Intellectual Property

The Brattle Group
Economic and Financial Experts
In a fast-changing and increasingly competitive global economy, intellectual property has become a crucial factor shaping the economic successes and failures of businesses large and small. Never before has possession of a proprietary technological advantage had such competitive significance.

At the same time, intellectual property rights have never before been so threatened. Competitors, both domestic and foreign, succumb to the temptation to copy critical technologies, and valuable trademarks are readily copied by unscrupulous manufacturers. Rapidly evolving information technologies make it possible for individuals to carry extensive software libraries and giant databases in a pocket or purse.

Recent years have also seen significant changes in the legal landscape defining intellectual property rights, adding a new layer of complexity to addressing these issues. A series of seminal decisions have raised the standards that must be met in order to quantify damages associated with misappropriation of intellectual property. Damage claims must now be supported by more robust evidence and analysis, and a patent owner can no longer count on being able to exclude an infringing product from the market.

Economists at The Brattle Group provide innovative and rigorous economic analysis, combined with in-depth industry experience, to assist our clients with complex intellectual property matters. We are known for our close working relationships with leading academics and practitioners, and for the clear and successful communication of economic and financial reasoning to clients, judges, juries, and other decision makers. In a changing and unpredictable litigation environment, we strive to manage costs carefully, while delivering the maximum net value to our clients.

*Our collective intellectual property experience spans a wide range of industries, including medical devices, pharmaceuticals, computer hardware and software, telecommunications, navigation and location technologies, and consumer products.*
Patent Infringement Damages Analysis
The experts of Brattle’s IP practice have extensive experience quantifying economic damages in both lost profits and reasonable royalty cases. We have testified on behalf of both plaintiffs and defendants on damages in a wide range of industries.

In lost profits cases, we are well-versed in the analyses required to satisfy the Panduit factors and are recognized for our expertise in using state-of-the-art economic analysis to evaluate the market share and profits that would have accrued to the plaintiff(s) in the absence of the alleged infringement. In reasonable royalty cases, we are experienced in identifying the value of patented technologies from existing data, documents, and licenses. We are also proficient in the use of survey techniques to collect and analyze primary data on the value of the technology at issue.

Theft of Trade Secrets
Theft of trade secrets and industrial espionage are of increasing concern to companies around the world, and litigation related to this issue can present distinctive challenges that require an experienced team of economists. The Brattle Group’s IP experts have worked on behalf of companies that have been injured by the theft of trade secrets to quantify profits lost by the plaintiff and evaluate the gains accrued to the defendant.

We have also worked on behalf of defendants to determine the validity of theft claims and quantify damages. In all instances, our analyses combine a thorough review of the historical record with rigorous analysis of the economic value the secret delivers to each.

Valuation and Transfer Pricing
Transfer pricing is one of the most significant tax issues facing multinational corporations and a key area in which the economic analysis of intellectual property rights plays a central role in disputes. Moreover, this field is extremely dynamic due to constantly changing tax rules and the growing tax rate differential between the United States and the rest of the world. These changes, together with the emergence of global supply chains and the growing importance of intangible property in the global economy has led to major disputes between governments and multinational companies.

Brattle is uniquely positioned to provide independent economic analyses, because we have extensive experience assisting clients with audits, appeals, litigation, and other situations in which tax authorities challenge intra-company prices, in addition to having worked extensively with tax authorities around the world. We have been involved in some of the major transfer pricing litigations of recent years, including the GlaxoSmithKline-IRS and the Astra-Zeneca-HMRS disputes.

Contract Disputes
Owners of intellectual property frequently enter into licensing contracts with other parties and there are often disagreements about whether one or the other party has behaved in accordance with contract terms. Brattle economists have been asked to evaluate the various sources of damage arising from those alleged breaches, including lost profits, price erosion, reputation or brand impairment, and unjust enrichment.
**ITC Section 337 Litigation**

*The Brattle Group* has handled a variety of Section 337 cases across a range of industries and has extensive experience working on these fast-paced, high-stakes cases. Our Section 337 expertise benefits from extensive institutional knowledge coupled with relevant technical skills spanning the intellectual property, international trade, and antitrust practices. Our testifying experts are leading academics and industry experts, including a former chief economist and director of operations at the International Trade Commission.

In addition to addressing a wide range of economic issues, our analyses have covered numerous products, including semiconductors, flash memory devices, liquid crystal display panels, navigation devices, and medical devices, as well as consumer products such as refrigerators, televisions, smartphones, Blu-ray players, computers, and automobiles.

**Requests for Injunctive Relief**

In patent, trade secret, and similar matters, plaintiffs will often seek a preliminary injunction to halt the sale of a competing product that they believe makes improper use of their intellectual property. *Brattle* economists help clients to determine if the competitive harm can be addressed through a damages award or whether irreparable harm has been suffered by a patent owner due to the entry of a potentially infringing product. Following the eBay decision, we have also been involved in a number of cases in which we prepared analyses of irreparable harm pursuant to a party’s request for a permanent injunction.

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**Lanham Act Cases**

The Lanham Act prohibits a number of activities, including trademark infringement, trademark dilution, and false advertising. In all of these cases, a crucial part of the analysis involves identifying the effects of misinformation on consumer choice, whether that misinformation arises from one firm mimicking the products of another, or from a firm making false statements about their competitor. We have conducted this type of analysis in a variety of cases.

We are experienced in collecting primary customer data in order to elicit the value that consumers place on particular product features, as well as in performing conjoint analysis, or the statistical and econometric evaluation of data with respect to customer purchases and sales. *Brattle* principal and Nobel Prize winner Daniel McFadden pioneered many of the methods used in these analyses and several of our consultants either studied under him or have worked with him in designing data collection methods and analysis.

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**Services Offered**

- Expert Testimony
- Litigation Support
- Strategy Development
- Identification of Technical Experts
Selected Cases

**Patent Infringement in the Medical Device Industry**

In a patent infringement lawsuit involving medical devices, we were retained on behalf of the plaintiffs to offer testimony regarding damages. In this complex case, the plaintiff asserted three patent infringements against the defendant, and in turn was accused by the defendant of infringing one of its patents. *Brattle’s* testimony examined the manner in which these devices were used, the related products used with them in surgery, and the nature of the competition offered by alternative surgical approaches. We also examined the client’s manufacturing facilities and production systems, its transfer pricing policies, and the effects these had on the lost profits of the subsidiary that owned the patents in suit. At trial our expert testified regarding both lost profits and reasonable royalty damages. The jury awarded *Brattle’s* client over $100 million in damages.

**Theft of Trade Secrets**

We were retained by the defendant, a diversified Fortune 100 manufacturing and financial services company, to offer testimony regarding damages in a theft of trade secrets case. The case involved allegations by a competitor that two of its former employees who had taken jobs with the defendant had brought with them a large volume of confidential documents — including business plans, marketing plans, strategy presentations, and customer correspondence — and that the defendant had used these materials in various ways that had injured the plaintiff. We testified that most of the materials in question were widely known outside of the plaintiff’s organization or were too dated to be of commercial value. Where there were true trade secrets, we showed that when the defendant won business from a former customer the switch occurred prior to the alleged theft.

**Contract Dispute in the Pharmaceutical Industry**

For a major pharmaceutical company, *The Brattle Group* provided expert testimony before an arbitration panel on the damages that the company suffered as a result of the termination of a co-marketing agreement for a prescription hormonal therapy. Our client’s co-marketing partner terminated the agreement just as the product reached a breakeven point, and well before the agreement was due to expire. Our team quantified the profits that the pharmaceutical company would have earned had the agreement run its expected course, as well as the profits the company could have expected to earn on its existing portfolio of products had it never entered into the agreement. In response to *Brattle’s* testimony, the arbitration panel awarded the pharmaceutical company approximately $60 million in damages.

**Irreparable Harm**

*Brattle* experts prepared testimony on irreparable harm that was used to successfully defend a global human resources consulting company against a competitor’s efforts to obtain a preliminary injunction that would have barred the consulting company from selling its software products for a two year period. Our testimony showed that our client had an insignificant share of the plaintiff’s target market and rarely marketed its product to the same firms as the plaintiff. Moreover, despite the plaintiff’s claims to the contrary, a large number of firms provide the accused software to customers. Hence, any injunction to remove our client from the market would have a *de minimis* impact on the fortunes of the plaintiff.
**Patent Challenges Under Hatch-Waxman**

*Brattle* economists have worked on a number of cases in which branded drugs have been faced with patent challenges by generic companies under the Hatch-Waxman Act. In many of these cases, the generic company has sought to enter the market “at risk” — i.e., prior to resolution of the patent suit — and the branded drug company has responded with a request for a preliminary injunction. In these injunction cases, we have been asked to evaluate whether the branded drug company would suffer irreparable harm due to “at risk” generic entry. We have addressed this question by analyzing the likely impact of such entry on the branded drug company’s sales, research incentives, marketing efforts, employment, and manufacturing facilities. We have also investigated the impact of such entry on the branded drug’s formulary status and the goodwill of its customers.

**Analysis of the Pharmaceutical Supply Chain**

Several *Brattle* consultants worked extensively with the IRS and supported a team of six testifying experts that fully analyzed and presented testimony on the pharmaceutical value chain. We analyzed a dozen different drug markets including migraine, anti-ulcer, and anti-asthma, and performed a “but for” analysis of market shares and profits for the entire portfolio of GlaxoSmithKline’s pharmaceutical products. Our analyses placed particular emphasis on disentangling the economic value of detailing and other forms of marketing as barriers to entry, as opposed to the patented technology. We have been involved in a variety of other pharmaceutical, software, hardware, and medical device cases where disputes over the lifecycle value of R&D and marketing intangibles arise. In this work, our testimony has regularly shown that significant profits exist, that the traditional transfer pricing methods and regulations fail, and that alternative economic techniques must be used to identify arms-length prices and transaction values.

**Effects of False Advertising in the Apparel Industry**

A British manufacturer of distinctive footwear alleged that a U.S. shoe company had infringed on the trademark stitching on some of its shoe products. On behalf of the footwear manufacturer, a *Brattle* economist estimated damages based in part on confusion surveys conducted at shopping malls. Using the survey data, we were able to measure lost sales and establish the value of the trademarked stitching as a distinguishing feature of the British company’s shoes. The case settled on favorable terms for our client.

**Damages Estimation in the Commercial Manufacturing Industry**

For a commercial manufacturer of complex machinery, we prepared testimony on damages associated with the company’s alleged infringement of patents that improved an aspect of the machinery’s performance. In the testimony, we demonstrated that a number of other technologies were available that could achieve comparable improvements in performance, and that this specific aspect of performance was but one of a number of factors driving customer purchase decisions. We also identified significant conceptual and computational errors in the testimony submitted by the plaintiff’s damages expert. Our findings caused that expert to file an amended report proffering a significantly reduced damage claim.
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We combine in-depth industry experience, rigorous analysis, and principled techniques to help clients answer complex economic questions in litigation, develop strategies for changing markets, and make critical business decisions.

We are distinguished by:

- Thoughtful, timely, and transparent analysis of complex markets and issues
- Affiliations with leading international academics and highly credentialed industry specialists
- Clearly presented results that withstand critical review

Our Functional Practice Areas
- Antitrust/Competition
- Commercial Damages
- Environmental Litigation and Regulation
- Forensic Economics
- Intellectual Property
- International Arbitration
- International Trade
- Product Liability
- Regulatory Finance and Accounting
- Risk Management
- Securities
- Tax
- Utility Regulatory Policy and Ratemaking
- Valuation

Our Industry Practice Areas
- Electric Power
- Financial Institutions
- Natural Gas
- Petroleum
- Pharmaceuticals, Medical Devices, and Biotechnology
- Telecommunications and Media
- Transportation

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The Brattle Group
Economic and Financial Experts

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