

THE USE AND MISUSE OF PATENT LICENSES

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ABSTRACT

As the number of nine- and ten-figure verdicts continues to increase it is impossible not to take notice: patents are becoming an ever bigger business with more and more wealth at stake. At the center of that business lie the damages that courts award at trial, and the ways in which courts go about calculating those damages. Yet the legal standards meant to govern patent damages are notoriously ambiguous and unhelpful. In the face of these difficulties, courts have sought a market mechanism that would aid them in calculating patent damages. The solution they have seized upon is to use existing licenses, typically granted by the plaintiff to third parties, as evidence of the proper measure of damages. But the use of existing licenses to measure reasonable royalty damages creates three significant and distinct problems: first, it relies upon private information available only to the parties to the pre-existing licensing agreement; second, it is ineluctably circular; and third, it creates incentives for the patent holder to distort the value of the licenses it negotiates in order to mislead the court. The Article describes and analyzes these three problems, and then turns to potential solutions. It analyzes a variety of possible reforms, including selection of particular licenses for comparison or the application of a multiplier to the value of existing licenses. Though several of these solutions show promise, none come close to being a complete answer. It may well be that courts have no choice but to largely ignore existing licenses when calculating patent damages, leaving them more at sea than ever.