

Do Patent Juries Punish?

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Patent law has two primary theories underlying the different types of damages it awards. First and foremost, both lost profits and reasonable royalty awards are designed to fairly compensate patentees for any actual damages the patentee suffers due to infringing activity. But patent law also allows for courts to impose punitive damages under 35 U.S.C. § 284. Under that statute, a judge can treble compensatory damages to punish infringers for willful infringement. Examples include copying the patented technology or acting in reckless disregard for the patentee's rights. Importantly, patent law divides damages decision-making between the jury and the court. Compensatory damages are typically determined by juries. They also determine whether the case is eligible for enhanced damages. But the trial judge determines whether enhanced damages are warranted, and if so, what the multiplier should be.

Based on findings from our prior work on damages, the authors hypothesize that juries in patent cases may not be following the instructions they are given when deciding lost profits or reasonable royalties. Rather, juries may often consider damages as a kind of punishment and will assess damages with that goal in mind. If this is true, juries may be systematically awarding punitive damages for essentially the same reason judges are supposed to enhance damages under § 284. This may be happening even when there has not been a finding of willfulness. Moreover, when enhanced damages are called for, judges are deciding the multiplier outside the jury's presence. In these cases, juries may still be implicitly awarding punitive damages at the same time, resulting in a kind of double recovery.

This abstract sketches out a potential experiment to test these theories. First, we plan to create different versions of the same patent infringement vignette. While all the scenarios will have precisely the same evidence of infringement and damages, the vignettes will be manipulated in two dimensions. First, we will vary the degree of the defendant's fault: 1) blatantly copying patented technology (blameworthy); 2) generally aware of plaintiff's patent and created a slightly different design (possibly blameworthy); or 3) independently developed the accused product (not blameworthy). If jurors award higher levels of compensatory damages in conditions 1) and 2) than condition 3), we suggest this shows juries are punishing the defendant.

Second, we will vary the jury instructions to either: A) ask the jurors to award reasonable royalties alone; or B) ask the jurors to award both reasonable royalties and punitive damages, a category that does not exist under current law. We will then compare both the total damages and compensatory damages in conditions A) and B). Logically, the compensatory damages should be essentially the same in both conditions and the total damages in condition B) should be equal or larger than that in condition A). However, others have already shown that juries don't divide damages into neat categories. Given only one choice (compensatory damages), we suspect that jurors, nonetheless, will award both punitive damages and compensatory damages. But when they are presented with both choices, they will try to roughly allocate damages to the correct categories. If that is true, we would expect that compensatory damages in condition B) will be smaller than that in condition A) and that the difference will be found in the punitive damages category in condition B). This is another way to show that punitive damages are already being awarded under the guise of compensatory damages. We invite comment on our planned approach.