Google Damages Ruling Offers Lessons For Testifying Experts

By **Adam Rhoten** (July 1, 2025)

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The May 21 en banc U.S. Court of Appeals for the Federal Circuit decision in EcoFactor Inc. v. Google LLC **overturned** a $20 million jury award on the grounds that the district court failed to fulfill its gatekeeping duty under Rule 702.[1]

The court found that the plaintiff's expert opinion on damages using a calculated per-unit reasonable royalty lacked sufficient factual support, and therefore should not have been admitted.

This ruling, significant in its own right, also represents a broader shift in the way courts evaluate expert testimony in patent cases. From the perspective of a testifying economic expert, this case serves as a cautionary tale and a catalyst for recalibrating how we approach licensing analysis, apportionment and the presentation of per-unit royalty opinions.

From the perspective of a testifying economic expert, the decision marks a shift toward stricter judicial scrutiny of damages methodologies, particularly in decisions relying on license conversion and apportionment assumptions.

The article discusses methodological pitfalls, recent Rule 702 clarifications and practical strategies for expert witnesses. It concludes with guidance for adapting expert practices in light of evolving judicial expectations, including implications for standard essential patent licensing.

The Remedies Remedy: A New Era of Judicial Skepticism

The Federal Circuit's decision in EcoFactor v. Google represents more than just a case-specific correction — it reflects a broader doctrinal shift that damages experts must now take seriously.[2]

Dennis Crouch, a law professor at the University of Missouri Law School, refers to this as the remedies remedy trend: a judicial move toward tightening the standards not only for injunctive relief, as seen following the U.S. Supreme Court's 2006 decision in eBay Inc. v. MercExchange LLC, but now also for monetary remedies such as reasonable royalty awards.[3] In this context, EcoFactor sends a clear message that courts will no longer defer to juries when expert opinions rest on incomplete factual foundations.

For damages experts, this new reality means adjusting how we structure our reports and prepare our testimony. Opinions must be more than methodologically sound, and they must be grounded in reliable, specific and verifiable data.

Experts who convert lump-sum settlements into per-unit royalties, for instance, must explicitly support those conversions with quantitative evidence such as unit sales, royalty-bearing product details or documented licensing terms. Vague references to "whereas" clauses or unsupported assertions of intent will likely not survive judicial scrutiny under the amended Rule 702.

Experts should organize underlying agreements, sales data and negotiation histories. If

these materials are incomplete, the expert should disclose any limitations and use alternate supporting methods, e.g., triangulating with third-party licenses or benchmarking studies.

In short, experts must now fully develop and rigorously document their damages theories as part of the report, not leave essential steps for cross-examination or trial clarification. Doing so will not only strengthen the credibility of the opinion, but also enhance its survivability through Daubert and Rule 702 challenges.

Even prior to the December 2023 amendments to Rule 702 and the EcoFactor decision, the Federal Circuit in C R Bard Inc. v. AngioDynamics Inc. in 2020 and Omega Patents LLC v. CalAmp Corp. in 2021 had already signaled a heightened scrutiny of damages opinions.[4]

In C R Bard, the court excluded an expert's testimony for failing to rigorously justify his apportionment based on the patented improvement. Similarly, in Omega Patents, the court reversed a $5-per-unit royalty award where the expert relied on a portfolio license without adequately apportioning its value. These cases illustrate a growing emphasis on evidentiary rigor, requiring practical sound logic, not just plausible methodology.

Rule 702 and the Evolving Role of the Court as Gatekeeper

The 2023 amendments to Rule 702 clarified that courts must affirmatively find that the expert's opinion is based on sufficient facts and a reliable methodology before admitting it.[5] This modification was designed to resolve inconsistency in how judges were applying the rule, sometimes letting juries weigh evidence that should never have been admitted.

In EcoFactor, the court applied Rule 702 to exclude an expert who converted lump-sum licenses into a per-unit royalty using "whereas" clauses, without supporting sales data or evidence of licensee agreement.[6]

The court treated this not as a factual dispute but a methodological failure. This should be seen as a warning to experts and guidance on where the line should be placed between legal and technical matters. Similarly, in Sundance Inc. v. DeMonte Fabricating Ltd. in 2008, the court reaffirmed that experts cannot testify on legal matters disguised as technical inference.[7]

Methodological Pitfalls: Converting Lump-Sum Licenses to Per-Unit Royalties

Experts often convert lump-sum licenses into running royalty equivalents to derive a comparable per-unit rate without a known unit count. In EcoFactor, the court found this method unsupported and speculative.[8] Experts must now go beyond agreement language and anchor such conversions in economic evidence: unit sales, negotiation context, apportionment analysis and industry standards.

Reliable approaches are outlined in the Federal Judicial Center's Reference Manual on Scientific Evidence and Licensing Executives Society International's Licensing Best Practices.[9] Courts also favor triangulation, the process of using multiple methods to determine the same outcome across hypothetical negotiation, cost savings and comparables as seen in the Federal Circuit's 2014 decision in VirnetX Inc. v. Cisco Systems Inc.[10]

Practical Strategies and Expert Positioning: Adapting Expert Testimony Post-EcoFactor

Experts should proceed with caution when performing per-unit conversions explicitly as

normalization tools and not as reflections of licensee intent. When producing such conversions, experts should include sensitivity testing and alternative scenarios, as advised by the American Bar Association's IP Section.[11]

While the EcoFactor majority imposed strict admissibility standards, U.S. Circuit Judge Jimmie V. Reyna dissented, warning against replacing the jury's role with judicial gatekeeping.[12] His views reinforce that courts must distinguish between flawed opinions and reasonably debatable ones.

Implications for Standard Essential Patents

SEPs often involve complex license stacks and fair, reasonable and nondiscriminatory commitments. Post-EcoFactor, courts may require greater proof when converting global or cross-licenses into unit rates. Experts will need to supply granular economic modeling and robust factual grounding, even when parties rely on standard industrywide practices.

What This Means for Litigators and Damages Experts Going Forward

The Federal Circuit's decision in EcoFactor sets a higher bar for expert admissibility under Rule 702.[13] As a community of litigators and testifying experts, we must view the EcoFactor ruling not only as a cautionary tale, but as a practical guide for refining and elevating our work.

The decision underscores the importance of developing a complete, well-supported damages theory, one that is not only methodologically sound but firmly rooted in verifiable data and documentation.

Going forward, experts must redouble their efforts to ensure that every assumption, conversion and valuation judgment we make is clearly explained, transparently supported and readily defensible under the standards now clarified in Rule 702.

Whether calculating reasonable royalties, apportioning value among patents or converting lump-sum licenses into per-unit equivalents, experts work must demonstrate rigor, clarity and economic integrity.

The path forward is not merely about compliance with new judicial expectations; it is an opportunity to enhance the precision and credibility of the contributions to the litigation process experts make. Let's meet that challenge not with hesitation, but with confidence, discipline and a commitment to professional excellence.

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[1] EcoFactor, Inc. v. Google LLC , No. 21-1750, 137 F.4th 1333 (Fed. Cir. 2025) (en banc).

[2] Id.

[3] Dennis Crouch, "A Remedies Remedy," Patently-O, May 2025, https://patentlyo.com/patent/2025/05/remedies-complete-ecofactor.html.

[4] C R Bard Inc. v. AngioDynamics, Inc. , 979 F.3d 1372 (Fed. Cir. 2020); Omega Patents, LLC v. CalAmp Corp. , 13 F.4th 1361 (Fed. Cir. 2021).

[5] Committee Notes on Rules—2023 Amendment to Fed. R. Evid. 702, https://www.uscourts.gov/rules-policies/archives/committee-notes-rules-2023#evidence.

[6] EcoFactor, Inc. v. Google LLC, No. 21-1750, 81 F.4th 1201 (Fed. Cir. 2025) (en banc).

[7] Sundance, Inc. v. DeMonte Fabricating Ltd. , 550 F.3d 1356 (Fed. Cir. 2008).

[8] Id. at 1208–1209.

[9] Federal Judicial Center, Reference Manual on Scientific Evidence, 3rd ed. (2011). Licensing Executives Society International (LESI), Licensing Best Practices: The LESI Guide to Licensing Best Practices.

[10] VirnetX, Inc. v. Cisco Systems, Inc. , 767 F.3d 1308 (Fed. Cir. 2014).

[11] American Bar Association, Section of Intellectual Property Law, Best Practices for Economic Expert Testimony in IP Litigation.

[12] Id. at 1213 (Reyna, J., dissenting).

[13] EcoFactor, Inc. v. Google LLC, No. 21-1750, 81 F.4th 1201 (Fed. Cir. 2025) (en banc).