

Second Edition

Nancy J. Fannon
Jonathan M. Dunitz

Excerpt from:

Calculating Economic Damages in Intellectual Property Infringement Cases

Calculating Economic Damages in Intellectual Property Infringement Cases

SECOND EDITION

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and
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What It's Worth

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*In memory of my biggest cheerleader and the most powerful
influence in my life...my dad.*

NJF, 2016

To my parents, for their decades of support.

JMD, 2016

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The information contained in this guide is provided for informational or educational purposes only. It is not intended and shall not be deemed to constitute legal advice.

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Richard Hoffman, CPA/ABV, has nearly 20 years of experience in performing damage calculations, business valuations, and other forensic accounting projects for several international consulting firms. He is a frequent instructor on the proper methods of measuring damages resulting from intellectual property disputes. He co-authored *Intellectual Property Damages: Guidelines and Analysis* and has taught many courses for

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Naviloff has also assisted in a variety of business disputes involving asset and company value, labor and employment, professional malpractice, breach of contract, antitrust, bankruptcy and reorganizations, intellectual property, securities, and other corporate litigation-related matters. Across these services, Naviloff often performs financial, accounting, and economic analyses on matters involving large volumes of documents and data and utilizes data analytics to identify hidden and obscure information.

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George P. Roach practices damages law and provides consulting or testimony on corporate damages and valuation in Texas. He is also a senior adviser to the litigation consulting firm of Freeman & Mills Inc. in Los Angeles. Prior to establishing his own practice in Dallas, he directed a consulting group for a corporate litigation boutique in Dallas, operated a cattle ranch in East Texas, and worked for a major bracket investment bank in New York City. Several of his articles have been published in the *Business Valuation Review* and in a variety of law reviews, including “Counter-Restitution for Monetary Remedies in Equity” (*Washington & Lee Law Review*, Vol. 68, No.3, page 1271 (Fall 2011)) and “Rescission in Texas, A Suspect Remedy” (*The Review of Litigation*, Vol. 31, Summer 2012). His background includes an MBA (Harvard—high honors), J.D. (University of Texas—honors) and an A.B. in economics (UC Davis—high honors). For further information, see www.litigation-consultant.com.

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Foreword

*"It costs us nothing to be just."*¹

This book is about financial evidence: how to gather it, interpret it, and tell its story in a lawsuit or litigation setting related to intellectual property or patent infringement. This is the task that the attorney typically retains the financial expert to accomplish. In this comprehensive guide, we bring together the financial expert's knowledge of accepted methods and procedures with the attorney's knowledge of legal issues and insights. This includes a summary of the applicable rules of civil procedure and of evidence. However, like any guidance, it is a tool and not a substitute for the professional's knowledge of a particular case, the potential impact of local rules regarding discovery, and the jurisdictional nuances that may affect the damage calculations.

The attorneys and financial experts who have participated in putting together this text are among the best in the country in their respective areas of expertise. Our heartfelt thanks go out to all of them for their generous and substantial contributions. Each of their chapters served to make this a better, more comprehensive work covering a range of never-before-addressed topics—including extensive analysis of concepts and case law that lawyers and experts have to grapple with when faced with a damage analysis.

This third edition includes materials on a variety of damages measures, including lost profits or value and intellectual property damages. There is also comprehensive analysis of motions to exclude experts and an in-depth review of the concept of reasonable certainty, the result of significant research on the topic.

Much of the text's material has been substantially enhanced for this edition, and we thank the continuing efforts of the panel of contributing authors for their efforts.

In addition to these expanded materials, new topics have been added to this edition, including the use of statistics in damage analyses; the use of surveys in intellectual property damages; and Internet tools for assessing intellectual property infringement. The expansion to include these and other topics is the reason this treatise is now titled *Calculating Economic Damages in Intellectual Property Infringement Cases* instead of *Calculating Lost Profits in Intellectual Property and Patent Infringement Cases*.

1 Henry David Thoreau, "A Plea for Captain John Brown" (1859).

Once again, Business Valuation Resources, LLC, has provided extraordinary support, and, in particular, we thank Sarah Andersen, publisher at BVR, whose assistance has been irreplaceable.

To all our new contributors to the guide, a warm welcome and to all who participated in this edition, a heartfelt thank you.

We hope you find this text to be a rich resource for your practice and welcome your suggestions and input for our continuing updates and for new topic areas that would benefit your work as an attorney or expert.

Nancy J. Fannon and Jonathan M. Dunitz
2016



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