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PATENTS

The authors give historical context to the Federal Circuit's recent patent infringement damages jurisprudence and offer advice for preparing damages arguments at the outset of a litigation.

In Dredging up the Past, the Federal Circuit Makes Patent Damages More Difficult to Prove; But Has It Left Some Avenues Open?



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Over the past few years, the landscape for damages awards in patent lawsuits has shifted dramatically, posing increasing challenges for those drafting damages reports. While the past decade was marked with several high-figure patent judgments, a recent trend in the Federal Circuit has reined in excessive damages awards. Similarly, in previous times *Daubert* exclusions of patent damages theories were much less common than today.

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I. The Legislative Branch's Inaction

While courts have stepped up to constrain excesses in the damages arena, the legislative branch has done little to help. Part of the legislative branch's failure to act likely stems from the fact that the two largest groups of patent holders have largely conflicting interests. Indeed, pharmaceutical patent holders and electrical and computer engineering (i.e., high technology) related patent holders make up the overwhelming majority of patent holders, yet the practical realities of their respective industries generate competing interests in patent law. Over the past few decades, high technology companies have been more susceptible to patent troll litigation. These companies often make or sell products that are covered by several, if not hundreds, of patents. Accordingly, these patent holders are generally more supportive of strict limits on patent damages awards. In the pharmaceutical sector, companies often protect blockbuster drugs with only a few patents and seek to protect their ability to recoup losses from patent infringers (who are usually competitors). Pharmaceutical patent holders are reluctant to water down the patent remedies statute.

Due to these diametrically opposed views, there has been little opportunity for Congress to satisfy both camps with applicable statutory language. Indeed, language from prior patent damages reform attempts was ultimately never adopted. For example, the draft Patent Reform Act of 2009 recited:

Upon a showing to the satisfaction of the court that the patent's specific contribution over the prior art is the predominant basis for market demand for an infringing product or process, damages may be based upon the entire market value of the products or processes involved that satisfy that demand.

Bolstering the Entire Market Value Rule (EMVR), this stricter language likely would have satisfied those in the high-technology sector, while leaving pharmaceutical companies disappointed. Considering the competing view of two industries with large lobbying capabilities, it is not surprising that Congress shelved its attempt to address damages awards in the 2011 America Invents Act. Where Congress did not address the concern of patent damages, it appears that the Federal Circuit has decided to act.

II. Federal Circuit Dusts Off Old Cases

While some believe that recent Federal Circuit decisions placing a more restrictive view on damages awards are a result of the court correcting an ongoing problem, it can also be argued that the Federal Circuit simply went back to past jurisprudence. Early cases dealing with patent damages look surprisingly similar to the positions the Federal Circuit is taking today.

In 1853 in *Seymour v. McCormick*, concerned with the potential for a series of infringement claims on small improvements to swallow up a manufacturer's profits, the Supreme Court warned "that it is a very grave error to instruct a jury 'that as to the measure of damages the same rule is to govern, whether the patent covers an entire machine or an improvement on a machine.'" In 1884 in *Garretson v. Clark*, the Supreme Court reiterated its distinction between a patent to an entire machine versus a component of that machine, stating "[t]he patentee . . . must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features" Similarly, in 1912 in *Westinghouse v. Wagner*, the Court reminded that "an invention may have been used in combination with valuable improvements In such cases, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains."³

These cases, particularly *Garretson*, have become the weapon of choice in the Federal Circuit's and district courts' attempts to rein in damages awards. The Federal Circuit relies on these cases to strike awards for failure to show a causal nexus between damages and infringement. On the other hand, district courts use these cases, along with the Federal Circuit's jurisprudence citing the same, to perform their gate-keeping function under *Daubert* to exclude damages theories that fail to consider the scope of claims when selecting a royalty base. Although obtaining a reasonable royalty remedy may not be as easy as it used to be, there are several approaches that may maximize the potential that a damages theory will survive.

III. Drafting Stronger Damages Reports

The Federal Circuit's increased vigilance in reviewing damages awards requires practitioners to respond in kind from the outset of a case. It is unwise to assume that damages will be based upon the entire value of an infringing product. Although some practitioners make

this assumption because these sales data are the only figures available to the patentee, the Federal Circuit explained in *LaserDynamics v. Quanta* that it will reject an argument "that practical and economic necessity" require a patentee to base its royalty on the price of the entire product containing the infringing component.⁴

Similarly, a patentee cannot necessarily rely on an argument that it selected the "smallest salable patent practicing unit" as the royalty base.⁵ Indeed, a growing trend suggests that selecting the smallest salable patent practicing unit may simply be one step toward apportioning the value of the royalty base between patented and non-patented features.⁶

When developing a reasonable royalty theory, a patentee must ask several questions concerning its proposed royalty base. These questions include:

- What are the features of the infringing product?
- What impact do the features have on a consumer's decision to purchase the product?
- What is the relationship between those features and the patent claims?
- What is the relationship between those patented features and a consumer's decision to purchase the product?

Depending on the answers to these questions, a reasonable royalty analysis based upon sales of the infringing product may be straightforward or may require a detailed assessment of the consumer market and infringing product.

a. Infringing Product as the Royalty Base—Impact of EMVR

If a patent claim encompasses the entire infringing product or each of its features, reliance on the sale of the infringing product is straightforward. But, in many instances, a patent covers a single feature of a product and potentially implicates EMVR. Where a patent does not cover each feature of an infringing product, the safest course for a patentee is to follow the path laid out in *Laser Dynamics* and *Cornell*. By showing that the patented feature drives the demand for the competitor's product, a patentee can rely on the sales of the infringing product as the royalty base. But this is often more easily said than done.

Establishing the demand drivers for a product usually requires evidence of consumer preference for that product. The first step in establishing this preference should start with the technical advantages of the patented feature. This will require a damages expert to work with technical employees or experts of the patentee. By understanding the technical advantages related to the patented feature, the damages expert can support the patentee's position with reasons that the patented feature drives a consumer's purchase.

⁴ *LaserDynamics v. Quanta Computer, Inc.*, 694 F.3d 51, 69, 2012 BL 222195, 104 U.S.P.Q.2d 1573 (Fed. Cir. 2012) (84 PTCJ 809, 9/14/12).

⁵ *Cornell Univ. v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279, 288 (N.D.N.Y. 2009).

⁶ See, e.g., *VirnetX, Inc. v. Cisco Systems, Inc.*, 767 F.3d 1308, 1327, 113 U.S.P.Q.2d 1112 (Fed. Cir. 2014) (88 PTCJ 1247, 9/19/14).

¹ *Seymour v. McCormick*, 57 U.S. 480, 491 (1853).

² *Garretson v. Clark*, 111 U.S. 120, 121 (1884).

³ *Westinghouse Elec. v. Wagner*, 225 U.S. 604, 615 (1912).

Although at least one district court has taken issue with a damages expert relying upon the technical analysis of another expert paid for by the party, the Federal Circuit in *Apple v. Motorola* held that such reliance is appropriate.⁷ However, reliance on another paid expert's opinion may attract scrutiny during cross-examination, so it is important to insure the reliability of the technical data used by the damages expert.

Technical evidence is only one step in establishing the reason a consumer selects a product. Marketing and sales data are also useful evidence of consumer preferences. Such evidence may sometimes be found in the patentee's or competitor's files, but internal documents often do not break down consumer preferences regarding the patented feature. In these cases, patentees may be forced to generate evidence to support a chosen royalty base.

Confronted with the obligation to establish a causal link between the patented feature and demand for the product, patentees have sought third-party data, such as online forums or reviews, to show consumer preference. These analyses may look to reviews by purchasers of the product or professionals who use and rate the product. Although these reviews benefit from the absence of arguments regarding reviewer bias, the information gleaned from these data may fail to establish the causal link between the patented feature and the decision to purchase the product. In some instances, courts have rejected such consumer assessments, because "selected users' statements in isolation and without a relationship to the actual claimed technology do not show an accurate economic measurement of the total market demand for the [patented] feature, let alone its contribution to the demand for the entire product asserted as the royalty base."⁸

A standard requiring linkage between consumer purchases and the patented feature may leave a patentee with no choice but to rely upon litigation-generated surveys.⁹ In these instances, a survey expert, in coordination with a damages expert, can construct a survey to determine the role that the patented feature plays in customers' purchasing decisions. This consumer survey may assess the importance of the patented feature by asking participants to rank a selection of features in a product as to their importance to the consumer.¹⁰ However, one concern with such a survey is that the questions may be subject to bias attacks, as an opponent may argue that these questions elevated the patented features' importance in a product through its inclusion in the list of features.

Other surveys may offer a litany of proposed products containing various features in an effort to understand the participants' views as to which of those products would be most desirable. The participants are asked to select between two hypothetical products that differ by a few features. From these data, a survey ex-

pert can attempt to establish the role that the patented feature played in the participants' selections of products they would purchase.

Although surveys offer an avenue by which one can understand the role a patented feature plays in a consumer's decision, these surveys are often challenged when offered to a trial court. Opponents may challenge whether a survey confirms that a patented feature was the sole reason for a consumer's decision to select the product or may otherwise challenge the methodology of the survey.¹¹ But, when properly designed, a survey can be valuable. For example, the Federal Circuit approved a patentee's use of survey data in one of its few affirmances of a large damages award in *i4i v. Microsoft*.¹²

Under a reinvigorated application of EMVR, survey data will likely take a more prominent place in patent damages cases. If one chooses to rely on survey data, the survey must be carefully designed to ensure that the data show that the patented feature is what drives consumer choice, without improperly promoting that feature to survey participants. As this is often difficult to achieve, patentees have also approached the reasonable royalty analysis by other avenues.

b. Potential Avenues if Evidence on EMVR Is Difficult to Compile

i. Per-Unit Royalty

In some cases, patentees have avoided challenges under EMVR by articulating a per-unit royalty damages theory as opposed to a percentage of total sales. This may insulate the patentee from a challenge under EMVR, because a "per unit royalty rate does not depend on the accused products' revenues or profits, and therefore the entire market value is not applicable."¹³ Disconnecting the royalty rate from the sales of an accused product through the use of a per-unit royalty also avoids the impact that price changes may have on the damages calculation.¹⁴ A per-unit royalty remains the same whether a defendant sells the accused product for a dollar or a thousand dollars. Moreover, this methodology avoids the potential of prejudice to jurors by presenting large sales numbers and seeking a smaller percentage of those total sales.¹⁵

Although some district courts have taken the position that a per-unit royalty does not implicate EMVR, others have rejected this proposition.¹⁶ Similarly, recent Federal Circuit decisions lead one to suspect that a per-unit

⁷ *Apple, Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1321-1322, 110 U.S.P.Q.2d 1695 (Fed. Cir. 2014) (88 PTCJ 12, 5/2/14).

⁸ *IP Innovation LLC v. Red Hat, Inc.*, 705 F. Supp. 2d 687, 690, 2010 BL 311964 (E.D. Tex. 2010).

⁹ Although surveys are useful in establishing a causal link to the patented feature and consumer demand, they are not mandatory. *Sloan Valve Co. v. Zurn Industries*, No. 10-cv-00204, 2014 BL 82718 7-8 (N.D. Ill. Mar. 26, 2014).

¹⁰ See, e.g., *Rembrandt Social Media, L.P. v. Facebook, Inc.*, 22 F. Supp. 3d 585, 591, 2013 BL 334618 (E.D. Va. 2013).

¹¹ See, e.g., *Smartflash LLC v. Apple, Inc.*, No. 6:13-cv-447-JRG-KNM, 2014 BL 362470 6-7 (E.D. Tex. Dec. 23, 2014); *Rembrandt Social Media*, 22 F. Supp. 3d at 596; *Lucent Techs., Inc. v. Microsoft Corp.*, 837 F. Supp. 2d 1107, 1122, 2011 BL 335179 (S.D. Cal. 2011).

¹² *i4i L.P. v. Microsoft Corp.*, 598 F.3d 831, 93 U.S.P.Q.2d 1943 (Fed. Cir. 2010) (79 PTCJ 538, 3/12/10).

¹³ *Multimedia Patent Trust v. Apple, Inc.*, No. 10-cv-2618-H, 2012 BL 306087 5-6 (S.D. Cal. Nov. 20, 2012).

¹⁴ *Ericsson, Inc. v. D-Link Sys., Inc.*, No. 6:10-cv-473, 2013 BL 210559 17 (E.D. Tex. Aug. 6, 2013) *aff'd in part, rev'd in part, vacated in part and remanded by Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 113 U.S.P.Q.2d 1001 (Fed. Cir. 2014) (89 PTCJ 295, 12/5/14).

¹⁵ See *LaserDynamics*, 694 F.3d at 68.

¹⁶ Compare *Multimedia Patent Trust*, 2012 BL 306087 5-6; *Ericsson*, 2013 BL 210559 17, with *GPNE Corp. v. Apple, Inc.*, No. 5:12-cv-02885-LHK, Dkt. No. 242 at 7 (N.D. Cal. April 16, 2014); *Sloan Valve*, 2014 BL 82718 8 (N.D. Ill. Mar. 26, 2014).

royalty may not avoid such scrutiny. In *Ericsson v. D-Link*, the Federal Circuit reviewed a unit royalty damages award. At the trial level, the court rejected the defendant's post-verdict motion that asserted that the plaintiff's expert "derived his \$0.50 per unit royalty from the value of the end products . . . instead of the smallest salable patent-practicing unit."¹⁷ The district court denied the motion, because the expert relied upon licenses that "reflected a real-world valuation of [plaintiff's] patents" and that the per-unit royalty proposed "does not fluctuate with the price of a product" showing that the expert "did not rely on the value of the end product in his analysis."¹⁸ The Federal Circuit did not address whether a per-unit royalty invokes EMVR but did state that, "in a case involving a per-unit royalty, the jury is asked to choose a royalty base as the starting point for calculating a reasonable royalty award."¹⁹ As the Federal Circuit states that an obligatory step in calculating a per-unit royalty is to determine a starting royalty base, one may assume that the court would not allow selection of such a royalty base without consideration of the patented feature's contribution to generating the sales in that base.

Reasonable royalties can come in different forms, such as a lump-sum payment or running payment.²⁰ In *VirnetX*, the Federal Circuit noted that, irrespective of the form, "a patentee must take care to seek only those damages attributable to the infringing features."²¹ In that case, however, the Federal Circuit did not address a per-unit royalty, which arguably differs from the calculation of a lump sum payment and a running royalty rate that includes "two prongs: a royalty base and a royalty rate."²² Despite its failure to include a per-unit royalty rate as a potential form of royalty, it seems that the Federal Circuit's language asserting that apportionment applies no matter the form of the royalty could potentially trump an argument that per-unit royalties sidestep the requirement to apportion.

ii. Comparable Licenses To Support Royalty Base

Outside the context of a reasonable royalty analysis, competitors often use sales of an entire product as the royalty base to which a royalty rate applies. Accordingly, existing licenses may be a mechanism by which a patentee can support an entire product's value as the royalty base.²³ Noting the importance that the Federal Circuit attributed to licenses in *ResQNet.com v. Lansa*,²⁴ at least one district court allowed an expert to use the value of the entire product without showing that the patented feature drove the demand, because the comparable licenses relied on that royalty base.²⁵ The district court asserted that such reliance "can be economically justified," because "Federal Circuit damages jurisprudence encourages this result by placing a large

emphasis on comparable licenses of the patents-in-suit."²⁶

Other district courts have not been as kind to experts that rely upon the "economically justified" language of *Lucent* and comparable licenses to circumvent EMVR.²⁷ In *Digital Reg of Texas v. Adobe Systems*, the district court rejected the patentee's attempts to assert that it was economically justified to rely on the value of the entire product while applying a lower licensing rate.²⁸ The court found the patentee's reliance upon the "economically justified" language of *Lucent* unpersuasive as more recent Federal Circuit precedent clarified that a patentee could rely on the entire value of a product only when the patentee establishes that the patented feature drives demand for the entire product.²⁹

Potentially quelling dispute at the district court level, the Federal Circuit recently reiterated the importance of existing licenses on the reasonable royalty analysis, but cautioned against reliance on such licenses without considering the differences between real-world licenses and a license that results from a reasonable royalty analysis.³⁰ Several district court decisions are instructive as to the importance of ensuring that previous licenses are comparable or that an expert has accounted for the differences among the licenses.³¹

If one intends to have its expert rely on existing licenses, it is important that the expert address any differences between existing licenses and a license that would result from a hypothetical negotiation.³² Differences that may impact the comparability of licenses include the intellectual property covered by the license (e.g., multiple patents, trademarks, trade secrets or know-how); the nature of the license (e.g., nonexclusive or exclusive); and the circumstances that resulted in the licenses.³³ An expert will then need to address how these differences impact the value of the licenses and attempt to determine the value in the existing licenses that flows from the right to use the patented technology.³⁴

iii. Apportionment Through Royalty Rate

Whether relying on a per-unit royalty or comparable licenses, a patentee will confront arguments for apportionment unless it presents evidence that the patented feature drives demand for the product. The patentee will likely need to apportion the value of the patented features vis-à-vis the value of the unpatented features.

²⁶ *Id.*

²⁷ *Digital Reg of Texas, LLC v. Adobe Systems, Inc.*, No. 12-cv-01971-CW, Dkt. No. 632 at 7-9 (N.D. Cal. Aug. 19, 2014).

²⁸ *Id.*

²⁹ *Id.*, citing *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1319-1320, 2011 BL 1830, 98 U.S.P.Q.2d 1203 (Fed. Cir. 2011) (81 PTCJ 275, 1/7/11); *Laser Dynamics*, 694 F.3d at 67-68.

³⁰ *Ericsson*, 773 F.3d at 1227-1228.

³¹ *Golden Bridge Tech. v. Apple, Inc.*, No. 5:12-cv-04882-PSG, 2014 BL 137602 4 (N.D. Cal. May 18, 2014); *ABT Sys., LLC v. Amerson Electric Co.*, No. 4:11-cv-00374, Dkt. No. 430 at 4-5 (E.D. Mo. Feb. 8, 2013); *Apple, Inc., v. Samsung Elecs. Co.*, No. 11-cv-01846-LHK, 2012 BL 173112 7 (N.D. Cal. June 30, 2012).

³² *Lucent*, 580 F.3d at 1329; *LaserDynamics*, 694 F.3d at 79; *ResQNet.com*, 594 F.3d at 870.

³³ *Multimedia Patent Trust*, 2012 BL 306087 6-9.

³⁴ *Wordtech Sys., Inc. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1320, 2010 BL 135032, 95 U.S.P.Q.2d 1619 (Fed. Cir. 2010) (80 PTCJ 264, 6/25/10).

¹⁷ *Ericsson*, 2013 BL 210559 16.

¹⁸ *Id.* at 15.

¹⁹ *Ericsson*, 773 F.3d at 1226.

²⁰ See *VirnetX*, 767 F.3d at 1326.

²¹ *Id.*

²² *Id.*

²³ *Mondis Tech., Ltd. v. LG Elecs., Inc.*, No. 07-cv-00565, Dkt. No. 555 at 5-6 (E.D. Tex. June 11, 2011).

²⁴ *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869-873, 2010 BL 24667, 93 U.S.P.Q.2d 1553 (Fed. Cir. 2010) (79 PTCJ 422, 2/12/10).

²⁵ *Mondis Technology*, Dkt. No. 555 at 5-6.

Often it is difficult to apportion the value of these components within the price of a product. In real-world negotiations, parties would not seek to undertake this mathematical exercise. Instead, the parties would address the value that the patent provides by adjusting the royalty rate.

However, the Federal Circuit has addressed attempts to utilize this approach in arguably contrary ways. The Federal Circuit has raised concerns that apportionment through a lower royalty rate may allow the patentee to prejudice the jury by displaying very high sales figures.³⁵ District courts have taken heed of the Federal Circuit's concern and have rejected attempts by experts to apportion in this manner.³⁶

Decisions by practitioners to apportion in this manner appear to flow from the Federal Circuit's statements in *Lucent* that, "[a]lthough our law states certain mandatory conditions for applying EMVR, courts must nevertheless be cognizant of a fundamental relationship between EMVR and the calculation of a running royalty damages award. Simply put, the base used in a running royalty calculation can always be the value of the entire commercial embodiment, as long as the magnitude of the rate is within an acceptable range (as determined by the evidence)."³⁷ However, it is difficult to read the Federal Circuit's subsequent decisions in *Uniloc* and *LaserDynamics* as anything other than rejecting the view that a running royalty can "always" be based on the value of the entire commercial product.

Despite the subsequent criticism of *Lucent's* apportionment methodology, a recent Federal Circuit decision has breathed new life into the approach. In *Ericsson*, the Federal Circuit noted that an economist can apportion by carefully selecting the royalty base to reflect the value added by the patented feature or by adjusting the royalty rate to reflect a discount for the non-patented features.³⁸ Presumably, understanding that one may view this position as conflicting with language from earlier cases, the Federal Circuit attempted to address *LaserDynamics* by explaining the need to ensure a jury is not misled by apportionment through a lower royalty rate.³⁹

Although *Ericsson* may support an apportionment approach that applies a lower royalty rate to account for non-patented features, practitioners should proceed with caution. The Federal Circuit's past statements provide sufficient ammunition to attack that theory before it ever reaches a jury.

c. Consider Whether Lost Profits Is an Easier Row to Hoe

Practitioners have viewed lost profits as more difficult to establish than a reasonable royalty theory. This view was warranted by the heavier burden a patentee

must meet to establish (1) demand for the patented product; (2) absence of an acceptable noninfringing alternative; (3) capacity to meet the demand; and (4) the patentee's profit.

To establish lost profits a patentee must show "but for" the presence of the infringing product, it would have made a sale. This may be difficult to accomplish, but there is some flexibility in presenting such evidence. For example, a patentee can offer a hybrid approach and seek lost profits equivalent to its market share in a market that excludes the infringing product.⁴⁰ The patentee applies a reasonable royalty calculation to sales of the infringing product not captured by the lost profits calculation.

A benefit of using a lost profits approach for a multi-component product is that the *Panduit* factors only require the patentee to show demand for the patented product—not demand for the patented feature. Relying upon reasonable royalty jurisprudence, alleged infringers have asserted that demand for the patented product must result from demand for the patented feature. The Federal Circuit has treated this argument differently, but the overall weight of precedent appears to run counter to this position.⁴¹ As it may be more difficult to show EMVR applies or to meet the apportionment standards, a patentee may be better served by seeking lost profits. These efforts may reap higher rewards based upon the patentee's profit margins on its product.

IV. Conclusion

The Federal Circuit has reached back into Supreme Court jurisprudence to rein in damages. Although the Federal Circuit has fashioned a methodology that ties a damages award to the value of a patent, the methodology may be difficult to follow. Federal Circuit criticisms of parties apportioning the patent value—as real-world negotiators would—through an adjusted royalty rate further complicate the reasonable royalty analysis. Although a practitioner may sidestep some of the burdens associated with EMVR, by applying a unit royalty, relying upon comparable licenses or even abandoning a reasonable royalty approach for a lost profits analysis, each approach contains its own uncertainties.

In the end, this reinvigorated damages jurisprudence requires practitioners to consider damages issues early in a case, especially as the damages evidence required to support a patentee's proposed damages award may take the most time to obtain. Those who fail to consider these issues at the outset may win the liability battle but lose the war, because the overall impact of the patent judgment is minimal to the infringer.

⁴⁰ See *Ericsson, Inc. v. Harris Corp.*, 352 F.3d 1369, 1377, 69 U.S.P.Q.2d 1109 (Fed. Cir. 2003) (67 PTCJ 156, 12/19/03).

⁴¹ Compare *Calico Brand v. Ameritek Imports*, 527 Fed. Appx. 987, *995-96, 2013 BL 191158 (Fed. Cir. Aug. 26, 2013) (86 PTCJ 635, 7/26/13), and *Funai Elec. Co. v. Daewoo Elecs. Corp.*, 616 F.3d 1357, 1375, 96 U.S.P.Q.2d 1329 (Fed. Cir. 2010) (80 PTCJ 641, 9/17/10), with *DePuy Spine, Inc. v. Medtronic Sofamor*, 567 F.3d 1314, 1330, 90 U.S.P.Q.2d 1865 (Fed. Cir. 2009) (78 PTCJ 180, 6/12/09); *Versata Software v. SAP Am.*, 717 F.3d 1255, 1265, 106 U.S.P.Q.2d 1649 (Fed. Cir. 2013) (86 PTCJ 13, 5/3/13).

³⁵ *LaserDynamics*, 694 F.3d at 68; *Uniloc*, 632 F.3d 1319-1321.

³⁶ *Digital Reg of Texas*, No. 12-cv-01971-CW, Dkt. No. 632 at 7-9; *Multimedia Patent Trust*, 2012 BL 306087 6-9; *Fractus, S.A. v. Samsung Elecs. Co.*, 876 F. Supp. 2d 802, 831, 2012 BL 162013 (E.D. Tex. 2012).

³⁷ *Lucent*, 580 F.3d at 1338-1339.

³⁸ 773 F.3d at 1227.

³⁹ *Id.*