The Technological Comparability Of Patent License Agreements

By John Elmore

You are a master at strategy. The cards in your hand show it. With a smile, you lay down your winning formula. "Gin!" you declare triumphantly. Your adversaries around the card table stare in disbelief. After a pause, one of them utters, "But we're playing poker, not gin rummy."

Imagine now that you are at trial presenting damages to the jury. You explain that a common approach used to determine a reasonable royalty in patent infringement litigation employs a "hypothetical negotiation" construct whereby a willing patent owner and a willing potential licensee enter into an arms-length negotiation.[1] You explain further that one of the means used to arrive at the outcome of the hypothetical negotiation is where the jury, typically assisted by experts, considers patent license agreements that are comparable to the hypothetical license at issue.[2] You then carefully lay out your supporting license agreements like a winning hand of cards. At that point, you do not want the court to be like your poker friends and tell you that you have been playing the wrong game by relying on non-comparable license agreements.

So what do the courts have to say about comparability? The Federal Circuit maintains: "This court has long required district courts performing reasonable royalty calculations to exercise vigilance when considering past licenses to technologies other than the patent in suit."[3] Yet case law until recently has provided very little detail on the issue of comparability.

In the wake of recent legislative patent reform efforts and the U.S. Supreme Court's criticism of the Federal Circuit's handling of patent infringement issues over the past few years, the courts are exercising more scrutiny with respect to economic damages and the comparability of patent license agreements. Last year, the Federal Circuit vacated a $358 million award of reasonable royalty damages in the case of *Lucent Technologies, Inc. v. Gateway, Inc. et al.* because, in part, it found that the license agreements presented as evidence in support of the damages award were not comparable.[4] Six months later, the Federal Circuit, citing *Lucent*, vacated the damages award in *ResQNet.com, Inc., et al. v. Lansa, Inc.* on the same grounds.[5]

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While the courts recognize a number of factors in assessing comparability, the most often cited measure in case law is technological comparability. In *Lucent*, the Federal Circuit noted "it was Lucent's burden to prove that the licenses relied upon were sufficiently comparable" and that the "damages award cannot stand solely on evidence which amounts to little more than a recitation of royalty numbers... particularly when it is doubtful that the technology of those license agreements is in any way similar to the technology being litigated here."[6]

Lucent's patent described a software-based method to enter information on a computer screen without using a keyboard (for instance, using a mouse). Lucent contended that Microsoft's use of a graphical drop-down calendar to select dates in its Outlook and Money products infringed Lucent's patent. In support of reasonable royalty damages, Lucent presented four patent license agreements.[7] The Federal Circuit dismissed the agreements, stating, "Lucent's brief

1. The hypothetical negotiation construct is based on *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F.Supp. 1116 (S.D.N.Y. 1970), *aff'd*, 446 F.2d 295 (2d Cir.), cert denied, 404 U.S. 870 (1971).

2. Consideration of patent license agreements stem from the fifteen factors to consider in determining a reasonable royalty as introduced in *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F.Supp. 1116 (S.D.N.Y. 1970), *aff'd*, 446 F.2d 295 (2d Cir.), cert denied, 404 U.S. 870 (1971).

3. *ResQNet.com, Inc. et al. v. Lansa, Inc.*, 2010 U.S. App. LEXIS 2453, 2474 (Fed. Cir. 2010).

4. *Lucent Technologies, Inc. v. Gateway, Inc., Gateway Country Stores LLC, Gateway Companies, Inc., Cowabunga Enterprises, Inc. and Gateway Manufacturing LLC*, 580 F.3d 1301, 1329, 1340 (Fed. Cir. 2009).

5. *ResQNet.com*, 2010 U.S. App. LEXIS at 2483, 2484.

6. *Lucent*, 580 F.3d at 1329, 1332.

7. Lucent presented eight license agreements of which four were dismissed by the Federal Circuit as not comparable because they provided for a running royalty rather than a lump-sum royalty, leaving four agreements that the Federal Circuit considered on the merits of technological comparability. See *Lucent*, 580 F.3d at 1327, 1328.

describes the four agreements as 'PC-related patents,' as if personal computer kinship imparts enough comparability to support the damages award."[8]

The *Lucent* opinion suggests that the Federal Circuit's definition of comparability is not commensurate with broad technology categories (*e.g.* PC-related). The court's opinion discourages comparisons of loosely related technologies. And the opinion would seem to diminish the usefulness of industry-based royalty rate studies, such as those published by Robert Goldscheider and Russell Parr,[9] in which license agreements comprising various technologies and economic circumstances are aggregated into industry groupings like pharmaceuticals, telecommunications, and semiconductors.

The Federal Circuit's opinion begs the question: how does a licensing professional determine whether proposed comparable license agreements involve similar technology? Herein is a discussion of a framework for evaluating the technological comparability of patent license agreements.

Identification of Patented Technology

An important initial question in evaluating a license agreement for technological comparability is whether the agreement involves *patented* technology. This may seem obvious, but some licenses convey only the rights to use a developed technology or software that may appear similar to a patent license agreement yet convey no patent rights. The Federal Circuit vacated the damages award in *ResQNet.com* because the plaintiff's damages expert based his reasonable royalty opinion in part on a set of licenses that provided "re-bundled" software products and source code, among other things, but no patent rights. The Federal Circuit noted that the expert had "misunderstood (or worse, misrepresented) the re-bundling licenses as somehow amounting to 'patent plus software' licenses when, in fact, the record shows no use in these licenses of ResQNet's claimed invention."[10] Generally, an agreement must state that the licensee enjoys certain patent rights; an agreement conveys no patent rights merely because it licenses software or other developed technology embodying a patented feature.[11]

Even where an agreement provides for a patent license, the agreement may convey benefits broader in scope than the patent rights commensurate to a patent-in-suit. The courts have identified a number of these non-patent benefits as: (1) the use of trademarks and other non-patent intellectual property,[12] (2) know-how,[13] (3) technical assistance,[14] (4) marketing assistance,[15] and (5) indemnification.[16] Moreover, the courts have found that patent rights may be too broad in scope where a license involving multiple patents is compared to a license for a single patent, particularly where those patents cover a broad range of technologies.[17] Thus, case law cautions that patent license agreements providing substantial non-patent benefits or multiple patents may not be comparable to a "straight" patent license.

First Factor: Technical Attributes as a Measure of Similarity

In comparing patented technologies, a first factor to consider is "attribute-oriented" similarity, which is the similarity of the technology based on a comparison of relevant technical attributes. A technical expert can be helpful in identifying the relevant technical attributes of a patented technology to be considered. The United States Patent and Trademark Office (USPTO) is also a helpful resource. The USPTO organizes patents utilizing a subject matter classification system wherein classes generally are defined according to relevant technical attributes.[18]

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8. *Lucent*, 580 F.3d at 1328.

9. Goldscheider, Jarosz, and Mulhern, "Use of the 25 Per Cent Rule in Valuing IP," *les Nouvelles*, December 2002, 123-133; "Industry Royalty Rate Data Summary," *Licensing Economics Review*, Vol. 6, December 2007, 6-7; and Parr, Russell L., *Royalty Rates for Licensing Intellectual Property*, John Wiley and Sons, Inc., Hoboken, NJ, 2007.

10. *ResQNet.com*, 2010 U.S. App. LEXIS at 2477.

11. A patent comprises a bundle of rights, including the right to make, use and sell the invention. A license is formed by the transfer of some of those rights from the party in possession of them to another. See *e.g. Vaupel Textilmaschinen KG and Vaupel North America v. Meccanica Euro It Alia S.P.A. and American Trim Products, Inc.*, 944 F.2d 870, 873, 874 (Fed. Cir. 1991).

12. See *e.g. Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1539 (Fed. Cir. 1983).

13. See *e.g. Mobile Oil Corp. v. Amoco Chemicals Corp.*, 915 F.Supp. 1333, 1345 (D. Delaware 1995).

14. *Id.*

15. See *e.g. ResQNet.com*, 2010 U.S. App. LEXIS at 2475.

16. See *e.g. Mobile Oil*, 915 F.Supp. at 1345.

17. See *e.g. Anders E. Trell v. Marlee Electronics Corp*, 912 F.2d 1443 (Fed. Cir. 1990); Lucent, 580 F.3d at 1328.

18. An exception may be the classification of patents by the USPTO on the basis of the industry employing the patented technology. Such classification may group patents with little or no relevant technical attributes merely on the basis of industry affiliation. This approach does not appear to have been used much in the modern era but several classes based on it still exist today (*e.g.* Butchering and Bee Culture). See "Handbook of Classification," United States Patent and Trademark Office (USPTO), available at *http://www.uspto.gov/web/offices/opc/documents/handbook.pdf, p. 3.*

It maintains over 400 classes under which a patent can be categorized. Classes are further broken down by subclasses that have hierarchical associations. (For example, class 710 entitled "Electrical Computers and Digital Data Processing Systems: Input/Output" embodies the attributes of electrical power, computation capability, and transmission of digital data, among others. Class 710 features subclass 100 entitled "Intrasystem Connection," which is further comprised of subclasses associated with computer bus connections and transactions.) The USPTO assigns each patent to a "primary" class and it may further assign a patent to one or more "secondary" classes or to a subclass.

Due to the wide variety of technologies represented by the USPTO's classification system, the USPTO has employed a variety of approaches to classify patents.[19] A first approach classifies patents on the basis of a patented technology's fundamental, necessary or direct function. For example, heat exchange devices (*e.g.* drink coolers, radiators, etc.) are grouped into a single classification and further subdivided into features essential to such devices. A second approach classifies patented technology into industrial or trade groupings based on the result produced, whether tangible (*e.g.* the product of a manufacturing process) or intangible (*e.g.* the communication of sound at a distance). This approach tends to be used for complex processes or structures requiring a number of successive activities (*e.g.* telephone system). A third approach classifies patented technology on the basis of structural configuration or physical makeup. It is employed generally for patented technology that lacks an apparent functional characteristic. For example, a classification of a material may be made on the basis of its chemical compounds and their arrangement irrespective of the material's utility or function. Finally, a fourth approach classifies patented technology according to two or more very different attributes. It is particularly suited to patented technologies that take more than one form (*e.g.* a process and a structure). For example, class 588 covers processes that detoxify waste products. Subclasses further define this class into two its two forms: the process steps used in detoxification and the toxic materials being processed.

As a general principal, patents assigned by the USPTO to the same class are more similar than those assigned to other classes because they embody similar relevant attributes. Patents assigned to the same primary class are more similar to patents assigned to the same secondary class. And patents assigned to the same subclass are more similar than patents assigned to the same class but different subclass.

Second Factor: Relationship to Product as a Measure of Similarity

A second factor to consider in comparing patented technologies is the relationship of the patented technologies formed via the products they embody. This "product-oriented" similarity factor stresses the commercial relationship of the technologies, an aspect central to licensing, over similarity of attributes. A product can form the relationship of two patented technologies A and B by incorporating them as components.

Product-oriented similarity can hinge on how "product" is defined. Generally speaking, a product can be strictly defined as a particular good or it can be more broadly defined as a market of related goods. The Federal Circuit has recognized at least four definitions of product, which are illustrated as concentric rings in Figure 1. Each ring expands the scope of the product definition as one moves outward from the center. Starting in the center, the first ring focuses on the infringing products and represents the strongest form of product-oriented similarity. In the *Lucent* case, this included Microsoft's *Outlook* and *Money*. The second ring represents substitutes—products comparable to the infringing products, particularly with respect to price and quality.[20] The third ring represents the general market, including both substitutes and non-substitutes for the infringing products. And the fourth ring, the weakest form of product-oriented similarity, represents products from different general markets that operate together as a functional unit.[21] In the *Lucent* case, this included the PC system that hosts *Outlook* and *Money*. Both belong to different

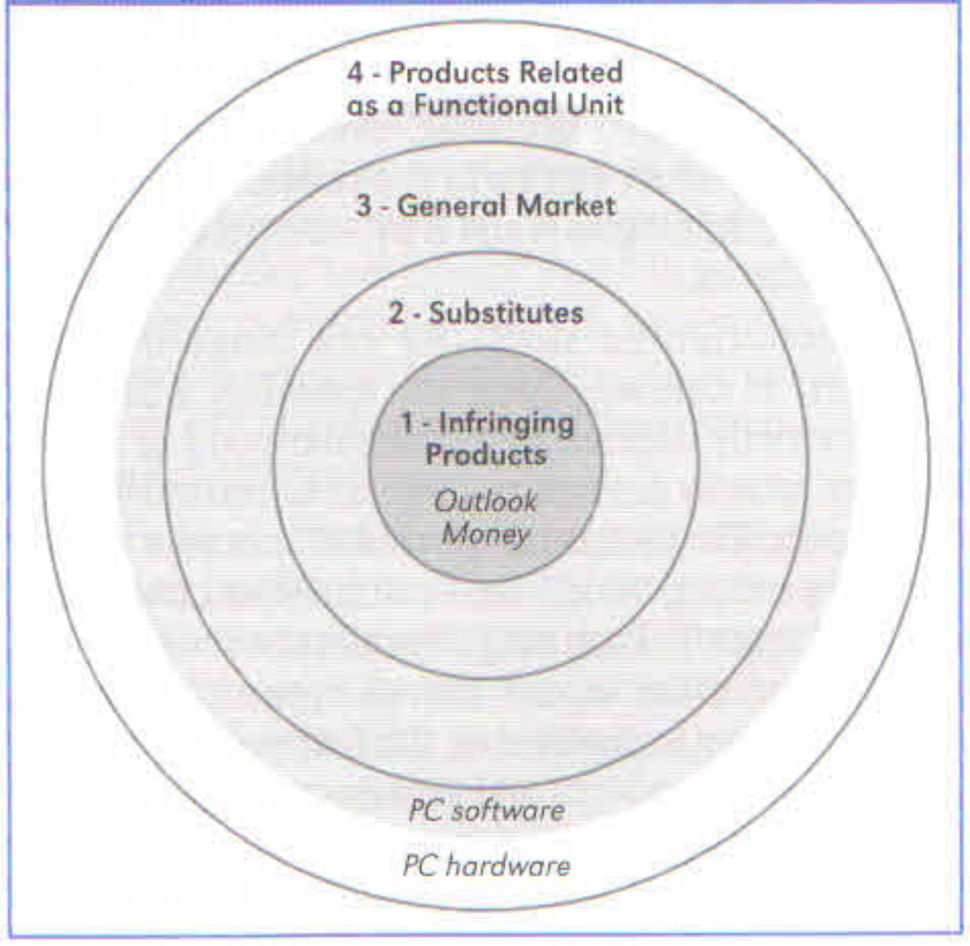
19. *Id.*, pp. 3-5.

20. *Bic Leisure Products v. Windsurfing International*, 1 F.3d 1214, 1219 (Fed. Cir. 1995) (to qualify as an acceptable substitute "to the infringer's customers in an elastic market, the alleged alternative 'must not have a disparately higher price or than or possess characteristics significantly different from the patented product").

21. The Federal Circuit has recognized that a product incorporating a patented technology may itself be comprised of different, separable products that are functionally related and sold as a single unit. See *e.g. Rite-Hite Corp. v. Kelley Company Inc.*, 56 F.3d 1538 (Fed. Cir. 1995) (employing the "functional unit test" as a means of defining a product). In Lucent, the Federal Circuit endorsed the use of the "entire market value rule" / "functional unit test" to determine a reasonable royalty, stating that "sophisticated parties routinely enter into license agreements that base the value of the patented inventions on as a percentage of the commercial products' sales price" and that "even when the patented invention is a small component of a much larger commercial product, awarding a reasonable royalty based on either sale price of number of units sold can be economically justified." *Lucent*, 580 F.3d at 1339.

general markets (*i.e.* email applications versus money management applications) but are functionally related as PC software.

Figure 1.



To minimize confusion, the product definitions for all but the center ring in Figure 1 are referred to as metaproducts. This terminology is intended to distinguish the particular infringing products from the more abstract product definitions. In *Lucent*, for example, the infringing products are *Outlook* and *Money* and the metaproduct is PC software.[22] The metaproducts should not be confused with the royalty base despite parallels in their determination. In some cases, depending on the facts and circumstances involved, the royalty base may be equivalent to the metaproduct, as it appears to be in *Lucent*.[23]

22. Neither the district court nor the Federal Circuit in *Lucent* explicitly defined the scope of what products associated with proposed third-party patent license agreements were comparable to the patent-in-suit and the infringing products. However, the definition of metaproduct as "PC software" in the Lucent case may be inferred by (1) the Federal Circuit's ruling that *Lucent* failed to show that its proposed third-party patent license agreements related to an entire PC system were comparable to the patent-in-suit juxtaposed with (2) the district court's allowance of PC software as the royalty base. It would be incongruous for either court to allow the royalty rate to be applied to PC software but not also consider third-party patent license agreements associated with PC software to be comparable to the patent-in-suit.

23. A determination of the royalty base typically depends on the consideration of methodologies such as *Georgia-Pacific* factor analysis. In some cases, depending on the methodology employed and the facts and circumstances involved, the outcome of a hypothetical negotiation would have resulted in a royalty base larger than an infringing product specifically addressed in a lawsuit.

But in other cases, it may reflect only the infringing products. The metaproduct concept, as discussed in this paper, is intended to aid the licensing professional in determining what products embodying patented technologies are comparable.

The metaproduct definition in *Lucent* is illustrated by the shaded area in Figure 1. This area dissects the outer ring, marking the *Lucent* court's hardware/software distinction. It is premised on the court's apparent view that comparability extended to PC software products beyond the infringing products but not to PC hardware products (*i.e.* the functional relationship between hardware and software alone was insufficient to warrant an extension).

A key issue for determining the reasonable royalty in *Lucent* involved the product definition: whether it was the entire PC system—hardware and software—or only the software. In its argument to the district court regarding the royalty base, Lucent asserted the patent-in-suit related to the entire PC system because software requires hardware in order to operate, thus forming a single functional unit.[24] In ruling against Lucent on this issue, but allowing Lucent to present reasonable royalty damages based on only the PC software component of the system, the district court made a distinction between a PC hardware product and a PC software product.[25] The ruling signals caution against relying on overly broad relationships, even where a functional relationship exists.

While the district court did not elaborate further, one plausible interpretation of the ruling is that the hardware and software components of the PC system were distinguishable because they were subject to significantly different drivers of customer demand and were available for sale as separate products. Lucent's patent related to a feature of *Outlook* and *Money* which were marketed as software products usable on a variety of computer systems (*i.e.* not dependent on any particular computer hardware).

As a practical matter, the move toward even narrower definitions appears constrained by evidentiary considerations. For example, the task of identifying comparable patent license agreements becomes increasingly difficult with each step toward the cen-

24. Lucent and Multimedia Patent Trust's Opposition to Dell's Motion in Limine No. 2 to Exclude the Testimony of Roger Smith Regarding Royalty Rates and Royalty Base, filed January 28, 2008, *Lucent Technologies, Inc. v. Gateway, Inc., Gateway Country Stores LLC, Gateway Companies, Inc., Cowabunga Enterprises, Inc. and Gateway Manufacturing LLC,* Civil Case No. 07-CV-2000-H (CAB).

25. *Lucent*, 580 F.3d at 1338.

ter ring of Figure 1. The Federal Circuit in *Lucent* opined that calls by legal commentators for further narrowing "ignores the realities of patent licensing and the flexibility needed in transferring intellectual property rights."[26]

The Federal Circuit appears to have recognized this practical limitation in prior opinions as well. In *Bic Leisure Products v. Windsurfing International*, for example, the court's opinion reflected a dichotomy between the determination of lost profits and reasonable royalty damages with respect to the definition of product.[27] The court found that certain higher-priced, higher-quality sailboards sold by patent-holder Windsurfing were not substitutes for infringer Bic Leisure Products' lower-priced, lower-quality sailboards and should not have been included in determining lost profits, so the lost damages award was vacated.[28] Yet the Federal Circuit allowed those same higher-priced, higher-quality sailboards to be included in the royalty base for determining a reasonable royalty. While the court noted that "Windsurfing itself set the value of its patent rights by licensing its technology to nearly every company supplying sailboards in the United States without competing itself in most sailboard submarkets,"[29] it affirmed the reasonable royalty damages based on those patent license agreements.[30] Thus, the court accepted the metaproduct definition of "sailboards"—incorporating both infringing and non-infringing products in the general market—for the purpose of comparing patent licenses and determining a reasonable royalty, while it vacated the lost profits award on the premise that lost profits should be restricted to the particular infringing products.

Third Factor: The Relative Improvement Over the Prior Art

A third factor to consider in comparing two patented technologies is their relative improvement over the prior art. According to a study by Degnan and Horton, a patented technology can be classified as a minor, major or revolutionary improvement.[31] A minor improvement represents an incremental improvement over the prior art in an existing industry,[32] meaning that a similar next-best alternative exists, curbing the economic value of the improvement. A major improvement represents a significant improvement over the prior art in an existing industry which enhances the superiority of products in that industry. And lastly, a revolutionary improvement represents a great leap forward over the prior art, often leading to the creation of a new industry.

These three degrees of improvement can either enhance or diminish technological comparability. As a general premise, comparability is enhanced where two patented technologies being compared, X and Y, provide an equivalent degree of improvement. Conversely, comparability is diminished where the two technologies provide a dissimilar degree of improvement. Figure 2 represents a comparison matrix for X and Y suggesting the effect on comparability. The comparison of a revolutionary patented technology with one providing minor improvement represents the widest chasm and, therefore, could warrant a substantial diminishment of comparability. Revolutionary patents, by their nature, are relatively rare and likely less comparable to other patents.[33]

Figure 2.

		X		
		Minor	Major	Revolutionary
Y	Minor	+	–	– –
	Major	–	+	–
	Revolutionary	– –	–	+

Key: + Enhances comparability
– Diminishes comparability
– – Substantially diminishes comparability

The Federal Circuit in *Lucent* echoed the distinction between a major and a minor improvement when it criticized Lucent's damages expert for failing to consider in certain license agreements "whether the patented technology is essential to the licensed product being sold, or whether the patented inven-

26. *Lucent*, 580 F.3d at 1339.

27. A plaintiff proving infringement under U.S. patent law will receive at least a reasonable royalty but may recover lost profits under certain circumstances. See 35 U.S. §1117. The Federal Circuit provided a four-part test for determining the eligibility of lost profits in *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F2d 1152 (6th Cir. 1978).

28. *Kaufman Company Inc. v. Lantech Inc.*, 926 F.2d 1136, 1142, 17 U.S.PQ.2d 1828 (Fed. Cir. 1991).

29. *Id.*

30. *Id.*

31. Stephan Degnan and Corwin Horton, *A Survey of License Royalties, les Nouvelles*, June 1997, p. 107.

32. See, generally, Stephan Degnan and Corwin Horton, *A Survey of License Royalties, les Nouvelles*, June 1997.

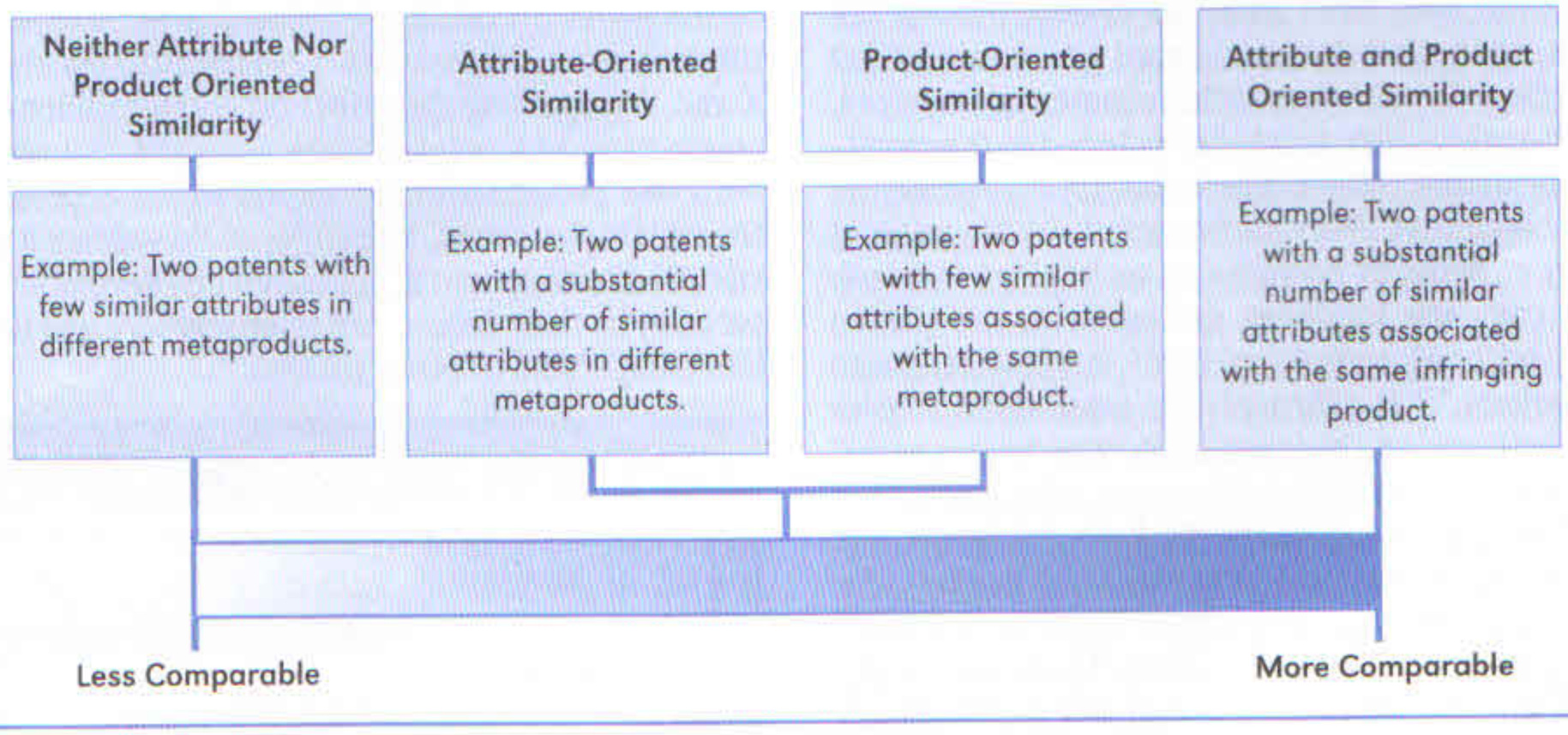
33. See *e.g. Brunswick Corp. v. U.S.*, 36 Fed. Cl. 204, 212 (1996) ("The patent at issue is a pioneer patent, and therefore, there are no exactly comparable patent licenses and royalty rates from which to draw wisdom.")

tion is only a small component or feature of the licensed product..."[34] The court further opined that "the infringing use of *Outlook's* date-picker feature is a minor aspect of a much larger software program..."[35] As a minor improvement, it would diminish any technological comparability between Lucent's patented technology and the "PC-related" licensed technologies, which included major improvements.[36]

The Spectrum of Technological Comparability

Both attribute-oriented similarity and product-oriented similarity influence the comparability of patented technologies. Generally speaking, the interplay of these two factors can be viewed as a spectrum from "less comparable" to "more comparable,"[37] as shown in Figure 3. The more comparable technologies are those that exhibit both attribute and product-oriented similarity. The less comparable technologies exhibit neither. Those that exhibit one or the other fall in-between the ends of the spectrum. The third factor, the relative improvement of the patented technologies over the prior art, can enhance or diminish the comparability established by the first two factors.

Figure 3.



To illustrate further, consider four PC-related patents classified by the USPTO as follows:

Patent	Class	Class Description
A	710	Electrical Computers and Digital Data Processing Systems: Input/Output
B	381	Communications: Electrical: Electrical Audio Signal Processing Systems and Devices
C	700	Data Processing: Generic Control Systems or Specific Applications
X	700	Data Processing: Generic Control Systems or Specific Applications

34. *Lucent*, 580 F.3d at 1330 -1331.

35. *Lucent*, 580 F.3d at 1333.

36. The court noted that the "PC-related" licensed technologies included the entirety of IBM's patent portfolio related to personal computers. *Lucent*, 580 F.3d at 1328-1329. IBM, it is widely known, was a pioneer in the development of the personal computer.

37. This spectrum is intended to provide general guidance and is not intended to establish a bright-line rule for comparability. Whether two patented technologies are comparable will depend on the particular facts and circumstances of each case. Further, a determination of attribute-oriented similarity may involve more than a count of similar attributes; for instance, the relevance of each attribute may be taken into account and some attributes may be given more weight than others when considering them. And a determination of product-oriented similarity may involve factors not discussed such as substitute products.

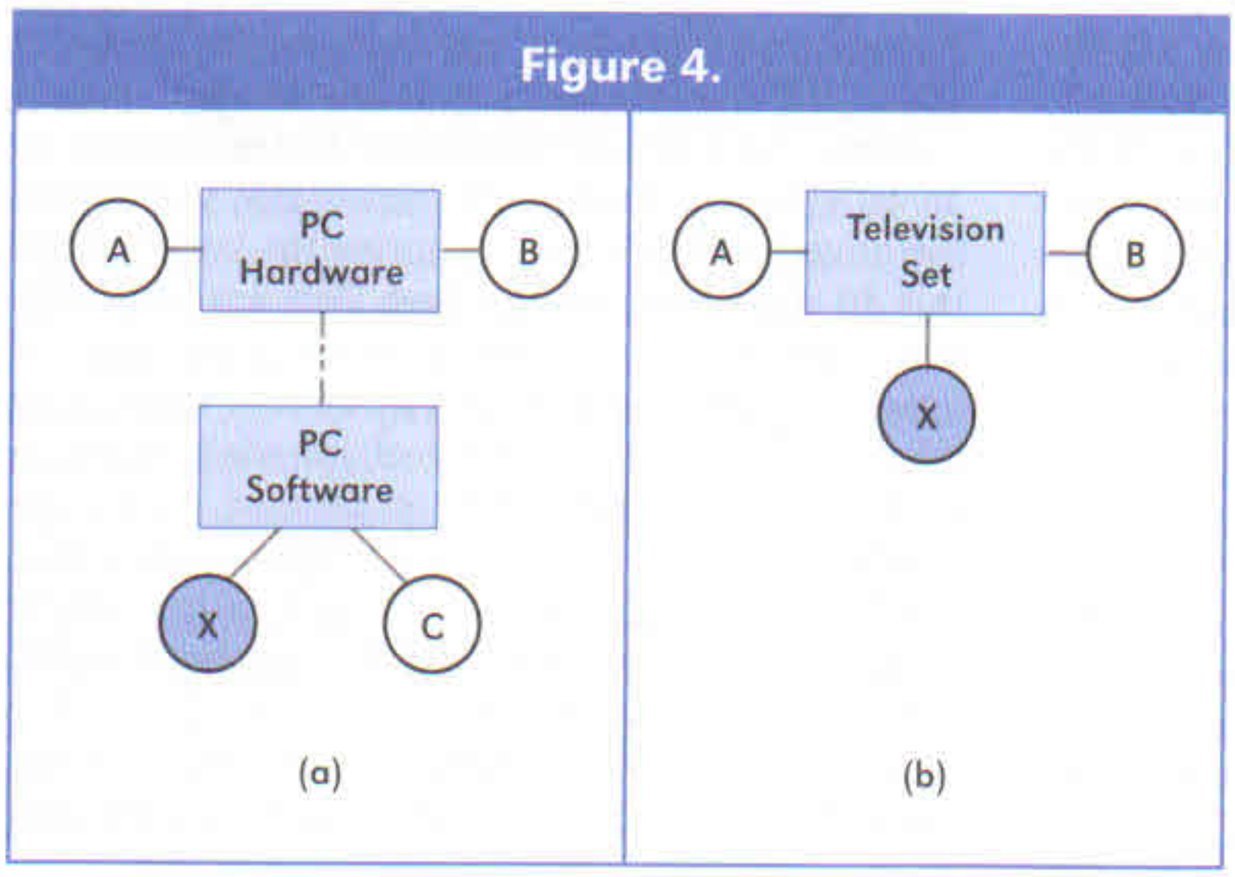
Assume patent X is the patent-at-issue and the other patents are represented by third-party licenses. Further assume patents A and B relate to technologies incorporated into the hardware of a PC. Patent X relates to a graphical drop-down calendar feature, and patent C relates to another software graphical menu feature. The relationship of these patented technologies to the products is shown in Figure 4(a). If the product incorporating patent X is defined as PC software, then patents A and B exhibit little, if any, attribute or product-oriented similarity with patent X, which positions them toward the less comparable end of the spectrum. This result appears to comport with the Federal Circuit's finding in *Lucent* that the proposed "PC-related" patent technologies were not shown to be comparable to the patent-in-suit.

On the other hand, patent X exhibits both attribute and product-oriented similarity with patent C, as each are software graphical interface features that belong to the same USPTO classification and are functionally related to the same product. This suggests the two patents are positioned toward the more comparable end of the spectrum in Figure 3. It also suggests that Lucent's damages expert may have had more success in defending his position had he focused on third-party patent licenses related to PC software and demonstrated a meaningful similarity in attributes of those patented technologies to the patent-in-suit.

Now consider a second product—a television set—comprised of the same patents A and B, as shown in Figure 4(b). Again, patent X is the patent-at-issue. Unlike the PC system in Figure 4(a), however, no distinction is made here between a hardware product and a software product, though the television set is comprised of both hardware and software components. Why? Because unlike the infringing products in *Lucent,* the television set's software is not available to consumers as a separate product; it is embedded into the circuitry of the television to which consumers ordinarily have no access. The drivers of demand for the software features serve to drive demand for the television set as a whole. In this example, the hardware and software components could be considered part of the same product, resulting in the patents A and B exhibiting product-oriented similarity to patent X unlike in Figure 4(a).

The patents in Figure 4(b), however, exhibit little or no attribute-oriented similarity to patent X. They do not belong to the same technology classification or otherwise exhibit relevant technical attributes that are similar to patent X. For this reason, these patents fall somewhere in the middle of the comparability spectrum in Figure 3, depending on the strength of their product-oriented similarity.

Figure 4.



Conclusion

To win in court, as well as poker, you must follow the rules of the game. Patent license agreements, the courts say, must be technologically comparable to the patent in suit if they are to be part of a winning hand. In assessing whether proposed comparable license agreements involve similar technology, a licensing professional should consider three factors: (1) attribute-oriented similarity based on a comparison of relevant technical attributes; (2) product-oriented similarity based on the relationship of the patented technologies formed via the products they embody; and (3) the relative improvement of the patented technologies over the prior art, which can enhance or diminish the comparability established by the first two factors. These three factors influence technological comparability on a spectrum ranging from less comparable to more comparable depending on their combination and strength. Using these factors to evaluate potential license agreements, the licensing professional will be in a better position to know when to hold 'em or when to fold 'em. ■