Patent Infringement: Proving Royalty Damages Amid Increased Court Scrutiny
Use of Licenses, the EMVR, Daubert, Survey Evidence

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Reasonable Royalty Damages

*Daubert, Evidence and Pitfalls*

May 12, 2014

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CAFC Reasonable Royalty Cases
1983-2008
(15% reversal rate due to the patentee’s bad methodology)
CAFC Reasonable Royalty Cases 2009-2013
(48% reversal rate due to the patentee’s bad methodology)
Daubert Challenges

• **Apple v Motorola**
  - *Daubert* challenges only relate to “methodology”
  - Fact issues go to weight not admissibility

• But Federal Circuit affirms *Daubert* challenges based on “bad evidence” not “bad methodology”
    - District court’s exclusion of expert affirmed
    - Fact issues re licenses relied on by expert

• Federal Circuit rejects damages awards on appeal on same “bad evidence”
Georgia-Pacific v. U.S. Plywood
(The most famous case no one has read)

• Georgia-Pacific is not a damages “methodology” itself
• 15 factors which are a non-exclusive list of possible relevant evidence as to reasonable royalty damages under the “willing licensor-willing licensee” methodology
• But the “evidence” often becomes the “methodology”
  • CAFC focus is always on the underlying “evidence”
  • “Bad evidence” equals “bad methodology”
Only Two Georgia-Pacific Factors Deal With Licenses

• Most (but not all) “bad evidence” problems relate to the experts use of licenses

• **Georgia-Pacific** factor 1:
  • “The royalties received by the patent owner for licensing the patent in suit, proving or tending to prove an established royalty”

• **Georgia-Pacific** factor 2:
  • “The rates paid by [the infringer] for use of other patents comparable to the patent-in-suit”
No *Georgia-Pacific* Factor Deals With Third Party Licenses

- *Georgia-Pacific* factors 1 and 2
  - Incorrectly used to rely on licenses between companies not involved in the lawsuit
- *Georgia-Pacific held* third party licenses to be irrelevant
  - “Bare data as to royalty rate and cursory information to the nature of a particular [third party] license (is) gravely deficient in probative value” on the issue of reasonable royalty damages.

*Georgia-Pacific v U.S. Plywood, 318 F.Supp. 1116, 1140*
The CAFC Starts Looking Closely At “Licensing Evidence”

- **Lucent v Gateway**, 580 F.3rd 1301 (Fed. Cir. 2009)
  - Damages award vacated
  - No evidence that the licenses relied on by expert involved similar technology to patented invention

- **ResQNet.com v Lansa**, 594 F.3rd 860 (Fed. Cir. 2010)
  - Damages award vacated
  - No evidence that the licenses relied on involved similar technology to patented technology
    - The patentee’s expert relied on bundled licenses not including the patent-in-suit as “evidence” under GP factor 1.
More “Licensing Evidence” Problems

- **Laser Dynamics v Quanta**, 694 F.3rd 51 (Fed. Cir. 2012)
  - Damages award vacated
  - Running royalty not supported by lump sum licenses without additional proof

- **Wordtech v Integrated Net.**, 609 F.3rd 1308 (Fed. Cir. 2010)
  - Damages award vacated
  - Lump sum award is not supported by lump sum licenses without proof relating to: 1) number of licensed products anticipated by actual lump sum licenses; 2) the nature of those products; 3) how the lump sum was calculated
The CAFC and *Daubert*

- *Power Integrations v Fairchild*, 711 F.3rd 1348 (Fed. Cir. 2013)
  - District court abused its discretion in admitting testimony of patentee’s damages expert
- *Laser Dynamics v Quanta*, 694 F.3rd 51 (Fed. Cir. 2012)
  - Prohibits patentee’s expert from testifying on running royalty theory on remand
  - District court’s exclusion of expert affirmed
    - Licenses relied on were for multiple patents including cross licenses
    - Licenses relied on pre-dated the hypothetical negotiation date by years
    - Licenses relied on were in settlement of litigation
Patent Infringement: Proving Royalty Damages Amid Increased Court Scrutiny

May 12, 2014

Krista Holt
Agenda

1. Daubert Risks and Opportunities
2. Apple v. Motorola
3. Patent Surveys
4. Recent Patent Survey Case Law
Daubert Risks and Opportunities

Guidelines

The following are guidelines for admitting scientific expert testimony:

• Testimony must be based upon sufficient facts or data
• Testimony must be the product of reliable principles and methods
• The witness must apply the principles and methods reliably to the facts of the case
Daubert Risks and Opportunities

Success Rates of Daubert/Rule 702 Challenges

Source: PwC Daubert Challenges to Financial Experts, 2012
Success Rate of *Daubert* Challenges To Financial Expert Witnesses, By Case Type (2000-2012)

- Intellectual Property: 53%
- Fraud: 51%
- Breach of Contract/Fiduciary Duty: 45%
- Discrimination: 44%
- Antitrust: 38%

*Source: PWC, “Daubert challenges to financial experts: A Yearly Study Of Trends and Outcomes”*
Agenda

1. Daubert Risks and Opportunities
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4. Recent Patent Survey Case Law
After concluding that neither party’s damages experts had presented competent evidence from which the trier of fact could estimate the value of a reasonable royalty, Judge Posner ruled that there is no entitlement to sue for nominal (past) damages for patent infringement.

In addition, he concluded that neither party was entitled to an injunction, because (among other things) each claimed that its damages were ascertainable (and in Motorola’s case, that its patents were standard-essential), and if so, an ongoing royalty would suffice.

However, the parties’ failure to present competent evidence as to the amount of such a royalty meant that they were not entitled to recover a prospective royalty.

Apple v. Motorola (No.1:11-cv-08540)(N.D. IL.)
Defendant’s Expectations in “Hypothetical Engagement”

- Would Not Rely on Patent Holder’s Employees/Consultants
  - Biased
- Would Not Rely on Defendant’s Employees/Consultants
  - Wouldn’t Pay the Consultant for What I Already Know
- Reasonable Degree of Certainty
- All Options Considered
Implications in Litigation Context

• Cannot Rely on Fact Witnesses

• Cannot Utilize Findings of Other Experts
  ▪ Posner’s Hypothetical Seems to Assume a Single Expert
  ▪ Jack of All Trades = Master at None?

• How to Judge “Same Approach” Outside Litigation Context?
  ▪ Hypothetical is Atypical
  ▪ What is the Standard?
  ▪ What Could Experts Do to Prove They Meet the Standard?
Apple v. Motorola

Other Implications of Daubert Ruling

Identical Claim Construction

• Scope of Claim Limited in Pre-Trial Conference
• Expert’s Opinion Submitted Earlier
• Invalidated Because it Relied Upon Broader Claim Scope
• Not Allowed to Resubmit Report Because of Faulty Methodology
Apple v. Motorola

Reversal of Judge Posner’s Ruling on Damages

Federal Circuit reversed and remanded the exclusion of Apple’s and Motorola’s damages experts:

- Reversal of exclusion of Apple’s damages expert’s testimony for Apple’s patents
- Affirmation of exclusion of Motorola’s damages expert testimony relying on Motorola’s licensing expert’s testimony; reversal of exclusion of remainder of Motorola’s damages expert testimony
Apple v. Motorola

*Emphasis on Rules 702 & 703 of Federal Rules of Evidence*

- Circuit ruling points to Federal Rules of Evidence as the benchmark to determine admissibility of evidence, together with established case law.

- When applying proper standard for admitting expert testimony, the focus “must be solely on principles and methodology, not on the conclusions that they generate.”

509 U.S. at 595. *In Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)*
Apple v. Motorola

*Emphasis on Rules 702 & 703 of Federal Rules of Evidence*

Rule 702 states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert’s scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.
“...Expert’s methodology is not inherently unsound; rather, it is ‘the product of reliable principles and methods.’ ... [expert] began with an existing product containing features he contended were similar to the asserted features... next [expert] attempted to isolate the value of these similar features by valuing other, non-claimed features of the [device] and subtracting this value... To reach a reasonable royalty, [expert] then compared his resulting royalty to related licenses and rationalized the price differences... in all [expert’s] testimony was the product of reliable principles and methods.

Rule 703 states:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.
Apple v. Motorola

CAFC Affirms Reliance on Other Experts

The district court had also excluded Apple’s damages evidence because Apple’s expert relied upon information provided by a technical expert hired by Apple, based on a hypothetical conversation.

Court of Appeals disagreed: “The district court’s decision states a rule that neither exists nor is it correct. Experts routinely rely upon other experts hired by the party they represent for expertise outside of their field.”

Rule 703 explicitly allows an expert to rely on information he has been made aware of “if experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.”

Fed.R. Evid. 703
CAFC affirmed only the exclusion of Motorola’s damages testimony that was based on Motorola’s licensing expert, but reversed the district court’s exclusion of the remainder of the Motorola damages expert testimony.

“[Motorola’s damages expert] incorporated [Motorola’s licensing expert’s] into her own when she relied on his proposed testimony to opine that the first few patents from a given portfolio would typically command 40%-50% of the entire portfolio rate... here, where a potentially reliable theory is not tied to the facts of the case, the expert testimony is inadmissible.”
“That a party may choose to pursue one course of proving damages over another does not render its expert’s damages testimony inadmissible. Nor is there a requirement that a patentee value every potential non-infringing alternative in order for its damages testimony to be admissible."
“... the district court based its damages analysis on an incorrect claim construction.”

“...the district court erred by not considering the full scope of the asserted claims, questioning the conclusions of Apple’s expert, and substituting its own opinion, rather than focusing on the reliability of the principles and methods used or the sufficiency of the facts and data relied upon.”
District court had agreed with Motorola that “Apple was not entitled to damages because there was ‘no evidence upon which Apple may rely to reliably establish or measure any amount of damages’ for the infringement to the ‘647 patent.”

Court of appeals disagreed: “…A finding that a royalty estimate may suffer from factual flaws does not, by itself, support the legal conclusion that zero is a reasonable royalty.” “If a patentee’s evidence fails to support its specific royalty estimate, the fact finder is still required to determine what royalty is supported by the record.”
Apple v. Motorola
Additional Implications of Ruling – FRAND Licensing

District court had decided that injunctions are *per se* unavailable for SEPs:

“By committing to license its patents on FRAND terms, Motorola committed to license the ’898 to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent.”
Court of Appeals disagrees with this reasoning:

“The Court of Appeals disagrees with this reasoning:

“While Motorola’s FRAND commitments are certainly criteria relevant to its entitlement to an injunction, we see no reason to create ... a separate rule or analytical framework for addressing injunctions for FRAND-committed patents. The framework laid out by the Supreme Court in eBay, as interpreted by subsequent decisions of this court, provides ample strength and flexibility for addressing the unique aspects of FRAND committed patents and industry standards in general.”
But affirms decision to grant summary judgment that Motorola is not entitled to an injunction on different grounds:

“Motorola’s FRAND commitments, which have yielded many license agreements encompassing the ’898 patent, strongly suggest that money damages are adequate to fully compensate Motorola for any infringement.”

“...Motorola has not demonstrated that Apple’s infringement has caused it irreparable harm.”
Apple v. Motorola
Additional Implications of Ruling – FRAND Licensing

But affirms decision to grant summary judgment that Motorola is not entitled to an injunction on different grounds:

“Motorola argues that Apple has refused to accept its initial licensing offer and stalled negotiations. However, the record reflects that negotiations have been ongoing, and there is no evidence that Apple has been, for example, unilaterally refusing to agree to a deal.”
Entire Market Value Rule

• Entire Market Value Rule:
  • Can obtain damages on entire product even though patent only covers a part of the entire product
  • Can obtain damages on unpatented items if patented item and unpatented items are physically part of the same machine or constitute a functional unit
  • *Rite-Hite Corp v Kelley*, 56 F.3rd 1538 (Fed. Cir. 1995) (*en banc*)
    • But the patented feature must be the basis for the customer demand for the entire product
The CAFC Looks Closely At EMVR Support

- **Lucent v Gateway**, 580 F.3\textsuperscript{rd} 1301 (Fed. Cir. 2009)
  - Damages award vacated because no evidence “patent related feature” was basis of “customer demand” for the entire product
- **Uniloc v Microsoft**, 632 F.3\textsuperscript{rd} 1292 (Fed. Cir. 2011)
  - Damages award vacated because no evidence of “customer demand”
- **Imonex v W.H. Munzprufer**, 408 F.3\textsuperscript{rd} 1374 (Fed. Cir. 2005)
  - Affirmed district court’s exclusion of EMVR because no evidence of “customer demand”
- **LaserDynamics v Quanta**, 694 F. 3\textsuperscript{rd} 51 (Fed. Cir. 2012)
  - Affirmed district court’s exclusion of EMVR because no evidence of “customer demand”
The CAFC Sees Other EMVR Problems

- **Marine Polymer v Hemcon**, 672 F.3rd 1350 (Fed. Cir. 2012)
  - Even if the parties agree the EMVR applies, the Federal Circuit still looks at the “customer demand” evidence

- **LaserDynamics v Quanta**, 694 F.3rd 51 (Fed. Cir. 2012)
  - A patentee’s tactic is to use the EMVR to get the infringer’s total sales figures before the jury. The jury thinks any “royalty” is reasonable in view of the total sales figures
  - *The CAFC holds here that disclosure of overall sales figures cannot help but skew the damages for the jury*
Problems With Multiple Patents

- **Verizon v Vontage,** 503 F.3rd 1295 (Fed. Cir. 2007); **Accentra v Staples,** 500 Fed. Appx. 922 (Fed. Cir. 2013)
  - In multiple patent cases, the damages issue gets remanded if some patents are thrown out on appeal, but only a single damages amount was awarded
- **Alexsam v IDT,** 715 F.3rd 1336 (Fed. Cir. 2013)
  - In cases with multiple infringing products, the damages issue gets remanded when some products are found not to infringe
Problems With Multiple Patents

- Separate verdicts?
- Separate analysis for each patent?
  - Are the patents “related” in the USPTO sense?
  - If not:
    - Same hypothetical negotiation date?
    - Same *Georgia-Pacific* factors?
    - Same valuation?
    - Same license evidence?
CAFC’s Comments Can Create Problems

- *ResQNet.com v Lansa*, 594 F.3rd 860 (Fed. Cir. 2010)
  - CAFC merely said that the one settlement license for the patent-in-suit in that case seemed far more relevant than the bundled licenses (not including the patent) that the patentee’s expert relied on.
  - This comment is erroneously later cited by several district courts as holding that settlement agreements involving the patent-in-suit are the most relevant to reasonable royalty damages.
  - This was *not* a holding in *ResQNet*
    - The CAFC did *not* rely on the settlement license in that case.
    - The CAFC in *LaserDynamics v Quanta*, 694 F.3rd 51 (Fed. Cir. 2012) correctly described this portion of *ResQNet* as being “limited” in scope and circumstances, and held that the settlement agreement in its case was the “least relevant” and it was an abuse of the district court’s discretion to admit it.
Licenses In Settlement of Litigation

• Rule 408 of the Federal Rules of Evidence
  • Evidence offering to compromise a claim is not admissible to prove the amount of the claim

• CAFC usually finds such settlement agreements have little weight (only a few listed here):
  • *Deere v Intern. Harvester*, 710 F.2nd 1551 (Fed. Cir. 1983)
  • *Hanson v Alpine Valley*, 718 F.2nd 1082 (Fed. Cir. 1983)
  • *Laser Dynamics v Quanta*, 694 F.3rd 51 (Fed. Cir. 2012)
  • *Whitserve v Computer Packages*, 694 F.3rd 10 (Fed. Cir. 2012)
The Use Of Benchmarks?

- *i4i Limited v Microsoft*, 589 F.3rd 831 (Fed. Cir. 2010)
  - The patentee’s expert relied on:
    - An expensive third-party “benchmark” *stand-alone* product with many features to set the defendant’s projected profit on a *feature* of WORD
    - A survey with 46 responses
    - The “25% rule” resulting in a $96/unit royalty
    - Adjustment for *GP* factors to $98/unit royalty
  - The CAFC affirms saying that the patentee’s damages expert relied on *Georgia-Pacific* but the royalty rate was really set before that
  - CAFC now cites to this case as “approving benchmarks”
The 25% Rule Is Really Dead

- **Uniloc v Microsoft**, 632 F.3\textsuperscript{rd} 1292 (Fed. Cir. 2011)
  - It is inadmissible under *Daubert* and the Federal Rules of Evidence
- **Whitserve v Computer Packages**, 694 F.3\textsuperscript{rd} 10 (Fed. Cir. 2012); **Energy v William Demant**, 697 F.3\textsuperscript{rd} 1342 (Fed. Cir. 2012)
  - “Rule” is inadmissible
- **Douglas Dynamics v Buyers Products**, 717 F.3\textsuperscript{rd} 1336 (Fed. Cir. 2013)
  - District court’s damages award based on the “rule” vacated
Practical Suggestions

• *Daubert* challenges are very important even if unsuccessful at the district court level

• There are two types of challenges
  • The evidence being relied on by the other side’s expert is not relevant without additional, specific evidence
  • The evidence being relied on is inadmissible
Practical Suggestions

• Always challenge the use of licenses if the other side has not provided:
  • *Evidence* the technology is the same
  • *Evidence* the parties are in the same position
  • *Evidence* the format of your damages contention (e.g., lump sum) matches up with your evidence

• Always challenge EMVR, if there is no solid proof that customer demand for the overall product is based on the patented feature.

• Always challenge any use of the 25% rule
Agenda

1. Daubert Risks and Opportunities
2. Apple v. Motorola
3. **Patent Surveys**
4. Recent Patent Survey Case Law
Use of Survey Data Endorsed

“[C]onsumer surveys designed to determine the value of a particular feature or property of a consumer product are a common and acceptable form of evidence in patent cases. Such a survey might well have dispelled the uncertainty . . . ”

“[Apple’s expert] has provided no evidence on which to base an estimate of a reasonable royalty for that program, let alone for the subprogram applicable only to the Kindle application. So far as it appears, the only evidence that could be provided would be consumer-survey evidence; it is much too late for Apple to be permitted to conduct a survey.”

“[Apple’s expert] provided no estimate of how many such ignorant consumers there are, still another question that could be answered within the limits of tolerable uncertainty by a competently designed and administered consumer survey.”

“In sum, Cornell did not provide any more evidence for its consumer demand argument than the type of evidence this court found insufficient during [plaintiff’s expert’s] Daubert hearing…. Cornell did not offer any customer surveys or other data to back these predictive claims.”

“Simply put, Cornell’s failure to connect consumer demand ... to the claimed invention... undermined any argument for applicability of the entire market value rule.”

Judge Rader sitting by designation
Patent Surveys

Use of Surveys Endorsed

Use of survey endorsed during discovery stage:

- Pacing Technologies requested that a survey of Garmin’s customers be used to gather information regarding how Garmin customers interacted with the Garmin website and used the allegedly infringing patented feature.

- Garmin expressed privacy concerns, among others. However, Magistrate Judge McCurine, Jr. reasoned that, since the survey would yield information that only Garmin’s customers possessed, the survey would be allowable.

Patent Surveys

*Used To Address Patent Issues*

Surveys Could Potentially Be Used To Assess:

- **Panduit Factor #1 - Demand**
  - Is the patented feature the main driver of sales?
  - Is the patented feature even known to customers?
  - What concessions (distance, price, etc.) would customers be willing to accept to obtain the patented feature?

- **Panduit Factor #2 - Alternatives**
  - What do customers consider to be alternatives to the patented product or feature?
  - Do customers consider these alternatives to be acceptable? If so, under what circumstances? If not, why not?
  - Which product(s) would customers purchase if the infringing device was not available?
  - What are the price sensitivities of demand for the patented product and any alternatives?
Patent Surveys

*Used To Address Patent Issues*

Surveys Could Potentially Be Used To Assess:

- **Panduit Factor #3 - Marketing Capacity**
  - Are the defendant’s customers aware of the plaintiff’s products?
  - Do customers consider the plaintiff’s and the defendant’s products to be comparable? On what basis?
  - What do customers consider to be the distinguishing features of the two parties’ products?
  - Would customers buy from either the plaintiff or the defendant? If not, why not?
Potential Questions Addressed Through Surveys May Include:

• Georgia-Pacific Factor #5:
  ▪ Do customers consider the plaintiff and the defendant (as well as third-party alternative providers) to be competitors for their business?

• Georgia-Pacific Factor #6:
  ▪ Are purchasers of the patented product influenced to buy other (non-patented) products from the same seller as a result of purchasing the patented product?

• Georgia-Pacific Factor #8:
  ▪ What are the usage rates of this product?
  ▪ How much more would customers be willing to pay for the patented feature?
Potential Questions Addressed Through Surveys May Include:

- **Georgia-Pacific Factor #9:**
  - What products do customers consider to be similar in purpose to the patented product?
  - How do previous products compare to the patented product?
  - Do customers consider those similar products to be acceptable alternatives?

- **Georgia-Pacific Factor #10:**
  - What benefits do customers perceive from the use of the patented products?
  - Which of the benefits identified by customers do they associate with the patented feature?
Potential Questions Addressed Through Surveys May Include:

- Georgia-Pacific Factor #13:
  - Would customers be willing to purchase the alleged infringer’s product without the feature? If so, would a price concession be necessary?
  - What features other than the patented feature are important to the customer?
  - What are the relative weights of importance of those features?
  - What do customers say about the value of the patented feature compared with other features identified as important to the purchase decision?
  - What relative impact does each of the features have on the customers’ purchase decision?
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Patent Surveys

Types Of Surveys And Their Applications

Usage Survey

- Determines the extent to which a patented attribute might be used

Demand Survey

- Determines the extent to which consumers demand the patented feature and would not buy the product without that feature

Conjoint Survey

- Determines consumer preferences by means of selecting between product combinations possessing (or not) patented features and other marketable features
- Can include price as a feature, which can be used to determine relative value between different features
Patent Surveys

*Use Of A Choice Based Conjoint Survey in Litigation*

- The court granted defendant's motion to exclude plaintiff's damages expert's use of another expert's conjoint analysis to determine market share.

- Consumer surveys are **not “inherently unreliable,”** but may become so when the experts (as in this case) “artificially forced” the participants or the data to a desired outcome.

Specifically, the court stated –

"[Plaintiff's expert] had no reasonable criteria for choosing the four non-patented features to test; instead, he picked a low number to force participants to focus on the patented functionalities, warping what would have been their real-world considerations. . . If the conjoint analysis had been expanded to test more features that were important to smartphone buyers (instead of the four non-patented features selected for litigation purposes), then the study participants may not have placed implicit attributes on the limited number of features tested."

*Oracle America, Inc. v. Google, Inc. (Order on March 1, 2012)*
Interpreting a CBC Survey: Willingness to Pay v. Demand

“The Court agrees with Samsung that evidence of ‘the price premium over the base price Samsung consumers are willing to pay for the patented features,’ PX30, is not the same as evidence that consumers will buy a Samsung phone instead of an Apple phone because it contains that feature.”

“... the survey does not measure willingness to pay for products; it measures willingness to pay for features within a particular product amongst consumers who have already purchased the particular product... To establish a causal nexus, Apple would need to show not just that there is demand for the patented features, but that the patented features are important drivers of consumer demand for the infringing products.”

In the TV Interactive Data Corp. v. Sony Corp. case, conjoint analysis was used to estimate the “market’s willingness to pay” (MWTP) for plaintiff’s patented technology as an incremental benefit in defendant’s accused products.

- The estimated MWTP was used as a baseline by plaintiff’s other expert in his calculation of a reasonable royalty rate.
- Criticisms in Daubert motion deemed survey “fundamentally flawed and unreliable,” but Court ruled that defendant’s criticisms were more appropriate for jury consideration.

In the Apple v. Samsung case, a conjoint survey was proffered by the patentee to try to prove there was a nexus between the patent infringement and the irreparable harm, and more specifically to show that the consumers wanted the patented feature. The court found that the survey was not adequate to support the contentions.

“Apple must ‘show that the infringing feature *drives* consumer demand for the accused product.’ ” (quoting *Apple II*, 695 F.3d at 1375) (emphasis added). “[R]ather than show that a patented feature is *the exclusive reason* for consumer demand,” however, “Apple must show *some connection* between the patented feature and demand for Samsung's products.”

*Apple v. Samsung, 2014 WL 976898 (N.D.Cal.)*
Patent Surveys

*Use Of A Choice Based Conjoint Survey In Litigation*

The Court concluded that the survey results failed to show the “requisite causal nexus” between Samsung's infringement and Apple's claimed irreparable harm.

**Criticisms:**

- Survey evaluated relative willingness to pay for features rather than effect on product prices
- Limited features in survey provided insufficient information as to whether any price increase was significant
- Survey inflates the value of the patented features

However, the court denied Defendants’ subsequent motion to exclude the expert’s survey evidence

*Apple v. Samsung, 2014 WL 794328, 976898 (N.D.Cal.)*
The survey failed to establish the Entire Market Value Rule rule because it did not prove that the patented technology was the basis of demand for the software and hardware. The survey focused only on the software and ignored the hardware.

Patent Surveys

Demand And Usage Surveys

“...the surveys do not measure the value of Plaintiff’s technology [Multiband Functionality and small size], but merely measure the perceived consumer value of cell phones with any internal antennas.”

“Survey evidence purportedly demonstrating the value of internal antennas not tied directly to Plaintiff’s [patented] technology...must be excluded.”

Patent Surveys

Demand And Usage Surveys

• Plaintiff’s expert conducted three surveys asking customers and advertisers to rank each of twenty-one features in order of importance. Each feature’s weighted percentage of importance was said to represent the demand for Defendant’s product driven by that feature. Among the features were News Feed; Timeline; Like (external); Friend Request; Personal Profile; etc.

• Based on the survey results, the expert excluded an amount of revenue attributable to the features not causing Defendant to infringe from the royalty base

Rembrandt Social Media, LP v. Facebook, Inc. No. 1:13-cv-158, 2013 WL 6327852
Patent Surveys
Demand And Usage Surveys

• Expert was criticized for calculating the royalty base by using surveys that did not test for the importance of major revenue-producing features, but the court stated that “an expert’s reliance upon some facts but not others is not always cause to exclude such testimony under Daubert... “

• Court concluded that “while the expert may have relied upon an incomplete list of facts in conducting his consumer surveys, such matters could be brought to a jury’s attention ... and expert’s testimony is not excluded on this basis alone”

Rembrandt Social Media, LP v. Facebook, Inc.
No. 1:13-cv-158, 2013 WL 6327852
Patent Surveys
Demand And Usage Surveys

• Plaintiff’s expert “admitted that his survey was just meant to determine the features that most drive Facebook’s usage, and that ‘the link between this [usage] data and the revenue question has to be the subject of a separate analysis.’”

• Plaintiff’s damages expert did not perform this analysis, or explain why the weighted importance of some features to a user directly correlates to a certain percentage of defendant’s advertising revenue

• For this and other reasons, the damages expert’s opinion was excluded in its entirety

Rembrandt Social Media, LP v. Facebook, Inc.
No. 1:13-cv-158, 2013 WL 6327852
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