Sins of Omission: *Panduit's* Overreach in Patent Model Jury Instructions

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IT IS GENERALLY AN ARTICLE OF FAITH that to obtain an award of lost profits in patent infringement cases, a patentee plaintiff has the burden of proving a double negative. It must prove the non-existence of non-infringing substitutes. This is the teaching gleaned and consistently applied—or misapplied—from the *Panduit* case.[1] This burden effectively "cuts off" entitlement to lost profits awards in many business-to-business patent cases,[2] forcing plaintiffs to fall back on smaller reasonable royalty awards.

But that burden does not, or should not, always apply. Major model patent jury instructions contribute to the problem. While their treatment of *Panduit* leads to only minor concerns, they do not clearly set out the occasions in which the *Panduit* analysis, including the requirement to prove the double negative, does not apply. These sins of omission have a critical impact on obtaining—or seeking to obtain—lost profits in patent cases. While commentators decry the significant cost of patent litigation brought by patent trolls in obtaining "unwarranted" royalty awards, few focus on the impact of devalued lost profits claims in purely business-to-business disputes.

Case law, policy, and logic mandate that those addressing patent lost profits recognize at the forefront at least three important exceptions. Those exceptions are:

- A patentee plaintiff can avoid the burden of proving the non-existence of non-infringing substitutes in a multi-seller market if it successfully applies the Market Share Rule, obtaining its percentage share of profits from sales previously enjoyed by the infringer.
- A patentee plaintiff can avoid the burden of proving the non-existence of non-infringing substitutes when it and the defendant are in a two-supplier market.
- A patentee plaintiff should be permitted to avoid the initial burden of production of evidence of the non-existence of non-infringing substitutes when it proves willful infringement.

A fourth "exception," if you will, exists that we will not address. That is the holding in several key cases, advising that the *Panduit* factors are not the exclusive path to proving lost profits.[3]

THE LOST PROFITS SCHEMA UNDER *PANDUIT*

Section 284 of the patent statutes tells us clearly that there are two paths toward obtaining damages in patent infringement cases: a plaintiff is entitled to adequate compensation, including lost profits, upon infringement.[4] In the alternative, if the former cannot be proved or is shown to be the lower of the two, the patentee may receive at least the reasonable royalty value derived from infringement.[5]

Most patent awards are based on a reasonable royalty.[6] Usually, that is not because plaintiffs prefer that form of award; it is more because proving lost profits is difficult. When recoverable, lost profits awards tend to be significantly greater than reasonable royalty awards. A study by Lex Machina of damage awards gave median royalty awards, year by year, in their study over each of the last four years of $403,000 to $2,715,000.[7] The medians for year-by-year lost profit awards, on the other hand, ranged from $2,358,000 to $5,000,000.[8]

If lost profits awards are generally higher, why are they more difficult to get? One answer is *Panduit*. Lost profits awards require proof of causation of loss from defendant's conduct; reasonable royalty awards do not. Even if causation of injury cannot be proved, Section 284 says a plaintiff is entitled at least to a reasonable royalty.

The oft-cited case of *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.* has served as the standard bearer for decades on the question of lost profits. To prove lost profits in the context of multi-supplier markets, the *Panduit* test is said to require a plaintiff to prove (1) demand for the patented product; (2) absence of acceptable, non-infringing substitutes; (3) its capacity to meet demand and (4) the amount of profit it would have made.[9]

It is that second factor—absence of a non-infringing alternative—which usually defeats proof of lost profits.

Damages law seeks to reconstruct the market that would have existed "but for" the infringement, to measure loss. In the influential *Grain Processing* case on non-infringing substitutes, the court opined that a sale to an infringing defendant presumably would not have gone to the plaintiff if a defendant could choose to select a different, available (non-infringing) design, even where it chose instead to continue infringing.

> [A] fair and accurate reconstruction of the "but for" market also must take into account, where relevant, alternative actions the infringer foreseeably would have undertaken had he not infringed. Without the infringing product, a rational would-be infringer is likely to offer an acceptable non-infringing alternative, if available, to compete with the patent owner rather than leave the market altogether. The competitor in the "but for" marketplace is hardly likely to surrender its complete market share when faced with a patent assuming it can compete in some other lawful manner.[10]

The *Panduit* factors are often applied as if proof by plaintiff of this double negative—the non-existence of non-infringing alternative products in the marketplace—is a prerequisite for establishing entitlement to lost profits.[11] This burden of production of evidence is, at least, considered generally to be a prima facie hurdle the *plaintiff* must overcome, to have any shot at all at winning lost profits through carrying out its burden of persuasion.[12] In looking at the third proposed exception to *Panduit* factors—lost profits when willful infringement exists—we will examine that juridical assumption concerning human nature more closely.

PATENT INFRINGEMENT DAMAGES MODEL JURY INSTRUCTIONS—*PANDUIT* OVERSTATED?

Three major model jury instructions significantly overstate *Panduit* as a necessary first step in analysis and understate exceptions to its application.

The Federal Circuit Bar Instruction

The 2014 version of the Federal Circuit Bar's Model Patent Jury Instructions, Instruction Number B.6.2, entitled "Lost Profits—'But For' Test," reads:

> [This instruction should only be given in the event the patent holder is seeking lost profits damages, in whole or in part.]
>
> In this case, [patent holder] seeks to recover lost profits for some of [alleged infringer]'s sales of [infringing product], and a reasonable royalty on the rest of [alleged infringer]'s sales.
>
> To recover lost profits (as opposed to reasonable royalties), [patent holder] must show a causal relationship between the infringement and [patent holder]'s loss of profit. In other words, [patent holder] must show that, but for the infringement, there is a reasonable probability that [patent holder] would have earned higher profits. To show this, [patent holder] must prove that, if there had been no infringement, [it would have made some portion of the sales that [alleged infringer] made of the infringing product,] [it would have sold more products that are functionally related to those products,] [it would have sold its products at higher prices,] [or it would have had lower costs].
>
> [Patent holder] is entitled to lost profits if it establishes each of the following:
>
> (1) That there was a demand for the patented [product] [method] [product produced by the method].
>
> (2) That there were no available, acceptable, non-infringing substitute products, or, if there were, its market share of the number of the sales made by [alleged infringer] that [patent holder] would have made, despite the availability of other acceptable non-infringing substitutes.
>
> (3) That [patent holder] had the manufacturing and marketing capacity to make any infringing sales actually made by [alleged infringer] and for which [patent holder] seeks an award of lost profits—in other words, that [patent holder] was capable of satisfying the demand.
>
> (4) The amount of profit that [patent holder] would have made if [alleged infringer] had not infringed.

While not inaccurate, this instruction by implication ties the *Panduit* factors squarely into the requirement for showing "but for" causation, without clarifying that the latter can exist without the former. Coupled with the vagueness of instructions discussing exceptions, noted below, these model instructions are problematic.

The AIPLA Instruction

The American Intellectual Property Law Association (AIPLA) did a slightly better job of decoupling the "but for" test from the *Panduit* factors by separating them into two instructions. Its 2012 version of the "but for" instruction is Number 11.3:

> [The Plaintiff] is seeking lost profits damages in this case. To prove lost profits damages, [the Plaintiff] must show by a preponderance of evidence that, but for [the Defendant]'s infringement, [the Plaintiff] would have made additional profits through the sale of all or a portion of the sales of [the allegedly infringing products] made by [the Defendant]. Thus, part of your job is to determine what the customers who purchased the [allegedly infringing product] [from the Defendant] would have done if the alleged infringement had not occurred. It is important to remember that the profits I have been referring to are the profits allegedly lost by [the Plaintiff], not the profits, if any, made by [the Defendant] on the allegedly infringing sales.

Its *Panduit* instruction in Number 11.4—like the Federal Circuit Bar's—creates the impression that *the* way to establish "but for" causation is to satisfy the *Panduit* factors. The instruction immediately below says plaintiff "has proven its lost profits," as if that is the only way to achieve the result. Since exceptions exist, a preferable expression would be to begin the instruction with "One way [the plaintiff] may prove its lost profits ...."

> [The Plaintiff] has proven its lost profits if you find that [the Plaintiff] has proven each of the following factors by the more likely than not standard:
>
> - the demand for the patented [[product] [method]],
> - absence of acceptable non-infringing substitutes,
> - that [the Plaintiff] had the manufacturing and marketing ability to make all or a part of the infringing sales actually made by [the Defendant], and
> - the amount of profit that [the Plaintiff] would have made if it were not for [the Defendant]'s infringement.

The Northern District of California Instruction

One of the leading district courts handling patent matters is the Northern District of California (NDCA). It has put forth its own model instructions for patent infringement. Its Instruction B.5.3 (June, 2014 version) is similar to the AIPLA approach in setting out *Panduit* factors, stating "[Patent holder] is entitled to lost profits if it proves all of the following ...."

However, out of the box, its "general" lost profits instruction ties the "but for" analysis to a confusing assumption regarding plaintiff's claims. Instruction B.5.2 assumes that the lost profits award will be for only a portion of infringing sales and royalties would be for another portion.

> In this case, [patent holder] seeks *to recover lost profits for some of [alleged infringer's] sales* of [infringing product], *and a reasonable royalty of the rest of [alleged infringer's] sales.* [¶] To recover lost profits for infringing sales, [patent holder] must show that but for the infringement there is a probability that it would have made sales that [alleged infringer] made of the infringing product. [Patent holder] must show the share of [alleged infringer]'s sales that it would have made if the infringing product had not been on the market. [Emphasis added.]

The reason this instruction uses the "some sales" language and addresses royalties is that the seminal case on the Market Share Rule, *Mor-Flo*, involved those facts.[13] However, the holding regarding the Market Share Rule did not depend on either aspect.

As discussed below, each of these three sets of instructions separately address the Market Share Rule. However, only one expressly states that the *Panduit* factors are only one path to obtaining lost profits. Only one, moreover, refers to the two-supplier market, and none address willful infringement.

THREE EXCEPTIONS TO *PANDUIT*—RELATED FACTORS FOR LOST PROFITS

The model jury instructions on lost profits should set out more clearly the three exceptions to the *Panduit* approach set out in this article. Simply put, as to all three exceptions, plaintiff should bear no initial burden to produce evidence regarding the non-existence of non-infringing substitutes. Two of those exceptions already exist firmly in the case law. The third—not yet entrenched in case law—has no current place in *model* jury instructions. However, aggressive, creative plaintiff's counsel should propose this third exception as an instruction where applicable, and model instructions should take this future development into account.

First Exception: the Market Share Rule

Last year, I had occasion to dine at the same table with former Chief Judge Randall Rader. Judge Rader has tackled patent damage issues in the Federal Circuit perhaps more vigorously than anyone else in recent memory. I seized on the opportunity to ask "why is the Market Share Rule not relied on more consistently by plaintiffs in patent cases?" After some thought, he suggested the problem could be one of defining the relevant market. That may be daunting in some cases, but not in others.

In fact, reliance on the Market Share Rule can make "easy work" of the plaintiff's task of showing lost profits, once the relevant market and its size is determined. The job is accomplished by noting the volume of sales by defendant (found in discovery) and that of plaintiff's own sales (already known intimately). The rest is sixth-grade mathematics.

For this reason, if no other, the clarity of jury instructions in connection with *Panduit* is important.

The Federal Circuit Bar model instructions sets out a separate Market Share Rule in Instruction Number B.6.2:

> If a patent holder establishes it would have made some, but not all, of an alleged infringer's sales but for the infringement, the amount of sales that the patent holder lost may be shown by proving the patent holder's share of the relevant market, excluding infringing products. A patent holder may be awarded a share of profits equal to its market share even if there were noninfringing substitutes available. In determining a patent holder's market share, the market must be established first, which requires determining which products are in that market. Products are considered in the same market if they are considered "sufficiently similar" to compete against each other. Two products are sufficiently similar if one does not have a significantly higher price than, or possess characteristics significantly different from, the other.

To its credit, this instruction explicitly states that the market share may be awarded "even if there were non-infringing substitutes available."[14] The AIPLA instruction does so less directly (see underscoring below), but the NDCA instructions fail to make that critical distinction.

The AIPLA model instructions also have a separate Market Share Rule instruction, Instruction Number 11.7. The problem here is twofold. First, the instruction appears to "require" the jury first to go through the process of determining the *Panduit* factors. Only if failure results for the plaintiff, the language suggests, should the jury then take a market share approach. Second, the instruction incorporates discussion of a two-supplier market as part of the market share discussion, creating additional issues discussed below. Instruction Number 11.7 reads:

> *If you find that there were other acceptable non-infringing substitute products in the market,* then [the Plaintiff] may be entitled to lost profits on a portion of [the Defendant]'s infringing sales. The burden is on [the Plaintiff] to prove that it is more likely than not that the patented product competed in the same market as [the Defendant]'s infringing product, and that [the Plaintiff] would have made a portion of the infringing sales equal to at least [the Plaintiff]'s share of that market but for [the Defendant]'s infringement. It is not necessary for [the Plaintiff] to prove that [the Plaintiff] and [the Defendant] were the only two suppliers in the market for [the Plaintiff] to demonstrate entitlement to lost profits. The burden is on [the Plaintiff], however, to show that it is more likely than not that it would have sold that portion had [the Defendant]'s product never existed. *In a two-supplier market, the burden is on [the Plaintiff] to show that its product competed in the same market with the [the Defendant]'s product and that it would have made those sales if the infringement had not occurred.* [Emphasis added.]

As for the corresponding NDCA instruction, B.5.3., it does not clarify that it is an exception to the *Panduit* approach. Especially since it fails to indicate that the availability of non-infringing substitutes is irrelevant, it risks confusing the jury into believing the market share approach (somehow) fits into the *Panduit* analysis as some unspecified factor:

> One way [patent holder] may prove the number of sales it would have made if infringement had not happened is to prove its share of the relevant market excluding infringing products. You may award [patent holder] a share of profits equal to that market share. [¶] In deciding [patent holder]'s market share, you must decide which products are in [patent holder]'s market. Products are in the same market if they are sufficiently similar to compete against each other. Two products are sufficiently similar if one does not have a significantly higher price than or possess characteristics significantly different than the other.

Two of the instructions, furthermore, suffer from the profound omission of not discussing two-supplier markets. We turn next to that second exception.

Before proceeding, first a word of explanation: some would argue that the Market Share Rule encompasses the two-supplier market rule. The Market Share Rule, described immediately above, is premised on the assumption that a plaintiff presumptively would enjoy its "fair share" of the infringing sales, where multiple suppliers are in the market. The two-suppler market rule simply presumes the patentee would have gotten the sales the infringer had, since there were no other suppliers to turn to. Thus, they arguably may be deemed as one and the same, where there is only one other supplier. Under that rule, moreover, if the market share of the patentee after removing the infringer is 100%, the resulting lost sales is the same as would be determined under a separate application of the two-supplier rule. Moreover, both are discussed in the *Mor-Flo* case, which announced the Market Share Rule.[15] However, the focus on each is different. The Market Share Rule was initially applied in a multi-supplier market. Cases applying the two-supplier test do not always expressly apply the Market Share Rule or cite *Mor-Flo*.[16] Further, sufficient confusion exists to merit separate discussion, and a simpler approach when a model rule is applicable.[17]

Second Exception: the Two-Supplier Market Rule

Another exception is the two-supplier market, which is more likely to appear in niche markets. Said another way, *Panduit only* applies in multi-seller market cases, if then. Where infringement occurs in a two-supplier market, lost profits calculations are simpler than the *Panduit* approach. In such a market, buyers deprived of the infringing item have both demonstrated a readiness to purchase the product having infringing features and have nowhere else to go but to the patentee to acquire the product. It is reasonable to infer in such cases that the patent owner would have made the sales made by the infringer. Hence, there is no need to analyze whether non-infringing alternatives exist to the infringer's sales. Under such circumstances, the initial burden of proving causation of injury is rebuttably presumed or met.[18]

Nowhere is this discussion more clearly set out than in *Micro Chemical Inc. v. Lextron, Inc.*[19] The Federal Circuit first noted the basic principle that to recover lost profits, a patentee must show that "but for" the infringement it would reasonably have made the additional profits requested, and that "[t]his court has not restricted patentees to any one particular method of proving 'but for' causation."[20] In that regard, Judge Rader's opinion stated that, "[t]he *Panduit* and two-supplier market tests are recognized methods of showing 'but for' causation."[21]

The lower court in *Lextron* had denied the patentee's claim for lost profits based on a two-supplier market theory, reasoning that in the relevant market there were additional suppliers.[22] Rejecting that, Judge Rader first underscored part of the premise of this article: "[a]dmittedly, this court's precedent has not reconciled completely the two-supplier test with the *Panduit* test."[23] He then went on to say the two-supplier test does *not* require a showing the non-availability of non-infringing substitutes, citing *State Industries, Inc. v. Mor-Flo Industries, Inc.*[24] The Court there held that such a patentee would likely have "made the infringer's sales," as a matter of "but for" causation presumption.[25] Once the patent holder has shown an inference of "but for" causation is reasonable, "the burden shifts to the infringer to show that the inference is unreasonable for some or all of the lost profits.[26]

Once the relevant market is determined to have only two suppliers, the lost profits calculation is relatively easy: on a prima facie basis, the patentee simply proves the net profit it would have enjoyed on the units of sales accomplished by the infringer. On remand, the plaintiff was expressly entitled to seek lost profits based on either "the *Panduit* or the two-supplier test to show 'but for' causation."[27]

The Federal Circuit applied the two-supplier market again in *Integrated Technology Corp. v. Rudolph Technologies, Inc.*,[28] reaffirming that lost profits may be proved without evidence that non-infringing alternatives exist. No discussion was evident of the Market Share Rule. On June 30, 2014, the Supreme Court denied certiorari to review that issue.[29]

Nowhere in two of the three model patent jury instructions is this exception to *Panduit* noted or addressed. It is mentioned as part of AIPLA's Market Share Rule instruction number 11.7. Arguably, however, it would be better to set the model rule apart from the Market Share Rule. It invites confusion in "assuming" that it is part of the Market Share Rule. The two-supplier test is essentially one of presumption, arising from the fact that there is no other supplier and the natural conclusion that sales would thus have gone to the patentee. Cases cite the two-supplier rule without reference to the Market Share Rule, as noted immediately above. The Market Share Rule on the other hand is more one of reasonable allocation, founded on the appraisal that other suppliers each would have enjoyed some of the sales soaked up by the defendant. This is a different emphasis. While the case law is less than fully settled on the point, there may therefore be different requirements for each rule. Moreover, the AIPLA instruction is open to debate. It ignores cases that state the existence of a two-supplier market relieves plaintiff of the burden of making a further showing of causation.[30]

Third Exception: Willful Infringement

The above two exceptions to *Panduit* are firmly set out in case law, if not clearly expressed in the model instructions. The third exception is on less solid ground. Nevertheless, I believe it should be recognized for case rationale, logic, and policy reasons.

Patent litigators view willful infringement as a question of trebling or enhancing damages beyond the compensatory award. But it should also play a role in analyzing causation of lost profits. It becomes relevant because of the quirky logic involved in the second *Panduit* factor—requiring the plaintiff to sustain a burden of production of evidence of the absence of non-infringing alternatives. If that burden is sustained, the burden of persuasion then shifts to the defendant.[31] This initial burden of production on plaintiff is based on a judicial assumption on how "rational" infringers would act if heeding a demand to stop infringing. They would "presumably" shift to a non-infringing alternative, if one exists, thus eliminating a claim of causation of injury. Why a willful infringer would be presumed to stop infringing on this hypothetical when it already knows it is infringing is never explained.

Virtually no case has ruled on non-infringing alternatives where an infringer acts willfully. A major case on non-infringing substitutes, *Grain Processing*, extended the rationale of "available" alternatives even to products not yet on the market, but it expressly noted that it was doing so when the infringement in question was not willful.[32] Another court commented, "[w]e also note that the argument that there were acceptable, non-infringing substitutes is undermined by [appellant's willful infringement]. As the *Panduit* court noted, the 'acceptable substitute' element, though it is to be considered, must be viewed of limited influence where the infringer knowingly made and sold the patented product for years while ignoring the 'substitute.'"[33]

The irony is that—by establishing a de facto rebuttable presumption of no causation of harm from the existence of non-infringing alternatives—*Panduit* applies its protection almost exclusively when its protection is least deserved. If the infringer heeds the demand to stop, there is little or no lost profits damage; damages accrue only from notice. If an infringer promptly switches to a non-infringing substitute, again, little or no lost profits damage. Ask yourself then, is it sound public policy to insulate infringers from damage exposure, where good faith is the premise but bad faith is the only meaningful application?

Whatever its merits generally, the logic behind placing the burden of production on the plaintiff in the face of willful infringement is questionable. At best, a court without empirical evidence or a supporting record has imposed a sense of burden based upon an arbitrary supposition. An infringing sale, made with knowledge that the sale was infringing, would likely *not* be diverted. That decision has already been made, by the premise of willfulness. In fact, we know at trial it was not diverted. The infringer—armed with that knowledge and option—willfully opted to forego changing products, sensing some competitive advantage by doing so. Its informed choices must not be ignored but rather embraced as a key, actual fact, derived from concrete results. It suggests, at the very least, that the features found only in the patent and infringing product responded to or created consumer preference, in the infringer's eyes. The infringer in essence made a bet: it bet that its existing, infringing product was better than a non-infringing alternative, even if the latter is available. It nevertheless proceeded apace. That bet is some evidence of not only motivation but also of causation. Without the infringing product, the customer, in the eyes of the infringer, would "often" have swung to plaintiff, the only other party presenting the features being infringed.

Furthermore, the *Panduit* view on non-infringing alternatives views the accused infringer as the only relevant actor. What about the customer? If the infringing product were taken off the market (it wasn't), would not the customer be more likely to go with the product which most closely resembles the infringing product on the patented features, all else being equal? If so, there is little reason to presume the customer would go for a product lacking the patented feature, absent evidence from the defendant to that effect.

Of course, no model jury instruction could be expected to incorporate a willfulness exception to *Panduit.* No case law yet has been developed to establish this principle firmly. However, litigators should press for judicial consideration of this issue. Further, the model instructions are incomplete or misleading on *Panduit* to such an extent that further revisions should take into account the possible or probable evolution into an additional, eventual exception to *Panduit.*

Finally, a further word on presumptions and use of model instructions. The argument here is not that a defendant cannot challenge causation as a defense. The argument is, that at least in these three situations, the initial burden of production rests not with the plaintiff in its prima facie case. It continues to have the burden of proof on causation of injury; it does not need to have an additional burden piled on to that. It should be the burden of production of the *defendant* in these "exceptional" matters, as part of an affirmative defense or application of shifting burdens, to present evidence why there is no causation of injury from infringement.

It is also a given that model instructions need not all be used, even if available. In some cases, the issue is squarely a *Panduit* matter of causation in a multi-seller market, where the plaintiff for whatever reason does not seek additional instructions. Perhaps there was insufficient evidence or motivation to show market share, there may be no two-supplier niche, and willful infringement may be a remote hope. In some cases one exception but not the other two may be appropriate to assert. Rarely perhaps would all exceptions need to be presented to the jury. But nevertheless model instructions should be available for use as needed.

SUMMARY AND CONCLUSION

The various model jury instructions on lost profits follow the rationale in *Panduit.* At worst, they imply requirements that may not really exist. The problem is more one of omission: failure to set out clearly when *Panduit* does not apply.

Panduit does not set out the sole basis for obtaining lost profits, even in multi-seller markets. It presents one avenue, where other avenues are permitted, and tends to foreclose viable alternatives, both by omission and by implication. While jury instructions exist primarily to instruct juries, they also inform attorneys and judges of available, prevailing legal principles. The current three major patent model instructions in some instances blur requirements and tend to channel thinking solely along *Panduit* lines when exceptions already exist. The Market Share Rule is not clearly marked as an "exception" but in one case considered a fall back. In some, false prerequisites seem to be inserted. In others, limiting language emerges that only "some" sales qualify. The two-supplier exception is not mentioned in two sets. None of the *Panduit* instructions recognize that they only apply in multi-supplier markets. Finally, and unsurprisingly, they do not recognize the third exception regarding willful infringement, which logically does not support an initial moving burden on plaintiff to show the non-availability of non-infringing substitutes.

Two recognized exceptions exist to *Panduit.* It would assist parties, counsel and court alike to make that clearer.

A better approach than that of any of the three model jury instructions discussed above would be the following:

- Separate the "but for" requirement from the *Panduit* factors, as both the AIPLA and NDCA instructions do.
- Provide a basic *Panduit* instruction much like the NDCA's starts out: "[Patent holder] is entitled to lost profits if it proves all of the following . . . ."
- Follow immediately after the *Panduit* instruction with two model instructions—one regarding the Market Share Rule and the other on a two-supplier market. However, unlike any of the instructions discussed above, each instruction should start out with qualifying words such as, "the foregoing four elements of proof for lost profits are not required in the instance of a two-supplier market. In that instance, [the patent holder]'s burden of proof is to show instead . . . ." Also: "the foregoing four elements of proof for lost profits are not required in an analysis of market share. In that instance, [the patent holder]'s burden of proof is to show instead . . . ."

Additionally, plaintiff's counsel should submit proposed instructions when willfulness is being asserted, as a third exception to the *Panduit* principles. It does not yet belong in model instructions, because it is not established law. But one day it should be. ◂◂

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Endnotes

1. *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.,* 575 F.2d 1152,

1156 (6th Cir. 1978).

2. By definition, non-practicing entities rarely can assert lost profits claims, having no product to sell. Their claims almost invariably focus on reasonable royalty awards.
3. *Micro Chemical, Inc. v. Lextron, Inc.*, 318 F.3d 1119, 1122 (Fed. Cir. 2003).
4. 15 U.S.C. § 284.
5. *Id.*
6. *Lex Machina*, Patent Litigation Damages Report (2014), http://pdfserver.amlaw.com/nlj/LexMachina-Patent%20Damages%20Report.pdf, p.3, figure 4.
7. *Id.*
8. *Id.*
9. *Panduit,* 575 F.2d at 1156.
10. *Grain Processing Corp. v. American Maize-Products Co.,* 185 F.3d 1341, 1350–51 (Fed. Cir. 1999).
11. *See, e.g., Sanofi Aventis Deutschland v. Glenmark Pharm. Co.,* 821 F. Supp.2d 681, 688 (D. N.J. 2011); *Versata Software, Inc. v. SAP America,* 717 F.3d 1255, 1263–64 (Fed. Cir. 2013).
12. *See, e.g., Panduit Corp.,* 575 F.2d at 1156.
13. *State Indus., Inc. v. Mor-Flo Ind. Inc.,* 883 F.2d 1573 (Fed. Cir. 1989) (*citing TWM Mfg. v. Dura Corp.,* 789 F.2d 895, 898 (Fed. Cir. 1986)).
14. *Id.*
15. *Id.*
16. *Lam, Inc. v. Johns-Manville Corp.,* 718 F.2d 1056, 1065 (Fed. Cir. 1983).
17. As one example, some case law indicates that in a two-supplier market, a conclusive presumption exists that all sales of the infringer would go to the patentee, at least with respect to the initial burden of production. *Lam,* 718 F.2d at 1065; *Polymer Indus. Prods. Co. v. Bridgestone/Firestone,* Inc., 10 Fed. Appx. 813, 819 (Fed. Cir. 2001). *But see Micro Chemical, Inc. v. Lextron, Inc.,* 318 F.3d 1119, 1124 (Fed. Cir. 2003). *Mor-Flo,* on the other hand, which introduced the Market Share Rule, required analysis of the remaining *Panduit* factors of demand, capacity and amount of profit. 883 F.2d at 1577-79.
18. *Lam,* 718 F.2d at 1065; *Polymer Indus. Prods. Co.* 10 Fed. Appx. at 819.
19. 318 F.3d 1119 (Fed. Cir. 2003).
20. *Citing King Instruments v. Perego,* 65 F.3d 941, 952 (1995) and *Rite-Hite Corp. v. Kelley Co.,* 56 F.3d 1538, 1545 (Fed. Cir. 1995).
21. *Lextron,* 318 F.3d at 1122.
22. *Id.* at 1124.
23. *Id.*
24. 883 F.2d 1573, 1578 (Fed. Cir. 1989).
25. *Lextron,* 318 F.3d. at 1125.
26. *Id.*
27. *Id.*
28. 734 F.3d 1352 (Fed. Cir. 2013).
29. __U.S.__, 134 S. Ct. 2873 (2014).
30. *Lam, Inc. v. Johns-Manville Corp.,* 718 F.2d 1056, 1065 (Fed. Cir. 1983); *Polymer Indus. Prods. Co. v. Bridgestone/Firestone, Inc.,* 10 Fed. Appx. 813, 819 (Fed. Cir. 2001).
31. *Rite-Hite Corp. v. Kelley Co.,* 56 F.3d 1538, 1545 (Fed. Cir. 1995).
32. *Grain Processing Corp. v. American Maize-Products Co.,* 185 F.3d 1341, 1353 (Fed. Cir. 1999).
33. *Stryker Corp. v. Intermedics Corp.,* 96 F.3d 1409 (Fed. Cir. 1996), abrogated in part by *In re Seagate Tech, LLC,* 497 F.3d 1360 (Fed. Cir. 2007) (eliminating the affirmative duty of due care standard for willfulness).