Impact of Patent Licensing on Patent Litigation and Patent Office Proceedings

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Within the last decade, there has been an explosive growth in the importance of intellectual property (IP) as a corporate asset. In business enterprises based primarily on the transfer of information or high technology, IP is often the dominant asset in the company's portfolio.

One of the great advantages of IP, as compared to tangible assets, is that the IP owner can deploy its IP assets to generate revenue without incurring significant capital costs. The most common method of generating such revenue is through licensing. Patents, in particular, are an important type of IP asset and are frequently licensed.

Patent attorneys and other technology transfer professionals are normally eager to assist their clients in generating revenue through patent licensing. Patent licensing professionals are well acquainted with the flexibility available to define the scope of a license in terms of several variables including royalty provisions, geographic territory, and field of use. This flexibility allows the patent licensor to fine tune his licensing program to his particular business and/or economic objectives.

These business and economic objectives are frequently defined or measured in terms of cash flow generation and/or market penetration. These two terms are often the major considerations to the licensing professional and the patent owner.

There are, however, other, longer-term ramifications of patent licensing that should be considered by the patent owner and its agents. These ramifications include the:

- Ability to obtain a preliminary injunction against an infringer of the patent;
- Lost profits and royalties that are recoverable as damages in litigation; and
- Ability to rebut an invalidity attack based on obviousness, made either in a Patent Office proceeding or in patent litigation.

Impact on the Availability of Preliminary Injunctive Relief

Legal Standard for Obtaining a Preliminary Injunction

District courts may grant injunctions in patent cases "in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."[1] A preliminary injunction prohibiting patent infringement involves substantive issues unique to patent law and, therefore, is governed by the law of the Federal Circuit.[2]

In order to obtain a preliminary injunction, a movant must show:

1. A reasonable likelihood of success on the merits;
2. That irreparable harm will be suffered if preliminary relief is not granted;
3. The balance of hardships tip in favor of the movant; and
4. A tolerable effect on this public interest.[3]

The movant's burden is no more stringent in patent cases than it is in other preliminary injunction proceedings.[4]

Irreparable Harm Element

The second element the patentee must establish in order to obtain a preliminary injunction is that it will suffer irreparable harm if the preliminary injunction is not granted. When there is a strong showing of likelihood of success on the merits, and that strong showing is coupled with continuing infringement, a presumption of irreparable harm to the patentee is raised.[5]

Factors to be considered in the irreparable harm inquiry include (1) whether the patentee's reputation will be injured by the public mistaking inferior, infringing goods of the alleged infringer for the patentee's product; (2) whether the patentee or its licensees will be injured by competition from the alleged infringer; and (3) whether the patentee runs the risk of loss of sales or goodwill in the market.[6]

The Federal Circuit has recognized market realities that help and hinder the patentee seeking to prove irreparable harm. The Federal Circuit has held that infringement may have market effects, such as decreases in market share and revenue that are not fully compensable in money.[7] The Federal Circuit also has recognized that "a concept that every patentee is always irreparably harmed by an alleged infringer's pretrial sales would . . . disserve the patent system."[8]

It is well-established that even a "presumption of irreparable harm to a patentee is, like all presumptions, rebuttable."[9] The Federal Circuit has attempted to balance the various presumptions and absences of presumptions that result from the grant of a patent with respect to irreparable harm by holding: [10]

1. The nature of the patent grant weighs against holding that monetary damages will always suffice to make the patentee whole; and
2. There is no presumption that money damages will be inadequate in connection with a motion for an injunction.

The availability of monetary damages coupled with admissions made by the patentee that monetary damages are adequate to compensate it for the use of its patent likely will result in a finding that the patentee has failed to establish irreparable harm at the preliminary injunction stage. In *High Tech*, the Federal Circuit noted that "the availability of damages is particularly significant where, as here, the patentee can point to no specific interest that needs protection through interim equitable relief."[11]

Incompatibility of Licensing and Irreparable Harm

In *High Tech*, the Federal Circuit held that "licensing is incompatible with the emphasis on the right to exclude that is the basis for the presumption [of irreparable harm] in a proper case." The Federal Circuit interpreted the patentee's offer of licenses as a willingness "to forgo its patent rights for compensation." The Federal Circuit found that the evidence in *High Tech* suggested that any injuries suffered by the patentee "would be compensable in damages asserted as part of the final judgment in the case."[12] The Federal Circuit concluded that the District Court had committed legal error in its analysis of irreparable harm and reversed the District Court's grant of a preliminary injunction.[13]

In several other cases, the Federal Circuit has found that patent licensing is inconsistent with a claim of irreparable harm.[14] In *Smith & Nephew*, the patentee had not only licensed its patent, but also had waited 15 months before seeking a preliminary injunction. The Federal Circuit held that even if there were a presumption of irreparable harm, "it would have been rebutted here by Nephew's delay in seeking an injunction and by its grant of licenses, acts incompatible with the emphasis on the right to exclude that is the basis for the presumption in a proper case."[15]

In *Illinois Toolworks*, the District Court held:

> This court believes that in instances where the patent holder has not demonstrated a reasonable likelihood of success on the merits, but has licensed its patent to another, monetary damages can sufficiently compensate the patent holder for infringement occurring during the course of the litigation. Such is the case here. It is undisputed that ITW [the patentee] has licensed its patents to another company. ITW thus does not have the exclusive market for plastic carriers, and the court can place a value on the market for those carriers by looking to the licenses themselves.[16]

The Federal Circuit affirmed the District Court's denial of a preliminary injunction in *Illinois Toolworks*.[17]

In a creative attempt to avoid the impact of the Federal Circuit's decisions in *High Tech*, *Polymer Technologies*, and *Smith & Nephew*, a patentee who had previously licensed its patents argued that it had not licensed the claims that were the subject of the preliminary injunction proceeding.[18] The district court was less than receptive to this argument, holding that "the proposition that a patentee can license certain claims of a patent while attempting to exercise exclusivity over others runs contrary to common sense."[19] The district court in *Arthrex* held that "engaging in licensing activity is incompatible with the right to exclude," citing the Federal Circuit decisions in *Smith & Nephew* and *High Tech*.

In a recent decision the district court for the Northern District of Georgia held that a patentee had failed to establish irreparable harm, even though its "licensing was not extensive."[20] The district court in *Sidel* emphasized that the "licenses provide the court with a measure of damages" if the plaintiff prevails on its infringement claims.[21]

In some cases, a mere offer to license may not have the same devastating impact on establishing irreparable harm as does the grant of a license.[22] In the *Advanced Communication Design* case, the district court held that the patentee was entitled to a presumption of irreparable harm because it had established that it had a valid and enforceable patent that had been infringed.[23] The district court further held that although the patentee had "offered to enter into a licensing arrangement with Premier [the defendant] does not rebut the presumption of irreparable harm."[24]

One of the major rationales for the Federal Circuit holdings that the grant of a license precludes the existence of irreparable harm is that the license constitutes an admission by the patentee that there is a sum certain (the negotiated royalty) that will adequately compensate the patentee for the use of its invention. It is hard to understand how a patentee's mere offer to license is any less an admission that there is a sum certain that will adequately compensate it for the use of its invention. The district court's holding in *Advanced Communication* that a mere offer to license does not negate the presumption of irreparable harm appears to be inconsistent with the controlling Federal Circuit precedent in *High Tech*, *Polymer*, and *Smith & Nephew*.

Lost Licensing Opportunity as a Basis for Irreparable Harm

Ironically, although the Federal Circuit has repeatedly found the grant of a patent license to be inconsistent with the patentee's claim of irreparable harm, the Federal Circuit also has held that a patentee who does not practice its invention may establish irreparable harm "by showing that an existing infringement precludes its ability to license its patent."[25] Thus, a patentee who has previously licensed its patents may find itself unable to establish the irreparable harm needed to obtain preliminary injunctive relief, while a patentee who has never licensed its patents may be able to rely on its licensing aspirations as a basis for establishing irreparable harm. It is difficult, if not impossible, to reconcile the Federal Circuit's decision in *Roper* with its holdings in *High Tech*, *Polymer*, and *Smith & Nephew*.

Lessons Learned

The patentee who agrees to a royalty in an arms length transaction makes an admission that there is a certain sum which it will accept in exchange for the right not to be excluded from practicing the patented invention. That admission is inconsistent with the argument that pretrial infringement will result in irreparable harm. Thus, a prospective licensing transaction that may appear to favor the patentee from a cash flow or market penetration perspective may have a lurking "downside" that is not readily appreciated by all licensing professionals.

Patentees are well served by patent licensing professionals who advise the patentees of the potential adverse effects of patent licensing on the availability of preliminary injunctive relief. The prudent patent licensing professional will wish to avoid having his or her client become educated about this issue at the preliminary injunction hearing.

Impact on the Award of Damages in Patent Litigation

Categories of Damages Available for Patent Infringement

The scope of damages available to patentees has increased significantly in the last five years as a result of the Federal Circuit's *en banc* decision in *Rite-Hite Corp. v. Kelley Co. Inc.*,[26] approving the application of the "entire market value," to determine the award of damages in patent infringement litigation. The scope of damages available to the patentee now encompasses various combinations of one or more of the following remedies:

1. Lost profits[27] suffered by the patentee from lost sales of the patented item as well as the sales of collateral items ("tag along sales"); and
2. A reasonable royalty applicable to the infringing units made, used, or sold as well as collateral items.[28]

The lost profits remedy is usually the more lucrative remedy for the patentee to pursue. There may, however, be scenarios when a reasonable royalty is more lucrative than a lost profits remedy. Such a scenario may exist when the patentee's profit margin is low due to its high overhead or other operating inefficiencies and the reasonable royalty is high due to large upfront royalty payments or large minimum annual royalty payments which are present in existing licenses.

Impact of Prior Patent Licenses on the Recovery of Lost Profits

One of the factors that must be proven in order to establish entitlement to lost profits for patent infringement is the absence of acceptable noninfringing alternatives.[29] In the "old days" this element was difficult to prove in a market with more than two suppliers. In recent years, the Federal Circuit has demonstrated flexibility by accepting various methods by which patentees may prove the absence of acceptable noninfringing alternatives. These methods include the patentee's submission of "proof of its market share for proof of the absence of acceptable substitutes."[30]

"In a market with only two suppliers, the patentee and the infringer," proof of the absence of the acceptable noninfringing substitutes "is readily met."[31] When the patentee grants nonexclusive licenses, the patentee creates acceptable noninfringing substitutes.[32] In *Pall*, the patentee and its licensees had 25 percent and 75 percent of the market share for the patented product, respectively. The Federal Circuit remanded the case with instructions to the district court to award the patentee lost profits damages for 25 percent of the defendant's infringing sales and a reasonable royalty for 75 percent of the infringer's sales.

Thus, the patentee who grants nonexclusive licenses may find that the later availability of lost profits damages is reduced in direct proportion to the nonexclusive licensees' market share. A patentee who is informed of this consequence prior to licensing may elect to license only in fields of use or territories where its major competitors are unlikely to compete. This practice will mitigate the adverse impact of the licensees' market share on the availability of a lost profits recovery.

Impact of Prior Patent Licenses on the Magnitude of a Reasonable Royalty

Section 284 of the Patent Act states, in part:

> Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but 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.[33]

Thus, the reasonable royalty is regarded as the "floor" below which the award of damages for patent infringement shall not submerge.

The Federal Circuit has recognized that "the reasonable royalty may be based on an established royalty, if there is one, or if not on a hypothetical royalty resulting from arms length negotiations between a willing licensor and a willing licensee."[34]

Impact of Prior Licenses on "an Established Royalty"

As a general rule, the greater the number of license agreements there are involving the patent-in-suit, the greater the probability that those agreements will be sufficient to evidence "an established royalty." The Federal Circuit has provided the following guidance on this issue.

Moreover, as the magistrate stated, "a single licensing agreement does not generally demonstrate uniformity nor acquiescence in the reasonableness of the royalty." For a royalty to be "established," it "must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have occasion to use the invention."[35]

One should not infer, however, that the existence of only one or two license agreements will not be admissible as relevant evidence in determining what a reasonable royalty would be. The customary ranges of royalty rates available for patented inventions may vary widely from industry to industry, based on many factors, including but not limited to the capital-intensive nature of the technology, the projected life of the technology, and the projected size of the market for the technology. Thus, the terms "high" and "low," as applied to royalty rates, are used relative to the industry in which the patented technology is to be sold.

Patentees who license their patents at "high" royalties will build a base of evidence from which to support the assertion that the established royalty for the patented invention is equivalently "high." The converse is true for patentees who license their patents at "low" royalties. Patentees will often elect to license at a "low" royalty at the incipient stage of a technology in order to gain market share and acceptance.

One way to mitigate the adverse effect of a "low" royalty license is to state in the recital section of the license that it is entered into between the licensor and the licensee in order to avoid patent litigation.[36] The Federal Circuit has held that licenses entered into when litigation "was threatened or probable . . . should not be considered evidence of an established royalty since license fees negotiated in the face of a threat of high litigation costs may be strongly influenced by a desire to avoid full litigation."[37]

Impact of Prior Licenses on Hypothetical License Negotiations

When there is no established royalty, the trier of fact may engage in the fiction of hypothetical licensing negotiations between a willing licensor and a willing licensee.[38] The Federal Circuit in *Rite-Hite* held:

> The hypothetical negotiation requires the court to envision the terms of a licensing agreement reached as the result of a supposed meeting between the patentee and the infringer at the time infringement began.[39]

The Federal Circuit has held that any determination reached by the trier of fact regarding a reasonable royalty "must be supported by relevant evidence in the record."[40]

The most widely recognized family of factors to be evaluated in determining a reasonable royalty resulting from hypothetical licensing negotiations are known as the "*Georgia-Pacific*" factors.[41] The first two *Georgia-Pacific* factors are relevant to preexisting licenses. They are:

1. The royalty received by the patentee for the licensing of the patent-in-suit, proving or tending to prove an established royalty; and
2. The rates paid by the licensee for the use of other patents comparable to the patent-in- suit.[42]

The relative magnitude of the royalty rates in preexisting license will have the same favorable or adverse impact on the *Georgia-Pacific* analysis as such magnitude has on the determination of an established royalty, as already discussed. Thus, even a single prelitigation license may impact the determination of a reasonable royalty.

When the magnitude of the royalty in the prelitigation license is relatively "low," the license should state that it has been entered into between the parties in order to avoid patent litigation. This prophylactic measure should increase the probability that this low royalty license will not be considered in determining a reasonable royalty.[43]

Impact on Secondary Considerations of Nonobviousness

Considerations for Rebutting *Prima Facie* Case for Obviousness

A claimed invention may be challenged as obvious in a Patent Office proceeding (prosecution or reexamination) or during patent litigation, in order to argue that the patent claim is invalid. Once a *prima facie* case for obviousness is made, the burden shifts to the patent applicant, patentee, or assignee (collectively, patentee) to rebut it, if it can, with objective evidence of nonobviousness.[44] These so-called secondary considerations or indicia of nonobviousness may relate to any of the *Graham v. John Deere Co*. factors, such as:

- Copying by others
- Fulfilling a long-felt but unsolved need
- Failure of others
- Commercial success
- Unexpected results or properties
- Skepticism of skilled artisans before the invention
- Licenses showing industry respect for or acquiescence in the invention[45]

Use of Licenses to Show Nonobviousness

Accordingly, a license under the patent may be offered as persuasive evidence in rebutting a *prima facie* case for obviousness.[46] At least one district court has held that even the mere attempt to obtain a license under the patent is admissible evidence that is relevant to obviousness.[47]

Industry Respect or Litigation-Avoidance

Evidence from licenses is merely persuasive, not infallible. For example, it is possible that those who seek licenses and refrain from infringement may do so not "out of respect for the strength of the patent" but "out of a desire to avoid the costs of litigation."[48] Thus, a license may be viewed as having been entered into merely to avoid litigation, rather than as evidence of industry respect.

Nexus Between the License and the Claimed Features of the Invention

Moreover, the patentee bears the burden of showing that a nexus exists between the claimed features of the invention and the objective evidence offered to show nonobviousness.[49] Unless there is a nexus between the secondary indicia of nonobviousness (such as a license or commercial success), the motivation to enter the license or cause of the commercial success may have been due in large part to other economic and commercial factors unrelated to the technical quality of the patented subject matter.[50]

For example, it could be argued that an IBM® patent is licensed primarily because of the commercial strength of the IBM® mark. As another example, the licensed product may be commercially successful due to a good marketing campaign or due primarily to unclaimed features of a product also embodying the claimed features. Thus, the nexus between the license and the claimed features of the invention must be established in order to use a license as evidence of non-obviousness.

Licensing Strategy for Nonobviousness Purposes

Thus, the patentee's attorney should carefully negotiate and draft the license to maximize the patentee's chance of using it to rebut a prima facie case of obviousness. This may be done in the recital section of the license agreement. These clauses should refer to the invention which contains the elements or limitations claimed in the broadest patent claims of the patent under license, and should positively recite that this fulfills a long-felt need, and that the agreement is entered into because this invention fulfills various specified needs of the licensee.

The use of such language should help to establish the nexus between the license and the claims, so that the license shows industry respect rather than a desire to avoid litigation. It should be noted, however, that there is a tension between this strategy and others in which it is suggested that, when the magnitude of the royalty in the prelitigation license is relatively low, the license should state that it has been entered into between the parties in order to avoid patent litigation. As discussed, this is done to mitigate the adverse effect that a low royalty license might have on establishing what a reasonable royalty is for calculation of damages.

The patentee should carefully consider whether to characterize the license as entered into to avoid litigation, or as entered into so that the patentee can obtain the advantages of the claimed invention. When a high royalty base is established, the latter strategy will often be more attractive. Conversely, when a low royalty base is established, the former strategy may be desirable in order to maximize a reasonable royalty determination, but at the cost of sacrificing the license as evidence of nonobviousness.

Moreover, by utilizing such a recital clause, the license may also be used as evidence of the long-felt secondary consideration need of nonobviousness.

Conclusion

In many respects, patent licenses are like one's grades in undergraduate school. They never go away and you may be asked to produce them long after the fact. An appreciation for the long-term consequences of patent licensing entered into before the prospect of litigation or reexamination appears on the horizon, and of the tradeoffs and tensions that sometimes accompany various licensing strategies is necessary. The patent licensing professional who advises his or her clients of these ramifications will most likely be spared the unpleasantness of hearing a former client say "I would never have entered into that license if only you had advised me of its long term effects." Consideration of the longer-term ramifications of patent licensing discussed herein should enable patent licensing professionals to maximize the value of their clients' IP assets.

1. High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc. 49 F.3d 1551, 1554 (Fed. Cir. 1995).
2. Reebok Int'l Ltd., v. J. Baker, Inc., 32 F.2d 1552, 1555 (Fed. Cir. 1994).
3. Sofamor Danek Group, Inc. v. DePuy-Montech, Inc., 74 F.3d 1216, 1219 (Fed. Cir. 1996).
4. H.H. Robertson Co. v. United Steel Deck, Inc., 820 F.2d 384, 388 (Fed. Cir. 1987).
5. *Reebok Int'l* at 1556.
6. *High Tech Med*. at 1556–1558; *Reebok Int'l* at 1558, Roper Corp. v. Litton Sys., Inc., 757 F.2d 1266, 1273 (Fed. Cir. 1985).
7. Atlas Powder Co. v. Ireco Chem., 773 F.2d 1230, 1233 (Fed. Cir. 1985); Hybritech Inc. v. Abbott Labs, 849 F.2d 1446, 1447 (Fed. Cir. 1988).
8. Illinois Toolworks Inc. v. Grip-Pak Inc., 15 U.S.P.Q. 2d 1307, 1310 (Fed. Cir. 1990) (emphasis in original).
9. Polymer Technologies Inc. v. Bridwell, 103 F.3d 970, 974 (Fed. Cir. 1996).
10. *High Tech Med*. at 1557 (emphasis in original).
11. *Id*.
12. *Id*. at 1557.
13. *Id*. at 1558.
14. T.J. Smith & Nephew Limited v. Consol. Med. Equip. Inc., 802 F.2d 646, 648 (Fed. Cir. 1987); *Illinois Toolworks* at 1310; *Polymer* at 974.
15. *Smith & Nephew* at 648.
16. Illinois Toolworks Inc. v. Grip-Pak Inc., 725 F. Supp 951, 958 (N.D. Ill. 1989) (emphasis added).
17. *Illinois Toolworks*, 15 U.S.P.Q. 2d at 1311.
18. Arthrex, Inc. v. dj Orthopedics, L.L.C., No. 02-67 GMS, 2002 U.S. Dist. LEXUS 7634 at *13 (D. Del. Apr. 30th 2002).
19. *Id*.
20. Sidel v. Uniloy Milacron, Inc., No. 1:01-CV-1080-CAP, 2001 U.S. Dist. LEXUS 24004, at *30 (N.D. Ga. Nov. 14th 2001).
21. *Id*.
22. Advanced Communications Design, Inc. v. Premier Retail Networks, Inc., 186 F. Supp.2d 1009, 1024 (D. Minn. 2002).
23. *Id*. 1023–1024.
24. *Id*. at 1024.
25. Roper Corp. 757 F.2d at 1273.
26. Rite-Hite Corp. v. Kelley Co. Inc., 56 F.3d 1538 (Fed. Cir. 1995).
27. The award of lost profits is based upon patentee's gross or "incremental profit." State Indus. Inc. v. Mor-Flo Indus. Inc., 883 F.2d 1573, 1579–1580 (Fed. Cir. 1989).
28. *Rite-Hite* at 1554; Minco, Inc. v. Combustion Eng'g Inc., 40 U.S.P.Q. 2d 1001, 1008 (Fed. Cir. 1996) ("the Patent Act permits damages awards to encompass both lost profits and a reasonable royalty on that portion of an infringer's sales not included in the lost profit calculation").
29. This is known as the second "Panduit factor." *See* BIC Leisure Products Inc. v. Windsurfing Int'l Inc., 1 F.3d 1214, 1219 (Fed. Cir. 1993).
30. *Id*.
31. Pall Corp. v. Micron Separations Inc., 36 U.S.P.Q. 2d 1225, 1233 (Fed. Cir. 1995).
32. Exclusive licensees have standing to join the patentee in suit and seek a recovery of their lost profits in for infringing sales within the scope of their exclusive license. Rite-Hite Corp. v. Kelley Co. Inc., 774 F.Supp. 1514, 1519 (Ed. Wis. 1991); affirmed in part, vacated in part, and remanded, 56 F.3d 1538 (Fed. Cir. 1995).
33. 35 U.S.C. § 284.
34. Hanson v. Alpine Valley Ski Area Inc., 718 F.2d 1075, 1078 (Fed. Cir. 1983).
35. Rude v. Westcott, 130 U.S. 152, 169, 9 S.Ct. 463, 468, 32 L.Ed. 888 (1889). *Id*.
36. In many licensing scenarios when the patentee is willing to enforce its patent rights, this proposed clause merely states the obvious, because a licensed product does not infringe, and a licensee has little incentive to pay a royalty for an activity not covered by the patent claims.
37. *Hanson*, 718 F.2d at 1078–1079.
38. *Id*. at 1078; *Rite-Hite Corp*., 56 F.3d at 1554.
39. *Id*.
40. Unisplay, S.A. v. Am. Elec. Sign Co. Inc., 69 F.3d 512, 517 (Fed. Cir. 1995).
41. Georgia-Pacific Corp. v. United States Plywood Corp., 318 F. Supp. 1116, 1120 (S.D. N.Y. 1970) *modified and aff'd* 446 F.2d 295, (2nd Cir.) *cert. denied* 404 U.S. 870 (1971).
42. *Georgia-Pacific*, 166 U.S.P.Q. at 238.
43. *See* Deere & Co. v. Int'l Harvester Co, 710 F.2d 1551, 1558 (Fed. Cir. 1983) (in which a "license was negotiated against a backdrop of continuing litigation" the District Court could "discount the probable value" of the license "with regard to a reasonable royalty").
44. In re Rouffet, 149 F.3d 1350, 1355, 47 U.S.P.Q.2d 1453 (Fed. Cir. 1998); In re Fielder, 471 F.2d 640, 176 U.S.P.Q. 300, 302 (C.C.P.A. 1973).
45. *Rouffet*, 149 F.3d at 1355; Graham v. John Deere Co., 381 U.S. 1, 459 (1966).
46. In re Sernaker, 702 F.2d 989, 996, 217 U.S.P.Q. 1 (Fed. Cir. 1983).
47. Amsted Indus. Inc. v. National Castings Inc., 16 U.S.P.Q.2d 1737, 1751 n.11 (N.D. Ill. 1990) ("[E]vidence reflecting the merits and profitability of the patented invention as seen through the eyes of a potential competitor in the industry [is] probative.").
48. Pentec, Inc. v. Graphic Controls Corp., 776 F.2d 309, 316 (Fed. Cir. 1985).
49. WMS Gaming, Inc. v. International Game Tech., 184 F.3d 1339, 1359 (Fed. Cir. 1999); *see* also *Pentec*.
50. *Pentec* at 316.