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Original Paper

A Saga of Intellectual Property Licensing: Investigating the Credibility of 25 Percent Rule

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Abstract

A healthy IP system creates opportunities and benefits for the industries, consumers, small businesses, governments, and the economy, including greater innovation, choice, competition, and jobs. Incentives to innovate, job creations, opportunities and revenue generation for governments make the environment interoperable and beneficial for all stakeholders. The IP created by industries and individuals can be licensed to others as a way of generating revenue. It is within this, already complex environment, where negotiating a fair royalty rate can become one of the most challenging tasks. It is here where the application of the 25 percent rule emerged as a rule of thumb, to determine royalty rates in most licensing transactions, specifically in patent licensing. In light of the above, this research study has looked into different issues relating to the credibility of the 25 percent rule after the Uniloc case. Moreover, this study tried to trace out and examine multiple issues, such as the validity of the grounds for rejecting the Rule, the criticism leveled against it, the applicability of the Daubert standards, limitations and exceptions to the Rule and other related issues that will answer the credibility of the 25 percent rule.

Keywords

Intellectual Property, patent law, IP licensing, 25 percent rule, IP law

1. Introduction

Intellectual Property (IP) is a valuable economic tool. A healthy IP system creates opportunities and benefits for the industries, consumers, small businesses, governments, and the economy, including greater innovation, choice, competition, and jobs. Incentives to innovate, job creations, opportunities and revenue generation for governments make the environment interoperable and beneficial for all stakeholders (Kamil Idris, 2003). The IP created by industries and individuals can be licensed to others as a way of generating revenue. Licensing IP fosters collaboration among industry players, technological innovation, increased competition, and greater consumer choice. Quantifying and maximizing the value of IP is therefore of critical importance. Consequently, the fields of IP valuation and IP licensing are the most discussed topics in IP management where negotiations take place between parties relating to IP businesses.

It is within this, already complex environment, where negotiating a fair royalty rate can become one of the most challenging tasks. It is here where the application of the 25 percent rule ("the Rule") emerged as a rule of thumb, to determine royalty rates in most licensing transactions, specifically in patent licensing. The conceptual basis of the Rule is founded on the inherent risks associated with commercializing a licensed product and approximating the risk/reward ratio of 25:75 between the licensee and licensor. This is because the licensee usually bears additional costs and face uncertainties when converting the licensed technology into a marketable product, which may or may not attract a good revenue. On the other hand, the Rule was also considered in many cases relating to the infringement of intellectual property for estimating damages (Note 1).

Since 1943, the Rule was applied, in many instances, for licensing and calculating the damages in multiple intellectual property negotiations and battles in different court cases. However, things have overturned after the Federal court's decision in *Uniloc USA Inc v Microsoft Corp* (*"Uniloc")* (Note 2), which has rejected the 25 percent rule as a matter of law. Some of its flaws included, geographical reach, problems with sample size, significance of the alleged technology, competitors ability to design around a patentee's invention, any pre-existing relationship or past dealings between the parties and the patentee's ability to precise monopoly pricing on the licensee (Note 3). Considering all the issues and testimonies, the Federal Circuit concluded that "the 25 percent rule was based on scant evidence, and its inclusion in numerous patent decisions over the years had been based on an assumption of its utility rather than hard evidence" (Note 4). The *Uniloc* judgment has lead to a lot of uncertainty in law regarding IP damage calculations and in particular which baseline, if any, should be used.

In light of the above, this research study has looked into different issues relating to the credibility of the 25 percent rule after the *Uniloc* case. Moreover, this study tried to trace out and examine multiple issues, such as the validity of the grounds for rejecting the Rule, the criticism levelled against it, the applicability of the Daubert (Note 5) standards, limitations and exceptions to the Rule and other related issues that will answer the credibility of the Rule.

2. What Is the Rule and How Is It Applied?

The Rule's methodology is based on the income approach and according to its proponents "confirmed by careful examination of years of licensing and profit data, across companies and industries" (John Jarosz et al., 2010). An empirical study published in 2002 by Robert Goldscheider, who has been credited as the Rule's originator, demonstrated that the median royalty rate across all industries was 22.6 percent. He believed that this data supported the utilization of the Rule "as a tool of analysis" (Robert Goldscheider et al., 2002) (Note 7). It has often been used as a starting point to establish reasonable royalties for patent licensing negotiations, or for a reward for damages in Intellectual Property infringement litigation (35 U.S.C.A. § 284). It has successfully been applied in hundreds of cases prior to the *Uniloc* decision.

2.1 How Is the Rule Applied in IP Licensing and Infringement?

IP valuation follows one of the three different methods, cost method, market method and income method (Ted Hagelin, 2002) (Note 8). Royalty rates in IP licensing are calculated with due analysis and following standard methods (Note 9). In calculating damages, many experts rely on hypothetical negotiations between the patent owner and a licensee. Hence, different professionals introduced multiple methods including the 25% Rule (Note 10). The widely used 25% royalty calculation was developed as 1:3 profit sharing between the licensor and licensee at the base line negotiation stage, which is calculated on the pre-tax profit of the product.

2.2 The Interpretation of the Rule in Uniloc v Microsoft

The *Uniloc* judgment was widely interpreted as the death of the Rule's assumptions (Note 11). However, it is interesting to note how Goldscheider defines the Rule and his interpretation and analyses of the Court's judgment (Robert Goldscheider, 2011; Robert Goldscheider et al., 2002). In contrast, various authors have criticized Goldscheider's views regarding the Rule and have raised doubts about its creditability (Douglas Gidder, 2011).

2.3 Various Standards and Tests Applied in Uniloc

2.3.1 Implication of the Daubert Standards

The Daubert standard is the test that is used in the Federal courts and other state courts in the United States to determine the validity of scientific expert testimony (Note 12). This standard is usually applied by a trial judge, in making an initial assessment of whether the expert's testimony is based on reasoning that is scientifically valid and can properly relate to the facts of the specific case.

The following are the factors that are usually considered in determining the validity of the methodology under this standard (Note 13).

- Whether the theory or technique in question can be and has been tested;
- Whether it has been subjected to peer review and publication;
- Its known or potential error rate;
- The existence and maintenance of standards controlling its operation; and
- Whether it has attracted widespread acceptance within a relevant scientific

community.

2.3.2 Relevance of *Georgia-Pacific Corp v US Plywood Corp* ("Georgia-Pacific")

This case provides a synopsis of the 15 most important factors to be considered when calculating a reasonable royalty rate for a patent license, which is now referred to as a Georgia-Pacific analysis (Note 14). Over the last forty years, the Federal Circuit has endorsed these guidelines when calculating a reasonable royalty amount. Factor 13 is considered important here as it examines the "portion of realizable profit attributable to the invention as distinguished from non-patented elements, significant features/improvements added by the infringer, the manufacturing process or business risks" (Note 15). Factor 14, considers the "opinion testimony of qualified experts" (Note 16). These are important factors in patent licensing as the patent may cover some significant portion of the alleged product or process. Guideline 15 state that the estimated royalty could be equated to the likely outcome of a hypothetical arm's-length licensing negotiation between the parties at the time of the infringement (Note 17). In certain circumstances, some factors might increase the royalty rate, while others might cause it to decrease.

2.4 Factors Considered during Litigation, Especially in the Second Appeal before the Federal Circuit

The case was first heard by the District Court and it was decided that there was no infringement of algorithms patented by Uniloc. In an appeal, the Federal Circuit remanded the case whilst reversing the non-infringement judgment recommending the issue to a jury. The jury found infringement and validity with claim 19 of the original patent and granted $388 million in damages. However, the judgment was overturned and in the post-trial motion the district court granted a new trial on infringement and willfulness. In addition, the District Court granted judgment as a matter of law (JMOL) of non-infringement and granted a new trial on damages due to the improper referral of the entire market value rule.

Uniloc appealed against this judgment of the District Court. The facts in the second appeal were scrutinized as follows. The relevant law requires patent damages to be "in no event, less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court" (Note 18). The Daubert standards, together with the highly recognized fifteen factors identified in *Georgia-Pacific* are used as guidelines for expert testimonies to determine a reasonable award for damages (Note 19).

With all these considerations, Linn J has submitted his refusal of the 25% rule as: This court now holds as a matter of Federal Circuit law that the 25 percent rule of thumb is a fundamentally flawed tool for determining a baseline royalty rate in a hypothetical negotiation. Evidence relying on the 25 percent rule of thumb is thus inadmissible under Daubert and the Federal Rules of Evidence, because it fails to tie a reasonable royalty base to the facts of the case at issue (Note 20).

2.5 Damages Calculation and Expert Testimony

2.5.1 Uniloc's Expert Witness

Uniloc's expert based his calculation on the estimated value of the product key as $10 and utilizing the Rule arrived at a baseline value of $2.50 per product key. He then calculated the total royalty amount by multiplying the baseline value with the total number of items embodying the key sold. Then he checked the calculation against the total market value which approximate 2.9% revenue value of the licenses against the royalty rate. However, the Court rejected the validity of his method under *Daubert* and Federal Rules of Evidence. The Court held that the expert testimony has to be based on firm scientific and technological grounds and clearly connected to the facts of the case in issue.

2.5.2 Total Market Value

Even though Uniloc's expert only used the entire market value to cross-check his calculations, the Court found that this method was erroneous, as the infringed patent, the product activation key, did not provide the basis for the customers' demand for the sold product or substantially create its value. Using the entire market value calculation could have resulted in the jury being unduly influenced in their decision regarding the amount of damages awarded. (The fact that the judge advised the jury not to rely on this calculation was irrelevant). Accordingly, a new trial on damages was awarded.

3. "Rule of Thumb" and "Classical Rule": Is There Any Ambiguity?

In his articles written after the *Uniloc* decision, Goldscheider repeatedly highlights the fact that the term "rule of thumb" was frequently referred to in the judgment (Robert Goldscheider, 2011). The Cambridge dictionary defines the term "rule of thumb" as "*[a] broadly accurate guide or principle, based on practice rather than theory*". In his post *Uniloc* articles, Goldscheider distinguishes the rule Linn J referred to in his judgment as the "rule of thumb", to his own concept of the Rule, to which he refers to as the "classical rule". He states that the classical rule incorporates the norms identified in *Georgia Pacific v. US plywood* (Note 21) and the standards introduced in *Daubert v. Merrell Dow pharmaceuticals* (Note 22). However, the opponents of the Rule have pointed out, in a subsequent article, that the Rule is merely a rule of thumb as "there is no single, definitive statement of the rule" (Note 23). An example of this is that, even among the proponents of the Rule, no consensus exist as to whether the gross or net profit should be considered for the royalty calculation (Note 24). This article went further to justify why the "Rule" is no longer a rule, but rather a practice to calculate royalty rates. In response to this, Goldscheider retaliated with another article in an attempt to object to the points made in the above-mentioned article (Robert Goldscheider, 2012). He again reiterated his belief that in *Uniloc* Linn J clearly and repeatedly drew a distinction between the rule of thumb and the classic Rule, and that, only the rule of thumb was declared to be inadmissible. He further notes that practitioners using the classic rule should be mindful of the teaching of the Daubert and Kumho Tire cases, as well as Rule 702 of the Federal Rules of Evidence, to ensure that the final baseline royalty rate is based on, or takes into account, all relevant scientific, technical and other specialized knowledge (Robert

Goldscheider, 2012).

This is a further attempt to distinguish his classic rule from the rule of thumb, which Linn J held was a flawed method because "it fail[ed] to tie a reasonable royalty base to the facts of the case at issue". Although, the rest of the points Goldscheider makes in this article seem to be relatively minor, it does demonstrate his enthusiasm to keep the rule active in the arena (Robert Goldscheider, 2012).

4. Does the Rule Sustain the Interests of the Licensee and the Licensor?

A negotiation is typically based on balancing the interests of licensee and licensor. This scenario would be the best tool to evaluate the credibility of the 25 percent rule and the question of how it sustains the interests of the licensee and the licensor. The Rule is usually applied in two distinct scenarios namely, royalty rate negotiations and the calculation of damages in infringement cases. There are different factors to be considered in applying the Rule during the initial phase of licensing negotiations and to calculate the damages during an infringement. Figure 1 pictographically represents different factors influencing the calculations of royalty rates during licensing negotiations.

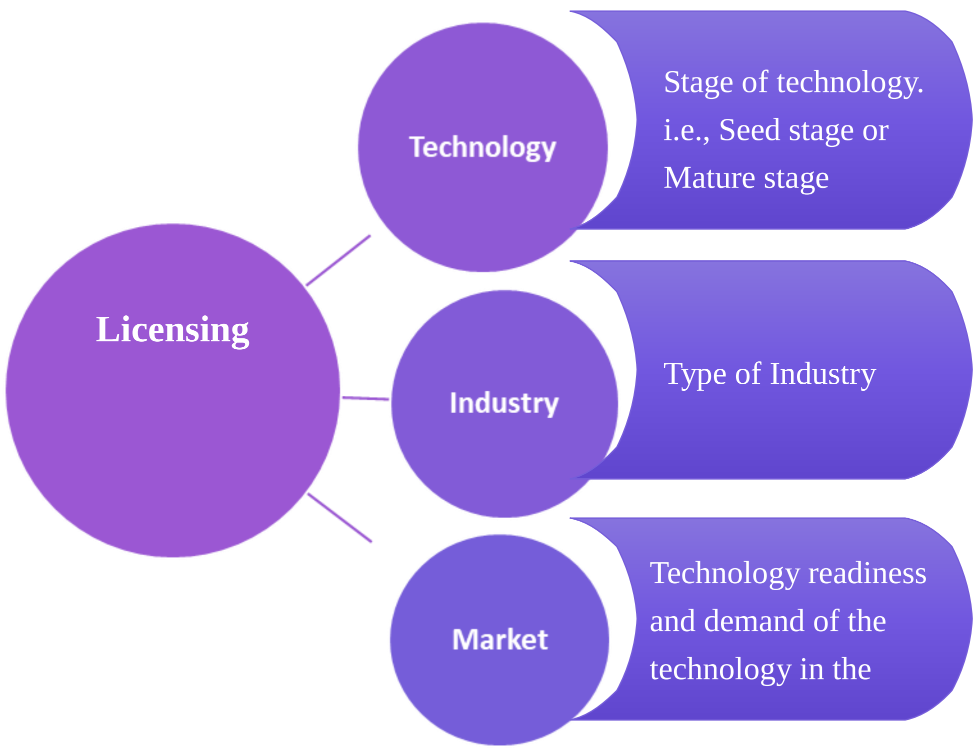

Figure 1. Factors Influencing the Calculations of Royalty Rates during Licensing Negotiations

4.1 Different Factors to Consider When Applying the Rule

4.1.1 Licensing (for Calculating Royalty Rates or Transactions)

In an article published in LES Nouvelles, the author, Grandstand, states that the royalty rate calculated in most licensing negotiations will depend on the licensor's share of total investments (Ove Grandstrand, 2006). Various factors can however, impact this, including the nature of the technology, the relevant industry and market involved, as well as the stage of development of the IP. He states further that a share of investment of approximately 25% is relatively common in several industries (Ove Grandstrand, 2006).

The authors provide the simple example of a company specializing in R&D with the view of selling licenses to companies who have the necessary production and marketing skills. In this situation, the seller's investment share would roughly equate the R&D portion of the total combined costs, which include the R&D expenditure, as well as the production and marketing costs. Based on these facts, should no reason exist to assume any of these portions to be significantly larger than the others, then the R&D component could be accepted to equate to approximately 33%. This would constitute the upper range of a fair and reasonable royalty rate. "A fair and reasonable deal can therefore be interpreted to exist when the return on investments of all trading partners are equalized" (Ove Grandstrand, 2006).

However, the process gets more complicated when various other factors are considered including the developmental stage of the technology when the license is sold, the need for further investment demands, financial support, the specific licensor's strategy, the market readiness of the technology, as well as its demand (Ove Grandstrand, 2006). The author suggests that industry-specific empirical studies could offer useful guidelines to establish whether lower or higher trends occur in some industries. Finally, the 25% rule generally applies in circumstances when the licensor's investment share is equal to 25% of the total investments (Ove Grandstrand, 2006).

4.1.2 Calculating Damages during Infringement

In patent infringement matters, damages are typically calculated by either determining the lost profits the patent owner suffered because of the infringement or by calculating a reasonable royalty, based on the use of the patent by the infringer.

As noted above in 2.5b, the entire market value principle becomes very important when calculating damages in an infringement claim. Clearly, the situation would differ significantly, if the infringed patent formed a substantial part of the sold item, in that it created the demand for the product, or substantially added to its value, as opposed to forming a less substantial part of the sold item, as in the *Uniloc* case.

As already noted, Uniloc's damages expert estimated that the value of the infringed product key was roughly $10 and by applying the 25% baseline royalty rate, he calculated the damages as $2.50 per product license sold. He, therefore, concluded that an award of $564,946,803 would be reasonable, as Microsoft had licensed 225,978,721 software products that contained Uniloc's patented invention.

However, the Federal Circuit held that as the Rule seemed to fail to take into account the specific technology, party or industry involved in the particular matter and was, therefore, arbitrary and not a reliable method to determine the baseline fair royalty rate when calculating damages in a patent infringement claim.

5. Royalty Rate Assessment (Before and After Uniloc): Australian Perspective

The Australian courts follow a different approach when dealing with royalty rate assessments and calculation of damages during infringement claims. The methods adapted by the courts for the calculation of royalty rates differs on a case-by-case basis according to multiple factors. A useful statement of principle was provided by *Ashley J in Pearce v Paul Kingston Ltd* (*Pearce*) (Note 27).

> "Damages may be assessed on an assumed royalties basis (Note 28). A similar approach obtains where a patentee cannot show, in a claim based upon loss of profits, that goods which he manufactured were likely to have been sold in a market established by the infringer (Note 29). In that case the plaintiff recovered damages based upon lost manufacturer's profits for such sales as were diverted to the infringer; but in respect of sales that the plaintiff would not have made, damages in the form of royalties were imposed. Such an approach was also taken in Catnic Components Ltd v Hill & Smith Ltd (Note 30). Where the patentee has not licensed exploitation of his patent in fact in the past, the court fixes the notional royalty payable by the infringer on the basis of what the infringer as a willing licensee would have been prepared to pay and the patentee as a willing licensor to accept (Note 31). It should, however, be borne in mind that these various methods adopted in ascertaining the measure of damage are, as Lord Shaw said in Watson Laidlaw at 117 "practical working rules". The core issue is always one of determining what is the proper measure of compensation, bearing in mind the futility of seeking mathematical precision. The onus of proof of damage lies, of course, upon the plaintiff".

Where the plaintiff licences the patented invention, prima facie the plaintiff's loss is measured by the licence fees or royalties that the defendant would have paid had the defendant's (infringing) conduct been licensed by the patentee. The licence fees or royalties charged by the patentee to others will be strong prima facie evidence of the rates to be charged. In *Pearce*, Ashley J assessed damages on a lost notional royalties basis (Note 32). The Court assumes, on the basis that the defendant should have acted lawfully, rather than unlawfully as it did, that a hypothetical negotiation occurred between a willing patentee, and a willing prospective licensee. In other words, the issue is what fee or royalty, on the balance of probabilities, the infringer would have had to pay in order to obtain lawfully that which in fact it obtained unlawfully (Note 33).

The Court will also use this method to strike a notional royalty/licence fee in two other situations:

(a) When the plaintiff claims damages for loss of profits, but is not able to persuade the Court on the evidence to make an award of damages on this basis as to part, or as to the whole, of the loss of profits claimed; and

(b) When the plaintiff has not exploited the invention at all, either by manufacture or licensing.

In these situations, the plaintiff may struggle to lead sufficient evidence of what the "market" for the licensing of the invention would have been. However, in *Advanced Building Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd*, Hill J made an alternative obiter assessment of damages on a notional royalty basis, although there was no evidence of the amounts which might be charged by patentees at arm's length in comparable situations (Note 34). Where the Court awards damages on a notional or assumed royalty basis where loss of profits damages cannot be proven, that is consistent with the compensation principle because the right to licence a patented invention is one of the monopoly rights enjoyed by the proprietor and the value of that right is diminished by the defendant's infringement. The measure of that is the monetary advantage that would have accrued to the proprietor by the infringer having acted lawfully by seeking a licence, rather than acting as it did unlicensed. "Otherwise that property which consists in the monopoly of the patented articles granted to the patentee has been invaded, and indeed abstracted, and the law when appealed to would be standing by and allowing the invader or abstractor to go free" (Note 35). In other words, the infringer cannot rely upon a patentee's difficulties in proving loss of profit damages to eliminate any compensatory damages claim by the patentee where the defendant has infringed.

6. What Methods may Replace 25 Percent Rule in Future?

The 25 percent rule have been used as a golden standard for royalty rate assessment and calculating damages until *Uniloc* case. Different methods have been in practice all over the globe to identify the royalties and to calculate the damages. However, no other method has been used as extensively as the 25 percent rule. In this scenario, the upcoming methods that have potential to replace the 25 percent rule should be refined extensively and should be flexible enough to get adapted to multiple cases.

6.1 Nash Bargaining Solution

Nash Bargaining Solution (NBS) is one of the common methodologies used to calculate damages and to determine reasonable royalties during an infringement. This methodology suggests that, under specific conditions during a negotiation over a known surplus, the resulting contract should reflect a 50-50split of the surplus. NBS has been used in calculating damages in courts in multiple cases. However, some courts have rejected (Note 36) the use of this method whereas some courts have accepted (Note 37) the use of NBS in different instances. There are some interesting insights when NBS is compared with the 25 percent rule. The 25percent rule is usually applied to the entire profits associated with the allegedly infringing product. However, the NBS focuses only on the incremental profits earned by the infringer from the use of the asserted patents.

7. Conclusions

The present global economy promotes IP in many ways. Concepts of “Soft IP” and “Open Source Systems” are becoming prominent developments in the IP field in promoting innovation (Ruth Taplin, 2010). On the other hand, violation of IP rights is another concern. IP infringements resulted in litigations and as a result, it contributes to large sum of compensations against the alleged infringer. In this scenario, management of IP assets has become the leading consideration.

Licensing and damage calculation are completely different aspects and the factors behind calculation of royalty rates for licensing and damages are quite different. According to this, 25% rule during licensing is still valid if discounting and uncertainty is taken into account. However, 25% rule for damage calculation is ambiguous because 25% rule as a theoretical construct fails to take proper account concerning any particular technology, industry, and market demand as well as the rule applied to the entire profits associated with the allegedly infringing product.

In this particular case, the use of a unique product key activation method is not the reason for the attraction of users. Nevertheless, the persuasive power and demand for licensed products that has arisen with the feature of tracking unlicensed product. Therefore, the judgment or *Uniloc* arguments seem to have missed that critical point which can be empirically proven. It is also observed that with clear empirical presentation and with the concluded comment “*We believe that the 25% Rule has been correctly tossed onto the scrap-heap of junk science by the CAFC*” conclusion by post comments (John Jarosz, 2010) (Note 38). Introduction of new methodology to replace the 25% calculation with comments over both for and against arguments clearly implies the need to detach from the 40 years old concept (Ove Grandstrand & Marcus Holgersson, 2012).

Finally, whether Goldscheider has managed to distinguish his classic 25 percent rule from the rule of thumb, remains a hotly debated topic. However, according to the WIPO manual on the valuation of Intellectual Property (Ashley Steven, 2016), technology valuation consists of the methodology used, as well as the data used in that methodology. It is therefore clear that the data used to determine the value of IP is as, if not more, important than the specific methodology chosen. One can argue that the methodology used is only as good as the data which backs it up. Although, in *Uniloc* Microsoft did object to the use of the Rule as a valid basis to calculate damages, they made the following statement in their court documents in support of their application for Judgment as a matter of Law (May 2009).

> Therefore, whatever utility the 25% “rule” might have in other cases where it was or might have been used as the starting point in the analysis, the evidence provided in *this case* does not support its use here… Moreover, even adopting the rule as a starting point, Mr. Gemini still fails to base his royalty rate on the real-world factors relating to the accused products and the parties in this case… During his testimony, Mr. Gemini merely parroted the *Georgia-Pacific* factors and generally recited evidence that may fall within the ambit of each factor. Critically, he never indicated the extent to which each factor might drive the royalty rate up or down from the 25% figure.

In light of the above, it seems that Microsoft's major objection was not so much the Rule itself but the manner in which Uniloc's witness applied it. Had Uniloc's expert witness managed to apply the Georgia-Pacific factors satisfactorily, basing them on the relevant circumstances of the case, changes are that the outcome of the caser regarding the Rule might have been different.

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Notes

Note 1. *Marconi Wireless Tel Co v United States*, 320 US 1 (1943); *Georgia-Pacific Corp v US Plywood Corp*, 318 F Supp 1116 (SDNY 1970).

Note 2. 632 F 3d 1292 (Fed Cir, 2011).

Note 3. Dorian Berger and Kenneth Weatherwax From Marconi to Microsoft: The Rise and Fall of the "25 Percent Rule" for Determining Damages from Patent Infringement (2011) <http://lowensteinweatherwax.com/publications/>.

Note 4. Ibid.

Note 5. *Daubert v Merrell Dow PharmaceuticalsInc Inc*, 509 US 579 (1993).

Note 6. John Jarosz, Carla Mulhern and Michael Wagner, "The 25% Rule Lives On" (2010); *Uniloc*, 632 F 3d 1292 (Fed Cir, 2011) 1313.

Note 7. *Uniloc*, 632 F 3d 1292 (Fed Cir, 2011) 1313.

Note 8. *Uniloc*, 632 F 3d 1292 (Fed Cir, 2011) 1313.

Note 9. Ibid 357-9. Hagelin explains that in the cost approach the concern is drawn on replacing identical or similar assets, while the market approach examines the transaction cost involved even between unidentified parties. The income approach is the relevant methodology, which was utilized in licensing agreements to calculate royalties between parties.

Note 10. Ibid.

Note 11. *Uniloc*, 632 F 3d 1292 (Fed Cir, 2011).

Note 12. *Daubert v Merrell Dow Pharmaceuticals Inc*, 509 US 579 (1993).

Note 13. Legal Information Institute, Daubert standard <https://www.law.cornell.edu/wex/daubert_standard>.

Note 14. 243 F Supp 500 (SDNY 1965).

Note 15. Ibid.

Note 16. Ibid.

Note 17. Barclay Damon, "Long-Standing '25 Percent Rule of Thumb' for Calculating Reasonable Royalty Damages Rejected by Federal Circuit Panel" < http://barclaydamon.com/alerts/Long-Standing-25-Percent-Rule-of-Thumb-for-Calculating-Reasonable-Royalty-Damages-Rejected-by-Federal-Circuit-Panel>.

Note 18. 35 U.S.C. s 284.

Note 19. *Georgia-Pacific*, 243 F Supp 500 (SDNY 1965).

Note 20. *Uniloc*, 632 F 3d 1292 (Fed Cir, 2011).

Note 21. 243 F Supp 500 (SDNY 1965).

Note 22. 509 US 579 (1993).

Note 23. *Uniloc*, 632 F 3d 1292 (Fed Cir, 2011).

Note 24. Ibid.

Note 25. *Uniloc*, 632 F 3d 1292 (Fed Cir, 2011).

Note 26. Above n17.

Note 27. *Pearce v Paul Kingston Ltd* (1992) 25 IPR 591 59 (Ashley J).

Note 28. *Meters Ltd v Metropolitan Gas Meters Ltd* (1911) 28 RPC 157, 164-5.

Note 29. *Watson & Laidlaw Ltd v Pott, Cassels & Williamson* (1914) 3 RPC 10, 117-120.

Note 30. *Catnic Components Ltd v Hill & Smith Ltd* [1893] FSR 512.

Note 31. *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1976] RPC 197, 221 (Wilberforce J).

Note 32. *Pearce v Paul Kingston Ltd* (1992) 25 IPR 591 59 (Ashley J).

Note 33. *Irvine v Talksport Ltd* [2003] FSR 35.

Note 34. *Advanced Building Systems Pty Ltd v Ramset Fasteners (Aust) Pty Ltd* (2001) 52 IPR 305 [191]-[203].

Note 35. *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104, 120.

Note 36. *Oracle Am Inc v Google Inc*, 798 F Supp 2d 1111, 1119–21 (N.D. Cal. 2011); *Dynetix Design Solutions, Inc v Synopsys, Inc*, No 11-5973, 2013 WL 4538210, (N.D. Cal. Aug. 22, 2013); *Robocast, Inc. v. Microsoft Corp*, No10-1055, 2014 WL 350062 (D. Del. Jan. 29, 2014).

Note 37. *Mformation Techs., Inc. v. Research in Motion Ltd*., No. 08-4990, 2012 WL 1142537 (N.D. Cal. Mar. 29, 2012)—*Gen-Probe Inc. v. Becton Dickinson & Co*., No. 09-2319, 2012 WL 9335913 (S.D. Cal. Nov. 26, 2012)—*Sanofi-Aventis Deutschland Gmbh v. Glenmark Pharms. Inc*., USA, No. 07-5855, 2011 WL 383861 (D.N.J. Feb. 3, 2011).