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MINI-ROUNDTABLE

IP DISPUTES: DAMAGES AND EXPERT WITNESSES



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Christopher Anderson is a partner at StoneTurn. A distinguished IP expert with over two decades of experience as a testifying and consulting financial expert, he provides critical financial analyses and strategic insights in intellectual property, valuation and complex litigation matters, and frequently serves as a testifying and consulting financial expert in high-stakes litigation.

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Mitchell Rosen is a partner at StoneTurn. Leveraging nearly 20 years of experience in economic damages and financial modelling and analysis services for companies, governments and counsel, he specialises in valuation, licensing and economic damages related to IP assets, including patents, trademarks, copyrights and trade secrets.

CD: Why has expert evidence become such a decisive factor in modern intellectual property (IP) litigation?

Rosen: Today's intellectual property (IP) disputes often involve sophisticated and multifaceted technologies that require equally sophisticated economic damages analyses. Courts therefore depend heavily on expert witnesses to explain scientific and technical concepts, evaluate infringement, quantify damages and interpret industry practices across fields such as software, biotechnology, telecommunications and artificial intelligence. Recent court decisions, especially *EcoFactor v. Google LLC*, illustrate how critical expert evidence has become. In *EcoFactor*, the Federal Circuit tightened judicial scrutiny of patent damages experts under Rule 702 and *Daubert*, holding that unsupported licensing assumptions could render testimony inadmissible rather than merely weak but otherwise admissible. The case reinforces that experts must use reliable methodologies grounded directly in documentary evidence and accepted economic principles. As a result, modern IP litigation increasingly turns not only on legal doctrine, but on whether expert testimony survives judicial gatekeeping and persuades judges and juries.

CD: Are damages awards becoming more predictable, or more uncertain, in IP disputes?

Anderson: Damages awards in IP disputes are as uncertain as they have ever been, especially disputes involving patents. Despite the volume of patent damages related case law in the last several years and the recent updates to Rule 702 regarding expert testimony, there are still enough variables in most damages analyses to make handicapping damages awards difficult. Damages experts have attempted to comply with case law developments using several approaches, but there are no formulaic methodologies applicable to damages quantification. Consequently, there is no way to accurately predict how either party will approach the same sets of facts and data to quantify economic damages. Plaintiffs' and defendants' damages calculations may still be separated by tens of millions of dollars. Judges, in turn, face the daunting challenge of interpreting competing damages approaches and deciding which ones satisfy Rule 702, so it is difficult for both sides to predict how courts will rule on damages questions preceding trial.

CD: How are judges' expectations of causation and apportionment evolving in complex IP cases?

Anderson: Apportionment is the central issue in most complex patent infringement cases because it frequently has the largest impact on the amount of damages disputed and because there exists the most case law on the topic. How apportionment should be applied has also been raised in the context of trade secrets misappropriation cases. Judges expect to address apportionment in Daubert motions preceding trial and for it to be a central issue on appeal post-trial. With so many cases involving multicomponent products and services, apportionment continues to be a central damages issue that judges must decide. Causation tends to be the focus of non-patent IP cases for which there are no statutory floors for damages. Plaintiffs must show that defendants' allegedly wrongful actions caused the harm for which it seeks the remedy, and causation has been a central focus of some high-profile cases involving non-patent IP such as trade secrets, trademarks and copyright.

CD: How important is transparency and explainability compared with technical sophistication in damages models?

Anderson: How technically sophisticated a damages model should be varies according to the

audience that must understand the model. At the report and pre-trial stage, more sophisticated models may be needed to satisfy the requirements of the

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*Mitchell Rosen,
StoneTurn*

court related to apportionment, accused sales and other variables salient to IP damages under Rule 702. Once these requirements are satisfied and the case proceeds to trial, explainability is paramount. Even the most complex damages models are typically summarised and displayed to the jury in conjunction with expert testimony as a high-level slide show presentation. In addition to effectively communicating to the jury, an important challenge for both attorneys and experts is to present enough information to the court to create an adequate record without overwhelming the jury with facts and figures. For these reasons, modern damages models

frequently require both technical sophistication and explainability as the case progresses.

CD: How has recent fair, reasonable and non-discriminatory (FRAND) case law changed what ‘good’ comparables analysis now looks like?

Anderson: Recent fair, reasonable and non-discriminatory (FRAND) case law does not change the analysis of comparable transactions for purposes of quantifying damages. What it may add is an additional variable to consider not present when analysing licence agreements not subject to FRAND – that is, the FRAND framework. More specifically, if the comparable licence agreements involved standard essential patents (SEP) subject to FRAND, the presumption is that parties to that agreement complied with FRAND requirements when negotiating the terms. For this reason, a damages analysis involving SEPs may consider licences to SEPs more comparable than licences to patents not essential to any standard. However, comparing all the variables that distinguish comparable licences is not a new concept in patent damages even if the FRAND framework is. In addition, the guidelines promulgated by some standard-setting organisations for evaluating FRAND

royalties are consistent with case law for quantifying patent damages regardless of the context. Like any variable relevant to a comparable licence analysis, the FRAND negotiations framework should be considered.

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CD: What role do expert witnesses play in shaping settlement behaviour before trial?

Rosen: Expert witnesses can heavily affect both a party’s willingness to settle, and the amount for which a case settles. By clarifying the strengths and weaknesses, and likely value, of the dispute, they help each side understand its litigation risk. An expert’s report and testimony often make technical and economic issues easier to evaluate, which can

prompt a reassessment of the case and encourage compromise. A persuasive expert with well-supported opinions may also provide one side with more leverage in negotiation. In contrast, an expert whose opinions are less credible or defensible can reduce settlement pressure by making the other side less willing to concede. Expert analysis can also narrow the disputed issues, making settlement discussions more focused, realistic and productive. The earlier experts become involved in a case, the more they can influence an ultimate settlement by providing early clarity on appropriate damages methodologies, damages quantification and litigation risk, helping parties to reassess their positions and negotiate from a more informed baseline.

CD: How is the internationalisation of IP disputes changing damages analysis?

Rosen: The internationalisation of IP disputes does not change how damages are quantified in the US, but the approaches used by experts in US courts may influence how damages are quantified in other countries. Despite the many differences between the US court system and those in Europe and Canada, for example the Unified Patent Court (UPC) and the Federal Courts of Canada, federal increasingly look to the US system for guidance. For example, US cases have been referenced in both Canada and Europe, especially with respect to patent

damages. However, it remains unclear whether the US and other countries' damages methodologies and approaches will converge in key areas in the future. Experts will increasingly be required to understand damages frameworks and case law in the jurisdictions in which they operate.

CD: What future challenges do you see for damages experts as IP and litigation become more international?

Anderson: It is difficult to predict how internationalisation will impact IP damages and litigation more broadly. Historically, damages have been a more central issue to US IP disputes. However, damages are increasingly becoming a more prominent element in some international venues, like the UPC, though the long-term impact remains to be seen. One thing is clear, though: successful damages experts will be required to adapt and modify their approaches to the ever-changing requirements imposed by courts in both the US and internationally. As the world continues to evolve, those damages experts who are able to stay abreast of the changes and adapt their approaches to them will be best positioned for long-term success. 



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