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4 Tips For Breaking Down Patent Damages To A Jury

By **Erin Coe**

Law360, San Francisco (April 28, 2016, 3:24 PM ET) -- Giving jurors the right amount of details when presenting patent damages arguments is tricky, but attorneys who enlist an expert early on, align the damages theory with the theme of the case and show how they did the math can make it look easy.

Patent litigators sometimes risk arguing their patent damages case either at too high or too low of a level, according to Kurt Pankratz, a partner at Baker Botts LLP.

"Finding the 'Goldilocks zone' is hard," he said. "Attorneys need to provide the right amount of information without boring the jurors to death, but also not skate so high above all the facts that they are unable to build credibility."

Here, experts share tips for making patent damages more understandable to jurors:

Get a Damages Expert Involved Early

Because infringement and invalidity contentions occur early in a patent case, damages is one issue that tends to be put on the back burner, but attorneys should be looking to engage an expert during the discovery phase, according to Pankratz.

"Attorneys get so focused on proving infringement on behalf of plaintiffs or noninfringement on behalf of defendants that they can forget to get a damages expert involved in a meaningful way," he said. "But if attorneys wait too long to bring a damages expert in and think about their damages case, they might provide information in ways that are not helpful or even potentially damaging to their case."

Pankratz said he likes to bring a damages expert on board months before the close of fact discovery at a minimum.

"It's important to be thinking early on what you want the damages model to look like, what needs to be provided by the client as well as what needs to be produced from the opposing side and third parties," he said.

One of the most critical decisions for putting on a good damages case is finding the right expert who will fit with the trial presentation, according to Paul Collier, a partner at Kirkland & Ellis LLP.

And keep in mind a Nobel laureate or professor with a national reputation or an expert with experience testifying at dozens of trials may not always be the best match. In defending a client accused of infringing Internet technology-based patents in a Florida federal court, Collier brought in a professor from a regional university who had previously testified at

only a handful of trials to show that a more renowned expert wasn't necessary to explain a straightforward damages case — in this instance, that a couple of specific patent licenses were controlling and undermined the plaintiffs' damages theory.

"Rather than get a Nobel laureate from MIT, we found a qualified, competent and articulate expert who fit with our theory that this was a simple and direct patent damages case," he said. "We received a full defense verdict — no infringement, no liability and no damages."

Keep it Simple

In patent cases, attorneys might try to explain to jurors what reasonable royalty damages are owed to a plaintiff based on a hypothetical negotiation or why a defendant is proposing a damages amount when at the same time it claims it didn't infringe the patent. While patent litigators live and breathe these concepts every day, they need to put themselves in the jurors' shoes, according to Pankratz.

"These concepts are so foreign to the average lay juror, it's like speaking a different language," he said.

Paul Berghoff, a founder of McDonnell Boehnen Hulbert & Berghoff LLP, said he served on a jury years ago in a personal injury case, and it cemented his view of how juries deal with damages.

"Juries completely ignore the law and the instructions they get from the judge on how to deal with damages," he said. "Someone throws out a high number, and someone else throws out a low number, and they negotiate. If people on the low side are more passionate, the jury will end up with a low number, and that's exactly how juries deal with damages in a patent case."

While attorneys may have to talk about the so-called Georgia-Pacific factors used to determine a reasonable royalty in patent infringement cases, presenting a chart with all 15 factors and laboriously going through them one by one with an expert will be doing little to engage jurors, Berghoff said.

"Listing all of the factors on a chart, which is not uncommon for attorneys to do, just sends the message that this is complicated, and I'm not sure that's the message they want to be sending," he said. "The key is to have a very simple story tied to graphics that reinforce the basic story, while speeding through the other stuff."

Attorneys should be careful not to overload juries with numerous patent license agreements to support a reasonable royalty damages theory, according to Collier. Instead, they should focus on the licenses that most resemble the patents in dispute.

"Sometimes attorneys introduce too many licenses that have only slight relevance to the technology at issue in a case, and they may start to diminish in value as far as their significance to a jury," he said. "Instead of choosing a dozen licenses to support a damages theory, focusing on three or four licenses is more likely to resonate with a jury."

Ensure the Damages Case Fits With the Overall Theme

When attorneys set a theme for the liability portion of a case, they should make sure it is consistent with the damages theory, according to Collier.

"It should be a seamless transition between the patent damages and liability cases, but what I've found in some trials is the patent damages presentation feels like it's been tacked onto the patent liability case and hasn't been given the same amount of attention," he said. "Attorneys can get themselves in trouble when there are inconsistencies between the patent

liability and damages cases or where the patent damages trial presentation doesn't enhance the same themes."

A few years ago in a federal Illinois case where a Kirkland & Ellis client was accused of infringing patented telecommunications technology that the plaintiff claimed was groundbreaking, Kirkland argued during its liability presentation that the patent at issue didn't relate to core technology in the area, according to Collier.

The firm then used the damages portion of the case to show that the licensing rights the plaintiff entered into for the patent were 10 times lower than licensing rights typically reached for groundbreaking technology in the field.

"Kirkland showed that the plaintiff was overreaching and that its groundbreaking technology claims didn't match its damages presentation as far as the licenses it entered into," he said.

Show Jurors the Math

Because jurors shouldn't be left in the dark on how attorneys arrived at the patent damages amount in the case, attorneys or their experts should spend some time showing the math and explaining why the amount is reasonable, according to Suann Ingle, managing partner of Suann Ingle Associates LLC who consults with lawyers on visual communications for jury trials, including patent cases.

"Jurors want to know how you got there," she said. "Attorneys need to give jurors a peek through the keyhole to the way the damages number is reached."

One technique that can come in handy is when a chart or animation reveals one step at a time in digestible bites, she said.

"It's not that sophisticated, but it looks sophisticated because the information is being revealed slowly," she said. "The graphics don't have to be pretty or decorative. They just have to try to recreate the interactive process to learning visually."

After providing a visual presentation on how the damages amount was calculated, attorneys also might find it helpful for their experts to show the underlying math on a whiteboard, she said.

"If jurors see someone on the stand go through the numbers, they have a greater opportunity to say, 'I get that,'" she said. "Even if they don't think they could do it, they will give the expert credit. Attorneys shouldn't be afraid to have their witnesses show how well they know the process as well as their confidence in the conclusion."

If patent owners fail to back up why they are entitled to a large damages amount, they could be pegged by accused infringers as being greedy.

Sanjay Murthy, a partner at Morgan Lewis & Bockius LLP, said when he defended clients accused of infringing drug-infusion pump technology in a California federal court in 2013, the plaintiff sought a "completely unreasonable" sum of money that prompted the defendants to make greed and money a key theme of the case.

"The jury returned a complete defense verdict," he said. "In post-verdict interviews, the jurors believed they decided the case on the technical merits, but each one said they had a very unfavorable view of the plaintiff because of the amount of money that was being sought in the case."

--Editing by Katherine Rautenberg and Emily Kokoll.

SUANN INGLE, MS
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Suann Ingle is one of the country's top visual communication consultants for trial attorneys and litigants. An expert graphic designer, she is also a trusted partner who offers decisive advice on presentation strategy and execution. After thousands of hours in the hot seat in courtrooms and arbitration hearings, Suann remains calm, focused and unflappable regardless of circumstances. This enables her to sense what's coming, and adjust visual communication on the fly to keep judges, juries and arbiters focused on the merits of the case. Suann's talents and experience take on even greater power when she integrates her graphics and presentation expertise with jury research and mock trials. With more than 500 cases behind her, she has developed a keen sense of how people learn, retain, and decide issues based on visual evidence. She and her team can convert this understanding into compelling messages with speed and precision, even when headline engagements require around-the-clock support.

Since entering the field in 1994, Suann has consulted on a wide range of litigation matters, including intellectual property, white collar, insurance, financial services, employment, and complex business disputes. She has extensive experience in scaling and managing trial support teams and has helped deliver successful outcomes in venues throughout the United States and in Europe.

Her visual expertise is grounded in intellectual knowledge, including a Master of Science degree in Communications Design from Pratt Institute. When she is sketching her ideas, she can explain the principles behind them – and why they increase the odds of winning. Her personal warmth and deep educational background also enable her to teach, develop and inspire other graphics professionals to embrace the challenges of high-stakes litigation as a career.

Prior to entering the field of trial consulting, Suann Ingle spent seven years at Coca-Cola where she managed the Creative Services Department. In 1996, she joined TrialGraphix and was instrumental in establishing its New York office. At TrialGraphix, Suann managed the office and provided clients with presentation consulting at trial. She also spent three years at DecisionQuest, where she assisted legal teams in trial by providing visual solutions to complex, high-stakes matters. Before starting her own firm, Suann worked at FTI Consulting, Inc., leading the New York office of the Trial Services Division.