

I completely agree. Under the statute, there has to be a way of calculating the remedy that is at least somewhat divorced from the particular facts of the case. The "reasonable royalty" is not merely "one indicator", it's a lower bound meant to guarantee the patent owner some money even if he can't prove any actual damages at all.

Malcolm: *What is a reasonable royalty for an invention that cost effectively nothing to make and that would surely have been invented shortly after by a thousand people a hundred times over if the incredible geniuses at Uniloc hadn't come up with it first?*

The reasonable royalty isn't based on whether you could have thought of that yourself. It's based on whether someone else has an exclusive right to it and you'd be better off using it than not. And I'm fine with presuming that the infringer was better off using it than not, since he apparently made a business decision to use it.

Paul Morgan: *BTW, re "operating profits" or gross profits [if they are excluding capital costs, R&D, tooling, or other significant fixed costs]. Did that ever make sense anyway for, say, chip industries with huge capital costs for fab plants that have to be recouped by huge sales to make any real profit? Isn't the imaginary theoretical patent licensing negotiation taking place BEFORE the defendant makes any decision to make the infringing product, before knowledge of possible infringement?*

Yes, the theoretical licensing negotiation should take place before the defendant makes the decision to infringe. And the defendant would value the invention based on incremental net profit, not gross profit. Or at least, what he would expect his incremental net profit to be a priori, but I don't mind using actual figures in retrospect to simplify the analysis.

Ned: *We need clearly need a default RR -- or an injunction. The injunction will test the actual value of the invention to the infringer.*

Please don't tell me you're suggesting that the plaintiff obtain an injunction for failing to prove the actual value of a reasonable royalty.

As for a default RR, what's so horrible about 25% of incremental net profits? Wouldn't any reasonable person pay 25 cents to make an extra dollar? I'm given to understand that even the very rich would gladly pay 34 cents (but not 37 cents under any circumstances) to make an extra dollar.

EG: *It also reflects that a key aspect of so-called "patent law reform" (control of large damage awards) is being done by the courts without the need of a legislative straitjacket.*

I wouldn't be so quick to say that the courts aren't in need of a straitjacket here, since they essentially gutted a statutory provision that's supposed to give the patentee an objective reference point for damages that are otherwise almost impossible to prove and even harder to evaluate in comparison to other "typical" cases.

I don't say this very often, but this is a case that really does weaken patents.

Posted by: IANA | [Jan 05, 2011 at 10:06 AM](#)

"And there is nothing new under the sun . . ."

See <http://supreme.justia.com/us/225/604/>

WESTINGHOUSE ELEC. CO. V. WAGNER ELEC. CO., 225 U. S. 604 (1912) - if you read the case this appears to me to be the second case - the first resulting in an injunction - and then the new 'design around' product 2.0 - in which scotus holds:

"At the conclusion of the lengthy testimony, the substance of which is barely outlined above, the master found from the evidence and under the decision in 117 F.4d 8, binding on defendant, that Claim 4 was an entirety, covering not only open spaces in the core, but the use of the oil in a closed receptacle for cooling the transformer; that all the commercial value of those sold by the defendant was due to the use of Claim 4 of plaintiff's patent, and not to additions made by the defendant. He recommended that a decree should be entered against the defendant for \$132,433.35,

"being approximately 25 percent on the net amount of the sales of infringing transformers after deducting commissions and fixing the factory cost at 40 percent."

You could say that lost profits and the difficulty in apportionment was overturned by the statutory floor of 'no less than a reasonable royalty.' But the posture of this case is that it was in fact the second case - and is not dealing with legal damages - but a post trial equitable remedy of the judgment from the first case. In this matter, the damages statute is silent.

Posted by: iwasthere | [Jan 05, 2011 at 10:12 AM](#)

"Indeed, and the double wammy is going to be the estensive discovery needed to prove out the damages case. This case is a great example: apparently you need to show the value of the copy protection system to the seller (MS) - obviously worth a great deal otherwise MS would have stopped."

As already noted to you guys on here, MS could care less about patents and everything having to do with them. Look at their books, patents and all patent issues cost somewhere around 1% of their expenditures.

They will do as they please.

"As for a default RR, what's so horrible about 25% of incremental net profits? Wouldn't any reasonable person pay 25 cents to make an extra dollar?"

That depends, how many other people are asking for the other 75 cents because you supposedly infringed on their propertylol?

"I wouldn't be so quick to say that the courts aren't in need of a straitjacket here, since they essentially gutted a statutory provision"

I kno rit? I was impressed.

Posted by: 6 | [Jan 05, 2011 at 10:24 AM](#)

That depends, how many other people are asking for the other 75 cents because you supposedly infringed on their property?

It hardly matters, since each will be taking only 25% of the value added by his own invention. If all that adds up to more than the net profit on the entire product, the infringer has clearly made a bad business decision somewhere along the line, but that's not for the patent law to sort out.

Posted by: IANA E | [Jan 05, 2011 at 10:30 AM](#)

"It hardly matters, since each will be taking only 25% of the value added by his own invention."

Where the f did you get that? The 25% rule, as it seems stated here, is 25% of the PROFIT, not the "value added by his own invention".

"If all that adds up to more than the net profit on the entire product, the infringer has clearly made a bad business decision somewhere along the line, but that's not for the patent law to sort out."

Lulz. No, of course not, because the reasonable royalty standard was fed beyond belief prior to this decision. Now it is starting to come in line with reality. Where, it seems, the court is beginning to understand the "value" of these "inventionlols". That is, less than the price of the paper they're printed upon.

In any event, if the patentee(s) are asking for so much that the business that keeps their trolling alive goes out of business then that is clearly an unreasonable royalty as the value added by any invention, even if it be the entire product down to the last bolt, is still not the "value of the invention" because you've already redefined above who the value is in relation to: the manufacturer, as opposed to the end customer. Which I doubt is how that particular part of the caselaw is to be interpreted. Rather you're supposed to ask what the value to the customer is, which again, in this case, and many others, is 0 or less than 0. Indicating a need, to me, for the inventor to pay the world for visiting this nonsense upon it.

Posted by: 6 | [Jan 05, 2011 at 11:27 AM](#)

In any event, if the patentee(s) are asking for so much that the business that keeps their trolling alive goes out of business then that is clearly an unreasonable royalty

That's not necessarily the case. Just because (assuming arguendo) \$2.50 per unit was a reasonable royalty for this particular technology (25% of the \$10 value of the claimed technology, not of the entire product, I note in passing), that doesn't mean

that Microsoft (who was not paying that royalty at the time) would have charged \$2.50 more for its product, or even priced in any sort of risk of liability for patent infringement.

If Microsoft used ten patented inventions that were each actually incrementally worth \$10 to them, without paying royalties, it's not the ten patentees' fault that Microsoft didn't price their product to turn \$100 in pre-lawsuit profit on each unit. Microsoft's failure to price its product according to the actual cost of producing it is Microsoft's own bad business decision, and should not disentitle any patentee to its reasonable royalty of \$2.50 per unit.

Put another way, if you use my patented invention I should be entitled to a reasonable royalty, even if it turns out that you were selling your product at a loss. Just as if you were a commercial tenant in my building you would owe me rent regardless of whether you show an operating profit from your use of the space.

Posted by: IANA E | [Jan 05, 2011 at 11:41 AM](#)

"Put another way, if you use my patented invention I should be entitled to a reasonable royalty, even if it turns out that you were selling your product at a loss."

I agree, I simply believe that your reasonable royalty should not be limited to positive numbers. Don't you agree with that?

Furthermore, if we're to determine the reasonable royalty based on the value to, say, the manufacturer, then you must look at what the value to him is, and not the value to the customer (i.e. the price of the object sold).

That is, put another way, we must look to whom we are talking about the "value of the claimed technology" being in relation to. And if, we decide the manufacturer, who, as it turns out, values your technology in the negative, then your reasonable royalty should reflect that in the form of it being a negative number.

It all seems very reasonable to me.

"If Microsoft used ten patented inventions that were each actually incrementally worth \$10 to them,"

Who says we must look incrementally rather than take a look at the situation as a whole? Surely a reasonable person in a negotiation would do that.

"it's not the ten patentees' fault "

It might be, depending on who they are.

Look IANA E, it is fun messin around with you, but surely you must see the error of your out-dated ways.

Posted by: 6 | [Jan 05, 2011 at 12:20 PM](#)

6: *I simply believe that your reasonable royalty should not be limited to positive numbers. Don't you agree with that?*

Why would anybody ever agree with that?

Posted by: IANA E | [Jan 05, 2011 at 12:33 PM](#)

"but surely you must see the error of your out-dated ways."

lulz 6 - why doncha explain it to him. Feel free to use one word answers and have it done in under ten minutes.

Posted by: ping | [Jan 05, 2011 at 12:35 PM](#)

6 - the arbitrator of "reasonableness" - Now that is some serious chuckles.

Posted by: ping | [Jan 05, 2011 at 12:39 PM](#)

"Why would anybody ever agree with that?"

Because there is no reason to disagree with it and there are many reasons to agree with it?

Let us be honest guys. We are in, or are approaching the days where someone would certainly be willing to pay a manufacturer to put in their invention to increase the popularity of it, and to thereby spur imitators to copy it. Then they could sue the imitators. Such might be the case with the instant invention. Surely in a royalty negotiation Unilock would have been willing to start the negotiations at them paying MS 25% of the perceived value of the invention to Unilock in order to have MS incorporate the feature into their products.

Posted by: 6 | [Jan 05, 2011 at 01:01 PM](#)

I think IANAЕ misapprehends how the 25 percent rule has been used. It is not 25 percent of the incremental profit that plaintiffs experts use, but 25 percent of the total operating profits for the entire product. As the cafc points out in the opinion (if you read it) the 25 percent rule gets you the same result no matter what the underlying patented technology is: 25 percent of total net profits. There is absolutely no attempt to discern the incremental contribution of the patented invention to profits. If there had been, then the patented would have a good starting point for a negotiation: the marginal contribution of the invention, which would act as at least a ceiling to the reasonable royalty.

And this hokum about a "default" minimum royalty rate is ridiculous. Patent damages are compensatory, not punitive. There are decades of case law on that point. If your invention has nominal value, or you can't prove what a reasonable royalty would be beyond a nominal amount, then you get nominal damages. That's why they call it a burden of proof. The statute says nothing that forecloses the possibility that for some patents (if not most) the reasonable royalty could be nominal or zero. The statute does not state that a patentee does not have to show the royalty they seek is "reasonable", in fact it requires it. A patentee with a worthless patent, or one whose worth can't even be shown by the preponderance of the evidence should not be rewarded simply for getting a nice piece of paper from the pto and bringing a lawsuit.

If the patentee can't show the reasonableness of the claimed royalty to a preponderance of the evidence based on record facts, then that's their problem. They should have either practiced the invention or licensed it before bringing suit in order to generate the economic facts they would need to establish a value to the invention.

Posted by: Jay | [Jan 05, 2011 at 01:13 PM](#)

I think IANAЕ misapprehends how the 25 percent rule has been used. It is not 25 percent of the incremental profit that plaintiffs experts use, but 25 percent of the total operating profits for the entire product.

Not in this case, at least. The 25% royalty was based on the monetary value associated with the product key (the patented invention), not the profits on the entire product.

Patent damages are compensatory, not punitive. There are decades of case law on that point. If your invention has nominal value, or you can't prove what a reasonable royalty would be beyond a nominal amount, then you get nominal damages.

Sure, if a reasonable royalty would be a nominal amount, and you can't show actual damages, you get a nominal sum. That's obvious. But that's not the point here.

If a reasonable royalty would be a significant amount, you should get that significant amount even if you can't show particularized damages from the plaintiff's infringement. If incorporating the patented technology into your product is actually worth \$10 to you, paying a royalty in any amount less than \$10 would be prima facie economically reasonable, because you'd still come out ahead on the deal.

Posted by: IANAЕ | [Jan 05, 2011 at 01:26 PM](#)

They should have either practiced the invention or licensed it before bringing suit in order to generate the economic facts they would need to establish a value to the invention.

Oh, also, that's a very good illustration of how unrealistic it can be to "establish a value to the invention" in patent infringement cases, and why we need (and nominally have) a reasonable royalty floor. If you've patented a feature of someone else's product, as is the case here, you can't just go and practice your invention. You might not be able to license it to anybody other than your infringer at all, or not on the same terms. What other licensee could possibly be expected to negotiate a royalty that would bear any relation to the "reasonable royalty" for MS Windows? And would you really be negotiating a reasonable arms-length royalty if you were rushing to put a number to paper just so you could sue Microsoft?

Posted by: IANAЕ | [Jan 05, 2011 at 01:32 PM](#)

IANAЕ I don't say this very often, but this is a case that really does weaken patents.

Any case where reason is allowed to trump "traditional" patent practice is going to weaken patents.

This is a good thing, btw.

I'm fine with presuming that the infringer was better off using it than not, since he apparently made a business decision to use it.

The business decision was based on the reasonable assumption that the patent was invalid.

Posted by: Malcolm Mooney | [Jan 05, 2011 at 01:35 PM](#)

Jay,

But how does such a (r)emedy - minimum (r)oyalty (r)ate of \$0 - make the holder of the (r)ight whole? Even (*or especially*) if the (r)ight to exclude lacks a monetary value, how do you propose to make the person whose (r)ight has been violated whole? For arguments sake, let's assume a valid infringed patent. What then?

This is *not* a situation where *no* (r)emedies exist, and there be one (r)emedy that mirrors the (r)ight very very closely (but we will only whisper what that is).

Posted by: ping | [Jan 05, 2011 at 01:41 PM](#)

The business decision was based on the reasonable assumption that the patent was invalid.

If so, it was made with awareness of the patent, and the risk (however small) that it might be valid. If the infringer took a smart business risk that ended up not paying off, that's not the patentee's problem.

That's not really the point, anyway. Even freely available technology costs money to incorporate into a product, and would only be incorporated if the seller saw some value in it - even if it's a nominal value like being able to crow about how many features your product has.

Posted by: IANA | [Jan 05, 2011 at 01:41 PM](#)

"The business decision was based on the reasonable assumption that the patent was invalid."

Which hole did ya pull that one outa? No one has even hinted that the patent was invalid in this discussion. If it aint windmills or fields of rye, it be straw.

Posted by: ping | [Jan 05, 2011 at 01:45 PM](#)

pingaling *Which hole did ya pull that one outa?*

See discussion of willful infringement above, pingalingadingdong.

Posted by: Malcolm Mooney | [Jan 05, 2011 at 01:56 PM](#)

"That's not really the point, anyway. Even freely available technology costs money to incorporate into a product, and would only be incorporated if the seller saw some value in it - even if it's a nominal value like being able to crow about how many features your product has."

I don't know about that. Many, many, many, many things in manufacturing can be blindly stumbled into without considering the necessary "advantages". You might simply happen to have a machine that does a certain thing already in your factory so you decide to use it with your new products. Just as one example among tens of gazzillions. The "technology" of using those machines to make that kind of product in a certain way may well be patented, but the only "value" it had to that guy was that he wouldn't have to buy a new machine.

Posted by: 6 | [Jan 05, 2011 at 02:08 PM](#)

Love the use of the obscure "revenant". From the OED:

n. A person who returns from the dead; a reanimated corpse; a ghost.

adj. That has returned from, or as if from, the dead; resembling or reminiscent of a ghost.

Posted by: patently proofread | [Jan 05, 2011 at 02:29 PM](#)

You can't deny that the revenant literature is a suppository of useful information.

Posted by: IANA | [Jan 05, 2011 at 02:37 PM](#)

@Jay: *If the patentee can't show the reasonableness of the claimed royalty to a preponderance of the evidence based on record facts, then that's their problem. They should have either practiced the invention or licensed it before bringing suit in order to generate the economic facts they would need to establish a value to the invention.*

Whether this is fair or not (I don't think so), it is no longer, at least as far as licensing goes. Potential infringers have been increasingly incentivized to continue infringing with potential damages greatly diminished (eBay, Seagate, etc.). Now, when an NPE with only a patent and no licenses tries to negotiate with an infringer, they will be laughed at (very politely in a form letter, I'm sure) and sent scurrying away.

Telling a patentee to practice the invention is not a good answer, either. What do you say to universities and research institutions who are not in the business of practicing their inventions? Practice, or else? Become a for-profit business? If you do that, you add the large costs of commercialization to your budget, and then you can't afford to do the research in the first place. What do you say to individual inventors who can't afford to practice their inventions because they don't have the money and they can't get funding? Sell it to a corporation? Take your patent and your invention to them and, if it's good enough, someone will buy it? Oh, oops, you haven't practiced or licensed your invention, so (*polite chuckle*) get on outta here, you crazy kid. That patent you're waiving at us? Worthless.

Posted by: Obvi | [Jan 05, 2011 at 03:38 PM](#)

I know I produced a program registration system for bill gates in 1990. I wonder how the australians got a hold of it this will probably be another rip like the wireless laptop computer I invented Is there an attorney in the house.

Posted by: Michael R. Thomas | [Jan 05, 2011 at 03:57 PM](#)

I am in TOTAL agreement with what Jay said, and am glad that he, rather than I, went to the trouble of writing it.

I've just finished going through the decision's analysis of the 25% rule. I found the analysis to be cogent and well-supported, as though it was written by an overly-eager new clerk. The reasoning was sound, the conclusions just, and the citations exemplary.

Nice work by everybody--finally, some rationality in patent law! Thanks even have to go to MS for raising the issue directly; it was yet another of those things that I couldn't believe still existed in patent jurisprudence.

I haven't yet read the entirety of the decision, but even though the part I read deals more with evidentiary concerns than with substantive patent law, it was a breath of fresh air.

Paul Cole, are you listening?

Posted by: Inviting Body Punches | [Jan 05, 2011 at 04:07 PM](#)

"Potential infringers have been increasingly incentivized to continue infringing with potential damages greatly diminished (eBay, Seagate, etc.)."

And I'm glad. I've noticed the value in products rising of late, I had wondered what in the world might have been causing it. Lo and behold the reason!

"they will be laughed at (very politely in a form letter, I'm sure) and sent scurrying away."

Look on the bright side, they used to tar and feather scammers.

"Telling a patentee to practice the invention is not a good answer, either. What do you say to universities and research institutions who are not in the business of practicing their inventions?"

Get someone to practice for them? I note that many of my old university professors and professors I knew had a side business.

"If you do that, you add the large costs of commercialization to your budget, and then you can't afford to do the research in the first place."

Oh please. Like they couldn't either sell the rights to someone else so they could make a business or get venture capital for their own. Jeez. What a bunch of babies.

"What do you say to individual inventors who can't afford to practice their inventions because they don't have the money and they can't get funding?"

They should work on their biz skillz? I don't know why you think the patent system should be a crutch for those without business skills. It is almost as if you're against the american way.

Posted by: 6 | [Jan 05, 2011 at 04:08 PM](#)

"What do you say to individual inventors who can't afford to practice their inventions because they don't have the money and they can't get funding?"

This is the funniest thing I've read here in a couple weeks.

Posted by: Malcolm Mooney | [Jan 05, 2011 at 04:19 PM](#)

@6:

I think you're trivializing how hard it is to start your own business or get VC funding. I've tried. It probably would have been significantly easier if I had a patent in hand. But now -- and this was one of my points -- I don't think that's the case.

They should work on their biz skillz? I don't know why you think the patent system should be a crutch for those without business skills. It is almost as if you're against the american way.

I just cried an eagle-shaped tear that exploded in red, white, and blue fireworks when I wiped it away. Then I killed an immigrant trying to illegally cross the border.

The patent system isn't supposed to discriminate between those who can successfully market their inventions and those who can't. It's supposed to reward invention. If you think otherwise, you clearly haven't met many inventors.

Posted by: Obvi | [Jan 05, 2011 at 04:22 PM](#)

Obvi--

Practicing or licensing the invention are two ways to generate facts that can be admitted into evidence, but are not the ONLY potential source of evidence.

In this case, Gemini (the expert) (is that his real name?) offered no testimony whatsoever to relate the 25% rule to the specific facts of the case. He didn't testify as to any basis for Goldscheider's or Degnan's observations--maybe if he had, there might have been at least some factual bases that had counterparts in the instant case, on which basis his expert testimony could have been admitted--but there was no such testimony offered.

The problem is this: if there was only very limited factual commonality, that would likely go to the weight to be accorded to his testimony, rather than to admissibility. How could the court assign that weight, in a situation where the testimony advocates a 25% "starting point"?

Does the court accept the 25% starting point, and then modify the starting point according to the relative strength of the infringing defendant's evidence? Does the court not accept it at all? If not, where DOES the court start?

If, IF there is some factual correspondence between Goldscheider/Degnan/etc. and the instant case, I would favor the approach of using the 25% starting point, and having the infringer move it from there by adducing his own evidence. If the patentee is not able to introduce any admissible evidence, the default should be zero%.

Anyway, nobody is telling patentees that they MUST either practice or license, only that that might provide the evidentiary gold standard for a damages assessment. I think Jay was being a bit hyperbolic in his last sentence, but I agree wholeheartedly with his basic sentiment.

Posted by: Inviting Body Punches | [Jan 05, 2011 at 04:25 PM](#)

Malcom;No malcom not funny very tragic big business controlls all the previous art its a monopoly if they dont beat you in court and steal it originally they will wait you out to get it for nothing. The system is backasswards with the inventor as the fool for even filing.

Posted by: Michael R. Thomas | [Jan 05, 2011 at 04:26 PM](#)

@IBP:

Where does the factual basis come from, though? Industry practice? Apparently, that's not good enough, considering that the license agreements on "PC-related patents" wasn't good enough. It's all good and well if there's evidence of licensing sufficiently related technology, but the whole point of the rule of thumb to begin with is that that information is often unavailable.

Besides, there was a factual basis for using the rule; that about 1/4 of the licensing companies surveyed in 1997 use 25% as a starting point in negotiations. Perhaps this isn't a very strong factual basis -- not tied directly to the facts of the case, but tied to the facts of negotiations generally -- but is it so weak that experts who use it without citing specific facts are automatically excluded via *Daubert*?

I haven't read the articles that Uniloc cites for support of its claim that the rule has "met its share of criticism," but at two of their "three categories" of criticism are not very strong. Failing to "account for the unique relationship between the patent and the accused product" or "between the parties" doesn't mean that the rule isn't a good *starting point*, it just means that these

facts have to be considered when adjusting the baseline 25% (or whatever) rate up or down. Then, if compelling facts aren't considered in the calculus, you get excluded under *Daubert*.

The reason for the existence of the rule is that it is very difficult, sometimes improbable or perhaps impossible, what that first number would be in an arms-length, hypothetical negotiation. Frankly, it's not a very scientific matter. Negotiation strategies are not science, and it's a stretch to even lump them into the realm of economics. That is, they are not very predictable. And that includes where they begin. So what to do? Look around and see what other people are doing, and start from there? And that's what Goldscheider tried to do. But that's not good enough anymore. Now, you can't just look around, but you have to be inside the room with parties who very much resemble the parties to the litigation, see what they do, and do that.

When someone negotiates in real life, the starting point is often essentially a number pulled out of their ass. It's the *act of negotiation*, considering the positions of the parties and many other facts at hand, that get the royalty about where it should be. That's what the Georgia-Pacific factors are for. The CAFC has effectively cut the tongue out of the hypothetical negotiator's mouth.

Posted by: Obvi | [Jan 05, 2011 at 04:59 PM](#)

Ping: *But how does such a (r)emedy - minimum (r)oyalty (r)ate of \$0 - make the holder of the (r)ight whole? Even (or especially) if the (r)ight to exclude lacks a monetary value, how do you propose to make the person whose (r)ight has been violated whole? For arguments sake, let's assume a valid infringed patent. What then?*

Royalties are not about making a patentee whole; royalties are about trading a right to use for money. *Damages*, by contrast, are about making the harmed plaintiff whole. You are confusing royalties with damages.

If the patentee has no damages, then there's no need to worry about making the patentee whole: the patentee was whole the entire time. There's no need to fix what is not broken.

Posted by: Willton | [Jan 05, 2011 at 05:00 PM](#)

Malcolm: *This is the funniest thing I've read here in a couple weeks.*

Okay, let's try it from a different angle. What do you say to the inventor who can't practice (or license) his invention because Microsoft is the only company that would have any realistic use for it, and Microsoft is currently infringing?

IBP: *Anyway, nobody is telling patentees that they MUST either practice or license, only that that might provide the evidentiary gold standard for a damages assessment.*

The impression I'm getting from the Federal Circuit is that either you come up with gold-standard evidence for your reasonable royalty or you can go back to the District Court and try again.

Posted by: IANA E | [Jan 05, 2011 at 05:06 PM](#)

6; requiring indigent inventors to practice the invention or lose it is clearly theft of intellectual property. This should only be enforced where a business has sufficient money and expertise to develop the idea. With noninventor lobbying politicians developing patent reform corruption and a grossly defective patent system will never be corrected.

Posted by: Michael R. Thomas | [Jan 05, 2011 at 05:09 PM](#)

"If the patentee has no damages, then there's no need to worry about making the patentee whole: the patentee was whole the entire time. There's no need to fix what is not broken."

School boy Willton, cepts one thing (oops) - *you* mistake damages as only monetary damages. There are things that are effectively priceless that are still broken. Gee, like maybe the patentee's right to exclude. Or do you think the basic fact of his right to exclude being violated ain't somethin that needs ta be fixed? Let's hear your policy wankin on that tidbit.

Second - Royalties, in the sense being discussed here, *are* directly related to damages. They just be one aspect. So no, I be not confusing royalties with damages. But thanks for so bravely piping in again and showin your ignorance.

Posted by: ping | [Jan 05, 2011 at 05:22 PM](#)

School boy Willton, cepts one thing (oops) - you mistake damages as only monetary damages. There are things that are effectively priceless that are still broken.

And both of you are confusing damages (which is a compensatory *award of money*) with loss or injury. So will you both pipe down now?

Posted by: Cy Nical | [Jan 05, 2011 at 05:26 PM](#)

Cy,

You forgot to say please.

Sides which, I was speakin to school boy in the tone he would recognize. Even takin your tone, it be plainly evident that loss or injury has happened even if ya cannot put a monetary value to that loss. All I be pointin out is that in such cases, there are other forms of remedy (sides "damages") that will make the patentee whole.

Once again, your perfunctory penchant for bein overly "correct" makes ya look like a pomp_ous person sitting on your pole. Lighten up and get with the flow, dude.

The nasally echo of "banana in your tailpipe" rings out.

Posted by: ping | [Jan 05, 2011 at 05:47 PM](#)

Obvi - "When someone negotiates in real life, the starting point is often essentially a number pulled out of their ass."

Well, that's just about the silliest thing I have ever heard. I can assure you that an offerer who came to the table with any number detached from reality would not be at the table very long.

The real problem in this case is that the true valuation of this patent in an arms-length negotiation would be diminishingly small percentage of the total cost of any of the products. Certainly less than a half a percent. The reason is simple: as it relates to the product at hand, the technology brought something unrelated to that which was actually being sold: office software, operating systems, etc. This is decidedly different from a case in which the patent itself covers the product as a whole or some feature that differentiates it from others.

The problem, of course, is that there appears to be a sort of inequity in applying such small royalty rates.

Another problem in cases like this one: contributing the idea is a very small part of the actual cost of implementing a DRM system.

Accordingly, one way to get to the root of damages might be to look at the royalty rates of DRM systems. If the per unit cost to add a fully implemented DRM system like this (e.g., software and all) is \$2.50/unit (and based on volume probably less), for example, you can assume that to be the max per unit price. The license cost is going to be something less than that.

Posted by: mmm | [Jan 05, 2011 at 05:51 PM](#)

IBP *In this case, Gemini (the expert) (is that his real name?)*

Based on my internet research, I think his full name is Gemini Dong.

there was a factual basis for using the rule; that about 1/4 of the licensing companies surveyed in 1997 use 25% as a starting point in negotiations. Perhaps this isn't a very strong factual basis -- not tied directly to the facts of the case, but tied to the facts of negotiations generally -- but is it so weak that experts who use it without citing specific facts are automatically excluded via Daubert?

Uh, "Yes" with a giant capital 'Y'. It's that weak. The question is ridiculous on its face, frankly. How much do these dxmbxss damages "experts" charge anyway? You want to figure out a reasonable royalty, you do the research and figure out what the reasonable royalty is based on actual relevant facts like, gee, I dunno, what are the *actual* royalties that Microsoft and similar companies are paying licensors for software of this type. But let me guess: that research is "hard". BOO HOO HOO HOO HOO!!!!!!

IANAE What do you say to the inventor who can't practice (or license) his invention because Microsoft is the only company that would have any realistic use for it

Easy: "Get a life."

Posted by: Malcolm Mooney | [Jan 05, 2011 at 06:09 PM](#)

mmmm *The problem, of course, is that there appears to be a sort of inequity in applying such small royalty rates [i.e., 1/2 percent].*

Really? To whom exactly does that appear "inequitable" and why? Genuinely curious. If 1/2 percent was used in this case instead of 25%, you end up with an \$11 million dollar damages estimate. That's about 10 million dollars more than the average US citizen earns over his/her entire lifetime. For a single software app that has zero utility to 99.99999% of human beings. Where's the "inequity"?

Posted by: Malcolm Mooney | [Jan 05, 2011 at 06:18 PM](#)

So what do you think about big wheels like gates who get your ideas then wont talk to you or acknowledge your conception or pay you then other people steal it from him then the justice system awards the money from it to the second thefters is that justice.

Posted by: Michael R. Thomas | [Jan 05, 2011 at 06:19 PM](#)

*You want to figure out a reasonable royalty, you do the research and figure out what the reasonable royalty is based on actual relevant facts like, gee, I dunno, what are the *actual* royalties that Microsoft and similar companies are paying licensors for software of this type. But let me guess: that research is "hard". BOO HOO HOO HOO HOO!!!!!!*

OK - try finding that out, and let me know how that goes. My guess: they asked MSFT for licenses, but there weren't any. At least not similar enough. I suppose you think, at that point, they should just pick up the phone and ask MSFT's competitors how much they charge/pay for licenses for similar technology? All this is based on the assumption that such licenses exist at all. Many times, they just don't.

Posted by: Obvi | [Jan 05, 2011 at 06:30 PM](#)

Obvi My guess: they asked MSFT for licenses, but there weren't any. At least not similar enough. I suppose you think, at that point, they should just pick up the phone and ask MSFT's competitors how much they charge/pay for licenses for similar technology? All this is based on the assumption that such licenses exist at all. Many times, they just don't.

And so let's just say \$565 million. LOL.

Posted by: Malcolm Mooney | [Jan 05, 2011 at 06:36 PM](#)

And so let's just say \$565 million. LOL.

Right, because that's exactly what happened.

Posted by: Obvi | [Jan 05, 2011 at 07:03 PM](#)

And so let's just say \$565 million. LOL.

Right, because that's exactly what happened.

To be clear, the "LOLz" is exactly what happened.

Posted by: Malcolm Mooney | [Jan 05, 2011 at 07:11 PM](#)

MM, even a broken clock is right twice a day, and while you are far from the two times daily rightness, you get the right award for the estimate of \$11Mil. It seems reasonable absent a showing that MS actually stole the technology from the "inventor."

Posted by: but what about | [Jan 05, 2011 at 07:15 PM](#)

so lets say 565 million then when I find an attorney then I sue for another 565 million that bandrupts the company or must be past on to the consumers raising prices on everything is that good for the economy. Then say that because they didnt give me the 565 million originally I have to wait another 15 years to get a settlement In then in the mean time the worlds greatest inventor lives in poverty and the nation sinks deeper into a depression because of the lack of inventions that could have been produced if I had the money to expand my business. The company that they award the money to blows it purchasing something that I should already own creating another lawsuit for non payment there. Does this sound like in the best intrests of justice?

Posted by: Michael R. Thomas | [Jan 05, 2011 at 07:17 PM](#)

6:

"I will. Is one of the questions on there about having owned a legit version of windows xp?"

Yes, the state bars ask you if you ever owned a legit version of windows xp. Now, will you start complying with the law? It is funny you want to practice in the IP field but disregard the laws directly related to such field.

Posted by: but what about | [Jan 05, 2011 at 07:20 PM](#)

I think we all should give special heed to the Westinghouse case cited above by Iwasthere. It does seem to endorse a default royalty of 25%. But, more importantly, when the entire value of the thing sold is not due to the patented invention, the burden of proof of apportionment of statutorily mandated damages (in that case, infringer profits) is on the infringer, NOT on the patentee.

I do not know of any recent Supreme Court case that changed these fundamentals. Some here will argue, of course, that Westinghouse was limited to statutory infringer profits as damages, which was legislatively overruled in the '52 Patent Act. I don't think that is a fair assessment. Like the predecessor infringer profit statute, the present statute requires the patentee receive a reasonable royalty. It just doesn't say on what. There is no need, under the statute, to apportion anything. This is the same situation as with infringer profits in the prior statute. The RR seems to be on the infringing apparatus sold with the burden of apportionment being on the defendant infringer, at least according to my read of Westinghouse.

Additionally, Westinghouse does also seem to endorse the 25% rule of thumb royalty.

WESTINGHOUSE ELEC. CO. V. WAGNER ELEC. CO., 225 U. S. 604 (1912)

<http://supreme.justia.com/us/225/604/case.html>

Posted by: Ned Heller | [Jan 05, 2011 at 08:06 PM](#)

"absent a showing that MS actually stole the technology from the "inventor."

Which part of the patent statute can I find this gem?

Posted by: lets make up law now | [Jan 05, 2011 at 09:31 PM](#)

"it is funny you want to practice in the IP field but disregard the laws directly related to such field."

Well, to be fair, the windows XP portion of my life was before I had the slightest interest in practicing on the law. In fact, it was right around the time when my last comp blew up that I decided to look into it.

"Now, will you start complying with the law?"

What makes you think I'm not atm? I have a lot more \$\$\$ now than I had years ago. You know, not all poor arse college kids "pirate" stuff just for shits and giggles and so they can risk getting a virus and blowing up their comp that does work or getting a version that doesn't work well and then having to reinstall another version.

"Yes, the state bars ask you if you ever owned a legit version of windows xp."

I think you're telling a fib, and I think the state bars frown upon fib telling.

The only laws that I know of that I break regularly anymore are traffic laws (and I don't even drive much) and any male on female sodomy laws present in VA (I don't know of any but there might be some).

Posted by: 6 | [Jan 05, 2011 at 09:47 PM](#)

"My guess: they asked MSFT for licenses, but there weren't any. At least not similar enough."

Maybe that's because the value of such a license is 0?

Posted by: 6 | [Jan 05, 2011 at 09:50 PM](#)

"IANAE What do you say to the inventor who can't practice (or license) his invention because Microsoft is the only company that would have any realistic use for it

Easy: "Get a life.""

Coincidentally, I did tell PH almost exactly that when he brought suit against them.

Posted by: 6 | [Jan 05, 2011 at 09:52 PM](#)

It only makes sense that if the monetary value is zero, then the appropriate remedy is an injunction.

I wonder how fast MS would change their tune? Or at least their software.

Let's ask i4i.

Posted by: the right to exclude | [Jan 05, 2011 at 09:55 PM](#)

"I think you're trivializing how hard it is to start your own business or get VC funding. I've tried. It probably would have been significantly easier if I had a patent in hand. But now -- and this was one of my points -- I don't think that's the case.

They should work on their biz skillz? I don't know why you think the patent system should be a crutch for those without business skills. It is almost as if you're against the American way.

I just cried an eagle-shaped tear that exploded in red, white, and blue fireworks when I wiped it away. Then I killed an immigrant trying to illegally cross the border.

The patent system isn't supposed to discriminate between those who can successfully market their inventions and those who can't. It's supposed to reward invention. If you think otherwise, you clearly haven't met many inventors. "

No, on the contrary, it is very hard to get a business up and running with or without outside \$\$\$, especially if you're poor. But then again, doing just about anything to make \$\$\$ is very hard(er) if you're poor.

Don't whine to me about how hard it is to take advantage of the damn near unlimited opportunities in this country.

"The patent system isn't supposed to discriminate between those who can successfully market their inventions and those who can't. It's supposed to reward invention. If you think otherwise, you clearly haven't met many inventors."

You say that, but you have no basis for saying any of it. Discrimination is just fine. And, furthermore, my uncle is an inventor. He wants me to come and invent for him (most likely retaining some of the rights myself). Many of my professors had multiple patents in their names. People who I worked with in industry had plenty of them to decorate their walls. I invent regularly, I even have a little notebook of inventions now. It isn't exactly bursting just yet, but then again, it isn't exactly my day job and I'm still young. "Inventing" is not hard, in most cases anyway. If you think it is, you're just plain uncreative. Not all of us have your affliction. Reducing things to practice and enabling some things is hard, on rare occasions and more so in some arts.

Just about everyone in my extended family has some "idea" they want to patent. Hell, my little sister invented the female urinal (note that this is 102b ed for about a century now, but she didn't know that until I looked for her) I know plenty of "inventors". And I also know the kinds of inventors who are capable of making a buck off of the inventions. My uncle has done it before, and he'll likely do it a few more times before he dies. So did several of my old professors and I'm sure they still are, or at least one of them still is (as long as no students have filed any sexual assault charges like one of my friends was want to).

I'm in on the "inventing" and trolling joke. Don't blab to me about these poor helpless inventors. I know what separates the successful ones that go on to build a business and contribute something from the would bes. And the would bes don't need any gimmies to reward them. I'm sorry, they just don't. I'm also sorry your biz didn't pan out, but that's life. And I don't give a damn if the statute was "supposed" to give them a gimmie or if it wasn't. I have a strong aversion to gov entitlements, no matter their form and I certainly don't like the patent welfare system that is in place, or at least that the Fed Circ. keeps trying to shove upon us. Anything to tear away the welfare portion of the patent system is a good thing imo. Welfare for inventards aka, software authors, scamster trolls, and prophets. Get that sht the f out of my country it is embarrassing.

I note that it is kind of cool that you can cry eagle shaped tears though, perhaps you should start a new business around that.

Posted by: [6](#) | [Jan 05, 2011 at 10:23 PM](#)

Thanks Ned. Glad someone agrees that Westinghouse is a very interesting case. Puts the hot topic issue of apportionment in to a practical light as well.

What do you think of unjust enrichment as the post final judgment theory under which a 'compulsory license' is accounted for in terms of money remedy?

Posted by: [iwasthere](#) | [Jan 05, 2011 at 11:04 PM](#)

Iwasthere, Not much. BTW, how is the court going to decide an ongoing royalty if it does not even award a statutorily mandated RR?

The "old" way of always granting the injunction actually forced prospective licensees to bargain at all stages in "good faith." The "new" system grants big business a virtual get-out-of-jail free card with respect to non competitor patents. They can stonewall negotiatins endlessly, and if actually sued, can litigate to the max knowing that if all else fails, all they will eventually have to pay is a nominal royalty. No real risk of an injunction.

The US patent system is all but gutted with the Unilock decision. In its place has been installed the very familiar "might-makes-right" regime that dominated world history since the dawn of time. To the extent the powerful do not have to follow the law, we have no law. Without law we have no rights. Without rights, we have no liberty. Instead the powerful impose their will by law and get away with murder.

Posted by: Ned Heller | [Jan 06, 2011 at 05:32 AM](#)

The US patent system is all but gutted with the Unilock decision.

Well d@mn. I guess I better brush up on my Wills & Estates law.

Posted by: Cy Nical | [Jan 06, 2011 at 08:00 AM](#)

I just picked me up a piece of blue sky that landed near me.

I would put it up for sale on Ebay, only it seems that there will be a lot more pieces.

Nedo, we can piggy back your thought of "*how is the court going to decide an ongoing royalty if it does not even award a statutorily mandated RR?*" with exclude's thought and *liberally* apply injunctions as remedies, since damages will clearly be insufficient to make the transgressed party whole - the silver lining to the cloud of dollarless damages.

Posted by: ping | [Jan 06, 2011 at 08:57 AM](#)

Cy Nical, perhaps we patent attorneys might give some thought to the future given the trends. I've been around long enough to remember a time when patents were all but a joke because they were hardly ever upheld in courts. The Federal Circuit was created to strengthen the system. But it now seems that the "good old days" have returned given the constant pounding of the system by certain big business litigants coupled with the obvious agendas of certain Federal Circuit judges.

The downhill spiral actually began about twenty years ago with the arrival on the Federal Circuit of a certain judge. Bad decision after bad decision has followed, including, in my opinion, this one.

Posted by: Ned Heller | [Jan 06, 2011 at 11:06 AM](#)

The downhill spiral actually began about twenty years ago

So much for creating a new court to strengthen the system. They got, what, eight years of that before the whole system was subverted into Rader's Crusade of Doom by a single ill-conceived appointment?

Posted by: IANA E | [Jan 06, 2011 at 11:17 AM](#)

"absent a showing that MS actually stole the technology from the "inventor."

Which part of the patent statue can I find this gem?

I think he's talking about treble damages for willful patent infringement, meaning that they copied the invention with knowledge of the patent protection.

Of course, we know that it can also apply in the case where they thought it up all on their own, but then became aware of the patent and went ahead anyway.

But people playing fast and loose with the "stole" word might backpedal and say that's stealing too, and that's what they meant all along. Let's find out.

Posted by: TINLA IANYL | [Jan 06, 2011 at 11:25 AM](#)

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