

How Licensing Affects Patent Damages Apportionment: Part 1

By Laurie Stempler and Dominic Persechini
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In determining a reasonable royalty, damages experts must apportion for the value that the patent at issue contributes to the accused product.

Courts, litigants and experts have long debated how to calculate a reasonable royalty that accounts for the value that the patent contributes and no more. As a result, experts' apportionment methodologies are frequently challenged in motion practice and on appeal.

But when the patentee has entered into a prior license agreement for the patent, can such a license exempt experts from having to perform an apportionment analysis?

This question arose in the briefing of the recent *Apple Inc. v. VirnetX Inc.* petition for certiorari to the U.S. Supreme Court, which was denied. But there is no obvious answer, and numerous factual circumstances affect the analysis.[1]

This three-part article will suggest best practices for considering the apportionment aspect of prior license agreements in a reasonable royalty analysis.

The Applicability of Apportionment to License Agreements

The apportionment requirement dates back at least as far as *Garretson v. Clark*, in which the Supreme Court held that:

the patentee ... must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features.[2]

For well over a century, the U.S. Court of Appeals for the Federal Circuit has upheld the need to apportion for the value of the patent at issue. That requirement also applies to cases in which an expert relies on prior license agreements as the basis of the damages theory.[3]

But some Federal Circuit decisions suggest that a separate apportionment step is not always required for licenses and that some prior negotiated licenses may have apportionment "built in." For example, in *Elbit Systems Land v. Hughes Network Systems LLC*,[4] the damages expert relied on a prior license agreement for the same patent that was at issue in the case, even though the accused system was different from the licensed system.[5]

The expert testified that apportionment was "embedded" in the value of the prior agreement.[6] The Federal Circuit held that the expert's methodology was "consistent with our precedent concerning the apportionment requirement that a royalty should reflect the value of patented technology." [7] To minimize vulnerability to challenges, litigants and experts must examine whether a license agreement requires further apportionment and, if so, to what extent.



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Do Prior License Agreements for the Patents-in-Suit Already Capture Apportionment?

As an initial matter, for license agreements to correctly capture apportionment, they must be comparable to the hypothetical license that is being negotiated. At a high level, comparability depends on (1) whether the prior license agreements contemplate a similar use for the patents-in-suit as the instant case and (2) whether the economic dynamics surrounding the prior license agreements are comparable to the economic dynamics of the instant case.

For example, how similar are the products in the instant case to those that have been licensed in the prior agreements? Is the market for the licensed products reasonably close (e.g., similar in size, geography and composition) to the market that is the subject of the litigation? Do the prior license agreements call for the licensee to pay royalties on sales that are of the same magnitude as those of the instant case?

What drove the parties to negotiate the terms and enter the agreement? Was the impetus something other than simply a desire for a patent license, such as the need to settle a dispute or exchange other business considerations? All of those questions focus on the issue of comparability.

Once a license is deemed comparable, how do we know whether it correctly captures apportionment? We submit that when the most important levers, or elements, of the prior license agreements are so close to the elements of the hypothetical negotiation that no adjustment to the financial aspects of the prior agreements are warranted, such comparable licenses may capture apportionment.

For instance, when the patent-in-suit is also licensed in the prior license agreement, the accused product and the licensed product are identical or nearly identical, and the markets in which the accused infringer and prior licensee operate are identical or nearly identical, the prior license may capture apportionment. Collecting evidence to support those similarities will be key to advancing a successful damages theory.

Importantly, though, if licenses aren't perfect, and they hardly ever are, damages experts may be able to make further quantitative and qualitative adjustments to ensure that the agreements correctly capture apportionment. Suggestions for such further adjustments will be discussed in the final installment of this article.

So, why do we look to prior comparable license agreements to correctly capture apportionment? When two parties are considering how much financial consideration to include as part of a one-way patent license that has no other business considerations, the parties must necessarily consider the relative value of the patented technology to the product that is being licensed.

In instances like the one described above (i.e., identical patent, licensed product and market), the financial consideration contemplated in the license is the apportionment question distilled to its essence. Relative value has to have been considered as part of any such comparable license agreement; otherwise, the parties to the prior agreement would be essentially picking a number out of thin air.

What Role Do Properly Apportioned License Agreements Play in a Georgia-Pacific Analysis?

From a damages expert's perspective, analysis derived from the Georgia-Pacific Corp. v. U.S. Plywood Corp.[8] decision is a cornerstone of calculating damages due to patent infringement. Our experience is that those patent damages analyses tend to begin with a starting point or a collection of starting points. The data points can be the amount of incremental profits that the patented technology generates, the cost savings that the user of the patented technology realizes, or the royalties contemplated in prior license agreements.

These three categories relate to the classic three categories of asset valuation – the income approach, the cost approach and the market approach. Depending on the facts of any particular case, one or all of these approaches may be useful avenues of inquiry for the damages expert.

However, if the facts allow, royalties from properly apportioned license agreements are often the optimal data point and should play a starring role in a Georgia-Pacific analysis. This is true for both plaintiffs and defendants, as either side could potentially have available agreements that are probative and comparable to the agreement being contemplated at the hypothetical negotiation.

Why are properly apportioned license agreements often the optimal data point? To answer that, let's first examine the other two types of data points. Imagine that the cost savings or incremental profit realized by the alleged infringer from using the patented technology has been calculated as part of a Georgia-Pacific analysis.

What proportion of those cost savings or incremental profits should go to the patent holder as a royalty? Whether looking at cost savings or incremental profits, a secondary analysis is required to determine how to share the value between the patent holder and the alleged infringer.

In contrast, properly apportioned license agreements relieve experts from doing such an additional analysis and have the extra benefit of simplifying the damages presentation for the jury. This is because any time money changes hands between two parties, a question, if not the central question, is: "What value is being received for the money being paid?"

This is exactly the dynamic that is present in a licensing negotiation and why the sharing of value is implicit in any financial consideration of the license agreement. Consequently, properly apportioned license agreements are often the optimal data point for a Georgia-Pacific analysis because they have already accounted for the value split between the licensor and licensee.

Litigants and experts need to be prepared for how to approach the reasonable royalty analysis when prior license agreements are part of the record.

Pending further guidance from the courts, parties should ensure that their proffered reasonable royalty fully accounts for the value of the patents-in-suit to the accused product and no more. In other words, to the extent comparable prior license agreements serve as an input to the reasonable royalty analysis, parties should advance damages theories that apportion those prior licenses.

Our next installment will address best practices to elicit documents and testimony helpful to the apportionment analysis as it relates to prior license agreements.

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[1] The Supreme Court denied certiorari on February 21, 2020. *Apple Inc. v. VirnetX Inc.*, No. 19-832 (S.Ct. 2020).

[2] 111 U.S. 120 (1884) (citation and internal quotation marks omitted).

[3] See, e.g., *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1228 (Fed. Cir. 2014) (noting that licensed-based evidence “is relevant and reliable, however, where the damages testimony regarding those licenses takes into account the very types of apportionment principles contemplated in *Garretson*”).

[4] 927 F.3d 1292, 1301 (Fed. Cir. 2019).

[5] 927 F.3d at 1300.

[6] *Id.* at 1301.

[7] *Id.*

[8] *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), mod. and aff’d, 446 F.2d 295 (2d Cir. 1971), cert. denied, 404 U.S. 870 (1971).

How Licensing Affects Patent Damages Apportionment: Part 2

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During discovery, the legal team has the opportunity to obtain evidence that will aid in the use of prior license agreements.

Our **previous Law360 guest article** covered whether prior licensing agreements exempt experts from having to perform a patent damages apportionment analysis. This article focuses on document requests and witness testimony as applicable to the use of prior license agreements in a patent damages analysis.

This information is key to determining damages in patent infringement cases involving prior license agreements, as in the recent high-profile *VirnetX Inc. v. Apple Inc.* matter that ended in March, after a decade of litigation. As in that case, when at least one side is relying on license agreements to support a damages theory, lawyers and experts can expect to dispute issues such as comparability and admissible apportionment methods.

And district courts continue to demand that experts tie such agreements to the value of the patents-in-suit with utmost precision.[1] How can the damages team ensure that a proffered expert opinion based on licenses will withstand scrutiny from opponents and the courts? At a minimum, the team needs to approach discovery with this question in mind so that it gathers sufficient data points to support (or combat) the use of license agreements.



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How should lawyers and damages experts approach license apportionment?

Parties frequently dispute the proper role and usage of patent license agreements in patent damages calculations. How you decide to use existing licenses depends on whether such licenses are favorable to your client.

If they are, you will want to identify as many economic and technological similarities as possible so that you can establish comparability to the license resulting from the hypothetical negotiation. If the licenses are not favorable, you will want to distinguish those licenses from the license resulting from the hypothetical negotiation.

Are the agreements produced through discovery appropriate benchmarks for a royalty? Do they already apportion for the value of the patent-in-suit? Legal teams and damages experts will wrestle with these questions. These questions arise for both plaintiffs and defendants, as the central issues with respect to license agreements are the same: comparability and apportionment.

To address comparability and apportionment for a given agreement, lawyers and damages experts need a keen understanding of why that agreement was executed and the economic dynamics surrounding that agreement. To do this, lawyers must pay particular attention to how to serve and respond to discovery requests, which types of witnesses are most helpful to depose, and what questions to ask those witnesses.

What is the best way to serve and respond to discovery requests for license agreements?

Whether you represent the patent owner or the accused infringer, there is a stock set of documents you should request. First, request documents reflecting a company's overall licensing policies and practices, as this is always relevant to the analysis derived from the Georgia-Pacific Corp. v. U.S. Plywood Corp. decision.

Second, you should request the license agreements themselves. Broad document requests are more helpful here because many agreements, even if not strictly patent license agreements, will include a patent license component.

For example, software agreements and joint venture agreements may also include a license or a cross-license to intellectual property. Phrase the request to ask for agreements that include a patent license to minimize pushback; agreements that are exclusively for other forms of intellectual property or that do not have any intellectual property license at all are unlikely to be helpful.

In addition to requesting the actual licenses, you will need documents and communications that reflect the underlying negotiations for each agreement. Such documents will assist you in determining whether the agreements are comparable and in obtaining information that will help your expert in the apportionment analysis.

For example, if the negotiations reveal that the patent-in-suit drove the deal, the license will likely be a strong data point for your expert. Conversely, if the negotiations show that the licensee was motivated to get access to a service of the licensor unrelated to the patented technology, your expert may assign the agreement less weight.

For license agreements that cover comparable technology, you must understand how the parties determined the financial consideration. The discovery request should therefore identify as specifically as possible what your damages expert will need for the apportionment exercise.

Ask for any negotiation correspondence or documentation in which the parties discussed:

- The scope of the relevant markets;
- The technology of licensed products;
- The licensed product sales;
- The number of patents licensed under the agreement;
- Whether the licensed patents were deemed valid and used;
- Whether the agreement includes any license grant backs;
- Whether there is a cross license or any other IP granted as part of the license;
- The benefit or value of the licensed technology;
- Whether the licensed technology was instrumental to the licensee's business; and
- Whether there are any other obligations or elements of value.

Attorneys should work with damages experts to ensure all relevant documents have been produced and, if not, that additional document requests seek information helpful to the apportionment analysis.

Finally, as we mentioned in our first article, the apportionment requirement does not disappear simply because the damages expert is relying on a prior patent license agreement for the damages analysis. Therefore, collect other categories of documents that will assist

both your technical and damages experts in valuing the accused features and functionalities.

For example, ask for:

- Any financial modeling that went along with the agreements;
- Records reflecting all license payments made under the agreements;
- Customer usage data reflecting how frequently an accused feature is used;
- Consumer surveys reflecting the value that the end user places on the accused feature;
- The costs of implementing the accused features; and
- engineering or marketing documents reflecting the value of the accused features to the overall accused product.

Your experts can use this information to tie the apportionment analysis to the facts of the case, a key step for admissibility.[2]

Of course, your client will need to produce its own license agreements. While you can and should confer with your opponent for clarity, you will almost certainly have to search for and produce any such agreements. Interview an employee with general knowledge of your client's license agreements so that you can investigate whether any helpful agreements exist — you'll want to be aware of such agreements so that you produce them and discuss them with your damages team.

You will have to produce agreements beyond just the one or two that are favorable to your client. If it would be less burdensome on both parties to not produce all licenses responsive to the request, confer with your opponent to reach agreement on appropriate limitations, such as producing licenses dated after a certain date.

Whom should lawyers depose for information helpful to the apportionment analysis, and what key questions should they ask?

To apportion a license agreement, you need to understand what the parties valued as part of the agreement and how the parties arrived at that value. Two types of witnesses that can answer those questions are (1) individuals who were involved in the negotiations and (2) financial analysts.

With respect to the first group, parties often designate Federal Rule of Civil Procedure 30(b)(6) witnesses that may be involved with licensing generally but may not have been involved in the negotiations for a specific license.[3] Therefore, if the damages team and the lawyers identify specific agreements that may be relevant, attorneys should request to depose the individuals that negotiated the agreement.

This is because, to apportion the license, you want to know what was in the parties' minds at the time of the negotiation. Did they negotiate the license out of a necessity unrelated to the value of the technology? What was the basis for choosing a particular form of royalty payment? Individuals with personal knowledge of the negotiations will be better able to answer such questions.[4]

The second type of helpful witness is a financial analyst that performed modeling as part of the license negotiation. This is especially important if the agreement features a one-time lump sum payment: the analyst may have information that will allow the damages expert to calculate an implied running royalty rate.

If you expect a particular license to be helpful to your opponent, ask questions designed to identify all of the economic and technological differences and to identify other value exchanged under the agreement (aside from the license to the patents-in-suit).

On the other hand, for licenses helpful to your client, seek testimony that the patents-in-suit drove the deal. If your expert wants to base his or her theory on a prior license, you will need as much evidence as possible tying that agreement to the patents-in-suit. A broad agreement for several different products, patents, or services will subject your expert's opinion to attack and possible exclusion.

Nevertheless, other agreements may still support your damages theory, so take the time to ask questions about each agreement so that you have the information your experts need to compare them to the hypothetical negotiation license.

When your client receives a 30(b)(6) notice that includes topics on license agreements and their underlying negotiations, it is best to designate an employee familiar with your client's licensing practices and who was involved in negotiating some of the licenses. This is especially important if your client's license agreements are helpful to your damages expert and may form the basis of his or her theory. Such individuals will better understand the drivers of each agreement and may know important information about the deal's context.

During deposition preparation, discuss with the witness the key questions that address how the parties arrived at the financial consideration of the agreement (such as those listed above in the discussion of document requests).

The above suggestions are not exclusive but rather are guidelines to lawyers and experts embarking on apportionment. Thinking ahead about specific ways you will want to use license agreements will assist you in obtaining the right discovery for your case.

After the lawyer has received her opponent's licenses, the experts have helped the lawyer identify the key licenses, and the lawyer has deposed knowledgeable witnesses, it is time for the experts to digest and analyze the information. Our next article will discuss how the technical and damages experts' roles intertwine when analyzing prior license agreements and the important steps in both preparing and challenging expert opinions.

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[1] See, e.g., Mem. Order, Sunoco Partners Marketing & Terminals L.P. v. Powder Springs Logistics, LLC, No. 17-1390, at 13 (D. Del. Jan. 3, 2020); Mem. Op. & Order, Sunoco Partners Marketing & Terminals L.P. v. U.S. Venture, Inc., No. 15-8178, at 37 (N.D. Ill. Jan. 29, 2020). In the Sunoco cases, both courts found that the plaintiff's expert did not sufficiently apportion a supply agreement for the value of the patents-in-suit.

[2] Summit 6, LLC v. Samsung Elecs. Co., Ltd., 802 F.3d 1283, 1296 (Fed. Cir. 2015).

[3] To cover the bases, include topics in your 30(b)(6) notice targeted toward your opponent's licensing practices and the details of specific license agreements.

[4] Consider serving an interrogatory asking your opponent to identify individuals most knowledgeable about the negotiations of agreements of interest.

How Licensing Affects Patent Damages Apportionment: Part 3

By Laurie Stempler and Dominic Persechini
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Our previous two **Law360 Guest articles** addressed the importance of, and reasons behind, apportioning prior license agreements and offered guidance on obtaining discovery to assist experts in apportionment.[1]

But discovery alone does not guarantee that a damages theory grounded in prior license agreements will be both defensible and impactful. Another key component for a successful damages theory based on prior licenses is support from the technical expert. In particular, the technical expert can help the damages expert identify comparable agreements and can offer a technology-based methodology for apportioning the license fee.



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Such opinions from the technical expert, when properly tied to the facts of the case, can help protect the damages expert's opinion from exclusion. Such was the case in *Finjan Inc. v. Cisco Systems Inc.* in the U.S. District Court for the Northern District of California, in which the court recently denied a motion to exclude the damages expert's royalty base and apportionment opinion based on feature count, noting that she properly relied on the technical expert's opinion to support her apportionment analysis.[2]



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Of course, to be helpful, the technical expert's opinion must meet the same evidentiary requirements as the damages expert's opinion. Without a sufficient technological basis for the conclusions drawn from prior licenses, the damages expert's apportionment methodology is vulnerable to attack.

For instance, in a recent ruling in *Guardant Health Inc. v. Foundation Medicine Inc.* in the U.S. District Court for the District of Delaware, the court found that, although the damages expert relied on the technical expert's statement that the patents-in-suit were foundational and accounted for at least 50% of the value of the accused products, the technical expert had no factual basis for his 50% figure. As a result, the court granted the defendant's motion to exclude the damages expert's opinion, with leave to serve supplemental reports.[3]

But the utility of the technical expert's opinion goes beyond communicating an opinion to the damages expert. In this article, we explore how damages and technical experts can best work together, with the support of the legal team, to arrive at an apportionment theory for prior licenses.

The damages expert evaluates license agreements for economic comparability and apportionment.

For a license agreement to be informative to a reasonable royalty analysis, it needs to be comparable to the hypothetical license from both an economic perspective and a technical perspective. While the issue of technical comparability falls within the purview of the

technical expert, the damages expert opines on economic comparability and on ways to apportion the license based on its terms.

As an initial matter, if there are license agreements that either: (1) license the patent-in-suit or (2) license technology that is technologically comparable to the patent-in-suit, it is important to consider whether those agreements were negotiated within markets that are similar to the instant case.

As a simplified example, suppose your client entered into a license agreement that licensed baking technology to a small regional bakery at a royalty rate of 5% of sales. Your client's instant case involves a major baked goods manufacturer and the same technology. Is it appropriate to apply the 5% rate to the major manufacturer's sales?

Although this agreement is informative to a royalty rate, depending on the facts of the case, it may be necessary for the damages expert to adjust for the fact that the potential licensee is a larger entity and sells into a larger market than the regional bakery. For example, adjusting the 5% rate down for a volume discount may be appropriate.

In addition to identifying potentially useful prior license agreements and adjusting them for economic comparability to the hypothetical license, the damages expert should also review any license agreements that the technical expert identifies as technologically comparable and determine whether those agreements are economically comparable.

Once the experts have identified comparable license agreements, they should discuss methods for apportioning the financial consideration of those agreements. The key to any apportionment exercise is the isolation of value. Isolation of value applies to virtually all differences between a prior license and the hypothetical license.

For example, if the prior license covers other intellectual property assets and discovery yielded data concerning the value of those other assets, the damages expert can subtract the value of the other assets from the financial consideration of the license agreement to arrive at the implied consideration of the IP at issue.

As another example, if prior licenses cover a family of products or product lines that include, but are not limited to, the products at issue, the damages expert may be able to determine the profits related to the other licensed products and use a ratio of profits for the products at issue to all products as a way to apportion a license agreement.

After making economic adjustments, the damages expert must continue to account for the value of the technology at issue and rely on the technical expert for analysis of technological comparability. The technical expert can also perform analyses that support the damages expert's apportionment analysis and ultimate damages opinion. To the extent that the facts of the case allow, we suggest that the damages expert seek to buttress any apportionment opinion with analysis in addition to input from the technical expert; having a multifaceted apportionment opinion serves to insulate the damages expert from risk under the *Daubert v. Merrell Dow Pharmaceuticals Inc.* standard should the technical expert's apportionment opinion be excluded.

The technical expert supports the damages expert with further analysis of comparability and apportionment.

Supporting the damages expert with testimony and analysis from the technical expert is critical to presenting a defensible, effective damages theory that apportions prior license

agreements. We are not suggesting that the technical expert sit with a stack of agreements, determine comparability and apportionment, and call the damages expert with the results.

Rather, the litigation team should first work closely with the technical expert to discuss each license and the patents and products it covers. When the technical expert has completed his analysis, the litigation team can bring the experts together for a discussion of comparability and apportionment.

The technical expert can help the damages expert analyze prior licenses in two key ways. As mentioned above, the technical expert should review prior licenses for technological comparability. The technical expert will want to examine the subject matter of the licensed patents and compare it to the patent-in-suit. He or she will also want to consider whether the licensed products are comparable to the accused products at issue.

The technical expert can highlight to the damages expert those licenses with technologically comparable patents and products. He or she may categorize the remaining licenses as having less weight due to differences from the hypothetical license, or he or she may recommend eliminating some licenses from the damages expert's consideration in lieu of significant technological differences.

Once the experts have identified a set of economically and technologically comparable licenses, the technical expert can provide a technological basis for apportionment. As described above, the damages expert will likely make economic adjustments on his or her own, but that may not suffice if the licensed patent in the prior agreement is not the patent-in-suit or if the accused technology differs from the accused products in the case.

Therefore, the technical expert should focus on the technological contribution that the patent-in-suit makes to the accused product and articulate the benefits that the patent-in-suit contributes to the accused products. [4]

Often, the document production will contain marketing or strategy documents that assign a value to particular features and benefits of the accused products. Such documents may provide the technical expert one means of determining the value of the patented features.

As another example, by examining the accused products and reviewing data related to the accused features and functionalities, such as consumer survey results, customer usage data, or product performance data, the technical expert can opine on how the value contributed by the patent-in-suit to the accused products compares to the value contributed by other technologies.

Other potential methods for technology-based apportionment include feature counting and forward citation analysis. The facts of each case will lend themselves to these and other methods of apportioning for the claimed technology. The key is to ensure that the technical expert considers and contributes to the apportionment exercise and closely ties his analysis to the facts of the case so that the damages expert has both economic and technological bases for the adjustments she makes to the prior licenses.

In any patent litigation, maintaining consistent positions among the varying aspects of the case is essential. When it comes to relying on prior license agreements, having a technological basis for adjustments made to prior licenses will strengthen the damages expert's report against potential challenges and lend further credibility to the ultimate damages theory.

Therefore, litigation teams should facilitate communication between the technical and damages experts so that they can coordinate and integrate their analyses. Effective integration allows the experts to be consistent with and support one another throughout the case.

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[1] As discussed in our first article, questions about whether a prior license agreement for the patent-in-suit requires further apportionment were briefed in connection with the Apple Inc. v. VirnetX Inc. petition for certiorari, denied in late February 2020. Apple Inc. v. VirnetX Inc., No. 19-832 (S. Ct. 2020).

[2] Order on Daubert Mot., Finjan, Inc. v. Cisco Sys. Inc., No. 17-cv-00072, 14-15 (N.D. Cal. Apr. 17, 2020).

[3] Report and Recommendation, Guardant Health, Inc. v. Foundation Medicine, Inc., C.A. No. 17-1616-LPS-CJB (Apr. 22, 2020), at 36.

[4] Garretson v. Clark, 111 U.S. 120 (1884); Ericsson, Inc. v. D-Link Sys., Inc., 773 F.3d 1201, 1226 (Fed. Cir. 2014).