

# You Can't Always Get What You Want: Recent Developments in Patent Infringement Remedies

Cynthia Bright  
Mark Flanagan  
Rob Galvin

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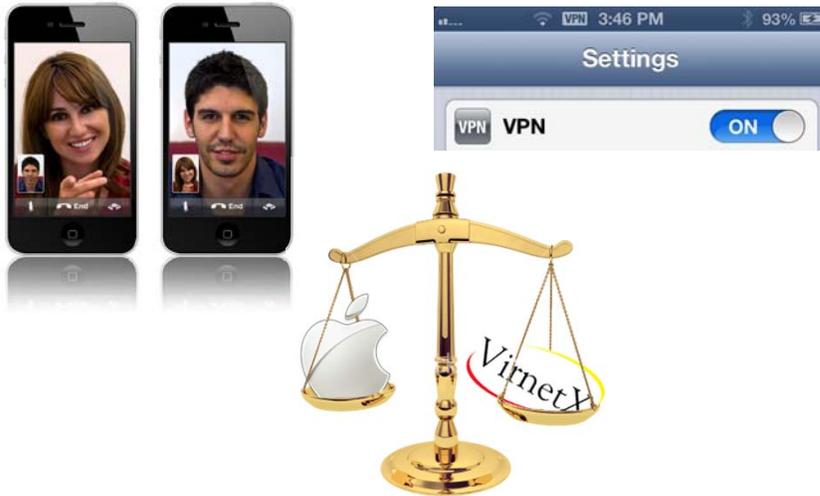
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## Overview

- Apportionment of Damages
  - VirnetX, Inc. v. Cisco Systems, Inc., 767 F.3d 1308 (Fed. Cir. 2014)
- Damages and Standard Essential Patents
  - Ericsson, Inc. v. D-Link Systems, Inc., 773 F.3d 1201 (Fed. Cir. 2014)
- Establishing Causal Nexus in Injunction Cases
  - District Courts' Treatment of Apple Inc. v. Samsung Electronics Co., 735 F.3d 1352 (Fed. Cir. 2013)

## VirnetX, Inc. v. Cisco/Apple



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3

## VirnetX, Inc. v. Cisco/Apple

- Patents at issue related to:
  - Establishing a secure communication link between a computer and target network address
  - Initiating a virtual private network between a proxy and secure site
- After five day trial, E.D. Texas jury awarded VirnetX \$368,160,000
- Apple appealed, among other things, the way damages were calculated

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4

## **VirnetX, Inc. v. Cisco/Apple**

- Use of “smallest salable unit” for royalty base is necessary, but not sufficient for apportionment

“Where the smallest salable unit is, in fact, a multi-component product containing several non-infringing features with no relation to the patented feature . . . the patentee must do more to estimate what portion of the value of that product is attributable to the patented technology. To hold otherwise would permit the entire market value exception to swallow the rule of apportionment.”

VirnetX, Inc. v. Cisco Sys., Inc., 767 F.3d 1308, 1327-28 (Fed. Cir. 2014)

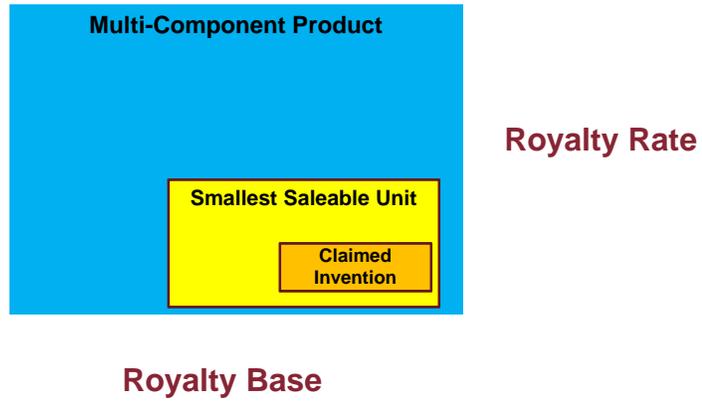
## **VirnetX, Inc. v. Cisco/Apple**

- Application of Nash Bargaining Solution

“The Nash theorem arrives at a result that follows from a certain set of premises. It itself asserts nothing about what situations in the real world fit those premises. Anyone seeking to invoke the theorem as applicable to a particular situation must establish that fit, because the 50/50 profit-split result is proven by the theorem only on those premises.”

VirnetX, Inc. v. Cisco Sys., Inc., 767 F.3d 1308, 1332 (Fed. Cir. 2014)

## Apportionment



## Ericsson, Inc. v. D-Link Systems, Inc.



RAND encumbered patents relating to Wi-Fi



## Ericsson, Inc. v. D-Link Systems, Inc.

- Ericsson patents were all standard essential patents for IEEE's 802.11(n) standard, which required Ericsson to license under RAND terms
- E.D. Texas jury awarded Ericsson roughly \$10 million in damages – approximately 15 cents per infringing device
- D-link appealed on number of grounds, including challenges to damages claim and instructions



## Ericsson, Inc. v. D-Link Systems, Inc.

- District court erred in giving 15-factor *Georgia Pacific* jury instruction

“In a case involving RAND-encumbered patents, many of the *Georgia–Pacific* factors simply are not relevant; many are even contrary to RAND principles . . . . Several other *Georgia–Pacific* factors would at least need to be adjusted for RAND-encumbered patents—indeed, for SEP patents generally . . . . Trial courts should also consider the patentee's actual RAND commitment in crafting the jury instruction.”

Ericsson, Inc. v. D-Link Sys., Inc., 773 F.3d 1201, 1230 (Fed. Cir. 2014)



## Ericsson, Inc. v. D-Link Systems, Inc.

- Affirmed district court's decision not to instruct on hold-up and royalty stacking

“In deciding whether to instruct the jury on patent hold-up and royalty stacking, again, we emphasize that the district court must consider the evidence on the record before it. The district court need not instruct the jury on hold-up or stacking unless the accused infringer presents actual evidence of hold-up or stacking. Certainly something more than a general argument that these phenomena are possibilities is necessary.”

Ericsson, Inc. v. D-Link Sys., Inc., 773 F.3d 1201, 1234 (Fed. Cir. 2014)



## Causal Nexus in Injunctions

- To show irreparable injury, must show causal nexus between infringement and alleged harm

“[T]he causal nexus inquiry is . . . part of the irreparable harm calculus and . . . although the irreparable harm and the causal nexus inquiries may be separated for the ease of analysis, they are inextricably related concepts . . . . Accordingly, we . . . confirm that the district court was correct to require a showing of some causal nexus between Samsung's infringing conduct and Apple's alleged harm.”

Apple Inc. v. Samsung Electronics Co., 735 F.3d 1352, 1361-64 (Fed. Cir. 2013)

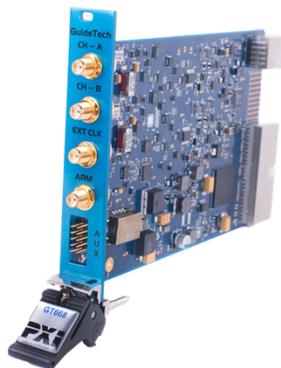
## WH Causal Nexus in Injunctions

- How do you establish nexus?

“For example, with evidence that a patented feature is one of several features that cause consumers to make their purchasing decisions . . . evidence that the inclusion of a patented feature makes a product significantly more desirable . . . evidence that the absence of a patented feature would make a product significantly less desirable.”

Apple Inc. v. Samsung Electronics Co., 735 F.3d 1352, 1364 (Fed. Cir. 2013)

## WH Causal Nexus in Injunctions



- Patents related to testing instruments for detecting timing errors in integrated circuits
- Plaintiff and defendant competed in field of precision time and frequency measurement instruments
- Plaintiff's arguments and evidence
  - Loss of their position in the market, good will, and revenue if no injunction
  - Evidence of lost past sales

## Causal Nexus in Injunctions

- Outcome? No causal nexus
  - “Evidence of loss of some sales in the past, without more, is insufficient to show that GuideTech is likely to lose sales and market share due to Brilliant’s infringing conduct in the future.”
  - Arguments that they will lose “good will, market position, and revenue . . . are speculative because they offer little more than attorney argument in support.”

*GuideTech, Inc. v. Brilliant Instruments, Inc.*, No. C09-5517, 2014 WL 4182340 at \*7 (N.D. Cal. Aug. 22, 2014)

## Causal Nexus in Injunctions



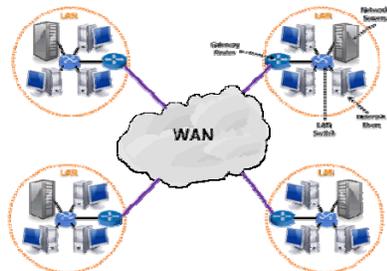
- Patents related to safer, easier-to-use consumer sea scooter
- Both companies competed in the sea scooter market
- Plaintiff’s arguments and evidence
  - Evidence that patented features changed traditional sea scooter into recreational device
  - Plaintiff and defendant not just direct competitors, but sole competitors

## WH Causal Nexus in Injunctions

- Outcome? Causal Nexus Found
  - “[C]ausal-nexus evidence is merely connecting the dots.”
  - Because patents made sea scooter easier to use, and there was evidence that these patents changed the sea scooter into a recreational device, court found that “the patented features propelled consumer demand . . . in more than an anecdotal way.”
  - Companies were sole competitors, and Green Max did not “present any countervailing evidence at trial to suggest that the patented features were less important than Hydrodynamic claims, or that any other unpatented, unprotectable features drive consumer demand for the sea scooters.”

Hydrodynamic Indus. Co. v. Green Max Distributors, Inc., No. 2:12-CV-05058-ODW, 2014 WL 2740368 at \*2 (C.D. Cal. June 16, 2014)

## WH Causal Nexus in Injunctions



- Patents related to data center and branch office deployments of Wide Area Network (“WAN”)
- Both companies competed in WAN market
- Plaintiff’s arguments and evidence
  - Lost sales, weakened reputation, constrained growth
  - Entered report created by analyst group to show weakened company reputation

## WH Causal Nexus in Injunctions

- Outcome?
  - No causal nexus – “requires a more concrete link.”
  - Not enough evidence – closest Silver Peak came “to connecting consumer demand with the patented features is to offer [defendant] documents claiming its products have all the functionality of [plaintiff’s] products.” Riverbed may have been successful because of its “global support structure, greater company stability, existing customer base, etc.”
  - Presumption that Riverbed would not have copied but for demand is insufficient

*Riverbed Tech., Inc. v. Silver Peak Sys., Inc.*, No. CV 11-484-RGA, 2014 WL 4695765 at \*12-13 (D. Del. Sept. 12, 2014)

## WH Causal Nexus in Injunctions



- Patents related to technology that facilitated language translation
- Both companies competed in translation market
- Plaintiff’s arguments and evidence
  - Defendant’s Director of Software Development testified that infringing patents were integral to their system
- Direct competitors, though not sole competitors



## Causal Nexus in Injunctions

- Outcome? Causal nexus found
  - Admissions from Defendant's Director of Software Development regarding importance of patented technology
  - "In the context of head-to-head competitors in a crowded field, the Court finds the evidence at trial adequate to establish a causal nexus between the infringing features and the profit to MotionPoint and concomitant harm to TransPerfect."

TransPerfect Global, Inc. v. MotionPoint Corp., No. C 10-2590 CW, 2014 WL 6068384 at \*6 (N.D. Cal. Nov. 13, 2014)



## Causal Nexus: Lessons Learned

- Harder to establish causal nexus, especially for multi-component products
- Each causal evidence argument should be rooted in some form of direct evidence