

Why Funder Forecasts Don't Belong In Royalty Analysis

By **Rick Eichmann** (June 24, 2025, 4:39 PM EDT)

The U.S. District Court for the Northern District of California's June 3 decision in *Haptic Inc. v. Apple Inc.* offers a valuable lens through which to examine the economic function of damages estimates and the boundaries of discoverability in patent litigation.

In denying Apple's motion to compel litigation funding communications, the court reaffirmed a principle that is often underappreciated in legal proceedings: The purpose for which an economic model is created — and the informational environment in which it is deployed — determines its evidentiary relevance.

As a matter of economic logic, a prelitigation damages model prepared for the purpose of securing third-party funding is not equivalent to a valuation undertaken for use in a hypothetical license negotiation or as a formal expert opinion under Rule 702 of the Federal Rules of Evidence.

Treating these distinct analytic outputs as interchangeable ignores both their intended function and their placement within different informational equilibria.

The Economic Function of Damages Forecasting in Funding Contexts

When plaintiffs engage litigation funders, they typically submit estimates of expected recovery. These forecasts reflect conditional expectations over a distribution of potential outcomes, often factoring in procedural risks, duration, cost of capital, and binary litigation thresholds (e.g., claim construction, summary judgment, admissibility challenges).

From an economic perspective, these estimates are akin to the expected value of a real option — contingent on future states of the world — and are adjusted to maximize capital formation.

In this context, the model serves a private signaling function. It is not designed to measure the ex ante market value of the intellectual property, nor does it apportion damages based on the marginal economic contribution of the patented technology. Rather, it reflects a forward-looking assessment of litigation value, not commercial value.

Apple sought to compel the production of such estimates, arguing that they were relevant to the reasonable royalty analysis under *Georgia-Pacific* Factors 14 and 15 — expert testimony and the amount a willing licensee would pay in a hypothetical negotiation. But this assumes a functional equivalence



Rick Eichmann

between private capital-market forecasts and economic inputs to a licensing negotiation, which is not supported by economic theory.

Asymmetric Information and the Structure of Legal Bargaining

In valuation theory, the accuracy and probative value of an estimate depend not only on the model's assumptions but also on the informational context in which it was generated. When a plaintiff provides a damages estimate to a funder, it operates under conditions of asymmetric information: The plaintiff knows more about the claim than the funder, and the funder accounts for potential exaggeration or selection bias by discounting the estimate or requesting scenario analyses.

This results in what economists refer to as a Bayesian updating process. The funder does not accept the estimate as true; it treats it as a signal and updates its belief about the claim's value accordingly. The plaintiff, anticipating this response, strategically selects which estimates to present. The resulting damages model reflects not a neutral valuation, but an equilibrium outcome of a signaling game under incomplete information.

By contrast, the hypothetical license negotiation in *Georgia-Pacific* assumes rational actors with symmetrical information and no litigation overlay. It posits a transaction between a willing licensor and licensee at a fixed point in time (typically the date of first infringement), where the parties have equal access to facts and negotiate a royalty based on commercial value and market alternatives. The incentives and assumptions in this construct are fundamentally different from those in litigation funding.

The court's refusal to treat the funding-related damages forecast as a stand-in for a *Georgia-Pacific* royalty reflects this difference. The funding estimate is generated *ex post*, after alleged infringement — under risk, and with strategic motives. It does not inform the hypothetical bargain in any analytically coherent way.

Relevance and the Legal Standard Under Rule 26

Rule 26(b)(1) of the Federal Rules of Civil Procedure limits discovery to nonprivileged material that is relevant to a claim or defense and proportional to the needs of the case. In economic terms, relevance requires a demonstrable causal or inferential link between the information sought and a disputed economic parameter — such as the royalty rate or lost profits amount.

The damages estimates Haptic shared with its funder were not prepared to inform the reasonable royalty analysis; they were prepared to evaluate the claim's expected monetization potential, inclusive of litigation risk. As the court noted, the materials were not valuations of the patent but strategic assessments of damages potential — effectively investment decks — not expert analyses suitable for jury presentation.

This ruling aligns with economic best practices. A damages expert opinion must satisfy standards of relevance, reliability and fit. A forecast constructed to solicit capital under uncertainty — one that aggregates procedural and litigation-specific risks — is not a reliable proxy for patent value in a but-for world. It is a stochastic simulation of possible outcomes, not an economic measure of infringement harm.

Economic Models and Functional Separation

For attorneys working with expert economists, this decision highlights the importance of functional clarity in the development and use of damages models. There are at least three distinct types of economic analyses that arise in IP litigation.

1. Litigation value forecasts are expected-value calculations used to inform funding decisions or internal settlement strategy. They typically incorporate litigation risk, case duration and potential adverse rulings.
2. Patent valuations are financial analyses estimating the commercial or licensing value of a patent under normal market conditions. Methods may include income-based (discounted cash flow), market-based (comparable licensing), or cost-based approaches.
3. Damages analyses are backward-looking estimations of economic harm caused by infringement, anchored in legal causation and fact patterns specific to the case. They may estimate lost profits, reasonable royalties or unjust enrichment.

Each model serves a different economic purpose and is subject to different assumptions, inputs and methodological constraints. Attempting to treat a litigation funding model as a royalty estimate conflates these functions and risks drawing inferences that are neither economically sound nor legally reliable.

Practical Implications

For practitioners, Haptic provides several takeaways.

Avoid overstating the role of early forecasts.

Attorneys seeking discovery should recognize that litigation forecasts are not equivalent to valuations or damages opinions. Their persuasive utility in court is limited unless they are shown to have informed the actual royalty negotiation or expert report.

Clarify the purpose of economic models.

Plaintiffs should clearly differentiate the role of each economic analysis in the case record. Work product protections and privilege arguments are stronger when the function of each model is well-documented and distinct.

Anticipate discovery risk in funding contexts.

While courts are generally protective of litigation funding communications, poorly drafted forecasts or ambiguous roles for experts in funding presentations may increase exposure. Clarity of purpose and scope is critical.

Conclusion

The Haptic court's decision reflects a sound economic understanding of how the purpose and informational context of an estimate shape its evidentiary value. In litigation finance, damages forecasts are tools for capital allocation — not economic measurements of patent value. They belong to a different class of models, governed by different assumptions and economic functions.

Treating such models as relevant to the legal damages inquiry, without more, risks importing noise into what should be a disciplined, causally coherent analysis. Attorneys and experts alike benefit from recognizing these boundaries — and respecting the distinct epistemological and economic roles that each model plays.

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