

**DAMAGES DONE: POST-ECOFACOR PATENT DAMAGES  
APPORTIONMENT AND THE PUSH TO REDOUBLE  
INJUNCTIVE RELIEF<sup>†</sup>**

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I WAITED, AND ANON BECAME AWARE  
THAT I WAS LOOKING LESS AT AVON'S EYES  
THAN AT THE DICTIONARY, LIKE ONE ASKING  
ALREADY WHY WE MAKE SO MUCH OF WORDS  
THAT HAVE SO LITTLE WEIGHT IN THE TRUE BALANCE.

— EDWIN ROBINSON, AVON'S HARVEST

I. THE PRICE OF PRESCIENCE

Legal scholarship suffers from a relevancy paradox — the more relevant, timely, and essential it is, the less cited it may be. It takes time to write, submit, and publish; so much so that often by the time it is written, it is already obsolete.<sup>1</sup> If it is reasonable, logical, and persuasive, it soon becomes axiomatic; if it was prescient, and argued for changes then implemented,<sup>2</sup> it then becomes a museum-piece antiquity<sup>3</sup> — held in high esteem, displayed proudly, but little discussed. Conversely, if it argues for the sensational, obscure, byzantine, or outrageous, it may retain lasting power and authority, and be cited and revived along the way, as debate rages on for decades.<sup>4</sup>

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<sup>†</sup> Response to: William F. Lee & Mark A. Lemley, *The Broken Balance: How "Built-In Apportionment" and the Failure to Apply Daubert Have Distorted Patent Infringement Damages*, 37 HARV. J.L. & TECH. 255 (2024).

\* General Counsel, Unified Patents. Thank you to the JOLT staff for their conscientiousness and hard work, Michelle Aspen for all of her help, and my family, especially Catherine.

1. Cf. LIFE IS BEAUTIFUL, Amazon Prime, at 39:32 (Studio Classics 1998) (Dr. Lessing: "If you say my name, I'm not there anymore. Who am I?" . . . Guido: "Silence.").

2. Whether it influenced the decision or simply recognized the way the wind was blowing.

3. See Danielle K. Citron & Robin West, On Legal Scholarship 1 (2014) (unpublished comment) (on file with the Boston University School of Law), [https://scholarship.law.bu.edu/shorter\\_works/75](https://scholarship.law.bu.edu/shorter_works/75) [<https://perma.cc/AM48-N4LF>] (arguing that legal scholarship "is overly argumentative, political, or, most generally, too 'normative,' by which is meant simply that its aim is to state what the law should be, as well as what the law is" and that it has "scant use to the practicing lawyer, and even less helpful for the sitting judge," positing that "[s]ome judges brag that they don't bother to read it"); Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6, 6–8 (2016).

4. Cf. Jacob Hammond, *How the Law Review Grind Makes Legal Scholarship Worse, Balls and Strikes* (Dec. 13, 2022), <https://ballsandstrikes.org/legal-culture/how-the-law-review-grind-makes-legal-scholarship-worse/> [<https://perma.cc/37B3-MSHC>] (cataloguing criticisms of law review processes from Supreme Court justices and noting that it is estimated that up to 40% of law review articles are never cited by another).

This publication's recent piece, *The Broken Balance: How "Built-In Apportionment" and the Failure to Apply Daubert Have Distorted Patent Infringement Damages*, by William F. Lee and Professor Mark A. Lemley,<sup>5</sup> has perhaps already suffered the same fate just months into its rather promising life. The piece (timely and comprehensively) advocated for the Federal Circuit to correct misapplications of *Daubert* challenges to patent damages analyses, failures to apply apportionment, and other related substantive drift. It persuasively argued for a change that, while not perhaps immediately fully realized, was at least at the heart of the recent Federal Circuit en banc decision in *EcoFactor, Inc. v. Google LLC*.<sup>6</sup> That case, and the follow-on *Jiaying Super Lighting Electric Appliance Co. v. CH Lighting Tech. Co.*,<sup>7</sup> reiterated the importance of evidentiary support for damages theories, the gatekeeping role of the U.S. district court judge in policing those theories presented to lay juries under *Daubert* and Rule 702,<sup>8</sup> and the continued need to apportion.<sup>9</sup>

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5. 37 HARV. J. L. & TECH. 255 (2025) [hereinafter Lee & Lemley].

6. 137 F.4th 1333 (Fed. Cir. 2025) (en banc).

7. 146 F.4th 1098 (Fed. Cir. 2025).

8. By its terms, Rule 702 applies to the testimony of all witnesses who are "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702; *see also* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) (holding the Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand"); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) ("[T]he trial judge's general 'gatekeeping' obligation — applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.").

Modern Rule 702 was adopted following *Daubert* and *Kumho Tire* and enumerates standards that are "broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate." Fed. R. Evid. 702 advisory committee's note to 2000 Amendment. Such testimony may be admissible under Rule 702 only if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. R. Evid. 702.

9. *See* *EcoFactor*, 137 F.4th at 1346 (concluding insufficient evidence to support the damages theory rendered the expert's testimony "unreliable and therefore inadmissible under Rule 702"); *Jiaying*, 146 F.4th at 1112 (stating "we have repeatedly explained that the damages expert must apportion among licenses" and that concerns with apportionment "may form the basis for a *Daubert* motion" on a damages retrial). *But see* *Barry v. DePuy Synthes Cos.*, No. 2023-2226 (Fed. Cir. Jan. 20, 2026) (Stark, J.) (Prost, S., dissenting) (arguing in dissent that *Barry* "contravenes the principles embraced in *EcoFactor* and the 2023 amendments" to Federal Rule of Evidence 702 and "will undermine district courts' abilities to exercise their important gatekeeping function").

As we noted in amicus support,<sup>10</sup> the anchoring effect of presenting high damages numbers to juries to maximize final jury verdicts<sup>11</sup> — that is, the tendency for people to estimate numbers close to an initial value presented to them — has long distorted district court trials and resulted in miscarriages of justice, something the Federal Circuit has now moved to remedy. It is widely accepted that, “[i]n any negotiation or litigation, the first number that a person (including a juror) hears becomes an anchor, and all subsequent resolution after that is essentially an adjustment on that number.”<sup>12</sup> This is used in negotiation training and often cited as a critical part of understanding hostage negotiations and garnering strategic advantage.<sup>13</sup> This means that no matter how unfounded or unrelated to the facts, “hearing an outrageous number creates a cognitive bias prejudicing the defendant by pushing the jury toward a higher award.”<sup>14</sup> While nuanced, this effect is real and must be policed by the gatekeepers of justice, or it will surely be used to advantage by opportunistic litigators.

Lee & Lemley noted this issue, other problems with built-in apportionment, a drift away from the smallest saleable unit, and many other policy and legal issues with the then-current state of damages law; the Circuit has since moved quickly to address them, first in *EcoFactor*, and later through follow-on cases.

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10. Brief of Unified Patents, LLC as Amicus Curiae Supporting Appellants at 11–16, *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333 (2024) (No. 2023-1101) [hereinafter “Unified Amicus”].

11. DANIEL KAHNEMAN, THINKING FAST AND SLOW 119 (2011) (“[A]n *anchoring effect* . . . occurs when people consider a particular value for an unknown quantity before estimating that quantity. What happens is one of the most reliable and robust results of experimental psychology: the estimates stay close to the number that people considered — hence the image of an anchor.”). Scholars at the University of Chicago collected numerous studies confirming that jurors are subject to the anchoring effect when considering damages. Yun-chien Chang, Kong-Pin Chen & Chang-Chin Lin, *Anchoring Effect in Real Litigation: An Empirical Study*, at 1 (Jan. 27, 2016) (unpublished article) (on file with the University of Chicago Coas-Sandor Institute for Law and Economics), <https://ssrn.com/abstract=2726903> [<https://perma.cc/T48R-F4DF>] (finding an “abundance of evidence, albeit predominantly experimental, on how anchoring influences the decisions of both the judge and the jury”). They also analyzed real-world data from land valuation cases in Taiwan that are decided by three-judge panels and found “strong evidence for the anchoring effect.” *Id.* at 4.

12. Unified Amicus at 11; *see also* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974) *reprinted* in Kahneman, *supra* note 11, at 419 (citing Paul Slovic & Sarah Lichtenstein, *Comparison of Bayesian and Regression Approaches to the Study of Information Processing in Judgment*, 6 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 649 (1971)).

13. *See, e.g.*, Katie Shonk, *What is Anchoring in Negotiation?*, HARV. L. SCH. PROGRAM ON NEGOT. (May 12, 2025), <https://www.pon.harvard.edu/daily/negotiation-skills-daily/what-is-anchoring-in-negotiation/> [<https://perma.cc/3P2Z-E2JN>]; Chris Voss, *What's the Deal with Anchoring In Negotiation?*, BLACK SWAN (Nov. 4, 2019), [https://www.blackswanltd.com/newsletter/whats-the-deal-with-anchoring-in-negotiation\\_](https://www.blackswanltd.com/newsletter/whats-the-deal-with-anchoring-in-negotiation_) [<https://perma.cc/B5C5-K7UL>] (explaining the axiomatic nature of the anchoring effect, but offering advice on how to best use it to advantage in negotiations).

14. *See* Unified Amicus at 11.

To be sure, some members of the court in *EcoFactor*, and at least one of the concurring-in-part, dissenting-in-part opinions,<sup>15</sup> sought to limit the reach of that case to the ultimate issue of apportionment by altering the question presented<sup>16</sup> — perhaps ineffectually, as later cases have already done so.<sup>17</sup> The majority admonished lower courts to do better, but applied a detailed, fact-based analysis of the particular expert’s methodology and support, honing in on the use of subjective belief in whereas clauses as the primary error on which they hung their hat.<sup>18</sup> That might skew too narrow for some, but the upshot of the ruling and subsequent precedent is nonetheless a strong reaffirmation of the apportionment principle, as well as, perhaps, an expansion of it. In this, Lee & Lemley clearly and succinctly laid out what has quickly come to pass.

## II. PATENT DAMAGES APPORTIONMENT

It thus remains axiomatic (and has now been reinforced) that apportionment is a fundamental requirement in assessing patent damages,<sup>19</sup> particularly for multi-component products.<sup>20</sup> A damages expert must rely on incremental value the patented feature adds to the product<sup>21</sup> and separate the value of the infringing features from the non-infringing ones.<sup>22</sup> Assuming built-in apportionment occurred within other licenses will not stand,<sup>23</sup> particularly where those licenses do not cover the same claims or reference the same products or features.<sup>24</sup> And

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15. 137 F.4th at 1354 (Stark, J., dissenting) (“I am concerned that today’s opinion will be misinterpreted as constraining damages experts in a manner not called for by either Rule 702 or *Daubert*.”).

16. Order at 2, *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333 (2024) (No. 2023-1101).

17. *See Jiaxing Super Lighting Electric Appliance Co. v. CH Lighting Tech. Co.*, 146 F.4th 1098 (Fed. Cir. 2025).

18. *EcoFactor*, 137 F.4th at 1342–43. This was clear error by the District Court, as “[w]hereas clauses are not contractual; they are recitations laying out the background understandings of the parties.” *T.H.R. Enterprises, Inc. v. United States*, 160 Fed. Cl. 236, 240–41 (2022) (citing *KMS Fusion, Inc. v. United States*, 36 Fed. Cl. 68, 77 (1996)). They may not be used to create ambiguity where the words of the contract have one permissible meaning. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 218 (2012).

19. *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1328 (Fed. Cir. 2014) (confirming that apportionment is necessary in reasonable royalty analysis).

20. *Commonwealth Sci. & Indus. Rsch. Org. v. Cisco Sys., Inc.*, 809 F.3d 1295, 1301–02 (Fed. Cir. 2015) (emphasizing that damages must be based on the incremental value the patented invention adds to the end product and requiring apportionment to separate the value of infringing features from non-infringing ones).

21. *Id.* at 1301.

22. *Omega Patents, LLC v. CalAmp Corp.*, 13 F.4th 1361, 1377 (Fed. Cir. 2021).

23. *Id.* at 1379.

24. *Cf. Mentor Graphics Corp. v. EVE-USA, Inc.*, 851 F.3d 1275, 1287–88 (Fed. Cir. 2017) (reiterating that a patentee must apportion damages between patented and unpatented features, ensuring that the royalty base and rate reflect only the value attributable to the infringing features).

after *EcoFactor*, it is again clear that apportioning value *amid* patents — including claims — as well as in accused products is an essential part in comparing existing license agreements and using them to present damages theories to a jury<sup>25</sup> (a point raised by Lee & Lemley).<sup>26</sup>

At the same time, the en banc court in *EcoFactor* reasonably confirmed that comparing other licenses of the parties may be relevant in a damages analysis, though that is questionable for various reasons the court has long noted.<sup>27</sup> In doing so, they reiterated a different *type* of damages apportionment than traditionally thought of — not apportionment among the accused product’s value to the patented feature, but rather apportionment of the value of any other license (comparable or otherwise) based on the patents at issue, the technology discussed, the types of parties, and other various objective facts that cannot simply be ignored or downplayed.

Here is something Lee and Lemley did not, perhaps, fully anticipate — the court focusing on and clearly requiring apportionment *among* the patents and claims at issue, in the suit as in other licenses, rather than among the accused products and services. Lee and Lemley discussed this concept as a natural outcropping of the comparability determination,<sup>28</sup> but fell short of arguing for what has emerged as a clear new rule: that all damages theories based on comparing licenses assign, analyze, and support the division of value between them.

This is critical in modern patent litigation, where parties are often confronted in court with a handful of patents, often from a much larger

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25. *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333, 1342 n.9 (Fed. Cir. 2025) (observing that because the litigation involving one agreement, the “Johnson license,” did not assert the patent-at-issue, this license would be evidence of “no ‘or very little’ value to the ‘327 patent” under Mr. Kennedy’s methodology). *But see id.* at 1350 n.4 (Reyna, J., concurring-in-part) (“The en banc court identifies no such language, and instead only discards the Johnson license on apportionment grounds, which are not at issue in this proceeding.”) (emphasis omitted).

26. *See* Lee & Lemley at 326–27, 299–302.

27. Note that for many years, the Supreme Court held that settlements could *not* be used to measure the value of the patented invention, as “[m]any considerations other than the value of the improvements patented may induce the payment in such cases.” *Rude v. Westcott*, 130 U.S. 152, 164 (1889); *see also* *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 77 (Fed. Cir. 2012) (“The notion that license fees that are tainted by the coercive environment of patent litigation are unsuitable to prove a reasonable royalty is a logical extension of *Georgia-Pacific*.”); *Panduit Corp. v. Stahl Bros. Fibre Works*, 575 F.2d 1152, 1164 n.11 (6th Cir. 1978) (Markey, J., by designation) (“A royalty, if any, resulting from settlement of an infringement suit between Panduit and a third party, should not be considered evidence of an ‘established’ royalty and thus a measure of adequate damages here.”). Despite *Rude* and its progeny, the Federal Circuit has allowed reliance on settlement agreements in “certain limited circumstances.” *LaserDynamics*, 694 F.3d at 77 (citing *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 870–72 (Fed. Cir. 2010)). Modern patent litigation risks the exception becoming the rule.

28. *See* Lee & Lemley, *supra* note 5, at 283–86.

portfolio,<sup>29</sup> each with an average of around 17 claims,<sup>30</sup> all amounting to hundreds of potentially infringing claims. That doesn't presume relevance of the broader portfolios backing up the litigated patents, which often contain thousands (and sometimes tens of thousands) of patents. In determining damages, if any, without per-patent and per-claim apportionment, many baseless or irrelevant claims will be included if parties and decisionmakers aren't careful. Such per-claim apportionment is essential to the fair administration of justice; we can't just have juries and judges wave their hands and just estimate a high number to encompass the sheer volume of patent claims confronting them.

### III. RULE 702(A) AND COMPARABLE LICENSES

Under Rule 702 (a), the testimony must help the factfinder understand the evidence, or it's out. For licenses to be comparable, courts look to *Georgia-Pacific* factor one — “royalties received by the patentee for the licensing of the patent in suit, proving or tending to prove an established royalty.”<sup>31</sup> Courts must not allow juries to compare the value of a patent to lump-sum settlements in exchange for licenses and releases to entire portfolios.<sup>32</sup> It will not allow ignoring the terms, differences, and the objective intent of the parties, nor will it allow mere speculation about the parties' subjective beliefs.<sup>33</sup> Indeed, that testimony becomes *unreliable* when the operative provisions of the

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29. See Michael J. Summersgill, Amanda L. Major, Harry Hanson & Hannah Santasawatkul, *Claim Limits and Claim Narrowing: Tools That Promote Efficiency and Fairness*, 36 INTELL. PROP. & TECH. L.J., July–Aug. 2024, at 1, 4–7 (2024) (discussing and listing cases with numerous patents or claims—most with a much larger patent family portfolio behind them — that were later narrowed by district courts).

30. See Dennis Crouch, *Patent Claim Count* (Nov. 17, 2024), <https://patentlyo.com/patent/2024/11/patent-claim-count.html> [<https://perma.cc/HE6A-H38W>].

31. See *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970); cf. *Exmark Mfg. Co. v. Briggs & Stratton Power Prod. Grp., LLC*, 879 F.3d 1332, 1348–49 (Fed. Cir. 2018) (explaining that one way to ensure apportionment is “through a proper analysis of the *Georgia-Pacific* factors”).

32. Indeed, allowing an expert to present a baseless damages theory violates a trial judge's “special obligation” to ensure that all expert testimony “is not only relevant but reliable.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993)).

33. *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333, 1343 (Fed. Cir. 2025) (concluding the expert's testimony was unsupported because the terms of the comparable licenses “provide[d] no indication the licensees . . . shared EcoFactor's belief that \$X constituted a reasonable royalty”).

license directly contradict it.<sup>34</sup> Belief is neither data nor fact. And wherein clauses can't support it.<sup>35</sup>

It is a sensible (and perhaps extant) outgrowth of apportionment law. And it has real-world application in the comparable license-driven damages models that dominate today. Licenses must be apportioned among patents and claims as clearly as products must, and that parceling out of value must be supported. Assumptions will not suffice.

This distinction was, perhaps, unexpected. At bottom, *EcoFactor*, with the limits of the en banc question<sup>36</sup> presented and the subsequent opinion, was perhaps intended to be more limited, as it directed the district courts to “do better”<sup>37</sup> and more rigorously gatekeep, primarily by ensuring that damages numbers are supported by hard evidence rather than speculation or generalization. But the Court soon went further, noting in *Jiaying* that district court judges must apply apportionment, avoid hand-waving built-in apportionment arguments, and cannot rest on the subjective beliefs or parties or the raw numbers of licenses that may be comparable in some ways, others not.<sup>38</sup>

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34. See *Daubert*, 509 U.S. at 591 (1993) (“[E]vidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.”).

35. What a contract represents in its non-binding terms cannot trump what it does in substance. See *Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.*, 925 F.3d 1225, 1229 (Fed. Cir. 2019) (holding that to “distinguish[] between ‘an assignment’ and a ‘mere license,’” courts must disregard contractual labels and “examine whether the agreement transferred all substantial rights to the patents”) (quoting *AsymmetRx, Inc. v. Biocare Med., LLC*, 582 F.3d 1314, 1319 (Fed. Cir. 2009)). This depends on the substance of what was granted rather than formalities or magic words. *Id.* (citing *Waterman v. Mackenzie*, 138 U.S. 252, 256 (1891) (“Whether a transfer of a particular right or interest under a patent is an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions.”)).

36. It is worth noting that the Federal Circuit appears to be one of the only circuits that both writes its own en banc questions and can amend them during the course of an en banc case. See FED. CIR., INTERNAL OPERATING PROCEDURES 28–29 (Dec. 1, 2024) (noting that the judges must upon voting to take a case en banc issue “an order setting forth the questions proposed to be addressed by the court en banc” under 1(e)), <https://www.cafc.uscourts.gov/home/rules-procedures-forms/internal-operating-procedures/> [<https://perma.cc/3K55-B68A>].

37. As noted by Professor Crouch at the University of Missouri School of Law: “My reading of *EcoFactor* was that it did not really change the law but . . . simply tell[s] district courts to ‘do it better,’ i.e., conduct the *Daubert* analysis with more rigor. Prior to *EcoFactor*, the Federal Circuit had already established precedent requiring damages experts to apportion license fees and Rule 702’s requirement[s] [of] expert testimony . . . was not new. *EcoFactor*, and now *Jiaying* simply reinforce these principles.” Dennis Crouch, *Federal Circuit Extends EcoFactor Framework to Patent Damages Apportionment in Jiaying Decision*, PATENTLY-O (Aug. 1, 2025), <https://patentlyo.com/patent/2025/08/ecofactor-framework-apportionment.html> [<https://perma.cc/7FLL-G6D2>].

38. *Jiaying Super Lighting Electric Appliance Co. v. CH Lighting Tech. Co.*, 146 F.4th 1098, 1112 (Fed. Cir. 2025).

This should have been old hat. While some have long argued that patents can be objectively, absolutely valued,<sup>39</sup> experience, scholarship, and practice suggest otherwise, in that the value of any given patent claim is subject to constant fluctuation and change, as evidenced by competing damages “expert” economic analyses arriving at wildly different values based on the same operative record.<sup>40</sup> Indeed, the government recently argued at length that measuring the value of patents is “very difficult and expensive” (on the way to paradoxically arguing this demanded the courts throw up their hands and enjoin practicing companies at the request of nonpracticing ones).<sup>41</sup>

Perhaps tautologically, the attempt to value patents inside of adversarial litigation itself affects the value of the patents. Call them Schrodinger’s valuations<sup>42</sup> — while there may be a true value which the marketplace is willing to pay for a particular patent claim at a given point in time, try to measure it, and the very fact that you are trying to measure it in the context of an expensive district court case subjects that value to change.

Regardless, damages calculations are, for lack of a better word, complex — with good reason. It is serious, important work to calculate damages accurately and in such a way as to avoid gamesmanship or inflation. Couple that with the economics of so few cases making it to trial and all of the expense and hurdles of getting there, and you have a system that motivates parties to inflate damages numbers to compensate for unrelated costs. It is thus essential that District Court judges and the appellate courts continue to apply *EcoFactor*, *Jiaying*, and their longstanding apportionment law to reign in the obvious incentives to inflate values beyond actual worth, lest patents become nothing more than abstract investments that do nothing to encourage — and actually dissuade — innovation and market growth.

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39. See John Squires & Eran Zur, *Why Investment-Friendly Patents Spell Trouble For Trolls*, KNOWLEDGE AT WHARTON (Sept. 24, 2014), <https://knowledge.wharton.upenn.edu/article/why-investment-friendly-patents-spell-trouble-for-trolls/> [<https://perma.cc/9CL4-Z7NY>] (article notably co-authored by the incoming Director of the United States Patent and Trademark Office arguing for patents as derivative assets that “can be mortgaged” and urging the marketplace to adopt a financial derivative patent pricing model, otherwise known effectively as litigation financing).

40. See, e.g., Laura B. Pincus, *The Computation of Damages in Patent Infringement Actions*, 5 HARV J.L. & TECH., 95, 96 (1991).

41. See Statement of Interest of the United States of America at 10, *Radian Memory Sys. LLC v. Samsung Elecs. Co.*, No. 2:24CV1073 (E.D. Tex. June 24, 2025) [hereinafter “Radian PI Br.”].

42. While a citation to the paradox hardly seems necessary, one suspects Schrodinger — and his dead and alive cat — can’t get enough credit and should be reread as often as possible. See John D. Trimmer, *The Present Situation in Quantum Mechanics: A Translation of Schrödinger’s “Cat Paradox,”* 124 PROCS. AM. PHIL. SOC’Y 323, 323–38 (1980).

## IV. THE “OVERTURN EBAY” CAMPAIGN

This has led, surprisingly, to further calls to simply bring back one-size-fits-all injunctive relief.<sup>43</sup> This, despite litigation and patent filings remaining high and Texas courts continuing to return outsized patent verdicts. In 2023, four of the five biggest patent verdicts came out of Waco and Marshall, Texas.<sup>44</sup> Indeed, from 2009 to 2022 Texas was the top state for so-called “thermonuclear” verdicts.<sup>45</sup> In that time frame, the Eastern District awarded \$10 billion dollars in intellectual property cases. The Western District (a big player before 2019,<sup>46</sup> and likely again so after 2024<sup>47</sup>) has since awarded over \$3.6 billion dollars in intellectual property verdicts. (This despite the government recently suggesting to one of those courts that these values were too “difficult” to determine.)<sup>48</sup>

This too, despite the dominant position of U.S. industry and innovation in the world, for decades. While one can (and often does) quibble about certain sectors, skewed incentives, or other local indicia,

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43. See, e.g., James Edwards, eBay, *Its Effects, and the RESTORE Patent Rights Act*, IPWATCHDOG (Sept. 4, 2024, at 11:15 ET), <https://ipwatchdog.com/2024/09/04/eBay-effects-restore-patent-rights-act/> [https://perma.cc/F637-3Y33] (discussing legislation and urging the restoration of pre-eBay levels of injunctive relief).

44. See Dani Kass, *The Top Patent Damages Awards of 2023*, LAW 360 (Dec. 19, 2023, at 22:44 ET), <https://www.law360.com/articles/1779258> [https://perma.cc/4UNB-D8AK].

45. See *Corporate Verdicts Go Thermonuclear, Texas*, MARATHON STRATEGIES <https://marathonstrategies.com/corporate-verdicts-go-thermonuclear-texas/> [https://perma.cc/AQ2M-ZC45].

46. Dani Kass, *Judge Albright Now Oversees 20% of U.S. Patent Cases*, LAW360 (Mar. 10, 2021, at 23:05 ET), <https://www.mckoolsmith.com/assets/htmldocuments/2021%2003%2011%20Judge%20Albright%20Now%20Oversees%2020%20Of%20New%20US%20Patent%20Cases-Law360.pdf> [https://perma.cc/57AS-Y3JF]; Order Assigning the Business of the Court as it Relates to Patent Cases, (W.D. Tex. July 25, 2022), <https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Order%20Assigning%20the%20Business%20of%20the%20Court%20as%20it%20Relates%20to%20Patent%20Cases%20072522.pdf> [https://perma.cc/66QJ-ZBPU]; Tommy Witherspoon, *Waco's Federal Judge Moving to Austin, Magistrate on 'Medical Leave'*, KWTX, (Jan. 31, 2025, at 16:30 ET), <https://www.kwtx.com/2025/01/31/wacos-federal-judge-moving-austin-magistrate-medical-leave/> [https://perma.cc/MAU8-KCES].

47. See, e.g., U.S. DIST. CT. W.D. TEX., CALENDAR YEAR 2024 STATISTICAL REPORT, at 5, <https://www.txwd.uscourts.gov/wp-content/uploads/District%20Statistics/2024/Calendar%20Year%202024%20Statistical%20Public%20Report.pdf> [https://perma.cc/G8AW-2RFZ] (showing a dramatic drop in Waco cases following the 2022 wheel order and a rise in 2024 in Austin).

48. See Radian PI Br., *supra* note 41, at 8–9. It bears noting that both major cases discussed here, *EcoFactor* and *Jiaxing*, involved reviews of damages models presented to juries in the Waco Division of the Western District before Judge Alan Albright. It remains to be seen if he and other district court judges respond accordingly and apply apportionment, or if they continue to run afoul of the appellate courts' scrutiny. This matters more in the patent litigation context than it would in other areas; rampant judge shopping means that five judges preside over the majority of all patent cases, so a single judge who chooses to abide by (or ignore) appellate guidance can have an outsized impact on thousands of cases annually. See generally Christian Helmers & Brian Love, *Welcome to Waco! The Impact of Judge Shopping on Litigation*, 41 J.L., ECON., & ORG. 294 (2025).

it is undeniable that for the past fifteen years, the United States has continued to drive value and dominate most known worldwide metrics in terms of wealth, growth, and innovation, effectively outperforming the world.<sup>49</sup>

Nevertheless, the patent maximalist narrative has long persisted.<sup>50</sup> There is a political rule that if you say something loud enough, long enough, it can become accepted policy.<sup>51</sup> Recall that, in 2006, the Supreme Court pulled patent law in line with injunctive relief in all other contexts, in effect for both preliminary and post-verdict relief. Justice Thomas, writing for the majority, held that injunctive relief in patent cases is, like all others, subject to the traditional rules of equity; namely, permanent injunctive relief was not automatic upon finding infringement, but rather subject to the traditional equitable four-factor test.<sup>52</sup> This, in turn, suggested to lower courts that if the plaintiff was a non-practicing entity (“NPE”), monetary damages were enough to satisfy the equities, as an injunction would not help an NPE compete in the marketplace, and money damages would make the NPE whole.

Practically, the ruling limited the use of injunctive relief to exert litigation leverage over defendants facing NPEs. It has lessened the economically disproportionate risk injunctive relief poses to U.S. industrial and economic activity, while in no way diminishing the

49. Matthew J Bartolini, *How Long Can the US Market Outperform the World?*, STATE STREET INVESTMENT MANAGEMENT (Nov. 12, 2024), <https://www.ssga.com/us/en/intermediary/insights/how-long-can-the-us-market-outperform-the-world> [<https://perma.cc/LHX9-DM93>] (noting that US markets and equities continue to outperform the rest of the world, and that the U.S. has “dominated the rest of the world in the past decade”).

50. See generally Richard Lloyd, *The Pro-Patent Lobby in the US Finally Seems to Be Getting its Act Together and so the Narrative Is Changing*, IAM (Oct. 17, 2017), <https://www.iam-media.com/article/the-pro-patent-lobby-in-the-us-finally-seems-be-getting-its-act-together-and-so-the-narrative-changing> [<https://perma.cc/4JXZ-SF2V>] (providing background on the duration and intent of the lobby). There are hundreds of events, talks, law review articles, blogs, and op eds written over the past ten years, the upshot of which aim to strengthen the patent system—by increasing the ease of assertion. For one of the more over-the-top examples, see this blog post by a prominent plaintiff’s attorney, Michael Shore, *How Google and Big Tech Killed the U.S. Patent System*, IP WATCHDOG (Mar. 21, 2018, at 9:15 ET), <https://www.congress.gov/117/meeting/house/114937/documents/HHRG-117-JU03-20220623-SD015.pdf> [<https://perma.cc/CT4W-LYB6>] (calling the US a “banana republic” for its patent policies). Note that practically, those interested in maximizing the value and leverage of patent assertion are the most fiscally motivated to continually spend money lobbying and urging change — funders, heavy licensors, and NPEs.

51. Tom Stafford, *How Liars Create the ‘Illusion of Truth,’* BBC (Oct. 26, 2016), <https://www.bbc.com/future/article/20161026-how-liars-create-the-illusion-of-truth> [<https://perma.cc/4DGD-YUDC>] (noting the adage “[r]epet a lie often enough and it becomes the truth” is a law of propaganda).

52. See *eBay Inc. v. MercExchange LLC*, 547 U.S. 388, 394 (2006).

magnitude of U.S. patent applications, grants, or even litigations,<sup>53</sup> all of which have gone on to reach new peaks in the intervening decades.<sup>54</sup>

Almost immediately, efforts began to discredit the Supreme Court's ruling, efforts that have continued for twenty years.<sup>55</sup> After decades, sustained efforts to question the Supreme Court's approach in *eBay Inc. v. MercExchange LLC*<sup>56</sup> have begun to find their footing. A few unserious bills have been introduced urging automatic injunctions (though substantial resources have been spent touting them).<sup>57</sup> Certain scholars, former officials, and other paid advocacy continue to beat the drum on the desperate — if economically vague — need for injunctive relief.<sup>58</sup>

Adding fuel to that smoldering fire, the current DOJ's antitrust authority recently strayed far from its roots as it helped advocate (abortively, as it turns out)<sup>59</sup> for injunctive relief for parties to whom

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53. See Ron Katznelson, *A Century of Patent Litigation in Perspective* (Nov. 14, 2014) (unpublished manuscript) (on file with SSRN), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2503140](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2503140) [<https://perma.cc/GS3Q-DHMG>] (normalizing patent law for the century preceding 2014, showing a rise in steep litigation after 2011, which author attributes in part to the passage of the AIA, and finding no significant deviation over the years after adjusting for relativistic factors).

54. See *U.S. Patent Activity Calendar Years 1790 to the Present*, U.S. PAT. AND TRADEMARK OFF., [https://www.uspto.gov/web/offices/ac/ido/ocip/taf/h\\_counts.htm](https://www.uspto.gov/web/offices/ac/ido/ocip/taf/h_counts.htm) [<https://perma.cc/5KVF-SVNW>] (showing a significant rise in patent applications and grants after 2000, on through to 2020 — more than doubling granted patents and increasing filings by roughly a third). Litigation peaked after the passage of the AIA at around 7,000 cases, but has generally been between 3,500 and 4,500, both before 2011 and after 2016, when joinder and venue rules changed, respectively. See Unified Patents, *Litigation Annual Report*, <https://portal.unifiedpatents.com/litigation/annual-report> [<https://perma.cc/R249-MTS6>]. It is on pace for upwards of 4,500 cases filed in 2024, another annual increase over the previous three years.

55. See, e.g., Kristen Osenga, *The Loss of Injunctions Under eBay: Evidence of the Negative Impact on the Innovation Economy*, THE HUDSON INSTITUTE (Feb. 28, 2024), <https://www.hudson.org/regulation/loss-injunctions-under-ebay-evidence-negative-impact-innovation-economy> [<https://perma.cc/VD8U-Z4M7>] (calling it a “new test” for injunctions and describing the “insidious fallout” of it).

56. 547 U.S. 388, 394 (2006) (restoring the traditional four-factor test for injunctive relief to patent cases).

57. The most recent example is the Realizing Engineering, Science, and Technology Opportunities by Restoring Exclusive Patent Rights Act, H.R. 9221, 118th Cong. (2024), or commonly, the RESTORE Act, not to be confused with an earlier-passed Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act (RESTORE Act) of 2012.

58. For example, Council for Innovation Promotion — for “C4IP” — is an organization (among many) whose purpose is to advocate for changes to the patent system that would benefit patentees, including explicitly overturning *eBay* or otherwise restoring patents. See *Key Issues*, C4IP, <https://c4ip.org/key-issues/> [<https://perma.cc/5YL2-PD9C>] (listing the RESTORE Act). It frequently sponsors, organizes, or pens advocacy urging the same. Its funding is not public.

59. Radian Memory Systems, LLC, an entity associated with litigation funder Fortress Investment Group, soon thereafter withdrew their request. See *Purported “Industry-Cast-Out” Sues Samsung*, RPX EMPOWER (Dec. 30, 2024), <https://insight.rpxcorp.com/news/84416-purported-industry-cast-out-sues-samsung> [<https://perma.cc/LCE2-GHTA>]

such relief has *no* marketplace value — non-practicing entities.<sup>60</sup> Interestingly, this comes at a time when the Administration, Congress,<sup>61</sup> and Supreme Court have sought to *limit* national injunctive relief.<sup>62</sup> The argument goes that, as it grows “harder” to prove damages, relief is needed in the form of much rougher, far more destructive justice. The crux of the government’s brief in the *Radian* affair was that “Patents Can Be Difficult to Value,”<sup>63</sup> and thus easier-to-obtain injunctions must be available to compensate.<sup>64</sup>

The irony here should not be lost on the reader — at a time when the Supreme Court and the administration are limiting or critical of national equitable relief, another, smaller arm of the administration is advocating for dramatically expanding it. And while that is against the current administrations’ obvious positions, it *is* consistent with pro-enforcement special interests and their longstanding push to revive *eBay*. Scholarship and paid advocacy have long argued for easing Supreme Court limits on patent equitable relief — often ironically in the form of legislative or judicial strictures that would constrain district court judges’ ability to consider all relevant equitable factors.<sup>65</sup>

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(discussing *Radian* assigning the patents at issue to Fortress Investment Group). They later dismissed the case, albeit without prejudice.

60. See generally *Radian* PI Br., *supra* note 41. The idea was not first theirs, but that of a Dallas-area patent lawyer. Michael Shapiro, *Patent Lawyer Buoyed in Pursuit of 1700s Injunction Argument*, BLOOMBERG LAW (July 7, 2025, at 5:02 ET), <https://news.bloomberglaw.com/ip-law/patent-lawyer-buoyed-in-pursuit-of-1700s-injunction-argument> [<https://perma.cc/G2F7-U9KF>]. It has since become a cause célèbre among patent maximalists.

61. See *Ending National Injunctive Abuse in United States District Courts*, AMERICA FIRST POLICY INSTITUTE (Apr. 2, 2025), <https://www.americafirstpolicy.com/issues/ending-national-injunction-abuse-in-united-states-district-courts> [<https://perma.cc/73U9-EM38>] (discussing Republican Congressman Darryl Issa’s recent No Rogue Rulings Act and critiquing nationwide injunctions as having no historical basis).

62. See *Supreme Court Substantially Limits Universal Injunctions (Trump v. CASA): Implications for Litigation Against the Government*, SIDLEY (July 1, 2025), <https://www.sidley.com/en/insights/newsupdates/2025/07/supreme-court-substantially-limits-universal-injunctions> [<https://perma.cc/S64N-KCR9>] (discussing how in *Trump v. CASA* the Supreme Court side with the government in substantially limiting injunctive relief).

63. See *Radian* PI Br., *supra* note 41, at 8.

64. Notice the purposeful, repeated reference to patents as “property,” despite the Supreme Court’s recent holding that they are “public franchises.” See *Oil States Energy Servs. v. Greene’s Energy Grp.*, 584 U.S. 325, 326 (2018) (“The franchise gives the patent owner ‘the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States’” and “did not exist at common law.”) (citations omitted).

65. See Eileen McDermott, *Coons, Cotton Reintroduce RESTORE Act on Injunctive Relief*, IP WATCHDOG (Feb. 25, 2025, at 2:50 ET), <https://ipwatchdog.com/2025/02/25/coons-cotton-reintroduce-restore-act-injunctive-relief/> [<https://perma.cc/L7A7-CGKG>] (discussing how the reintroduced RESTORE Act makes equitable relief a rebuttable presumption if infringement is found). *But see* Evan Langdon, *The Impact of Overturning eBay v. MercExchange*, IP WATCHDOG (Mar. 2, 2020, at 12:15 ET), <https://ipwatchdog.com/2020/03/02/impact-overturning-ebay-v-mercexchange/> [<https://perma.cc/K7LN-ZYUJ>].

The newfound argument is that there is a longstanding historical right<sup>66</sup> to the rough justice of market disruption<sup>67</sup> regardless of equity clearly runs counter to the current Supreme Court’s careful policing of the scope and effect of nationwide injunctions.<sup>68</sup> It was just three days after the government briefed this issue that the Supreme Court looked to equity and limited the application of nationwide injunctions — as the DOJ here had just advocated to dramatically expand it.<sup>69</sup> The left hand appears to have lost track of the right.

Regardless, even if the proper application of damages law leads to more courts considering injunctive relief — a bold assumption, given the figures cited above — actual equity should prevail. Courts have long looked to the golden rule of making the punishment fit the crime, and injunctions are no different. Apportioning the harm to be caused to the U.S. economy and limiting injunctions in time, scope, detail, and effect is the next logical step for a system grappling with erecting guardrails around powerful court cases that can otherwise disrupt U.S. domestic economic activity.

## V. OBJECTIVITY SHOULD RULE ALL REMEDIES

STRONG-MINDED PERSONS IN AUTHORITY CAN ORDINARILY GRAPPLE WITH PRACTICAL PROBLEMS OF FACTS. FACTS, NO MATTER HOW OUTRAGEOUS, CAN BE DEALT WITH BY OTHER FACTS. THE PROBLEMS OF MOOD AND ATMOSPHERE KNOWN TO THE PRESS AS ‘SITUATIONS’ ARE INFINITELY MORE SINISTER. A ‘SITUATION’ CANNOT BE PIGEONHOLED FOR REFERENCE AND THE APPROPRIATE ANSWER PULLED OUT OF A FILING CABINET. AN ATMOSPHERE CAN BE GENERATED OVERNIGHT OUT OF NOTHING OR EVERYTHING, ANYWHERE THAT HUMAN BEINGS ARE CONGREGATED.

— JOAN LINDSAY, PICNIC AT HANGING ROCK 99–100 (PENGUIN BOOKS 2017).

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66. See, e.g., Adam Mossoff, *The Supreme Court or Congress Must Restore Injunctions for Patent Owners*, THE HERITAGE FOUNDATION (June 25, 2020), <https://www.heritage.org/economic-and-property-rights/report/the-supreme-court-or-congress-must-restore-injunctions-patent> [<https://perma.cc/VJD5-DDXN>] (arguing for the “historical right” to be restored, regardless of broader economic consequences).

67. That, or that the damage to free trade and the market is a necessary evil of some moral dimension of patent infringement.

68. In its brief, the government sought to pick the parts of the Supreme Court’s approach it liked — the lookback into the historic courts of equity, and arguments that were able to surmount current precedent — and ignored that those cases sought not to expand or revive injunctive relief, but to limit and tailor it. See *Radian PI Br.*, *supra* note 41, at 6–7.

69. *Trump v. CASA, Inc.*, 606 U.S. 831 (2025); see also *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025). After *CASA* and *Mahmoud* were decided, *Radian* submitted a supplemental filing citing the two to support its position that founding-era equity practices govern injunction law. See Plaintiff’s Notice of Supplemental Authority at 1–4, *Radian Memory Sys. LLC v. Samsung Elecs. Co.*, No. 2:24CV1073, (E.D. Tex. July 3, 2025).

Lee & Lemley timely argued for more rigorous application of the bedrock principles of apportionment in patent damages, as well as a more searching review of the evidence relied upon by experts subject to the strictures of Rule 702 and *Daubert*. The Federal Circuit agreed, and affirmed these rational, reasonable approaches. This, paradoxically, both confirmed and reduced the long-term importance of their critical work. It advocated for a change already here.

In short, it convinced the court. *EcoFactor* quickly marked a doctrinal shift toward the precise, evidence-driven damages analysis Lee & Lemley advocated for — i.e., refusing to tolerate handwaving in damages theories and appropriately applying Rule 702. Despite attempts to narrow the ruling, in *Jiaying* it was subsequently applied to reiterate apportionment's essentiality. And it has renewed scrutiny on apportioning per-patent and per-claim value. The Federal Circuit is actively rebalancing patent damages law to objectively reflect the incremental value of claimed inventions — narrowing excessive damages awards and restoring credibility to expert testimony.

Which makes the continued arguments for expanding injunctive relief particularly paradoxical themselves. At a time when the courts accept a more reasonable application of their gatekeeper role in patent damages, why would they then throw open the floodgates to injunctions — blunt weapons that, if broadly applied, inequitably granted and subsequently overused, would do far more to harm U.S.-based economic activity than to encourage it? Why, in equity, would they provide injunctive relief to those to whom they offer no help, and to whom damages can make whole?

Injunctions remain largely senseless in the case of nonpracticing entities, who have no claim to equity and would not benefit from any of the resulting harm. Indeed, their arguments reveal their own true intentions — the threat of that catastrophic damage would be like holding a gun to a practicing company, at which point you can ask for what you want; it reveals it is all about leverage to make money. Thus, tautologically proving that money damages are what they are seeking, and they would be made whole by them; they would just like a better negotiating standpoint from which to seek them.

If enforcement of money damages was a concern, courts and adjudicators already have an array of other means by which to enforce judgements, from bonds and equitable authority to shape ongoing royalties to sanctions, willfulness, and other means of relief. That the only reforms currently offered are to create a presumption of injunctive relief or allow it for nonpracticing entities — who by definition can't benefit from the disruption of the actual marketplace — are signs of the true intention, which is just to force supersized settlements under the threat of devastating economic losses to practicing companies.

But domestic patents are not armaments for anyone from anywhere to train upon the U.S. economy; they are rewards that promise compensation for inventors of innovative technologies in exchange for sharing them with the public. A balanced approach to one remedy should not urge an unbalanced one in another. That is a paradox too far.