Published on *The National Law Review* https://natlawreview.com

Sales Projections and a "Litigation Risk Multiplier" Are Fair Game When Assessing Reasonable Royalty Damages

Article By:

Peter F. Snell

Meena Seralathan

A recent decision from Judge Stark, now presiding at the Federal Circuit, endorses the use, by a patent owner's damages expert, of sales projections and a "litigation risk multiplier" in determining reasonably royalty damages. In *Arendi S.A.R.L. v. LG Electronics, Inc. et al.*, C.A. No. 12-1595-LPS, D.I. 358 (D. Del. Apr. 8, 2022), Judge Stark confirmed that a damages expert may rely on such evidence notwithstanding defendants' *Daubert* challenges to the contrary.

Plaintiff Arendi S.A.R.L. ("Arendi") filed patent infringement cases against numerous defendants in 2012 and 2013. Almost a decade later, and after defendants including Microsoft had settled, the remaining defendants sought to exclude certain opinions and testimony of Arendi's damages expert.

First, defendants argued that Arendi's damages expert improperly relied on Arendi's settlement with Microsoft and an estimate of Microsoft's future sales, rather than on actual sales. *Id*. at 11. To calculate a per-unit royalty for the Microsoft settlement, Arendi's expert divided the settlement amount by the number of units sold or expected to be sold. C.A. 12-1602, D.I. 284 at 2. As Patent Owner showed in its opposition to Defendant's *Daubert* motion, Federal Circuit precedent permits experts to rely on sales projections to estimate a future royalty base. *See, e.g., Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371, 1384 (Fed. Cir. 2001). "The fact that a negotiating party did not subsequently meet those projections is irrelevant to that party's state of mind at the time of the hypothetical negotiation." *See* C.A. 12-1602, D.I. 358. Patent Owner also argued that any disagreement regarding the accuracy of the sales projections goes to the weight that should be afforded to the damages expert's opinion, not its admissibility. *See* C.A. 12-1602, D.I. 307 at 1; C.A. 12-1602, D.I. 358 at 12. Considering the evidence and arguments presented, the court denied defendants' request to exclude the opinion.

Second, defendants argued that Arendi's expert improperly considered, as part of the hypothetical negotiation related to reasonable royalty damages, the potential litigation risks and uncertainty that the parties would face. *See* C.A. 12-1602, D.I. at 5. For example, Arendi's expert calculated a litigation risk multiplier by determining what the patent owner's reasonable perception of risk would have been based on, for example, its prior litigation history. *Id.* at 5, 12. Arendi's expert then increased the per-unit royalty that was derived from Arendi's prior settlements by this litigation risk

multiplier to determine the reasonable royalty damages that the expert opined should be recoverable against the remaining defendants in the litigation. *See id.* As Patent Owner noted, courts have allowed damages experts to factor the risks of continuing litigation into a reasonable royalty calculation. *See id.,* at 12-13 (*citing Spectralytics, Inc. v. Cordis Corp.*, 649 F.3d 1336, 1347 (Fed. Cir. 2011); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016); *Robocast, Inc. v. Microsoft Corp.*, No. 10-1055-RGA, 2014 WL 202399, at *3 (D. Del. Jan. 16, 2014); *Saint Lawrence Commc'ns LLC v. ZTE Corp.*, No. 2:15-CV-349-JRG, 2017 WL 679623, at *2 (E.D. Tex. Feb. 21, 2017)). The court again denied defendants' request to exclude the expert's opinion based on the evidence and arguments presented.

Arendi serves as a useful reminder that damages experts have a number of tools at their disposal, including reliance on sales projections and analysis of litigation risk, to support their reasonable royalty opinions.

National Law Review, Volume XII, Number 119