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The Potential and Pitfalls of Calculating Patent Damages Using Conjoint Analysis

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For many generations, the technology industry has been improving their products and adding new features. The result is that products like smart phones and semiconductors now involve thousands of features, many of them patented. Despite the complexity of today's technology products, until recently, calculating damages in patent lawsuits involving these products has remained notoriously primitive. Damages experts have often applied rudimentary calculations, like the simple twenty five percent rule of thumb. But in the last few years, the courts have sent a clear signal that patent holders must rely on more analytically rigorous methods to justify their damage awards.

This work in progress focuses on conjoint analysis, an emerging technique that can be used in reasonable royalty calculations. Although conjoint analysis is new to patent law, market researchers have been relying on it for years. By surveying how consumers view products with different combinations of characteristics, businesses have used conjoint analysis to determine which features to include in their product offerings and what prices to charge. In patent cases, these same kinds of surveys can help isolate the value consumers place on the patented feature of the accused products.

Because conjoint analysis is less arbitrary than many common valuation techniques in patent law, it holds great promise. Indeed, conjoint analysis has already begun to be seen in a few high profile patent cases like *Apple v. Samsung*. But this methodology is not without risk. Like most surveys, the ones used in conjoint analysis can be designed to skew the results. Moreover, because conjoint analysis has the trappings of a scientific experiment that provides specific numerical answers, juries may accept its results uncritically. This work in progress will describe how the law assesses damages in patent law, explain how conjoint analysis can fit into that inquiry and identify potential weaknesses in the methodology.