

Reliable, timely information at a reasonable cost – What is that worth to your clients?

Management makes better decisions with better information, but good information can be difficult and costly to obtain, particularly in the contentious world of intellectual property litigation. You provide a beneficial service to your clients or employer if you can get better information, especially if you can get it quickly and at a reasonable cost.

Intellectual property rights can be valuable assets, but lose their value if the rights cannot be defended. Intellectual property litigation can be expensive, protracted, and difficult, but sometimes litigation is the only way to validate intellectual property rights. When claims of intellectual property infringement are made, the question of money damages is often a major element of the claim. Whether the claimed damages outweigh the likely costs of pursuing or defending litigation to its conclusion is information management needs to know at the outset.

You or your client can guess at damages, or use a “rule of thumb” for a quick and dirty assessment, but that is taking a big chance if your preliminary estimate won’t hold up in court, or sends you down a path that may not be justified. Obtaining solid results from incremental cost and profitability analyses considering the Panduit, Georgia Pacific, and other relevant factors requires expertise and experience outside the range of commonly available accounting skills. But conducting a full-scope damages calculation takes a long time and requires substantial professional costs, and the extent of the work required may be difficult to visualize at the outset of the engagement. Estimating the likely outcomes as well as the legal fees and other costs associated with litigation is the responsibility of counsel, but getting a handle on the likely damages will assist you in developing a cost-effective strategy.

Damages Diagnostic Highlights:

- Intellectual Property focus
- Broad estimate of likely damages to assist litigation strategy and engagement management
- Sound methodology
- Experienced professional team
- Fixed fee engagement
- Results in 2 to 3 weeks
- Protected by work product privilege
- Road map for proving or rebutting damages in court

Bill Black, an experienced financial professional with years of experience in support of intellectual property litigation, has developed a new service to assist intellectual property litigators in quickly evaluating the extent of damages. Black and his team work as consultants to legal counsel to provide a “damages diagnostic” early in a case. This shows the magnitude of damages that are likely to be substantiated if liability is proven. The diagnostic package draws from Black’s years of experience in assessing intellectual property damages and expert witness testimony in Federal Court and arbitration, as well as his professional training as a Certified Public Accountant Accredited in Business Valuation.

The diagnostic analysis uses widely-accepted methods of calculating damages to generate a preliminary estimate of lost profits, reasonable royalty damages, or other measures as appropriate. It uses a structured, efficient methodology that is tailored for the circumstances of the subject company. This tool is useful to plaintiffs considering litigation as well as defendants faced with the decision whether to fight or settle a claim. If litigation follows after the diagnostic, additional forensic accounting work will be necessary to refine the initial

estimate, verify current industry conditions and comparisons, address actual tactics used by opponents, develop detailed calculations of damages, and prepare documentation for proof of damages in court. However, that work will be much more efficient based on the diagnostic findings.

The diagnostic begins by developing an understanding of the claims at issue and the products or services affected by those claims. Tied in with this is an overview of the subject company, the industry, and the economic environment. Following these initial steps, the project team investigates the cost and profitability of the products under consideration, including variable and fixed cost assignment to products, and estimates the relevant incremental costs. Focused discussions with management and counsel will illuminate the possible alternative paths the dispute may follow, and assist in determining the probability of each potential path. We evaluate costs and revenues under a range of scenarios, and develop an indication of the order of magnitude of likely damages. Included in our evaluation are explicit statements of key assumptions, together with explanations of the factors or variables that could shift the analysis from one scenario to others. We also discuss the efforts that would be required to conduct a detailed damages calculation that could be expected to stand up in court.

The diagnostic review usually requires no more than 2–3 calendar weeks from inception to completion. It will be conducted for a fixed fee so management knows their financial commitment up front. Our findings are presented orally at a meeting with counsel and client representatives. Our work is conducted to respect the attorney work product privilege, and all professional staff members are keenly aware of the demands and constraints of the litigation environment.

Damages Diagnostic

Inputs:

- Claim information
- Product or service data
- Company data
- Industry data
- Economic data
- Cost and profitability data
- Interviews with management and counsel
- Teachings from relevant cases

Process:

- Confirm understanding of claims
- Review product or service characteristics
- Develop preliminary approach to calculating damages
- Assemble and evaluate company data, industry data, economic data
- Investigate and analyze cost and profitability data
- Develop alternative damage scenarios
- Estimate incremental costs
- Delineate key factors and variables
- Assess likelihood of alternative scenarios
- Perform initial damages calculation
- Test and challenge assumptions
- Summarize findings to date
- Develop estimate of efforts remaining to prove damages under major scenarios

Outputs:

- Initial estimate of damages
- Assumptions used
- Scenarios evaluated
- Key factors to consider
- Limitations on analysis
- Road map to proving or rebutting damages