



Two Product Market for Bamboo Decking Justifies Jury Award of Lost Profits

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The District of Delaware recently held that evidence addressing a lack of non-infringing alternatives from the perspective of the market as a whole, as opposed to customer-by-customer, may suffice when the market includes only two players—the patentee and the accused infringer.

Lost Profits

This case involved two competitors that sell outdoor decking products. More specifically, the Plaintiffs and Defendants both sell bamboo products for use in outdoor decking.

Following a jury's determination that it infringed Plaintiffs' patent, Defendants moved for judgment as a matter of law (JMOL) that the jury's \$1.5 million damages award was not supported by substantial evidence because Plaintiffs had failed to prove lost profits. According to Defendants, Plaintiffs failed to establish the absence of non-infringing alternatives on a **customer-by-customer** basis and, as a result, failed to present sufficient evidence to support the jury's lost profits award.

The district court rejected Defendants' argument, noting that a patentee is not required to intone the name of each customer or prove what each and every customer would have found to be an acceptable alternative. Rather, evidence that addresses the market as a whole may suffice in certain circumstances. Reviewing the evidence presented at trial, the district court explained that the evidence showed that both parties sell competing outdoor bamboo products. Both parties received certifications for their bamboo products that no other companies received. And according to at least one witness, the parties were the only

companies in the market whose products were actually considered to be bamboo. A customer of both parties also testified that he considered the parties' products complementary and that he had no other options for outdoor bamboo decking. Relying on this evidence, Plaintiffs' expert testified that the market only had two players (Plaintiffs and Defendants) and, consequently, there were no acceptable non-infringing alternatives in the relevant outdoor bamboo decking market. According to the district court, this evidence provided sufficient proof of a lack of acceptable non-infringing alternatives even though Plaintiffs' expert did not specifically analyze the preferences of each and every customer because there were no other companies making comparable products that might qualify as an acceptable non-infringing alternative.

Enhanced Damages

In addition to denying Defendants' JMOL challenging the jury's lost profits award, the court also granted Plaintiffs' motion for enhanced damages. While acknowledging that the decision of whether to enhance damages only requires the court to consider the egregiousness of the circumstances of the case, the court did so by applying the *Read* factors. On the whole, the court found that seven of the nine *Read* factors were either neutral or, given the court's finding that Defendants did not engage in litigation misconduct, weighed against enhancement.

Nevertheless, the court enhanced the jury's damages award because two factors weighed so strongly in favor of enhancement. First, the court found strong evidence of copying—the accused products were produced in the same factory as Plaintiffs' products and were, for all intents and purposes, identical to Plaintiffs'. Second, the court found strong evidence of Defendants' motivation for harm. In particular, the court found that one of Defendants' employees harbored animus towards Plaintiffs beyond a mere sense of competition. The court thus held that an enhancement of the damages award by 50% was warranted.

Practice Tip: A plaintiff seeking a damages award of lost profits should consider whether the relevant market can be defined in a manner such that it only includes two products—its own product and the accused product. Such a market may be sufficient to support the conclusion that there are no acceptable non-infringing alternatives.

Dasso Intl., Inc. v. Moso N.A., Inc., 17-CV-1574, 2023 WL 5349374 (D. Del. Aug. 21, 2023)

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