Real Hypothetical Negotiations

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Reasonable Royalties

35 U.S.C. § 284 - Damages

. . . shall award the claimant damages adequate to compensate for the infringement, but in no event less than **a reasonable royalty . . ..**

Hypothetical Negotiation

Timing - just before the infringement began.

Assumptions - patent is valid and infringed.

Georgia-Pacific – kitchen sink of 15 factors guide the analysis,

Post-infringement information: generally excluded, unless it provides insight into the value of the patent at the time of negotiation (i.e. the "Book of Wisdom" doctrine).

Problems with Current Approach

Confusing Framework: 15 unprioritized, overlapping factors

Expert Manipulation: Same data → vastly different conclusions

Inadequate Judicial Oversight: Daubert under-enforced in patent cases **J**

Jury Limitations: Susceptible to anchoring effects and psychological biases

Proposal: Real Hypothetical Negotiation

Core Concept: Industry professionals conduct simulated negotiations using real case materials

Grounded in Reality: Observed negotiation behavior vs. retroactive expert predictions

Same Evidence: Use actual litigation materials under controlled conditions

Authentic Dynamics: Real bargaining pressures, not litigation incentives-

Three Potential Enhancements

Blinded Experts: negotiation expert doesn't know which party hired them

- Eliminates conscious/unconscious bias
- Research shows improved credibility with juries

Neutral Expert: Fed. R. Evid 706 neutral oversight

- No adversarial loyalties
- Independent analysis of results

Multiple Rounds: Different participants, statistical reliability

- Address outlier results
- Generate distribution of outcomes

Information Framework Decision

Issue: Mirror pre-infringement limitations OR provide full information?

Recommended Approach: Complete symmetrical information because:

- Promotes innovation by capturing true technological value

- Reflects actual litigation conditions (both experts get discovery)

- Avoids gamesmanship over information exclusions

Planned Pilot Test: *Summit 6 v. Samsung*

Case Background:

- Patent on MMS photo compression technology
- Expert Disagreement: $29M (plaintiff's usage-based model) vs. $1.5M (defendant's comparable licenses)
- Jury Result: $15M award (compromise between expert positions)

Simulation:

Law Students in negotiation class will pair off and be asked to arrive at reasonable royalty.

Potential Additional Work

Testing Juror Reactions to Real Hypothetical Negotiations vs. Traditional Expert Testimony

Mock jurors evaluate identical patent case under two conditions:

- Traditional: Dueling experts provide *Georgia-Pacific* analysis.

- Real Hypothetical: Jury hears simulated negotiation results.

Key Questions:

- Do jurors find real negotiations more credible than expert predictions?

- Which approach produces more consistent damage awards? (i.e. less variable)

Thank you

Questions and comments please.