

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MOBILEMEDIA IDEAS LLC,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 10-258 (SLR)
)	REDACTED PUBLIC VERSION
APPLE INC.,)	
)	FILED: 11/7/16
)	
Defendant.)	

**PLAINTIFF MOBILEMEDIA IDEAS LLC'S OPENING BRIEF
IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A
MATTER OF LAW AND MOTION FOR A NEW TRIAL ON DAMAGES**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
NATURE AND STAGE OF THE PROCEEDINGS	3
SUMMARY OF THE ARGUMENT	3
STATEMENT OF FACTS	3
LEGAL STANDARDS	4
A. The Court May Increase A Damages Award Where The Amount Owed Is Not Disputed.....	4
B. In The Alternative, The Court Can Order A New Trial On Damages Where The Amount Awarded By The Jury Is Not Supported By The Evidence.	5
ARGUMENT.....	6
I. THE DAMAGES VERDICT SHOULD BE ADJUSTED UPWARD TO \$17.9M.....	6
A. No Substantial Evidence Supports the Improperly Low \$3.0M Verdict.....	9
B. There is No Genuine Dispute that \$17.9M is the Proper Reasonable Royalty.	9
C. Because There is No Genuine Dispute That \$17.9M is Proper, the Court Should Adjust the Damages Verdict to this Amount.....	12
II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT A NEW TRIAL ON DAMAGES BECAUSE THE DAMAGES VERDICT IS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE.	14
CONCLUSION.....	16

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Decato v. Travelers Ins. Co.</i> , 379 F.2d 796 (1st Cir. 1967).....	5
<i>Del Mar Avionics, Inc. v. Quinton Instrument Co.</i> , 836 F.2d 1320 (Fed. Cir. 1987).....	2, 5, 15
<i>Fromson v. Western Litho Plate & Supply Co.</i> , 853 F.2d 1568 (Fed Cir. 1988).....	5, 15
<i>Greenleaf v. Garlock, Inc.</i> , 174 F.3d 352 (3d Cir. 1999).....	5
<i>Liriano v. Hobart Corp.</i> , 170 F.3d 264 (2d Cir. 1999).....	2, 4, 13
<i>Mycogen Plant Sci., Inc. v. Monsanto Co.</i> , 243 F.3d 1316 (Fed. Cir. 2001).....	4
<i>Pannu v. Iolab Corp.</i> , 155 F.3d 1344 (Fed. Cir. 1998).....	4
<i>Perkin-Elmer Corp. v. Computervision Corp.</i> , 732 F.2d 888 (Fed. Cir. 1984).....	4
<i>Richardson v. Suzuki Motor Co., Ltd.</i> , 868 F.2d 1226 (Fed. Cir. 1989).....	14, 15
<i>Rite-Hite Corp. v. Kelley Co., Inc.</i> , 56 F.3d 1538 (Fed. Cir. 1995).....	12
<i>Spectralytics, Inc. v. Cordis Corp.</i> , 649 F.3d 1336 (Fed. Cir. 2011).....	1, 14
<i>U.S. E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.</i> , 117 F.3d 1244 (11th Cir. 1997)	2, 4, 12, 13
<i>Unisplay, S.A. v. Am. Elec. Sign Co., Inc.</i> , 69 F.3d 512 (Fed. Cir. 1995).....	2, 5, 15
<i>Whitserve LLC v. Comp. Packages, Inc.</i> , 694 F.3d 10 (Fed. Cir. 2012).....	14

<i>Wordtech Sys., Inc. v. Integrated Networks Solutions, Inc.</i> , 609 F.3d 1308 (Fed. Cir. 2010).....	5, 15
--	-------

Rules and Statutes

35 U.S.C. § 284.....	1, 12
Fed. R. Civ. P. 50(a)	3
Fed. R. Civ. P. 59	14

INTRODUCTION

On September 21, 2016, the jury found that Apple’s iPhone 3G, iPhone 3GS, and iPhone 4 products infringed MobileMedia’s U.S. Patent No. RE 39,231 (the “’231 patent”). As a result, the patent statute requires that MobileMedia recover a damages award that is “*in no event less than a reasonable royalty* for the use made of the invention by the infringer.” 35 U.S.C. § 284 (emphasis added).

The jury, however, awarded damages of \$3.0M, an amount untethered to any evidence at trial. MobileMedia therefore requests that the Court adjust the damages verdict upward to \$17.9M, the only amount supported by evidence in the record. The Court has the power to increase the damages amount at the post-trial stage because Apple presented no controverting evidence to challenge the \$17.9M amount. A jury is “entitled to choose a damages award *within the amounts* advocated by the opposing parties”—but Apple here chose not to introduce *any* evidence as to damages. *Spectralytics, Inc. v. Cordis Corp.*, 649 F.3d 1336, 1347 (Fed. Cir. 2011) (emphasis added), *abrogated on other grounds by Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016). The jury’s verdict therefore falls well outside the amounts advocated by the parties, and is far too low to fully compensate MobileMedia.

Apple bore all the risk here—it presented no damages case at trial, put no damages expert on the stand, and did not even argue that the evidence permitted a lower damages amount. Instead, Apple merely told the jury that no damages were due because Apple did not infringe:

The second thing is, we were compared to a crying child, a crying child that says we don’t infringe, but even if we infringe, the patent is invalid. And even if the patent is invalid, damages are low. I’ve never said that. No one here has ever said that. Okay? So let me be perfectly clear right off the bat, Apple does not infringe this patent, period, and never has.

(Trial Transcript (“Trial Tr.”), Volume (“Vol.”) 5, 1254:6–12 (Apple’s closing argument) (emphasis added).)

When, as here, the amount of damages has not been put in dispute, the Court can avoid the inefficiencies of a new trial and instead treat this motion for judgment as a matter of law with respect to damages as it would a summary judgment motion. *See, e.g., U.S. E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1252 (11th Cir. 1997) (appropriate for district court to increase jury’s damages award “where the jury has found the underlying liability and there is no genuine issue as to the correct amount of damages”); *Liriano v. Hobart Corp.*, 170 F.3d 264, 272–73 (2d Cir. 1999) (same). Because there is no evidence in the trial record that the reasonable royalty damages due to MobileMedia is less than \$17.9M, the Court should adjust the damages award to this amount.

In the alternative, MobileMedia requests that, because the jury’s award is against the clear weight of the evidence, the Court should grant a new trial on damages. A jury’s award must find some basis in the evidence in order to be sustained—but here, there is simply no evidence anywhere in the trial record that can support the damages award, and as a result, it must be overturned. *See, e.g., Unisplay, S.A. v. Am. Elec. Sign Co., Inc.*, 69 F.3d 512, 517–19 (Fed. Cir. 1995) (granting a new trial because the relevant evidence at trial did not support the damages award, and the “jury’s choice simply must be within the range encompassed by the record as a whole”); *Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1328 (Fed. Cir. 1987) (granting a new trial where there was no evidence in the record that could support the damages award).

NATURE AND STAGE OF THE PROCEEDINGS

Beginning on September 12, 2016, a 6-day jury trial was conducted in this matter. On September 19, 2016, pursuant to Fed. R. Civ. P. 50(a), MobileMedia moved for judgment as a matter of law, asserting, *inter alia*, that it should recover damages of at least a reasonable royalty in the event that at least one asserted claim is found infringed and not invalid, that the uncontroverted testimony proffered at trial was that the appropriate royalty rate needed to fully compensate MobileMedia for Apple's infringement was \$0.25 per iPhone, that 71.5 million iPhones had been accused of infringement in the case, and that as a result the total damages award owed to MobileMedia is \$17.9M. (D.I. 700; *see also* Trial Tr., Vol. 5, 1191:12–21.)

On September 21, 2016, the jury returned a verdict finding all asserted claims of the '231 patent infringed and not invalid, and awarding MobileMedia \$3M in damages. (D.I. 704; 705.)

SUMMARY OF THE ARGUMENT

1. Given the finding of infringement and no invalidity, no reasonable jury could find that MobileMedia was owed any less than \$17.9M, and the jury's damages verdict of \$3M was not supported by substantial evidence. Apple failed to present a fact or expert witness on damages, and therefore, the jury's award falls well below the amounts advocated by the parties at trial. Because MobileMedia's evidence of a reasonable royalty of \$17.9M remained undisputed, this Court has the power to, and should, increase the damages award to the uncontroverted \$17.9M. *See infra* § I.

2. In the alternative, the jury's damages award is against the clear weight of the evidence, and the Court should grant MobileMedia a new trial on damages. *See infra* § II.

STATEMENT OF FACTS

The relevant facts are set forth below by incorporation into the argument.

LEGAL STANDARDS

A. The Court May Increase A Damages Award Where The Amount Owed Is Not Disputed.

The Court may grant judgment as a matter of law on an issue such as damages where the “jury’s findings, presumed or express, are not supported by substantial evidence or, if they were, that the legal conclusions implied by the jury’s verdict cannot in law be supported by those findings.” *Pannu v. Iolab Corp.*, 155 F.3d 1344, 1348 (Fed. Cir. 1998) (citations and quotations omitted); *see also Mycogen Plant Sci., Inc. v. Monsanto Co.*, 243 F.3d 1316, 1324–25 (Fed. Cir. 2001). “Substantial evidence is such relevant evidence from the record taken as a whole as might be accepted by a reasonable mind as adequate to support the finding under review.” *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 893 (Fed. Cir. 1984) (citations omitted).

Where, as here, the jury’s damages verdict is significantly lower than that supported by the substantial evidence, and where there is no genuine dispute in the record as to the proper damages amount, district courts have the authority to adjust the damages award upwards to the uncontroverted amount. Several Courts have done exactly that. *See, e.g., U.S. E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1252 (11th Cir. 1997) (holding that it is appropriate to increase a jury’s damages award from \$10,513.86 to \$33,642.53 “where the jury has found the underlying liability and there is no genuine issue as to the correct amount of damages”); *Liriano v. Hobart Corp.*, 170 F.3d 264, 266, 272–73 (2d Cir. 1999) (upholding a district court’s decision to add an additional \$21,252.34, which reflected the value of a hospital bill that the jury had not included in its calculations, onto a damages award of \$895,040.49 because there “was no dispute” as to the amount of the hospital bill). The constitutional rule against additur “is not violated in a case where the jury has properly determined liability and there is no valid dispute as to the amount of damages,” as in such cases “the court is in effect

simply granting summary judgment on the question of damages.” *Decato v. Travelers Ins. Co.*, 379 F.2d 796, 798–99 (1st Cir. 1967) (granting a new trial instead of adjusting upwards, because there was a genuine dispute as to the proper amount of damages).

B. In The Alternative, The Court Can Order A New Trial On Damages Where The Amount Awarded By The Jury Is Not Supported By The Evidence.

Adjusting the damages verdict to what the evidence shows would avoid the need for a new trial on damages. Alternatively, the Court can order a new trial on damages where, as here, “there is insufficient evidence to support the verdict.” *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 365 (3d Cir. 1999). Where there is “no rational explanation” for the jury’s verdict, and the court is left with a “definite and firm conviction that a mistake has been made,” Third Circuit precedent holds that a new trial ought to be granted. *Id.* at 367.

A jury’s damages award must “have some factual basis . . . Any rate determined by the trier of fact must be supported by relevant evidence in the record.” *Unisplay*, 69 F.3d at 517. If the court cannot find sufficient factual evidence in the record to support the jury’s damages award, then the court must overturn the damages award and grant a new trial. *See, e.g., Unisplay*, 69 F.3d at 519 (finding that district court abused its discretion by failing to grant a new trial where the jury’s damages award was not supported by any relevant evidence); *Wordtech Sys., Inc. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1318–22 (Fed. Cir. 2010) (granting a new trial where the jury’s damages award had no basis in any of the factual evidence presented at trial); *Fromson v. Western Litho Plate & Supply Co.*, 853 F.2d 1568, 1576–79 (Fed Cir. 1988), *overruled on other grounds by Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337 (Fed. Cir. 2004) (remanding for further proceedings on damages where the district court’s reasonable royalty determination was without basis in the record); *Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1328 (Fed. Cir. 1987) (granting a new

trial because the court had “been directed to no evidence of record in support of the 5% royalty here assessed. It was not an established royalty, and was not found by the district court or shown by Quinton to be an approximation of the damages actually sustained. Its imposition on a patent owner who would not have licensed his invention for this royalty is a form of compulsory license, against the will and interest of the person wronged, in favor of the wrongdoer.”).

ARGUMENT

I. THE DAMAGES VERDICT SHOULD BE ADJUSTED UPWARD TO \$17.9M.

At trial, the only evidence regarding the value of a reasonable royalty pointed to a reasonable royalty of 25-cents per unit. The only evidence as to this reasonable royalty was put in through MobileMedia’s expert, economist John C. Jarosz, a managing principal at Analysis Group. Apple presented no damages case in response, and elicited no alternative reasonable royalty during cross-examination of MobileMedia’s witnesses. There simply is no evidence, from any witness, that supported the jury’s \$3.0M award.

Mr. Jarosz told the jury that his “ultimate opinion is that a reasonable royalty that would fairly and adequately compensate MobileMedia is 25 cents per phone. Applying that 25 cents to the number of iPhones that have been accused of infringement here, which is 71.5 million phones, results in total damages of \$17.9 million.” (Trial Tr., Vol. 3, 537:3–8.)

Mr. Jarosz provided hours of detailed testimony to support his opinion. He began by carefully explaining to the jury what his methodology would be for assessing MobileMedia’s damages:

- He told the jury how he used the hypothetical negotiation construct. (Trial Tr., Vol. 3, 538:11–19; 540:8–16.)
- He explained that although Sony would have been at the bargaining table instead of MobileMedia, he “assumed that Sony and MobileMedia would be equally interested in

giving a license to Apple . . . [and] conservatively [assumed Sony] would willingly grant a license to Apple.” (Trial Tr., Vol. 3, 541:3–7.)

- As is commonly done in patent damages analyses, he utilized a two-step process: he first “examined quantitative information . . . to determine what a range might be for fair and reasonable compensation” (Trial Tr., Vol. 3, 543:25–544:4), and second, he “looked at qualitative evidence, other things that . . . impact a license that are a little bit harder to put a price tag on.” (Trial Tr., Vol. 3, 544:5–7.)

Mr. Jarosz then went on to provide a thorough analysis of the licensing evidence that had been produced to him in this case:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Not satisfied with examining only the licensing evidence, Mr. Jarosz testified that he supplemented his analysis with what he called the incremental benefits approach, which helped him analyze “what the benefits were to Apple of using the patented invention.” (Trial Tr., Vol. 3, 557:16–17.):

- He noted how the invention was “oriented toward ease of use or an improved user experience” (Trial Tr., Vol. 3, 557:24–25), both of which were “extremely important” to Apple and its customers. (Trial Tr., Vol. 3, 558:14 and 559:1.)
- He examined the value of a single feature, “cut, copy and paste,” that Apple had offered as part of an upgrade, and determined the value of that feature to be, conservatively, “\$0.30 to \$0.83 per phone as valued by Apple Computer outside of litigation.” (Trial Tr., Vol. 3, 564:11–13.)

Finally, after examining all of these discrete pieces of evidence, Mr. Jarosz then explained how he used the *Georgia-Pacific* factors to determine where within his reasonable royalty range the final reasonable royalty analysis should fall. (Trial Tr., Vol. 3, 568:10–16.) Because “the *Georgia-Pacific* analysis said [he] should take a number toward the middle end of the range[, Mr. Jarosz] took a number toward the middle to lower end of the range and chose a number that would be appropriate here of \$0.25 per phone.” (Trial Tr., Vol. 3, 570:10–14.)

Taken together, Mr. Jarosz’s testimony provided the jury with substantial evidence that a reasonable royalty for Apple’s infringement was \$0.25 per phone, amounting to \$17.9M in total damages. That evidence stands alone.

A. No Substantial Evidence Supports the Improperly Low \$3.0M Verdict.

While Mr. Jarosz said that the range of potential royalty rates would fall between \$0.125 and \$0.83, the jury's award of \$0.04 fell *well* outside this range. Mr. Jarosz's opinion regarding the appropriate royalty rate was the *only* evidence presented at trial of an appropriate royalty rate. The law does not permit a jury to pick a number out of a hat. There must be evidence in the trial record to support the jury's \$0.04 royalty per iPhone, a rate even Apple never suggested. An award that falls so far outside the royalty range presented at trial simply cannot be supported by substantial evidence.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

There simply is no evidence in the trial record to support the \$0.04 royalty rate or the \$3.0M damages verdict.

B. There is No Genuine Dispute that \$17.9M is the Proper Reasonable Royalty.

Apple will likely argue that its counsel's cross-examination of MobileMedia's witnesses elicited evidence that creates a *doubt* as to whether a \$0.25 royalty was reasonable or not. However, cross-examination creating doubt does not give the jury the ability to pick any number without evidentiary support.

[REDACTED]

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As such, none of the evidence adduced through cross-examination controverted Mr. Jarosz's testimony about the \$17.9M proper reasonable royalty owed to MobileMedia.

C. Because There is No Genuine Dispute That \$17.9M is Proper, the Court Should Adjust the Damages Verdict to this Amount.

The Patent Act requires that a patentee shall be compensated for infringement and that such compensation shall be "in *no event less than a reasonable royalty* for use made of the invention by the infringer." 35 U.S.C. § 284 (emphasis added). The statute "set[s] a floor below which damage awards may not fall. . . . It affirmatively states that damages must be adequate, while providing only a lower limit and no other limitation." *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1544 (Fed. Cir. 1995).

The only evidence at trial was that \$0.25 per product was the proper amount of reasonable royalty owed to MobileMedia. Where, as here, the proper damages amount is not in genuine dispute, the Court may award a higher damages amount without the need for a new trial. For example, in *U.S. E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1252 (11th Cir. 1997), the Eleventh Circuit ordered a district court to increase a jury's damages award from \$10,513.86 to \$33,642.53 "where the jury has found the underlying liability and there is no genuine issue as to the correct amount of damages." According to the court, this increased award

was appropriate because the jury had awarded only six months of back pay, when in fact the defendant ought to recover approximately fifteen months of back pay. Importantly, the Eleventh Circuit approved this increase to the jury's damages award even over the defendant's objection that the jury had properly cut off the damages period: the court noted that "the uncontradicted evidence" was that the plaintiff could recover damages for the entire fifteen month period, and "Massey Yardley has not questioned the EEOC's calculations as to the amount of back pay (the wages and fringe benefits that Paigo should have earned) that would be due during this time." *Id.* at 1252. Much like in this case, then, when the jury had clearly erred in its damages calculations and the proper amount of damages was not in genuine dispute, the court was permitted to adjust the damages award to the uncontroverted amount.

Similarly, in *Liriano*, the Second Circuit found that the district court properly increased a damages award of \$895,040.49 by an additional \$21,252.34, which reflected the value of a hospital bill that the jury had not included in its calculations, because there "was no dispute" as to the amount of the hospital bill. 170 F.3d 264, 272–73 (2d Cir. 1999). The court, over defendant's objection, determined that the jury's failure to include this bill in its calculations did not prevent the court from adding that bill into the final damages amount. The jury had already determined liability, and there was simply no dispute as to the validity or amount of the bill.

Like in *Liriano* and *Massey Yardley*, this Court has the power to increase the jury's damages award to the uncontroverted \$17.9M figure in order to fully compensate MobileMedia for Apple's infringement. The jury has already determined that Apple infringes, and the \$17.9M remains uncontroverted: Apple did not argue for any other amount and elicited no evidence to put the \$17.9M figure in genuine dispute.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT A NEW TRIAL ON DAMAGES BECAUSE THE DAMAGES VERDICT IS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE.

Should the Court determine that there is a genuine dispute regarding the appropriate amount of damages, the Court should grant MobileMedia's request for a new trial on damages pursuant to Fed. R. Civ. P. 59, on the grounds that there is insufficient evidence to support the damages verdict, and because the jury's damages verdict is against the clear weight of the evidence. *See, e.g., Whitserve LLC v. Comp. Packages, Inc.*, 694 F.3d 10, 26 (Fed. Cir. 2012).

The Federal Circuit has held that a jury is "entitled to choose a damages award *within the amounts* advocated by the opposing parties." *Spectralytics*, 649 F.3d at 1347 (emphasis added). In other words, a jury award can be overturned if "the award is, in view of all the evidence, either so outrageously high or so outrageously low as to be unsupportable as an estimation of a reasonable royalty." *Spectralytics, Inc. v. Cordis Corp.*, 649 F.3d 1336, 1345 (Fed. Cir. 2011). And where a jury's damages award falls well outside the record evidence adduced at trial, such that "there was no reasonable basis on which [a] reasonable jury could have found that [a certain amount] was a reasonable royalty," the Court may overturn the jury's verdict and grant a new trial. *Richardson v. Suzuki Motor Co., Ltd.*, 868 F.2d 1226, 1241 (Fed. Cir. 1989), *abrogation on other grounds recognized by Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142 (Fed. Cir. 2011).

As discussed in detail above, the trial record is devoid of any evidence to support the jury's verdict of \$3M, a royalty rate of approximately \$0.04 per iPhone. There is no indication in the record of how the jury might have arrived at this \$0.04 rate. The Federal Circuit's decision in *Richardson* can therefore guide this Court here: the Federal Circuit remanded for a new trial largely because the jury awarded a \$0.50 per motorcycle royalty rate, even though the licensing evidence presented at trial included a \$2.00 per motorcycle royalty rate, with an annual minimum

of \$70,000. *Richardson*, 868 F.2d at 1241. Because, like in *Richardson*, there is no evidence in the record to support the jury's royalty rate, the verdict cannot be supported by sufficient evidence, and this Court should grant a new trial on damages.

Moreover, the gaping difference between the jury's verdict and MobileMedia's proposed royalty figure of \$17.9 million—nearly six times the amount awarded by the jury, and the only royalty figure actually proposed at any point by either party during the entire six-day trial—is sufficiently large that the award is simply contrary to the weight of the evidence. *See, e.g., Wordtech Sys., Inc. v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1318–22 (Fed. Cir. 2010) (granting motion for new trial on damages where damages award was not connected to any of the royalty rates presented at trial). The damages award found by the fact finder must, at minimum, “have some factual basis . . . Any rate determined by the trier of fact must be supported by relevant evidence in the record.” *Unisplay*, 69 F.3d at 517. Because there is simply no factual evidence in the record on which the jury could have based its award—indeed, the award itself is very far afield from the only royalty rate actually established in the record—a new trial on damages is appropriate in this matter.

Del Mar Avionics, Inc. v. Quinton Instrument Co., 836 F.2d 1320, 1328 (Fed. Cir. 1987), is also instructive: in *Del Mar*, the Federal Circuit overturned an overly low damages award because there was “no evidence of record in support of the 5% royalty assessed here.” *Id.* And in *Fromson v. Western Litho Plate & Supply Co.*, 853 F.2d 1568, 1576 (Fed Cir. 1988), the Federal Circuit overturned a damages award of 0.825%, noting that that the award was too low: “[t]hough it is probably safe to say that almost any licensee would be willing to pay less than one cent on each dollar of profit, or one-twelfth of a 10% profit . . . the question at hand is whether the royalty here is reasonable.” *Id.*

As these cases make clear, when a damages verdict is not supported by any evidence and well below the amount needed to properly compensate the patentee, it is appropriate to overturn the jury's damages verdict. Because there is no evidence supporting the jury's \$3.0M damages award, if this Court does not adjust the damages award upward to \$17.9M, it should grant MobileMedia a new trial on damages.

CONCLUSION

In order to fully compensate MobileMedia for Apple's infringement, this Court should grant MobileMedia's motion for judgment as a matter of law and enter a damages judgment of \$17.9 million. In the alternative, this Court should grant MobileMedia a new trial on damages.

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