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Damages

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Centripetal Networks v. Cisco Systems

The District Court for the Eastern District of Virginia recently concluded a 22-day bench trial in the case of *Centripetal Networks, Inc. v. Cisco Systems, Inc.,* Case No. 2:18-cv-00094 (U.S. Dist. Ct. E. Dis. of VA) October 5, 2020, ruling in favor of Centripetal Networks for $1.9 billion in past damages and a running royalty of 10% for three years followed by a 5% royalty for an additional three years. The case involved the assertion of five patents that deal with complex computer networking security functions. Centripetal accused various Cisco network devices of infringing the asserted patents, including Cisco's Switches, Routers, Digital Network Architecture, Cognitive Threat Analytics as well as other products. Of the five asserted patents, the Court found that each element of the asserted claims in four of the patents were infringed by one or more of Cisco's products, and that Centripetal had failed to meet its burden of proof on infringement of the asserted claims of the fifth patent.

An interesting aspect of this case was a live video platform used by both parties to present their evidence and the selection, over objections by Cisco, of a platform other than Cisco's. The reason for the need of a video platform was based on the technologies involved being "at the forefront in protecting intellectual property and confidential personal information" as well as their use in the national defense context. The court believes that it was in the public interest to move forward with the trial rather than waiting until an unknown time when courtrooms would be open for traditional civil trials. The use of this platform ended up being a success and at the end of the last day of trial, both parties "joined in congratulating the Court's staff for their handling of the trial evidence by means of the video platform."

Court Adopts Reasonable Royalty Approach

Following the Court's determination on validity and infringement, the issue of damages was discussed. As it related to past damages, Centripetal declined to present evidence of a causal relationship between suspected lost profits and Cisco's sales of infringing technology and therefore the lost profit method of calculating past damages was not at issue in this case. Rather, the Court adopted the approach based on the reasonable royalty Centripetal would have received through arms-length bargaining. The determination of reasonable royalties can be based on the following methods: (1) the analytical method which focuses on the infringer's projections of profit for the infringing product and (2) the hypothetical negotiation or the willing licensor-willing licensee approach. The Court stated that insufficient evidence was submitted for the first approach therefore the willing licensor-willing licensee approach was selected.

In accordance with the selected approach, the Court based its economic analysis on the factors laid out in *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 446 F.2d 295 (1971). Factors one and two of *Georgia-Pacific* focus on the presence of existing license agreements for the patents-in-suit and the rates paid by licensees to license other patents comparable to the infringed patents. In this case, the Court had recently heard a case involving Centripetal and Keysight Technologies where an agreement was made related to a Confidential Binding Term Sheet. In this agreement, Centripetal licensed patents that the Court determined to be comparable for a $25 million upfront payment in addition to a 10% royalty on directly competing products and a 5% royalty on non-competing products. The Court determined that the 10% royalty on directly competing products provided "a comparable baseline license from which the Court can determine a reasonable royalty in this case." Due to the fact that this agreement was the only comparable agreement, the Court was able to overcome the preference to exclude agreements that were obtained in the coercive environment of litigation as opposed to being the result of open negotiation.

The Court discussed the various other *Georgia-Pacific* factors and, while we will not elaborate on the specific discussion of each factor in this article, it is important to note that the Court determined that the "weight of the factors as a whole strongly favors Centripetal." This determination allowed the Court to find that the Keysight royalty rate of 10% is a reasonable royalty rate to compensate Centripetal for Cisco's past infringement. Another discussion related to the apportionment argument presented by both parties led to the determination that the apportioned royalty base was $7,558,085,447.

Damages Calculation

Following the determination of the reasonable royalty rate and the apportioned royalty base, the Court was able to calculate the total past damages award of $755,808,545, before adjusting for enhanced damages. On the topic of enhanced damages, the Court noted that Centripetal and Cisco signed an NDA in 2016 as a result of meetings where Centripetal's product offerings and the effectiveness of their solutions were demonstrated to Cisco. After additional meetings and further disclosures, Cisco released its "network of the future" products in June 2017, which incorporated Centripetal's patented technology. The Court outlined enough evidence to support its belief that "this is an egregious case of willful misconduct beyond typical infringement" and determined that enhancing the damages by a factor or 2.5 was appropriate. Applying this factor increased the damages to $1,889,521,362. One of the reasons stated by the Court to use a factor of 2.5 instead of 3 was because Cisco prevailed as to one of the asserted patents, potentially saving the company over $375 million in additional damages.

The Court then turned its attention to future damages where it denied Centripetal's request for injunctive relief and instead imposed an ongoing royalty obligation. Again, the Court used *Georgia-Pacific* to find that the Keysight license as a comparable license and selected a 10% royalty for the first three years and extended the three-year term of Keysight to 6 years for Cisco with a 5% royalty set for the final three years. The Court also set minimum and maximum annual royalties of $167 million and $300 million, respectively, for the first three years and $83 million and $150 million for the final three years.

The final tally of damages related to this case resulted in Actual Damages of $755 million enhanced to $1.9 billion and Prejudgment Interest of $13.7 million for a lump-sum award of 1,903,239,287 "due on the judgment date." Additionally, the future damages based on royalties over the next six years will range from $754 million to $1.3 billion. These combined damages awards rank among some of the highest patent damages awarded to date. Cisco has already announced its plan to appeal this decision to the U.S. Federal Circuit Court of Appeals, and we will update this blog as new information emerges.

Lynn Dudinsky is the Vice President of Foresight Valuation Group, a Silicon Valley-based intellectual property advisory firm, where he specializes in the valuation of intellectual property assets including patents, trade secrets, software, and brands. His experience in intellectual property includes graduating from Santa Clara University School of Law where he was awarded the High Tech Law Certificate with a specialization in intellectual property as well as working for the Patent Department of Samsung Research America. His work prior to law school has been the subject of multiple peer-reviewed articles related to his graduate research on the identification of causative genes of retinitis pigmentosa at Texas A&M as well as his work at NASA related to the International Space Station's Water Recovery System.