CMU's Motion for Prejudgment and Post-Judgment Interest [Dkt. 788]

May 1-2, 2013

United States District Court
Western District of Pennsylvania
Civ. No. 2:09-cv-00290-NBF

Marvell Technology Group, Ltd.
Marvell Semiconductor, Inc.

Alternative Interest Computations

Judgment	$1,169,140,271.00

Nearly 10 years of interest compounded quarterly at:

Statutory rate	$ 321,767,068.17
Alleged “investment return”	$ 280,326,930.68
Prime rate	$ 209,253,457.74

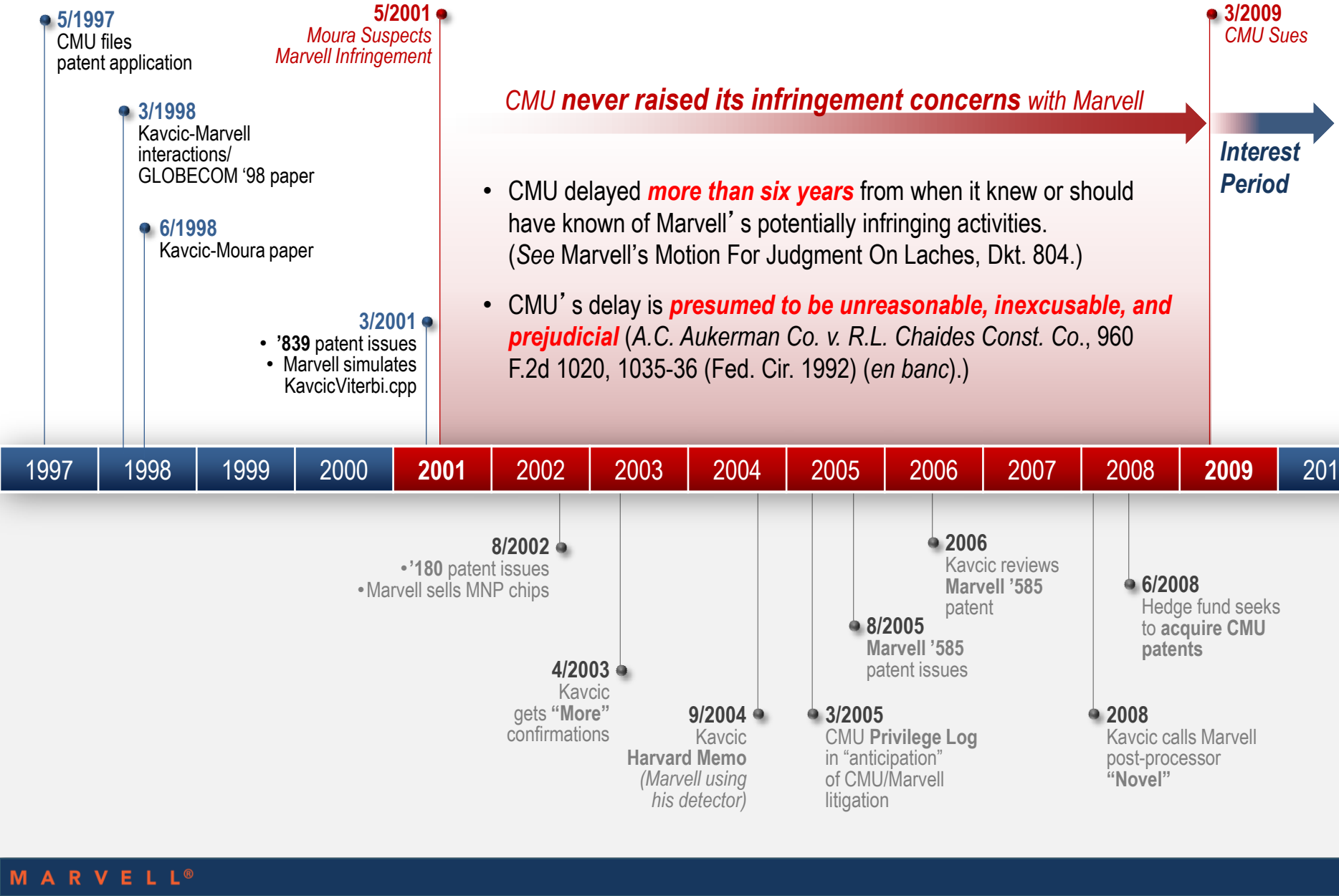
Prejudgment Interest May Be Reduced or Eliminated Where There Is Undue Delay

"We do *not* construe section 284 as requiring the award of prejudgment interest whenever infringement is found. That provision states that interest shall be fixed by the court, and in our view it leaves the court some discretion in awarding prejudgment interest. ***For example, it may be appropriate to limit prejudgment interest, or perhaps even deny it altogether, where the patent owner has been responsible for undue delay in prosecuting the lawsuit.*** There may be other circumstances in which it may be appropriate not to award prejudgment interest. We need not delineate those circumstances in this case."

General Motors Corp. v. Devex Corp., 461 U.S. 648, 656-57 (1983).

- **An explicit finding of laches is not required. *Lummus Industries, Inc. v. D.M. & E. Corp.*, 862 F.2d 267, 274-75 (Fed. Cir. 1988).**

CMU Delayed


5/1997
CMU files patent application
3/1998
Kavcic-Marvell interactions/ GLOBECOM '98 paper
6/1998
Kavcic-Moura paper
3/2001
• '839 patent issues
• Marvell simulates KavcicViterbi.cpp
5/2001
Moura Suspects Marvell Infringement
CMU never raised its infringement concerns with Marvell
3/2009
CMU Sues
Interest Period
• CMU delayed more than six years from when it knew or should have known of Marvell's potentially infringing activities. (See Marvell's Motion For Judgment On Laches, Dkt. 804.)
• CMU's delay is presumed to be unreasonable, inexcusable, and prejudicial (A.C. Aukerman Co. v. R.L. Chaides Const. Co., 960 F.2d 1020, 1035-36 (Fed. Cir. 1992) (en banc).)
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
8/2002
• '180 patent issues
• Marvell sells MNP chips
4/2003
Kavcic gets "More" confirmations
9/2004
Kavcic Harvard Memo (Marvell using his detector)
3/2005
CMU Privilege Log in "anticipation" of CMU/Marvell litigation
8/2005
Marvell '585 patent issues
2006
Kavcic reviews Marvell '585 patent
2008
Kavcic calls Marvell post-processor "Novel"
6/2008
Hedge fund seeks to acquire CMU patents

CMU's Delay Has Resulted in Economic Prejudice

- Had CMU sued ***before Marvell and its customers designed the NLD circuitry into their chip and hard drive designs, respectively***, common business sense suggests that Marvell likely would not have invested in NLD in the manner that it did. (Dkt. 844 (Marvell Opp. to CMU's Motion to Strike, at 5-8.)
  - *Lautzenhiser Techs., LLC v. Sunrise Med. HHG, Inc.*, 752 F.Supp.2d 988, 1004 (S.D. Ind. 2010) ("What is more, ***common sense suggests that Defendants would have modified their business strategies if they came under suit for infringement.***").
- After the NLD feature was included in the chip and HDD designs, it became much more difficult to re-design the chip circuitry without diverting significant resources to the effort. (Affidavit of Zining Wu at ¶ ¶ 20-25)
- Marvell likely would have invested and developed its technology differently had CMU sued Marvell in 2001 – 2007, notified Marvell of its intent to enforce its patents against Marvell, or obtained a judgment against Marvell in 2003-2007 (Affidavit of Zining Wu at ¶ 20; Aff. of S. Sutardja at ¶ 15).
  - Marvell substantially increased its research and development expenses from 2001 to 2009. (Affidavit of S. Sutardja at ¶ 6).
  - Marvell's investments in research, development, and production of MNP's, EMNP's, and NLV/NLD's increased from 2004-2009. (*Id. at ¶ 7).*

CMU's Delay Has Resulted in Evidentiary Prejudice

- CMU did not produce any of Dr. Moura's lab notebooks, emails, and other substantive writings dated in the critical years of 1996-2000 showing his contributions to the inventions and Dr. Moura admitted that his materials were lost during a move of his office. (*See, e.g.,* 11/29/12 Tr. (Moura) at 121:19 – 122:2.)
- Dr. Kavcic's 1996-2000 documents were lost, including his 1998 emails to Marvell and all other emails concerning his media-noise detector work. CMU claims that Dr. Kavcic's documents would have been purged upon leaving CMU in 1998, but cannot account for Dr. Kavcic's 1998-2000 Harvard and personal emails.
- The lead prosecuting attorney repeatedly admitted that he had no memory of the patent prosecutions. (7/21/10 Dep. of Parks, at 6:2-8, 40:1-41:19, 50:14-24).
- Witness memories faded and were no longer fresh, including Dr. Kryder's and Dr. Wooldridge's. (*See* Dkt. 804 (Marvell Brief) at 17-18.)
- Marvell's expert witness, Dr. Jack Wolf, a pioneer in this area of technology, passed away before trial.

The Appropriate Interest Period is ~4 Years At Most

- The court has the discretion to deny interest altogether.
- At most, The interest period should be capped at a maximum of ~4 years starting at the date CMU filed suit (March 2009 to January 2013).
- Interest compounded annually at T-Bill rate:

~4 Years	$	2,810,879.56
~10 Years	$	48,028,055.80

Interest Should Be Calculated Using a Low, Uniform Market Rate

- There is a strong judicial policy favoring use of a uniform rate
- The minimal risk of non-payment weighs in favor of using a low rate
- CMU's delay counsels in favor of a low rate

Judicial Policy Favors A Uniform Rate

"While the determination of the proper rate of interest or delay compensation is one of fact, ***there is a strong judicial policy favoring the establishment of uniform interest rates*** in order to avoid discrimination among litigants."

Brunswick Corp. v. United States, 36 Fed. Cl. 204, 219 (1996).

- **The vast majority of courts award prejudgment interest at uniform rates.**
- **The two prevalent uniform rates: prime rate or T-Bill rate**

Low Risk of Non-Payment Counsels in Favor of a Low Rate

"The argument against using the prime rate is that the prime rate is designed to compensate for financial risk (albeit the low risk of prime borrowers associated with the possibility of non-payment by borrowers. ***Given Microsoft's strong financial position, it presents a risk that is much more like that of the federal government making the Treasury Bill rate more appropriate.***"

Eolas Techs. Inc. v. Microsoft Corp., 70 U.S.P.Q.2d 1939 (N.D. Ill. 2004), *aff'd*, 399 F.3d 1325 (Fed. Cir. 2005).

Low Risk of Non-Payment Counsels in Favor of a Low Rate

"In determining the appropriate rate, courts have considered whether, during the period of infringement, the plaintiff 'borrowed money at a higher rate, what that rate was, or that there was a causal connection between any borrowing and the loss of the use of the money awarded as a result of [the defendant's] infringement.' Such factors would make an award at a higher rate more appropriate. ***Here, Apple maintains substantial cash reserves and there is no evidence that Apple borrowed any money because it was deprived of the damages award. Thus here, as in Laitram, the Court finds that the 52–week Treasury Bill Rate is sufficient.***"

Apple, Inc. v. Samsung Electronics Co., LTD.,
*-- F.Supp.2d ---, 2013 WL 772525, *5 (N.D. Cal. March 1, 2013)*

Low Risk of Non-Payment Counsels in Favor of a Low Rate

- **It is undisputed that Marvell has sufficient cash and short-term investments to pay the judgment**
  - Marvell has net cash of over $2 billion, including over $200 million earned in the fourth quarter of 2013 alone
  - Last quarter, Marvell had strong financial results above analysts' expectations—including a 4% increase in revenue to $775 million.
  - Marvell's rising share price in the first quarter of 2013 further supports a low risk of non-payment
  - Marvell can post a bond, which would ameliorate any risk of non-payment

Delay Counsels in Favor of a Low Rate

"[I]t may be appropriate to limit prejudgment interest, or perhaps even deny it altogether, where the patent owner has been responsible for undue delay in prosecuting the lawsuit."

General Motors Corp. v. Devex Corp., 461 U.S. 648, 656-57 (1983).

The Appropriate Interest Rate is The T-Bill Rate

- **Application of these legal principles favors use of the T-Bill rate**
  - ***The only uniform rates identified by the parties here are the prime rate and the T-Bill rate***
    - Use of the state statutory rate in patent cases would make interest calculations dependent on plaintiff's choice of forum and would bear no relation to market circumstances
    - CMU's purported "rate of return" is not a uniform rate, would not be applied if it were zero or negative, and is entirely speculative
  - ***The low risk of non-payment and CMU's delay counsel in favor of selecting the lower of the two uniform rates, the T-Bill rate***

CMU's Investment Rate of Return Is Inappropriate

- **CMU's Investment Rate of Return Is Not a Consistent Rate**
  - CMU's investment rate of return is "subjective" and applying it here would "utterly defeat the strong judicial policy of establishing uniformity in the award." *Brunswick Corp. v. United States*, 36 Fed. Cl. 204 (1996).
  - CMU's investment rate of return would not be used if that rate happened to be minimal, zero or negative.
- **Application of CMU's Investment Rate of Return Is Speculative**
  - CMU has offered ***no*** evidence that it would have made the same investment choices had it had access to more than $1 billion in additional funds.
  - The judgment here is greater than CMU's entire endowment.
  - Would require guessing what CMU would have invested in -- possibly "some spectacularly unsuccessful venture" where it would have "lost every penny." *Intex Plastic Sales Co. v. Hall*, 20 U.S.P.Q.2d 1367, 1371 (N.D. Cal. 1991).

The Case Law Weighs Against Using Investment Rate of Return

"Courts are loathe to use subjective indicia of the appropriate interest rate. Brunswick suggests that its after-tax Weighted Average Cost of Capital ("WACC"), ranging from 8.76% to 12.50%, be selected. . .While this WACC may potentially be the most likely rate to fully return Brunswick and its investors to the same economic position they otherwise would have held had royalties been timely paid and prudently invested, using the WACC utterly defeats the strong judicial policy of establishing uniformity in the award of delay damages."

Brunswick Corp. v. United States, 36 Fed. Cl. 204, 219 (1996).

Arco Does Not Support CMU

- **CMU cites *Arco* to support its request for its investment rate of return**
- **Unlike here, in *Arco* the plaintiff introduced evidence at trial:**

> "At trial, appellant addressed uncontradicted testimony that its rate of return on investment was substantially above 6%."
>
> *Arco Pipeline Co. v. SSTradeStar*, 693 F.2d 280, 281 (3d Cir. 1982)

- **There is no evidence that CMU would have invested its portion of the judgment as it invested its endowment.**
- **There is no evidence regarding how the inventors would have invested their portion of the judgment.**

The Federal Pennsylvania Cases CMU Cites Are Not Persuasive

- *R.R. Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1520 (Fed. Cir. 1984), *cert. denied*, 479 U.S. 871 (1984)
- *Univ. of Pittsburgh v. Varian Med. Systems*, 2012 WL 1436569, at *9-*10 (W.D. Pa. April 25, 2012)
- *Air Vent, Inc. v. Vent Right Corp.*, 2011 WL 2117014, at *2 (W.D. Pa. May 24, 2011)

Compounding

- **Compounding is only appropriate with a market rate (not a state statutory rate)**
  - Compounding is intended to compensate at the rate for which plaintiff would have earned if it had reinvested in the market.
  - Compounding therefore only should apply if a market rate applies.
  - The state statutory rate is not a market rate.
  - The non-market state statutory rate is, by definition, a *simple* interest rate that should not be compounded at all.
  - It is undisputed that Pennsylvania courts do not compound when calculating interest using the state statutory rate.

"The legal rate of interest is simple interest and may not be compounded."

Carroll v. City of Philadelphia, 735 A.2d 141, 146-47 (Pa. Commw. Ct 1999).

Compounding

- **Annual, not quarterly, compounding is appropriate**
  - Annual compounding provides adequate compensation where there is no uniform practice regarding payment of royalties
  - CMU has not established any industry standard for paying royalties
  - CMU has not established any uniform Marvell practice for paying royalties
    - CMU points to only three of dozens of Marvell agreements
    - CMU previously conceded those three agreements are not comparable to a license for the patents-in-suit
  - Annual compounding results in sufficient compensation, especially in light of CMU's delay