When Nominal is Reasonable: Damages for the Unpracticed Patent

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Reasonable royalties form a critical feature in the patent troll ecosystem. To obtain a substantial patent damage award, a patentee need not commercialize the patented invention; infringement is all that is needed. This surely incentivizes patenting but it dis-incentivizes innovation. Why commercialize yourself? The law allows you to wait for others to take the risks, and then you emerge later to lay claim to "in no event less than a reasonable" fraction of other people's successes. Today, it is rational to be a patent troll rather than an innovator. Today's interpretation of reasonable royalties is wrong as a matter of patent policy but, somewhat surprisingly, it is also wrong as a matter of patent history and statutory interpretation. The creation of reasonable royalties in the nineteenth century did mark a significant change to patent damages but it was nowhere as sweeping as today's interpretation would suggest. Up to the mid-1800s, the existing routes to patent damages were stringent, available only to patentees who had already commercialized their patented invention. Courts developed reasonable royalties for budding innovators who were laying the groundwork for innovation but who could not yet satisfy the existing strict routes to patent damages. Those cases never extended reasonable royalties to those who simply sat on their patents. Starting in the 1970s, through dubious statutory interpretation, reasonable royalties came unmoored from that foundation. Infringement alone, without any efforts by the patentee to commercialize, became sufficient for substantial damages. Today's view of reasonable royalties is not only unsupported but sits in tension if not outright conflict with those earlier, foundational cases. Properly understood, efforts to commercialize are a necessary element for substantial reasonable royalties. As a matter of patent doctrine, history, and policy, even if valid, infringed, and enforceable, nominal damages are reasonable for an unpracticed patent.

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