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A View From The Trenches:

The Limited Impact Of Grain Processing On Patent Litigation

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Commentary

A View From The Trenches: The Limited Impact Of Grain Processing On Patent Litigation

By
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I. Introduction

It has been almost ten years since the Federal Circuit handed down its decision in the famous *Grain Processing* case.[2] That decision significantly changed the way that patent infringers can defend against lost profits damages claims in patent cases. In particular, it changed both the criteria and the rationale that are used when determining whether or not an infringer's sales can be counted as lost sales for lost profits damages analysis.[3]

Before *Grain Processing*, the presence of acceptable noninfringing substitutes would only prevent lost profits damages if the defendant could show that such substitutes were actually available and on the market at the appropriate time. After *Grain Processing*, it became possible for a patent defendant to avoid lost profits damages by successfully arguing that a new noninfringing product, although not actually sold in the marketplace at the relevant time, *could* have been developed and made commercially available in a timely fashion and, therefore, should be treated as available for the purposes of the lost profits calculation.[4] When such substitutes are available, lost profits damages are not available to the patentee. Since the patent damages theories that lead to the very highest damages awards are lost profits theories, the decision is significant.

That being said, the significance of *Grain Processing* should not be overstated. In actual litigation, the decision has not had been so influential, as evidenced by the fact that it has been cited more often in law review articles than in court decisions. The discussion below sets forth, from a litigator's viewpoint, the reasons for which *Grain Processing* has not had a large impact either on trial practice or on litigant's behavior in response to claims of patent infringement.

II. The Facts And History Of The Grain Processing Litigation

In order to place the discussion of this article into context, the relevant facts and rulings of the case are summarized here. The plaintiff was Grain Processing. The defendant was American Maize Products. The dispute involved a kind of food additive called maltodextrins.[5] Maltodextrins are a desirable food additive because, although they have little taste or color, they improve the structure of food.[6]

The dispute between Grain Processing and American Maize Products was in litigation for an amazingly long eighteen-year period. During that period, American Maize Products adopted several different manufacturing processes — each of which allegedly infringed the patent in suit. When the lawsuit was originally filed in 1981, they were using Process I.[7] About a year later, they adopted a design-around process, Process II, that was intended to avoid infringement.[8] When the case was tried for the first time, the plaintiff asserted that both Process I and Process II infringed. The trial court ruled that Process II did not infringe. On appeal, the Federal Circuit reversed, ruling that Process

II did infringe the patent.[9] An injunction issued, and, as a result, defendant American Maize Products developed and adopted Process III, which was a good faith attempt to avoid infringement.[10] Grain Processing filed suit to enforce its injunction, and at first, the district court ruled that Process III also infringed and, in addition, found American Maize Products in contempt. Then, the district court reversed itself, determining that Process III did not infringe. On appeal, the Federal Circuit reversed again, ruling that Process III actually did infringe. As a result, American Maize Products had to design around the patent again. They did so, and adopted the resultant Process IV. Process IV was ultimately adjudicated not to infringe.[11]

After the above rulings, the court had to calculate damages under a lost profits theory of recovery. American Maize Products was able to demonstrate that it only took two weeks for it to develop Process IV, and that adopting Process IV did not require it to make any significant change of equipment. They argued that they adopted Process III in good faith as a non-infringing process, and had they but known that Process III infringed, they would have adopted Process IV instead within a few weeks at insignificant extra cost, and, therefore, the plaintiff, Grain Processing, was not entitled to lost profits based on the sales of any maltodextrins that were made by Process III.[12] Rather, because Process IV, an acceptable noninfringing substitute, was immediately available at no cost, the damages should be limited to a reasonable royalty even though the process was not on the market at the relevant time.[13]

The Federal Circuit accepted this argument, and ruled that Grain Processing was not entitled to lost profit damages for sales based on Process III. Grain Processing's damages were limited to a reasonable royalty. The Federal Circuit reached this conclusion because it accepted the argument that Process IV was "available" as an acceptable noninfringing substitute that the defendant could have adopted at any time.[14] Thus, the Federal Circuit's *Grain Processing* opinion stands for the proposition that a product that was not sold on the market during the time that is relevant to a lost profits analysis can nevertheless be an "available acceptable non-infringing substitute" that prevents the patentee from receiving a lost profits award. For the rest of this article, this proposition will be referred to as a "*Grain Processing* argument."

III. Grain Processing Arguments Are Not Common In Patent Litigation

In most patent litigations, *Grain Processing* arguments either do not arise or play only a minor role in resolving the dispute. In fact, as mentioned briefly above, the *Grain Processing* decision is cited more often in articles and commentary than it is in reported judicial decisions. For example, a Westlaw "KeyCite" search in March of 2008 identified over one hundred and fifty articles and treatises that cited to *Grain Processing*. The same search identified only fifty-seven judicial decisions that cited to *Grain Processing* over the same time period. This relatively small number of decisions citing to *Grain Processing* suggests that, for some reason, patent defendants are not presenting their *Grain Processing* arguments either in dispositive motions or at trial. This suggests that these arguments are not strong enough to be presented to the courts.

One may speculate that the facts that will support a *Grain Processing* arguments do not arise that often. After all, the defendant in *Grain Processing* had rather special facts to support their position.[15] In *Grain Processing,* the accused processes were first held to be noninfringing processes but were later found to infringe. This happened more than once. These reversals made it possible for American Maize Products to credibly argue that it would have adopted noninfringing Process IV earlier if it had only known that its Process III was an infringing process. In addition, because the infringement analysis was so difficult, there was no issue of willful infringement.[16] As a result, there was no possibility that the defendant would pay an enhanced damages award. Moreover, the final, non-infringing Process IV was already on the market and successful at the time that lost profits damages were adjudicated. In other words, the defendant had concrete evidence that the product was a genuine acceptable noninfringing substitute. Further, the defendant had successfully switched from infringing Process III to noninfringing Process IV, and there was solid evidence showing how long it took for them to make that switch. In summary, because infringement was so difficult to evaluate in the *Grain Processing* case, American Maize Products had solid evidence to demonstrate that it was reasonable to treat the acceptable non-infringing substitute as available at the relevant times due to the minimal time and cost associated with changing to an acceptable noninfringing process. Few defendants will have such an ambiguous patent claim to respond

to, or such clear evidence that a product that was not on the market at the relevant time was nevertheless an acceptable non-infringing substitute.

Another possible explanation is that *Grain Processing* arguments are being dropped for tactical or strategic reasons. The Patent Act provides that the remedy for patent infringement shall be "in no event less than a reasonable royalty."[17] Thus, a reasonable royalty is available in every patent case. In contrast, the lost profits theory of damages is only available when the patentee can make a strong evidentiary showing of causation.[18] Specifically, in order to win lost profits damages, a patentee has to establish a reasonable probability of "but for" causation, *i.e.*, that its profits were lost due to the infringement.[19] After the patentee makes such a showing, the burden shifts to the accused infringer to show that the claim for lost profits is unreasonable.[20] In other words, the patentee has the burden to prove lost profits and is the party that decides whether or not to put lost profits at issue in the case — if the patentee does not want to try to make the requisite evidentiary showing, they will not assert a claim for lost profits damages. If the patentee chooses to pursue a reasonable royalty theory rather than pursuing lost profits, the defendant will not have the opportunity to raise a *Grain Processing* argument.[21]

The patentee may decide to present only a reasonable royalty case for tactical reasons that have nothing to do with the merits of any potential *Grain Processing* defense. For example, the patentee may decide not to argue lost profits in order to reduce discovery. In order to support an argument for lost profits, the patentee will have to prove facts under the four-factor test that was originally set forth in the Federal Circuit's *Panduit* decision, *i.e.*: (1) that there is demand for the patented product, (2) that there are no acceptable noninfringing substitutes, (3) that the plaintiff had the manufacturing and marketing capacity to make all of the infringer's sales, and (4) the amount of profit that the plaintiff would have made but for the infringement.[22] Proving these *Panduit* factors is likely to increase the cost of discovery the patentee and may require the patentee to produce its own confidential and sensitive financial, marketing, and technical information in order to meet its burden of proof. Less of this sort of confidential information is needed in order to prove reasonable royalties, which means that choosing a reasonably royalty theory of damages may diminish the patentee's costs as well as its discovery burden. Further, even when the patentee produces the requisite discovery, the burden of proof is difficult to meet.[23] Indeed, patentees often lose lost profits arguments due to inadequate expert analysis or lack of sufficient proof — i.e., for reasons that have nothing to do with the merits of any possible *Grain Processing* argument.[24] Moreover, a plaintiff can win a lot of money arguing a theory of damages that asks for an amount "not less than a reasonable royalty."[25] In that regard, patent plaintiffs who have strong cases for injunctive relief and/or for willful infringement are even more likely to feel that these remedies will give them the leverage they need to negotiate a license without the extra effort that would be required to prove lost profits damages. As such, plaintiff's litigation tactics can relegate the *Grain Processing* arguments to a minor role in the dispute.

Moreover, even if the patentee puts lost profits at issue, the accused infringer may choose not to present a *Grain Processing* defense — there may be material factual issues that prevent them from presenting the argument on summary judgment, and there may be logistical problems that prevent them from presenting the argument at trial. For example, accused infringers are often successful at avoiding damages issues by bifurcating the litigation so that damages are not considered until after the court has ruled on validity and infringement.[26] If they win on the issues of validity or infringement, the court will never have to consider any *Grain Processing* argument. Moreover, even when the accused infringer is not able to bifurcate the trial, the time available for the patent defendant to present its case at trial may be so limited that it chooses to spend its valuable in-court time presenting evidence of invalidity, noninfringement, or inequitable conduct, with the idea that presenting a minimal case on damages and hoping for the best would be better than spending a lot of time before the fact finder's arguing about the details of the facts relating to patent damages. The concern is that, if too much time is spent on damages issue, the fact finder might get the impression that liability was a foregone conclusion. In the defense is given only a short time to present its case, and the issue of damages is not bifurcated, the *Grain Processing* argument will likely either be dropped (or unsuccessful) because it is difficult to present such arguments effectively in a short period of time.

Given all of these considerations, it is hardly surprising that *Grain Processing* arguments arise rarely either on dispositive motion or at trial. Fundamentally, the availability of a *Grain Processing* argument is not going to drive the litigation, the settlement negotiations, or even the patent defendant's decision of whether or not to continue selling a product that is alleged to infringe without attempting a design around.

IV. Grain Processing Arguments Are Apparently Difficult To Win

It appears that defendants are not having an easy time prevailing on *Grain Processing* arguments either on summary judgment or at trial.[27] In a few cases, defendants have raised *Grain Processing* arguments in pre-trial or discovery papers, some courts have found that the argument had sufficient merit that it should not be dismissed and, therefore, could be presented at trial.[28] That being said, there are few decisions handed down after trial where such an argument was actually presented. In fact, the few defendants that have tried the issue appear to have encountered great difficulty demonstrating that non-infringing substitute was actually acceptable and available at the appropriate time.[29] Moreover, defendants who have tried a *Grain Processing* argument to a jury and lost have found it difficult to overcome the lost profits award in post-trial proceedings.[30] Thus, even in the few cases in *Grain Processing* arguments have been raised and fully contested on the merits, it appears that the *Grain Processing* argument has often been an ineffective defense.

V. Any Academic Argument That Grain Processing Creates An Incentive To Infringe Is Not Supported In Practice

Some academics have argued that the *Grain Processing* decision creates an incentive to infringe. For example, the Berkeley Technology Law Journal recently published an article by Hausman, Leonard and Sidak arguing that the Grain Processing decision, by creating an incentive for people to infringe patents, reduces incentives to innovate.[31] Their position is that the *Grain Processing* doctrine creates an incentive to infringe because it allows a defendant to retroactively adopt a non-infringing technology and thereby avoid lost profit damages.[32] They assert that parties accused of patent infringement will adopt a wait-and-see attitude — if the accused product is held to infringe a valid patent, the defendant can simply take the benefit of moving to non-infringing technology later without worrying about lost profits damages.[33] The article presents calculus showing that defendants are more likely to continue to infringe a patent because of the *Grain Processing* decision than they would if Grain Processing arguments were not available under the patent laws.[34] These arguments do not accurately represent the reality of patent litigation.

While Hausman Leonard and Sidak's mathematical analysis is probably accurate (because any decision that potentially lowers damages to patent defendants will increase the likelihood of increased infringement), their underlying assumptions do not accurately model the behavior of defendants in patent cases. For example, if a patent defendant continues the allegedly infringing activity without modifying their conduct, they run the risk of enhanced damages and attorney fees, which are available as remedies in patent cases when the defendant's infringement is found to be willful.[35] Awards for willful infringement can be as much as triple the reasonable royalty (or lost profits) amount.[36] The remedies for willful infringement are a strong incentive for rational patent defendants to modify their behavior, whether by adopting non-infringing technology, settling litigation, taking a license, or exiting the market. In many cases, the danger of enhanced damages and attorney fees will outweigh the potential benefits of any *Grain Processing* defense.

In addition, the Patent Act provides for injunctive relief,[37] which can be as damaging to a defendant as a lost profits award, if not more so. Again, the danger of injunctive relief will often outweigh the potential benefits of any *Grain Processing* defense. Further, even if lost profits damages are not available, the damage awards under a reasonable royalty theory can be quite high because, as mentioned above, the statute provides that damages shall be "in no event less than a reasonable royalty."[38] Therefore, damages calculated on a "reasonable royalty" theory might not be overturned even when the trial court enters a high damages award.[39] Indeed, under some theories of damages, the "reasonable royalty" award alone can be high enough to deter a rational defendant from risking infringement damages at all or even from risking trial on the merits when an acceptable substitute is available.[40] Thus, the danger of excessive damages under a reasonable royalty theory will often

outweigh the potential benefits of any *Grain Processing* defense. Therefore, *Grain Processing* should not be viewed as creating a meaningful incentive to infringe. Rather, it should be viewed as an interesting defense that can sometimes be used effectively in patent cases but, more often, will be a peripheral argument.

VI. Conclusion

Although the *Grain Processing* decision represents a significant development in patent law, and presents a theory that can sometimes be used effectively by patent defendants to reduce their potential liability in patent dispute, the decision has not been a major force in the courtroom to date. Rather, although these arguments can often be made, they are not litigated that often and, when they are litigated, they are rarely central to the dispute.

Endnotes

1. David Alan Makman is a litigator at Howrey LLP in San Francisco.

2. *Grain Processing v. American Maize Products, Inc.*. 185 F.3d 1341 (Fed. Cir. 1999).

3. *Id.*

4. *Id.*

5. *Grain Processing* at 1343.

6. *Id.*

7. *Grain Processing* at 1345.

8. *Id.*

9. *Id.*

10. *Id.* at 1346.

11. *Id.*

12. *Id.* at 1347-48.

13. *Id.* In order to win lost profits damages, a patent plaintiff must demonstrate that there are no acceptable noninfringing substitutes available to the defendant. *See Panduit Corp. v. Stahln Bros. Fiber Works, Inc.*, 525 F.2d 1152 (6th Cir. 1978).

14. The court indicated that it required, and the defendant had demonstrated, "reliable economic proof" of the available substitute. *Grain Processing* at 1356.

15. *Id.*

16. *Grain Processing* at 1353 ("Grain Processing does not allege willful infringement and the record shows none").

17. 35 U.S.C. § 284 (2008). Note that the statute allows for awards that are more than a reasonable royalty, but are not lost profits awards. Therefore, patent defendants cannot be comfortable that, if they avoid lost profits, the damages will be reasonable.

18. *Grain Processing*, 3185 F.3d at 1349.

19. *Id.*

20. *Id.*

21. This appears to be changing. The Federal Circuit has suggested that *Grain Processing* arguments may be available in reasonable royalty cases. *See Micro Chemical Inc. v. Lextron, Inc.* 317 F.3d 1387, 1393-94 (Fed. Cir. 2003). Moreover, at least one court has accepted a *Grain Processing* argument in a reasonable royalty case and allowed a defendant to calculate reasonable royalties using the incremental price difference between an accused product and an acceptable noninfringing substitute. *See Fresnius Medical Holdings, Inc. v. Baxter International, Inc.*, 2006 WL 1390416 (N.D. Cal. 2006). However, the use of *Grain Processing* arguments in reasonable royalty cases is a new trend, there are very few examples, and it is not yet clear how broad the trend will be or how effective such arguments will be for reducing damages.

22. *Panduit Corp. v. Stahln Bros. Fiber Works, Inc.*, 525 F.2d 1152 (6th Cir. 1978).

23. *See, e.g.*, *Cargill, Inc. v. Sears Petroleum & Transport Corp.*, 2004 WL 3507329 (N.D.N.Y. 2006) (due to insufficient proof of lost profits damages, the plaintiff recovered on a reasonable royalty theory); *Lampi Corp. v. American Power Products*, 2004 WL 1656547 (N.D. Ill. 2004) (ruling that lost profits damages were not available because, among other things, Lampi's market share calculations were not based on a sound factual or economic predicate); *Novo Indus., L.P. v. Micro Molds Corp.*, 239 F. Supp. 2d 1282 (S.D. Fla. 2002) (denying lost profit damages because Novo had not presented sufficient evidence to prove or quantify what sales would have been made).

24. *See, e.g.*, *DSU Medical Corp. v. JMS Co., Ltd.*, 471 F.3d 1293 (Fed. Cir. 2006) (upholding a ruling that excluded testimony regarding sales of defendant's noninfringing device); *Fuji Photo Film Co., Ltd. v. Jazz Photo Corp.*, 249 F. Supp. 2d 434 (D.N.J. 2003) (finding that lost profits were not available as a matter of law because Fuji presented insufficient proof); *Johnson Elec. North America, Inc. v. Mabuchi Motor America Corp.*, 103 F. Supp. 268 (S.D.N.Y. 2000) (excluding an expert's lost profits report for failing to satisfy Rule 702's requirement that it assist the trier of fact in understanding the evidence or determining factual issues in the case); *National Research Labs. v. Eppert Oil Co.*, *Inc.*, 104 F. Supp. 2d 851 (S.D. Ohio 2000) (limiting the lost profits portion of damages to a single customer due to a lack of evidence regarding other customers); *Tel-Lock, Inc. v. Thomson Consumer Electronics*, 2005 WL 741930 (N.D. Ill. Mar. 30, 2005).

25. *See supra* note ___.

26. *See, e.g.*, *Princeton Biochemicals, Inc. v. Beckman Instruments, Inc.*, 180 F.R.D. 254, 256-60 (D.N.J. 1997).

27. *Applera Corp. v. Micromass U.K. Ltd*,, 204 F. Supp. 2d 724 (D. Del. 2004) (denying judgment as a matter of law and upholding a jury finding that there were no acceptable noninfringing substitutes); *BASF Aktiengesellschaft v. Reilly Industries, Inc.*, 2004 WL 3319163 (S.D. Ind. 2004) (declining to consider arguments about noninfringing substitutes on summary judgment early in the action).

28. *See, e.g., Bristol-Meyers Squibb Co. v. Poulenc Rorer, Inc.*, 2000 WL 356412 (S.D.N.Y. Apr. 5, 2000) (allowing defendant to present expert testimony that an off-the-market product was an acceptable noninfringing substitute, but ordering the parties to reduce the number of experts in the case); *Cardiac Pacemakers, Inc. v. St. Jude Medical, Inc.*, 418 F. Supp. 2d 1021 (S.D. Ind. 2006) (allowing a defendant to argue at trial that, in the "but-for world," it would not have gone through with a merger that terminated its license to the patent); *Collegenet, Inc. v. Applyyourself, Inc.*, 2004 WL 2050491 (D. Or. Feb. 5, 2004) (upholding a jury award of lost profits despite argument that the defendant could have turned the infringing feature off at any time); *McKinley v. Franklin Sports, Inc.*, 192 F. Supp. 2d 1214 (D. Kan. 2002) (ruling that the noninfringing substitute was "available" and noninfringing but leaving the issue of whether it was an "acceptable" substitute for trial); *Medtronic Xomed v. Gyrus Ent LLC*, 440 F. Supp. 2d 1300, 1331 (M.D. Fla. 2006) (denying summary judgment on the grounds that, even though the alleged acceptable noninfringing substitute was not available at the relevant time, the issue of whether it precluded lost profits damages was a material issue of fact); *National Research Labs v. Expert Oil Co., Inc.*, 104 F. Supp. 851, 859-60 (S.D. Ohio 2000) (ruling on summary judgment that the evidence proved only that a noninfringing substitute would have been sold for one customer, and allowing the patentee to pursue lost profits damages for all other customers).

29. *American Seating Company v. USSC Group, Inc.*, 514 F.3d 1262, 1270 (Fed. Cir. 2008) (upholding a jury's conclusion that a product called VPROII was not an acceptable noninfringing substitute); *Applera Corp. v. Micromass UK Ltd.*, 204 F. Supp. 724, 780 (D. Del. 2002) (a jury concluding that there were no acceptable noninfringing substitutes); *Cordis Corp v. Boston Scientific Corp.*, 2005 WL 1322593 (D. Del. June 5, 2005) (rejecting an argument that there were acceptable noninfringing substitutes); *Honeywell Int'l Inc. v. Hamilton Soundstand Corp.*, 166 F. Supp. 2d 1008, 1030 (D. Del. 2001) (ruling on judgment as a matter of law that a reasonable jury could have found that no acceptable noninfringing substitutes were available); *Micro Chemical, Inc. v. Lextron, Inc.*, 318 F.2d 1119, 1124 (Fed. Cir. 2003) (reversing summary judgment, and finding that the alleged acceptable noninfringing substitute was *not* available);

Polymer Indus. Prods. Co. v. Bridgestone/Firestone, Inc., 10 Fed. Appx. 812 (Fed Cir. 2001) (affirming a jury award of lost profits because noninfringing alternatives were not acceptable) (unpublished). *Cohesive Technologies, Inc. v. Waters Corporation*, 526 F. Supp. 2d 84 (D. Mass. 2007) (finding that a patentee did not meet its burden of proof to show no acceptable noninfringing substitutes).

30. *Applera Corp. v. Micromass U.K. Ltd.*, 204 F. Supp. 2d 724 (D. Del. 2004) (on judgment as a matter of law, upholding a jury finding that there were no acceptable noninfringing substitutes); *Honeywell Int'l Inc. v. Hamilton Soundstand Corp.*, 166 F. Supp. 2d 1008, 1030 (D. Del. 2001) (ruling on judgment as a matter of law that a reasonable jury could have found that no acceptable noninfringing substitutes were available). *But see Wechsler v. Macke Intern. Trade, Inc.*, 486 F.3d 1286 (Fed. Cir. 2007) (denying lost profits to a plaintiff who had no product on the market).

31. See Jerry A. Hausman, Gregory K. Leonard & J. Gregory Sidak, Patent Damages and Real Options: How Judicial Characterization of Non-Infringing Alternatives Reduces Incentives to Innovate, 22 Berkeley Technology Journal 825 (2007).

32. *Id.* at 826.

33. *Id.*

34. *Id.* at 842-845.

35. 35 U.S.C. § 284 (2008).

36. *Id.*

37. 35 U.S.C. § 283 (2008).

38. 35 U.S.C. § 284 (2008).

39. *H.M. Stickle v. Heublein, Inc.*, 716 F.2d 1550 (Fed. Cir. 1983) (explaining that, when lost profits are not available, damages should be tried under a reasonable royalty theory, which permits an award of more than a reasonable royalty, and opining that, in the right circumstances, damages under a "reasonable royalty" theory could even be greater than the defendant's sales price).

40. For examples of high damages awards under a reasonable royalty theory, *see Imonex Services, Inc. v. W. H. Munzprufer Dietmar Trenner GmBH*, 408 F.3d 1374 (Fed. Cir. 2005) (awarding damages based on the entire market value of a product, though the patent was related only to a component); *Juicy Whip, Inc. v. Orange Bang, Inc.*, 382 F.3d 1376 (Fed. Cir. 2005) (awarding damages based on profits from unpatented materials used with a patented device); *Golight, Inc. v. Wal-Mart Stores, Inc.*, 35 F.3d 1327 (Fed. Cir. 2004) (awarding 50% of incremental profits on a reasonable royalty theory of damages). ■

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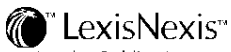

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