

## Patent Damages 2015 Primer: Panel Outline

- I. Panelist Introductions – Alan Ratliff
- II. Federal Circuit 2015 Patent Damages Roundup: 10 in :10 – Bo Davis & Alan Ratliff
  - A. *Warsaw/Medtronic v. Nuvasive* (Feb. 2015) (no lost profits on insufficiently functionally-related lost conveyed sales or licensee lost royalties);
  - B. *Astrazeneca v. Apotex* (Apr. 2015) (no apportionment required for combination of improvement and prior art where improvement created entire value of combination);
  - C. *Info-Hold v. Muzak* (Apr. 2015) (court must award prevailing patentee a reasonable royalty even if it excludes patentee’s damages expert);
  - D. *Apple v. Samsung* (May 2015) (design patent damages based on defendant’s profits do not require apportionment);
  - E. *Western Geco v. Ion* (Jul. 2015) (no lost profits for overseas use of patented articles after the sale from the U.S.);
  - F. *Carnegie Mellon v. Marvell* (Aug. 2015) (affirming royalty on estimated foreign sales of products reimported into the U.S. and acknowledging the possibility of royalty on foreign sales based on U.S. design wins);
  - G. *Summit 6 v. Samsung* (Sep. 2015) (jury finding of paid up lump sum affirmed given evidence in record concerning party lump sum licenses and expert testimony concerning lump sums compensating through patent expiration, despite expert damages computations limited to past damages);
  - H. *Nordock v. Poweramp* (Sep. 2015) (damages for design patent improperly limited to cost savings).
- III. Reasonable Royalty: Trends in Apportionment (:15) – Alan Ratliff, Moderator + Panelists
  - A. Use of surveys
    - i. On what topics have you seen surveys used in connection with apportionment issues in patent litigation?
    - ii. What type of survey methodology, question and response issues have arisen in connection with surveys that necessitated pretrial motions and rulings?
    - iii. How have you seen survey information presented to jurors effectively? Ineffectively?
  - B. Role of the technical expert
    - i. On what particular topics have you seen technical expert evidence used in connection with apportionment?

- ii. What have you seen (or what would you like to see) from technical experts that you think was/would be particularly helpful to the trier of fact on damages topics like apportionment?

C. Role of the damages expert

- i. What is the damages expert's role in connection with the apportionment issue?
- ii. What have you seen (or what would you like to see) from damages experts that you think was/would be particularly helpful to the trier of fact?

IV. Lost Profits: Do EMVR and apportionment concepts apply to lost profits? – Bo Davis, Moderator + Panelists (:10)

- A. Panduit 1 – Demand for the patented product: Does this factor require simply showing demand for the patented product, see, e.g., *DePuy Spine, Inc. v. Medtronic* (Fed. Cir. 2009), or the patented feature, see, e.g., *Calico Brand v. Ameritek Imports* (Fed. Cir. 2013)?
- B. Do you have to apportion lost profits? *Ericsson v. D-Link* (Fed. Cir. 2014) quoting *Garretson vs. Clark* (1884): “Indeed, apportionment is required even for nonroyalty forms of damages: a jury must ultimately ‘apportion the defendant’s profits and the patentee’s damages between the patented feature and the unpatented features’ using ‘reliable and tangible’ evidence.”
- C. Does Panduit 2 – Absence of acceptable non-infringing substitutes – already address this issue?

V. Discovery (:10) Bo Davis, Moderator + Panelists

A. Early Disclosures

- i. What have you ordered?
- ii. What seems to have worked to resolve cases sooner?

B. Accelerated/Early Targeted Discovery

- i. What have you ordered?
- ii. What seems to have worked?

C. Is there a tension between streamlined discovery and the increased burden of proving damages?