CRA Insights: Intellectual Property

CRA Charles River Associates

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CRA Insights: Intellectual Property is a periodic newsletter that provides summaries of notable developments in IP litigation, particularly in the areas of economic damages and valuation.

Sprint Communications Company LP v. WideOpenWest, Inc. et al., Case No. 1-18-cv-00361 (US District Court of Delaware)

Plaintiff Sprint Communications filed lawsuits against five defendants (Charter Communications, Inc., et al.; Mediacom Communications Corp.; WideOpenWest, Inc., et al.; Atlantic Broadband Finance, LLC, et al.; and Grande Communications Networks, LLC, et al.) alleging that their Voice-over-IP (VoIP) systems infringe nine US patents related to VoIP technology.

On March 16, 2021, in response to defendants' *Daubert* motions to exclude the expert testimony offered by Sprint's damages expert, US District Judge Richard G. Andrews in the US District Court for the District of Delaware issued an order:

1. granting defendants' motion to exclude the expert's *Georgia-Pacific* reasonable royalty calculation to the extent it relies on jury verdicts and settlement agreements;
2. denying defendants' motion to exclude the expert's lost profits analysis under *Panduit* Factor 3;
3. denying defendants' motion to exclude the expert's "analytical approach" analysis for determining a reasonable royalty;
4. denying defendants' motion to exclude the expert's royalty rate analysis specific to one of the patents-in-suit; and
5. denying defendants' motion to exclude all of the expert's damages opinions for failure to apportion.

On March 16, 2021, in response to Sprint's Daubert motion to exclude the expert testimony offered by Charter Communications, Inc.'s damages expert, Judge Andrews issued a separate order denying Sprint's motion to exclude the expert's "IP Share Approach" apportionment analysis.

March 16, 2021 Order Concerning Sprint's Damages Expert

Regarding the expert's *Georgia-Pacific* royalty opinion, the defendants argued that the expert's reliance on information from prior jury verdicts and settlements to calculate a reasonable royalty should be excluded. The expert opined that the hypothetical negotiation would "heavily consider" jury verdicts and settlement agreements and concluded that the hypothetical negotiation would result in a reasonable royalty of at least $1.37 per subscriber per month. Judge Andrews granted the defendants' motion and excluded any portion of the expert's analysis that relies on jury verdicts and settlement agreements, ruling that (1) the jury verdicts and settlement agreements "[were] not relevant when they occurred after the date of the hypothetical negotiation, as the hypothetical negotiation occurred not 'on the heels' of the settlement agreements and jury verdicts, but before them" and were therefore "excluded as irrelevant for all defendants whose dates of the hypothetical negotiation preceded the respective dates of the prior jury verdicts and settlement agreements;" (2) the jury verdicts were also excluded for all defendants because "they are not evidence from which a hypothetical negotiation can be reliably determined." Judge Andrews ruled that the jury verdicts represent "at best, an informed lay opinion" which is not a reliable basis for determining the reasonable royalty rate in a hypothetical negotiation; and (3) the settlement agreements were excluded because "[t]here is minimal probative value in using litigation settlement agreements to calculate a reasonable royalty, as the settlement agreement is not comparable to a negotiation between two willing parties," and the minimal probative value "is even less, where, as here, the settlement agreements occurred years after the hypothetical negotiation."

Regarding the expert's lost profits analysis under *Panduit* Factor 3, the defendants argued that the expert's analysis of manufacturing capacity was unsupported because he did not perform any calculations to show that Sprint had the capacity to handle the increase in subscribers it claimed as lost. Citing Federal Circuit precedent, Judge Andrews denied the defendants' motion, ruling that the expert appropriately relied on evidence other than calculations (deposition testimony and interviews with Sprint's executives, as well as Sprint's internal financial documents) to reach his conclusion that Sprint had the capacity to supply the accused services.

Regarding the expert's "analytical approach" analysis for determining a reasonable royalty, the defendants argued that, in reaching his royalty conclusion, the expert arbitrarily allocated to Sprint 100% of the cost savings he calculated from the defendants' use of VoIP technology. Citing Federal Circuit precedent, Judge Andrews denied the defendants' motion, ruling that the expert's analytical approach was appropriate because his analysis follows an accepted approach in which the infringer's usual net profit is subtracted from its anticipated net profit realized from sales of infringing products.

Regarding the expert's standalone royalty rate analysis for the enhanced services patent (one of the nine patents-in-suit), the defendants argued that the expert's reliance on pricing from non-party,Time Warner Cable, was improper. The expert relied on Time Warner Cable's pricing to determine that 9% (or $0.12 per subscriber per month of the $1.37 royalty rate he previously calculated for all the patents-in-suit) of the total value of the patents-in-suit was attributable to the enhanced services patent. Judge Andrews denied the defendants' motion, ruling that the precedent rulings cited by the defendants were not comparable to the issues in this matter. He further ruled that using Time Warner Cable's pricing to assess the value of the services covered by the enhanced services patent is reliable because the expert established "that it was not uncommon for service companies to prepare financial reports and predictions based on figures from competing companies."

Finally, Judge Andrews denied defendants' motions related to claims that the expert failed to properly apportion in each of his damages analyses. First, the defendants argued that the expert failed to apportion his lost profits analysis because the wholesale VoIP transactions he claimed were lost included services beyond the patented technology. Citing Federal Circuit precedent, Judge Andrews ruled that the expert's "lost profit analysis is properly apportioned and tied to the value of the patented methods" because his analysis of the first two *Panduit* factors showed that the demand for the product was tied to the patented features. Second, the defendants argued that the expert failed to apportion his calculated cost savings under his “analytical approach” analysis for determining a reasonable royalty and that the expert did not explain why all of the calculated cost savings were due to the patents-in-suit. Judge Andrews ruled that the expert’s “analytical approach appropriately apportions the cost savings” because his analysis included a sufficient explanation of apportionment and because his comparison of the two systems he analyzed apportions out other differences unrelated to VoIP. Judge Andrews also ruled that the expert established that the only meaningful difference between the two compared systems was the profit margin of VoIP specifically. Third, the defendants argued that the expert “does not explain why his calculated royalty of $1.37 per subscriber per month satisfies the entire market value rule or why the settlements and jury verdicts upon which he relies are attributable to” the patents-in-suit. The defendants also argued that the expert did not apportion the royalty base and did not exclude activities that are not infringing. Citing Federal Circuit precedent, Judge Andrews denied the defendants’ motion, ruling that a *Georgia-Pacific* analysis, when properly applied, embodies apportionment principles.

March 16, 2021 Order Concerning Charter Communications, Inc.’s Damages Expert

As part of her expert testimony on behalf of Charter Communications, the expert set forth an “IP Share Approach” apportionment analysis, which used two apportionment methods: (1) numeric proportionality and (2) skewed distribution of value. Sprint argued that the expert’s approach should be excluded for several reasons discussed below.

First, Sprint argued that the expert’s numeric proportionality and skewed distribution of value methods should be excluded because they represent an impermissible “top-down” approach “to a nebulous grouping of patents she has determined to be ‘relevant to VoIP.’” Judge Andrews denied the defendants’ motion because he disagreed that the expert’s analysis was a “top-down” approach. He ruled that, instead, the expert’s analysis “[was] an apportionment analysis that is tied to the facts of the case[.]”

Next, Sprint argued that the expert’s application of a numeric proportionality analysis was improper because it assumed that every patent “relevant to VoIP” was automatically comparable and had equal value. Judge Andrews denied the defendants’ motion, ruling that the expert’s numeric proportionality analysis did not assume that all patents relevant to VoIP are equal. Rather, the expert first showed that “Sprint’s patents are less equal” using a forward citation analysis, “but then [gave] Sprint the benefit of the doubt in making a calculation based on an assumption of equality.”

Next, Sprint argued that the expert’s skewed distribution of value analysis was unreliable because it “misapplie[d] [research findings] and is not tied to the facts of the case.” The expert’s distribution analysis applies research findings that the top 1% of electronics patents account for 24% of the total value of the patents in the group. In her analysis, the expert assumed that the patents-in-suit were in the top 1% of patents relevant to VoIP and apportioned the value of the patents-in-suit from all patents relevant to VoIP. Sprint argued that the expert assumed that the research findings applied to any “electronics” field in any country at any time, despite the fact that the research article did not suggest that the research findings would apply to other sets of patents. Sprint also argued that the expert “‘stretches the conclusions of the study too far’ by assuming that the value of the top 1% of patents is 24% of the value of the group and that the 24% is spread equally among all patents in the top 1%.” Citing precedent and other research studies that showed similar results, Judge Andrews denied the defendants’ motion, ruling that the expert “applies an accepted rule, the skewed distribution of patent value” and that the research findings were “a reliable source for [the expert’s] skewed distribution of value analysis… [and the research findings are] a source of the type upon which a damages expert would be expected to rely.”

Bayer Healthcare LLC v. Baxalta Inc., Baxalta US Inc., and Nektar Therapeutics, Case: 19-2418 (Federal Circuit 2021)

On March 1, 2021, the US Court of Appeals for the Federal Circuit (CAFC) affirmed the US District Court for the District of Delaware's denial of defendants Baxalta Inc. and Baxalta US Inc.'s motion for judgment as a matter of law or a new trial. In the district court case (No. 1:16-cv-01122-RGA), Bayer accused Baxalta and Nektar Therapeutics of infringing U.S. Patent No. 9,364,520 via Baxalta's Adynovate® product used to treat hemophilia A. A jury found the patent valid and infringed, and awarded Bayer $155,190,264 in damages based on a royalty rate of 17.78%.

The damages-related issues brought up in Baxalta's motion for judgment as a matter of law or a new trial were focused on Bayer's damages expert's opinion that the parties to the hypothetical negotiation would agree to a royalty rate within a range of 5.1% to 42.4%. Bayer's damages expert determined the royalty rate range based on Baxalta's maximum willingness to pay (its incremental profits on Adynovate®) and Bayer's minimum willingness to accept (its profits lost as a result of licensing Baxalta).

Before the District Court trial, Judge Andrews granted a *Daubert* motion against Bayer's damages expert which prevented him from testifying that a 50-50 royalty split was appropriate to apply to his royalty rate range because he did not tie such a split to the facts of the case. However, Judge Andrews denied Baxalta's request to prevent the expert from testifying to the range of royalty rates altogether. In its appeal to the CAFC, Baxalta argued that the expert should not have been permitted to testify that his entire range of royalty rates was reasonable because such an opinion was not in his expert reports, that the district court erroneously allowed Bayer to ask the jury to pick a royalty rate within the range, and challenged the jury's determination of the amount of damages.

The CAFC found that the expert's opinion that any royalty rate within his range was "a feasible outcome to the negotiation" was stated in and consistent with his reply expert report. Further, the CAFC held that "[w]hile an expert must use a reliable methodology for determining the range of possible hypothetical negotiation royalty rates, we are aware of no precedent that requires an expert to provide a single proposed royalty rate." The CAFC noted that Bayer's expert "considered and discussed the appropriate *Georgia-Pacific* factors at length," explained "the concept of the hypothetical negotiation and determining maximum and minimum points in a range," and explained "how he applied the hypothetical negotiation analysis and determined the specific end points of 5.1% and 42.4%." The CAFC also noted that Baxalta was able to cross-examine Bayer's expert on the methodology he employed and to present its own damages case via its expert, who opined to a 1% royalty rate.

Regarding the jury's determination of a 17.78% royalty rate, the CAFC agreed with the district court that the royalty was supported by the evidence, and noted that Bayer's expert's discussion of the *Georgia-Pacific* factors and hypothetical negotiation framework "provided ample guidance to the jury to help it determine the royalty rate."

Editors

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