REAL HYPOTHETICAL NEGOTIATIONS

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Abstract

Patent law's prevailing method for awarding reasonable royalties relies on a "hypothetical negotiation" framework that asks what royalty a willing licensor and licensee would have agreed to at the time infringement began. In practice, this approach has devolved into a battle of paid experts who manipulate the same evidence to reach dramatically different conclusions, often diverging by orders of magnitude. The current system's reliance on the unwieldy fifteen-factor *Georgia-Pacific* test, combined with inadequate judicial oversight and jury decision-making limitations, has transformed what should be a reliable proxy for market behavior into a stylized fiction used for strategic advocacy.

This article proposes replacing the current hypothetical negotiation framework with "real hypothetical negotiations." Under this proposal, an expert would engage industry professionals to conduct simulated negotiations. Rather than relying on retroactive expert predictions, this approach would ground royalty determinations in observed negotiation behavior, providing empirically based outcomes that better reflect authentic market dynamics. The proposal also describes several potential enhancements to improve reliability and reduce bias: 1) blinded negotiation experts who supervise the simulations without knowing which party retained them, or alternatively, 2) court-appointed neutral negotiation experts to oversee the negotiation process. Under either approach, simulations could be conducted multiple times with different participants to address outlier results and improve statistical reliability, adding robustness to the basic methodology.

To test this proposal, the article will also discuss the results of a planned pilot study based on *Summit 6 LLC v. Samsung Electronics Co.*, where opposing damages experts reached dramatically different conclusions ($29 million vs. $1.5 million). Law students will negotiate using the same materials that damages experts in the real case relied upon. A survey will then measure quantitative outcomes and ask qualitative questions to better assess how well the simulation works in practice.

Real hypothetical negotiations promise less biased royalty determinations by replacing paid expert testimony with actual bargaining behavior. Moreover, by providing negotiators with complete information, including both pre-infringement and post-infringement information, the methodology attempts to capture the true value of a patent's technological contributions. This approach also offers flexibility to address the criticism that some *Georgia-Pacific* factors allow value from patent holdup to inflate the final damages award. Future implementations could systematically exclude or modify information to remove patent holdup value from the negotiation. In sum, this proposal offers an immediate improvement over the current system while offering a flexible framework for continued refinement of reasonable royalty determinations.