

Contents

<i>List of Contributors</i>	page xi
<i>Foreword by Hon. Kathleen M. O'Malley</i>	xxi
<i>Preface and Acknowledgments</i>	xxiii
<i>Executive Summary</i>	xxvi
Introduction	1
1 Reasonable Royalties	
Thomas F. Cotter, John M. Golden, Oskar Liivak, Brian J. Love, Norman V. Siebrasse, Masabumi Suzuki, and David O. Taylor	6
1.1 Preliminary Matters	6
1.1.1 Empirical Literature	6
1.1.2 Theoretical Justifications	8
1.1.3 Principal Approaches	11
1.2 Reformulating <i>Georgia-Pacific</i>	13
1.3 Incremental Value and Other Issues	19
1.3.1 Incremental Value	19
1.3.2 Hypothetical Bargain	22
1.3.3 Dividing Incremental Value	23
1.3.4 Timing of Hypothetical Negotiation	28
1.3.5 Information Set	30
1.3.6 Comparable Licenses	33
1.3.7 Entire Market Value Rule and Smallest Saleable Unit	41
1.4 Practical Considerations	46
1.4.1 Expert Evidence and <i>Daubert</i> Gatekeeping in the United States	47
1.4.2 "Kickers" for Reasonable Royalties	48
1.4.3 Calibrated Evidentiary Burdens or Royalty Measures	49

2	Lost Profits and Disgorgement	
	Christopher B. Seaman, Thomas F. Cotter, Brian J. Love, Norman V. Siebrasse, and Masabumi Suzuki	50
2.1	Introduction	50
2.2	Lost Profits	51
2.2.1	Introduction	51
2.2.2	Specific Issues Regarding Lost Profits	52
2.3	Disgorgement of Infringer's Profit	72
2.3.1	Theoretical Justifications	72
2.3.2	Comparative Approaches to Disgorgement	74
2.3.3	Specific Issues Regarding Disgorgement	80
3	Enhanced Damages, Litigation Cost Recovery, and Interest	
	Colleen V. Chien, Jorge L. Contreras, Thomas F. Cotter, Brian J. Love, Christopher B. Seaman, and Norman V. Siebrasse	90
3.1	Introduction	90
3.2	Enhanced Damages	91
3.2.1	Approaches to Enhanced Damages	91
3.2.2	Criminal Sanctions	96
3.2.3	Policy Considerations Relating to Enhanced Damages	97
3.2.4	Recommendations and Further Research	103
3.3	Litigation Cost Recovery	104
3.3.1	Approaches to Litigation Cost Recovery	104
3.3.2	Economic Theory and Empirical Research on the Effects of Cost Recovery	108
3.3.3	Recommendations for Best Practices and Future Research	110
3.4	Pre- and Post-judgment Interest	111
3.4.1	Approaches in Selected Countries	111
3.4.2	Recommendations for Best Practices and Future Research	114
4	Injunctive Relief	
	Norman V. Siebrasse, Rafal Sikorski, Jorge L. Contreras, Thomas F. Cotter, John Golden, Sang Jo Jong, Brian J. Love, and David O. Taylor	115
4.1	Introduction	115
4.2	Theory	115
4.2.1	Nature of Patent Rights and Injunctions	115
4.2.2	Economic Analysis and Complex Products	118
4.2.3	<i>Preliminary v. Permanent Injunctions</i>	122
4.3	Comparative Overview of Injunction Practices	125
4.3.1	Overview	125
4.3.2	United States	127
4.3.3	England	134

4.3.4	Civil Law Systems	141
4.3.5	International Context and TRIPS	143
4.4	Recommendations	144
4.4.1	Basic Principles for Injunctive Relief	144
4.4.2	Proportionality	145
4.4.3	Tailoring Injunctive Relief	155
4.4.4	Ongoing Royalty in Lieu of Injunctive Relief	157
5	The Effect of FRAND Commitments on Patent Remedies	
	Jorge L. Contreras, Thomas F. Cotter, Sang Jo Jong, Brian J. Love, Nicolas Petit, Peter Picht, Norman V. Siebrasse, Rafal Sikorski, Masabumi Suzuki, and Jacques de Werra	160
5.1	Introduction	160
5.2	FRAND Commitments and Monetary Patent Damages	161
5.2.1	United States	162
5.2.2	European Union – Applicability of <i>Huawei v. ZTE</i> to Monetary Remedies	165
5.2.3	National Damages Laws	166
5.2.4	Discussion and Analysis: Monetary Damages and FRAND	167
5.3	FRAND Commitments and Injunctive Relief	171
5.3.1	United States	171
5.3.2	European Union	175
5.3.3	Korea	185
5.3.4	Japan	185
5.3.5	China	187
5.3.6	Discussion and Analysis: FRAND and Injunctions	188
	Appendix – National Law Considerations for Monetary FRAND Damages	191
	A. Germany	191
	B. Switzerland	193
	C. Korea	199
	D. Japan	200
	E. China	200
6	The Effect of Competition Law on Patent Remedies	202
	Alison Jones and Renato Nazzini	
6.1	Introduction	202
6.2	Objectives of Intellectual Property and Competition Law	204
6.3	Antitrust Liability for Enforcement or Exploitation of Patents	209
6.3.1	Background	209
6.3.2	Antitrust Limits on a Patent Holder Seeking Restorative Patent Remedies (and Judicial Exploitation of Patents)	211
6.3.3	Antitrust Limits on the Commercial Exploitation of Patents	219

6.4	Antitrust Remedies	232
6.5	Conclusions	236
7	Holdup, Holdout, and Royalty Stacking: A Review of the Literature	239
	Norman V. Siebrasse	
7.1	Introduction	239
7.2	Benchmark Return to Patentee	239
7.2.1	A Share of the Discounted Incremental <i>Ex Ante</i> Value: $\theta\beta\nu$	239
7.2.2	Incremental Value Over Best Alternative: ν	240
7.2.3	Bargaining Power Discount: β	246
7.3	Holdup	254
7.3.1	Varieties of Holdup	254
7.4	Mitigating Mechanisms	271
7.4.1	Introduction	271
7.4.2	<i>Ex Ante</i> Licensing	271
7.4.3	<i>Ex Ante</i> Validity Challenge	272
7.4.4	Norms	273
7.4.5	Repeat Play	273
7.5	Property Rules and Liability Rules	276
7.5.1	Inaccuracy of Damages Awards	276
7.5.2	Transaction Cost Arguments	277
7.5.3	Generating Information Regarding Potential Use	277
7.5.4	Inaccuracy of Damages Assessment	278
7.5.5	Summary	283
7.6	Holdout/Reverse Holdup	284
7.6.1	General	284
7.6.2	Underdetection	287
7.6.3	Undercompensatory Damages	288
7.6.4	Oligopoly Pricing in SSOs	289
7.6.5	Summary	289
7.7	Royalty Stacking	289
7.7.1	Introduction	289
7.7.2	Cumulative Effect of Holdup	290
7.7.3	Cournot Complements	290
7.8	Empirical Evidence	294
7.8.1	General	294
7.8.2	Case Studies	294
7.8.3	Testing of Empirical Models	299
7.8.4	Industry Structure	302
7.8.5	Summary	302
	<i>Bibliography</i>	303
	<i>Index</i>	338