

FEE-SHIFTING AND *OCTANE FITNESS*: AN EMPIRICAL APPROACH TOWARD UNDERSTANDING “EXCEPTIONAL”

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“However much men may honestly endeavor to limit the exercise of their discretion by definite rule, there must always be room for idiosyncrasy; and idiosyncrasy, as the word expresses, varies with the man.”¹

John Coleridge’s words capture the struggle many courts face when interpreting a statute with subjective language. Often, the ambiguity is necessary because it is difficult to write a one-size-fits-all rule that can be accurately and fairly utilized in every case as cases rarely present the same facts, litigation strategies, and parties. As a result, subjectivity keeps judgments flexible, allowing district courts to consider the circumstances unique to each case before issuing a holding. Unfortunately, it makes the legal process less predictable, and parties often have difficulty relying on caselaw to clarify the ambiguous language.

In *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*,² the Supreme Court rejected the Federal Circuit’s standard for fee-shifting in patent cases under the Patent Act’s provision in § 285.³ Moving away from the high standard set by the Federal Circuit, the Supreme Court defined an exceptional case based on the ordinary meaning of the word “exceptional.”⁴ The Court held that an “exceptional” case was a case that stood out from others with respect to the substantive strength of a party’s litigating position or the unreasonable manner in which the case was litigated.⁵

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1. *Libel of the Dead—Prosecutor a Foreigner*, 5 THE CRIM. LAW MAG. & REP.: A BI-MONTHLY PERIODICAL 834, 838 (1884) (citing *Regina v. Labouchere*, 12 Q.B.D. 330 (1884)).

2. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014).

3. 35 U.S.C. § 285 (2012).

4. *Octane Fitness*, 134 S. Ct. at 1756 (citing *Bilski v. Kappos*, 561 U.S. 593 (2010)).

5. *Id.*

The Court's decision in *Octane Fitness* increases a litigant's chances of winning a motion for fee-shifting under § 285.⁶ However, the Supreme Court's discussion of exceptionality does not provide significantly more clarity than the dictionary definition.⁷ Patent owners, alleged infringers, counsel, and lower courts are left to assess what "uncommon," "rare," or "not ordinary" mean in patent litigation.⁸ Stated differently, these parties must divine the markers that indicate when a litigant's position "stands out" from others.⁹

This Note assesses these issues through empirical analysis of the first wave of cases applying the Supreme Court's decision in *Octane Fitness*. This analysis considers the parties involved, the amount of attorneys' fees granted, the percentage of § 285 motions granted, and what "exceptionality" really means, in light of *Octane Fitness*. Part I describes the background and legislative history of fee-shifting, focusing on the fee-shifting provision in the 1952 Patent Act as well as recent legislative proposals in Congress for patent reform and fee-shifting. Part II explores the *Octane* case, examining the distinctions between the higher standard of "exceptional" as established in *Brooks Furniture Manufacturing, Inc. v. Dutailier International, Inc.* by the Federal Circuit and the new standard of "exceptional" in the Supreme Court's holding in *Octane Fitness*.¹⁰ Part III considers the emerging trends post-*Octane Fitness* based on an empirical analysis of attorneys' fees granted under § 285 post-*Octane Fitness*, a discussion of district court determinations of "exceptional," and other potential repercussions of the Supreme Court's holding.

I. THE DEVELOPMENT OF FEE-SHIFTING

The English and American Rules represent the outer-bounds of the wide spectrum of fee-shifting rules. Under the English Rule, the losing party is required to pay for the attorneys' fees of both parties, whether the defeated party is the plaintiff or the defendant.¹¹ Therefore, the additional

6. See discussion *infra* Section IV.A. (Part IV looks at emerging results of trends in fee-shifting post-*Octane Fitness*).

7. Merriam-Webster's Collegiate Dictionary (11th ed. 2008) (defining "exceptional" as "rare").

8. *Octane Fitness*, 134 S. Ct. at 1756.

9. *Id.*

10. 393 F.3d 1378, 1381 (Fed. Cir. 2005).

11. Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 46 (1984), available at <http://scholarship.law.duke.edu/lcp/vol47/iss1/3/>.<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1596&context=aulr>.

burden of paying the prevailing party's attorneys' fees is thought to have a chilling effect on unmeritorious, or "nuisance" suits.¹²

However, under the American Rule a prevailing party is typically not awarded attorneys' fees.¹³ As early as 1796, American courts generally opposed the award of attorneys' fees, unless the opportunity was explicitly stated by statute.¹⁴ Furthermore, during this period of time, Congress voiced multiple concerns of abuse or gamesmanship, including the need to prevent attorneys from reaping excessive rewards.¹⁵

Prior to 1946, patent cases in the United States generally followed the American Rule.¹⁶ In *Teese v. Huntingdon*, the Supreme Court noted that "[c]ounsel fees are not a proper element for the consideration of the jury in the estimation of damages in actions for the infringement of a patent right."¹⁷ However, the 79th Congress enacted a fee-shifting provision which allowed for fee-shifting in patent law, where "[t]he court may in its discretion award reasonable attorneys' fees to the prevailing party upon the entry of judgment on any patent case."¹⁸ This provision would later be included in 35 U.S.C. § 285, which states "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party."¹⁹ While Congress expressly authorized discretionary fee-shifting for exceptional cases in the 1946 Patent Act, the Senate Report of this Act indicated it

12. *See id.*

13. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 249–50 (1975).

14. *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796) (stating "[t]he general practice of the United States is in opposition to [allowance for attorney fees]; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute."). For example, Congress could make explicit provisions for the allowance of attorneys' fees in statutes such as the Clayton Act and the Civil Rights Acts. Clayton Act, 15 U.S.C. § 15(a) (2012) ("Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by his sustained, and the cost of suit, including a reasonable attorney's fee."); Civil Rights Act, 42 U.S.C. § 2000(a)–(e) (2006) ("In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.").

15. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 22 (1984).

16. Emily H. Chen, Note, *Making Abusers Pay: Deterring Patent Litigation by Shifting Attorneys' Fees*, 28 BERKELEY TECH. L.J. 351, 362 (2013) ("[T]he Patent Act of 1790 did not include any provisions for the award of attorneys' fees to the prevailing party.").

17. 64 U.S. (23 How.) 2 (1859).

18. 35 U.S.C. § 70 (1946 ed.).

19. 35 U.S.C. § 285 (1952).

was “not contemplated that the recovery of attorney’s fees will become an ordinary thing in patent suits.”²⁰ The report stated that the provision was intended to reserve these fee awards for “gross injustice” to an alleged infringer.²¹

With the 1952 Patent Act, § 285 was recodified to the modern text with a few changes. The 1946 Act expressly gave the court “discretion” to award attorney fees to the prevailing party, while the amendment in the 1952 Patent Act removed the court’s “discretion” and instead stated, “the fee may be awarded in exceptional cases.”²² The House Committee Report on the 1952 Patent Act mentioned that the “exceptional” case amendment was added to clarify the intention of the 1952 statute as shown by its legislative history and as interpreted by the courts.²³ By instituting an “exceptional” requirement, Congress effectively raised the fee-shifting requirement and brought § 285 closer to the American Rule by limiting the district courts’ discretion to award attorneys’ fees in patent litigation.²⁴

In the patent context however, the American Rule may have led to frivolous lawsuits by non-practicing entities (“NPEs,” also known as “patent assertion entities” (“PAEs”)).²⁵ Because NPEs generally do not produce end products or services and often use contingent-fee based legal services, they do not face potential counterclaim liability for infringing another patent and thus can defer significant legal costs.²⁶ NPEs therefore benefit from the American Rule regime, as NPEs can leverage substantial defense costs to encourage defendants, who generally pay high hourly legal

20. S. REP. NO. 1503, 79th Cong., 2d Sess. (1946) (“It is not contemplated that the recovery of attorney’s fees will become an ordinary thing in patent suits [. . .] The provision is also made general so as to enable the court to prevent a gross injustice to an alleged infringer.”).

21. *Id.*

22. *Id.*; see also Dennis Crouch, *What is an Exceptional Case Such that Court Should Award Attorney Fees?*, PATENTLYO (Oct. 3, 2014), <http://patentlyo.com/patent/2013/10/what-is-an-exceptional-case-such-that-court-should-award-attorney-fees.html>.

23. Crouch, *supra* note 22.

24. Compare § 1, 60 Stat. 778, 35 U.S.C. § 70 (1946 ed.) with 35 U.S.C. § 285.

25. This Note defines non-practicing entities as “individuals and firms who own patents but do not directly use their patented technology to produce goods or services” but instead assert the patents “against companies that do produce goods and services.” James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387 (2014), available at <http://ssrn.com/abstract=2091210>; see also John M. Golden, *Patent Trolls and Patent Remedies*, 85 TEX. L. REV. 2111, 2112 (2007).

26. Randall R. Rader et al, *Make Patent Trolls Pay in Court*, N.Y. TIMES (June 4, 2013), available at http://www.nytimes.com/2013/06/05/opinion/make-patent-trolls-pay-in-court.html?_r=0.

fees, into settling before trial.²⁷ As high hourly legal fees can cause patent cases to be extremely expensive, many defendants determine that economic considerations favor settlement, even in frivolous suits.²⁸

Fee-shifting could curb abusive practices by encouraging parties to thoroughly research their allegations before bringing suit and avoid bringing frivolous claims.²⁹ While a change to the English Rule would require a fundamental change in the statutory framework of § 285, many feel in light of the direct costs of NPE litigation, such a change is called for.³⁰ For example, in 2011, the direct costs of NPE cases were estimated at around \$29 billion.³¹ Additionally, NPEs initiated sixty-two percent of all patent litigation in 2012, growing from forty-five percent in 2011.³²

Legislative action has provided opportunities to lower the costs of NPE litigation. During the early development stages of the America Invents Act (“AIA”) in the 109th Congress, Senators Orrin Hatch and

27. Jane P. Mallor, *Punitive Attorneys’ Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613 (1983). Mallor notes that:

[A] defendant might choose not to challenge a disputed claim, or even a groundless claim, if the costs of defending the claim would exceed the plaintiff’s demands [T]he American rule may function as a ‘legalized form of blackmail’ that encourages frivolous claims and adds to the congestion of courts.

Id. at 617.

28. See *Abusive Patent Litigation: The Issues Impacting American Competitiveness and Job Creation at the International Trade Commission and Beyond: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 85 (2013) [hereinafter, *Abusive Patent Litigation*]. Statement of Kevin H. Rhodes:

It is an unfortunate reality that some patent owners have abused the litigation system by making overly-broad infringement assertions, often against an entire industry or against many different participants in a manufacturing/supply/distribution/retailer/end-user chain, intending to extract windfall settlements from multiple defendants seeking to avoid the cost and disruption of litigation.

Id. at 14.

29. *Abusive Patent Litigation*, *supra* note 28, at 14 (statement of Kevin H. Rhodes).

30. *Amendment in the Nature of a Substitute to H.R. 2795, the “Patent Act of 2005”*: *Hearing on H.R. 2795 Before the Subcomm. On Courts, the Internet, & Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 47–48 (2005), available at <http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg23434/pdf/CHRG-109hhrg23434.pdf> (statement of Philip S. Johnson, designee of the Pharmaceutical Research and Manufacturers of America).

31. Bessen & Meurer, *supra* note 25, at 389.

32. Colleen Chien, *Patent Trolls by the Numbers*, SANTA CLARA LAW DIGITAL COMMONS at 1 (Mar. 13, 2013), available at <http://digitalcommons.law.scu.edu/facpubs/609>.

Patrick Leahy introduced a similar bill known as the 2006 Hatch-Leahy Bill.³³ The 2006 Hatch-Leahy Bill had a provision affecting 35 U.S.C. § 285, by requiring the prevailing party in a patent-infringement suit to be awarded its attorneys' fees and costs, unless "the position of the nonprevailing party . . . was substantially justified."³⁴ Although not included in the AIA, the fee-shifting provision's creation reflects the growing concern over so-called "patent trolls" and frivolous patent lawsuits unfairly burdening an innocent defendant.³⁵

Post-AIA, Congress has responded to concerns over NPE litigation by introducing legislation containing various fee-shifting provisions. On May 22, 2013, the Senate proposed the Patent Abuse Reduction Act.³⁶ The fee-shifting provision in the Patent Abuse Reduction Act moved towards the English Rule, awarding attorneys' fees to the prevailing party, "unless—(1) the position and conduct of the non-prevailing party were objectively reasonable and substantially justified; or (2) exceptional circumstances make such an award unjust."³⁷ This provision is a dramatic inversion from the current fee-shifting provision of § 285 where attorneys' fees are only awarded in "exceptional" cases.

On October 23, 2013, the House of Representatives introduced the Innovation Act, which would also move the fee-shifting provision closer to the English Rule. Under the Innovation Act, a "court shall award, to a prevailing party, reasonable fees and other expenses . . . unless the court finds the position and conduct of the nonprevailing party or parties were reasonably justified in law and fact or that special circumstances (such as severe economic hardship to a named inventor) make an award unjust."³⁸ The Innovation Act passed the House on December 5, 2013 and was

33. H.R. 2795, 109th Cong. (2005); S. 3818, 109th Cong. § 5(b) (2006).

34. S. 3818, 109th Cong. § 5(b) (2006) (amending 35 U.S.C. § 285 to read: "(a) The court shall award, to a prevailing party, fees and other expenses incurred by that party in connection with that proceeding, unless the court finds that the position of the nonprevailing party or parties was substantially justified or that special circumstances make an award unjust."), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-109s3818is/pdf/BILLS-109s3818is.pdf>.

35. Bill Summary & Status 109th Congress (2005–2006) H.R. 2795, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:H.R.2795>: (last visited Jan. 12, 2015); Bill Summary & Status 109th Congress (2005–2006) S. 3818, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:S3818>: (last visited Jan. 12, 2015).

36. Bill Summary & Status 113th Congress (2013–2014) S.R. 1013, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s.01013>: (last visited Jan. 12, 2015).

37. S.R. 1013 § 5(a), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c113:S.1013>.

38. Bill Summary & Status 113th Congress (2013–2014) H.R. 3309, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:h.r.3309>: (last visited Jan. 12, 2015).

received by the Senate a few days later.³⁹ However, there has been no action on the Innovation Act since December 2013.⁴⁰ On July 17, 2014, House Judiciary Committee Chairman Bob Goodlatte and House Energy Commerce Committee's Subcommittee on Communications and Technology Ranking member Anna Eshoo sent a letter to the Senate Majority Leader Harry Reid and the Senate Judiciary Committee Chairman Patrick Leahy urging Senate action on the Innovation Act.⁴¹ The letter addressed "an exponential increase in the use of weak or poorly granted patents by 'patent trolls' to file numerous patent infringement lawsuits against American businesses with the hopes of securing a quick payday."⁴² Despite Goodlatte and Eshoo's advocacy for patent reform, there have not yet been any substantive steps towards further legislative action. As of March 1, 2015, neither the Patent Abuse Reduction Act nor the Innovation Act has passed both the House of Representatives and the Senate.⁴³

The next Part will discuss how courts have consulted this legal background in an attempt to fairly and accurately interpret 35 U.S.C. § 285. In light of the growing concern over NPEs and patent litigation abuse, fee-shifting serves as a significant remedy and deterrent.

II. OCTANE FITNESS: LOWERING THE BAR AND RESTORING JUDICIAL DISCRETION IN FEE AWARDS

The Supreme Court's decision in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.* is significant because it overturned the Federal Circuit's existing higher standard for exceptionality and reinforced a district court's ability to use its discretion when deciding whether or not to award attorneys' fees in "exceptional" cases.⁴⁴ This Part will first explore the

39. Innovation Act, H.R. 3309, 113th Cong. (2013), available at <https://www.congress.gov/bill/113th-congress/house-bill/3309>.

40. *Id.*

41. Goodlatte and Eshoo Call on the Senate to Pass Innovation Act, H.R. JUDICIARY COMMITTEE (July 17, 2014), <http://judiciary.house.gov/index.cfm/press-releases?ID=1F8AF0DB-E1DD-4A38-AE29-BB3F097746DE>.

42. *Id.*; see also Bob Goodlatte & Anna G. Eshoo, *Letter to the Honorable Harry Reid and the Honorable Patrick Leahy*, available at http://judiciary.house.gov/index.cfm?a=Files.Serve&File_id=6029ABD3-551C-461A-B3F8-A952A57C93DC.

43. Bill Summary & Status 113th Congress (2013–2014) H.R. 3309, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:h.r.3309>: (last visited Mar. 17, 2015); Innovation Act, H.R. 3309, 113th Cong. (2013), available at <https://www.congress.gov/bill/113th-congress/house-bill/3309>.

44. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014).

Federal Circuit's higher standard for exceptionality as defined in *Brooks Furniture Manufacturing, Inc. v. Dutailier International, Inc.* This Part will then discuss the procedural history and the facts of the *Octane Fitness* case. Finally, this Part will examine the Supreme Court's decision and its interpretation of an "exceptional" case.

A. THE FEDERAL CIRCUIT STANDARD PRE-*OCTANE FITNESS*

As defined by *Brooks Furniture Manufacturing, Inc. v. Dutailier International, Inc.*,⁴⁵ an "exceptional case" involved "material inappropriate conduct" or was both "objectively baseless" and "brought in subjective bad faith."⁴⁶ Examples of "material inappropriate conduct" included willful infringement; fraud or inequitable conduct in patent procurement; misconduct during litigation; vexatious or unjustified litigation; and conduct violating Rule 11 of the Federal Rules of Civil Procedure ("FRCP").⁴⁷ The court could independently sanction behavior that violates Rule 11 of the FRCP.⁴⁸ Furthermore, in order for litigation to be "objectively baseless," the litigation had to be "so unreasonable that no reasonable litigant could believe it would succeed," and the litigation would be considered to have been "brought in subjective bad faith" only if the plaintiff actually knew that the claim was objectively baseless.⁴⁹ Under this standard, there was a presumption that the assertion of infringement of a duly granted patent is made in good faith.⁵⁰ As a result, the Federal Circuit concluded that "clear and convincing evidence" was required to establish an exceptional case.⁵¹

Under the Federal Circuit's interpretation of § 285, determining exceptionality became a two-step process: first, the court needed to determine whether the case was exceptional under the definition established in *Brooks Furniture*, and second, if the parties provided "clear and convincing" evidence of the exceptional conduct.⁵² The Federal Circuit ruled that the exceptional case standard was the same for both

45. 393 F.3d 1378, 1381 (Fed. Cir. 2005).

46. *Id.* at 1381 (citing *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993)).

47. *Id.*

48. FED. R. CIV. P. 11(c).

49. *Brooks Furniture*, 393 F.3d at 1381; *see also* *iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1378 (2011).

50. *Brooks Furniture*, 393 F.3d at 1382; *see also* *Springs Window Fashions, LP v. Novo Indus., LP*, 323 F.3d 989, 999 (Fed. Cir. 2003).

51. *Brooks Furniture*, 393 F.3d at 1382.

52. *Wedgetail Ltd. v. Huddleston Deluxe, Inc.*, 576 F.3d 1302, 1304 (Fed. Cir. 2009).

prevailing plaintiffs and for prevailing defendants.⁵³ Unsurprisingly, courts rarely awarded attorneys' fees under the Federal Circuit's standard for § 285.⁵⁴

B. *OCTANE FITNESS*—SEEKING FEDERAL CIRCUIT
EXCEPTIONALITY IN THE DISTRICT COURT

In *Octane Fitness*, ICON Health & Fitness, Inc. owned a patent disclosing an elliptical exercise machine that allowed the user to adjust the machine to fit his stride path.⁵⁵ ICON sued Octane Fitness, alleging that some of the elliptical machines it manufactured infringed ICON's patent. After the district court granted Octane's motion for summary judgment, Octane moved for attorneys' fees under § 285, arguing that ICON's claim was objectively baseless because the judgment of non-infringement should have been a "foregone conclusion to anyone who visually inspected" Octane's elliptical machines.⁵⁶ Following the Federal Circuit's standard of exceptionality, the district court ruled that the respondent's infringement claims were neither "frivolous" nor "objectively baseless."⁵⁷ Although there was evidence that ICON never commercialized its patent, and an email exchange between two ICON sales executives indicated that ICON had brought the infringement action as "a matter of commercial strategy," the district court held that the case was not "exceptional."⁵⁸ The Federal Circuit affirmed the district court's order, rejecting Octane's argument that the district court had "applied an overly restrictive standard in refusing to find the case exceptional under § 285."⁵⁹

53. See *Eltech Sys. Corp. v. PPG Indus., Inc.*, 903 F.2d 805, 810 n.9 (Fed. Cir. 1990).

54. Colleen V. Chien, *Reforming Software Patents*, 50 HOU L. REV. 323, 380 n.355 (2012) ("Based on a search in Westlaw, in 2011, approximately twenty awards were made [on the basis of the exceptional cases rule of 35 U.S.C. § 285], and in 2002, ten awards were made. They were sought in eighty-six and fifty cases[, respectively]."); see also Rader et al., *supra* note 26 (finding that fees were shifted only twenty times in nearly three thousand patent cases in 2011).

55. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1754 (2014).

56. *ICON Health & Fitness, Inc. v. Octane Fitness, LLC*, No. 09-319 ADM/SER, 2011 WL 2457914 at *2 (D. Minn. Sept. 6, 2011).

57. *Id.* at *2-4; see also *iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1378 (2011); *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005).

58. *ICON Health*, 2011 WL 2457914, at *4.

59. 496 Fed. Appx. 57, 65 (2012).

C. THE SUPREME COURT DECISION

After the Federal Circuit's decision, Octane Fitness challenged the Federal Circuit's standard of § 285 as overly restrictive in light of the statutory language of 35 U.S.C. § 285.⁶⁰ Looking at § 285, the Court used ordinary tools of statutory interpretation and construed the definition of an "exceptional" case under § 285 in accordance with the term's ordinary meaning.⁶¹ The Court held that an "exceptional" case was simply a case that stood out from others with "respect to the substantive strength of a party's litigating position or the unreasonable manner in which the case was litigated."⁶²

This "ordinary meaning" interpretation differs drastically from the Federal Circuit's definition of "exceptional" under *Brooks Furniture*. The Supreme Court found the Federal Circuit's interpretation of § 285 to be "overly rigid" and stated that the formulation impermissibly placed an "inflexible framework onto statutory text that is inherently flexible."⁶³ The Federal Circuit's first category of cases that allowed for fee-shifting under the *Brooks Furniture* formulation, "material inappropriate conduct," appeared to be independently sanctionable conduct.⁶⁴ However, the Court stated that sanctionable conduct is not the appropriate benchmark for fee awards under § 285, and that a district court may award fees in rare cases where a party's unreasonable conduct is "exceptional" enough to justify an award of attorneys' fees but may not necessarily be independently sanctionable.⁶⁵

It is important to note that while the Supreme Court lowered the standard established by the Federal Circuit, it did not redefine "exceptional" as originally proposed by Congress under the 1952 Patent Act.⁶⁶ The Court found that the dictionary definition of "exceptional" at the time of the 1952 amendment meant "uncommon," "rare," or "not ordinary."⁶⁷ When determining a "stand out" case, the Court stated that district courts may exercise their discretion on a case-by-case basis, considering the "totality of the circumstances."⁶⁸

60. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (citing *Bilski v. Kappos*, 561 U.S. 593 (2010)).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1757.

66. *Id.* at 1756.

67. *Id.*

68. *Id.* at 1751 (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994)).

According to the Court, the Federal Circuit was too restrictive in awarding attorneys' fees under the second category of cases, those that were "objectively baseless" and "brought in subjective bad faith."⁶⁹ The Supreme Court stated that a plaintiff could have acted in a way that was less than "bad faith," but which still sufficiently marked a case as "exceptional."⁷⁰ The Court rejected ICON's argument that the dual requirement of "subjective bad faith" and "objective baselessness" followed the Supreme Court's decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* ("PRE"), which involved a "sham exception" to the *Noerr-Pennington* doctrine of antitrust law.⁷¹ In *PRE*, the Court held that to qualify as a "sham," a lawsuit must be "objectively baseless" and must "conceal 'an attempt to interfere directly with the business relationships of a competitor.'"⁷² In *Octane*, the Supreme Court stated that the standard established in *PRE* had "no roots in the text of § 285," and should not have been used in the context of determining whether a case was so "exceptional" as to justify an award of attorneys' fees in patent litigation.⁷³ The Court consequently rejected the Federal Circuit's ruling on § 285 in *Brooks Furniture* because the rule was "so demanding that it would appear to render § 285 largely superfluous."⁷⁴

Furthermore, the Supreme Court rejected the Federal Circuit's requirement that litigants had to establish an entitlement to fees under § 285 by "clear and convincing evidence."⁷⁵ The Supreme Court stated that there was no indication in § 285 that justified such a high standard of proof; rather, § 285 merely demanded a "preponderance of the evidence" standard.⁷⁶

Notably, any appeals to the Federal Circuit on the determination of exceptionality in a case can only be reviewed for "abuse of discretion."⁷⁷ The Supreme Court's decision in *Octane Fitness* was issued on the same day as *Highmark Inc. v. Allcare Health Mgmt. Systems*, which overturned the Federal Circuit's reversal of a fee award issued by the District Court

69. *Id.* at 1757.

70. *Id.*

71. *Id.*; see also *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1992).

72. *Professional Real Estate Investors, Inc.*, 508 U.S. at 51.

73. *Octane Fitness*, 134 S. Ct. at 1757 (quoting *Professional Real Estate Investors, Inc.*, 508 U.S. at 49).

74. *Id.* at 1758.

75. *Id.*

76. *Id.*

77. *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 134 S. Ct. 1744, 1747 (2014).

for the Northern District of Texas.⁷⁸ The opinion referred to the *Octane Fitness* decision, stating that a § 285 award is a “matter of discretion” and that the exceptional-case determination should be reviewed only for abuse of discretion.⁷⁹ This decision effectively changed how the Federal Circuit will review appeals of § 285 motions—instead of a de novo review, all aspects of a district court’s exceptional-case determination would be reviewed for abuse of discretion.⁸⁰

In summary, the Supreme Court overruled the Federal Circuit’s two-step process in determining exceptionality: first, the exceptionality determination using the standard established in *Brooks Furniture*, and second, the “clear and convincing” evidence requirement.⁸¹ Furthermore, after *Highmark*, the Federal Circuit could only review appeals of § 285 motions for an abuse of discretion.⁸²

The Supreme Court lowered the “exceptional case” standard in *Octane Fitness*.⁸³ However, the actual definition of “exceptional” is still unclear. Guidelines to consider the “totality of the circumstances” when determining the substantive strength of a party’s litigating position do not provide much direction. Part IV of this Note will address this ambiguity and shed more light on what really is an “exceptional” case.

III. EMPIRICAL ANALYSIS OF EXCEPTIONALITY

This Part presents data on the first wave of fee award decisions following the *Octane* decision. Section III.A examines overall fee award patterns. Section III.B delves into district court determinations of what cases are “exceptional,” as well as factors that may increase the likelihood of a finding of exceptionality. Section III.C discusses broader ramifications that might affect litigation behavior and whether legislative reform is warranted.

78. *Id.*

79. *Id.* at 1749.

80. *Id.* at 1746.

81. *Brooks Furniture Mfg., Inc. v. Dutailier Int’l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005).

82. *Highmark*, 134 S. Ct. at 1749.

83. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014).

A. THE POST-*OCTANE FITNESS* LANDSCAPE

This Section consists of the empirical research analyzing the post-*Octane* landscape.⁸⁴ While this is a developing landscape, recent cases allow a glimpse into early data on the number of fees awarded under § 285, possible trends in determinations compared among districts, and over time, the amount awarded under § 285 motions, and the apportionment of these awards. Finally, early data on cases in which an NPE was involved is presented. This data is then placed into context and specific district court decisions discussing the “exceptional” case standard are explored.

In the nine months following the Supreme Court’s holding in *Octane Fitness*, there has been a significant increase in the number of motions made for attorneys’ fees under § 285,⁸⁵ as well as the number of attorneys’ fees awarded to prevailing parties under §285. Table 1 below summarizes the number of cases in which fees were awarded in 2002, 2011, and post-*Octane Fitness*.⁸⁶

Table 1 – Attorneys’ Fees Under § 285 post-*Octane Fitness*

	Fees Awarded	Fees Not Awarded	Total	Remanded
2002 ⁸⁷	10	40	50	N/A
2011 ⁸⁸	20	66	86	N/A
post- <i>Octane Fitness</i>	27	36	63	4

84. The following numbers were determined using LexisNexis and Westlaw to consolidate all cases from April 29, 2014 to March 1, 2015 involving a 35 U.S.C. § 285 motion. The cases retrieved were checked against a list on the blog Patently-O.com that consolidated several fee-shifting motions post-*Octane Fitness*. The analysis considered factors such as whether fees were awarded, the district, the court’s reasoning, and the award amount. More detailed information about the cases can be found in the appendix of this Note.

85. See Table 1. The total number of § 285 motions made within the first seven months post-*Octane Fitness* is greater in proportion to the number of motions made in 2002 and 2011.

86. This Note relied on Professor Colleen Chien’s study to compare the proportion of attorneys’ fees awarded before the Supreme Court’s decision in *Octane Fitness*. Therefore, the two years analyzed (2002 and 2011) in Chien’s paper were used to illustrate the differences post-*Octane Fitness*. The following tables and figures utilized the information found in Table 3 in the appendix.

87. Chien, *supra* note 54, at 380–81 n.329.

88. *Id.*

Compared to the number of attorneys' fees awarded under the Federal Circuit standard, the percentage of § 285 motions granted has substantially changed.⁸⁹ In 2011, approximately twenty awards were granted out of eighty-six cases, while in 2002, approximately ten awards were granted out of fifty cases.⁹⁰ After *Octane Fitness*, the proportion of fee awards granted under § 285 has more than doubled. Furthermore, the Federal Circuit has remanded four cases in which the court originally denied a § 285 motion to be reheard under the new standard established by *Octane Fitness*.

89. *Cf. id.* (Compare twenty awards granted out of eighty-six cases in 2011 and ten awards granted out of fifty cases in 2002 with twenty-six awards granted out of fifty-nine cases post-*Octane Fitness*.)

90. *Id.*

Figure 1 – § 285 Motions Granted/Denied by District

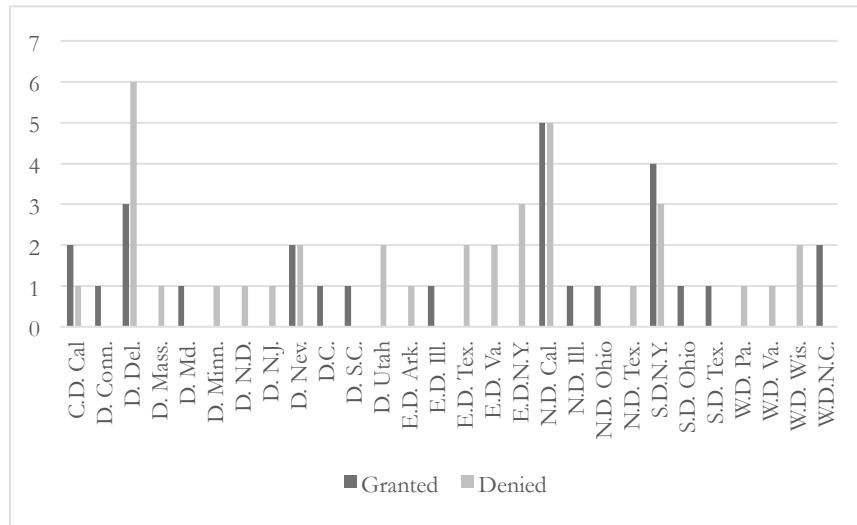


Figure 1 above compares the number of § 285 motions granted or denied by district. An initial analysis shows that there are certain districts with a higher proportion of cases in which attorneys' fees were granted than cases where they were not. Although there is not enough data at the moment to make any conclusive determinations, Figure 1 shows that the Northern District of California and the Southern District of New York have ratios of fees granted similar to the overall proportion of fees granted post-*Octane Fitness*.

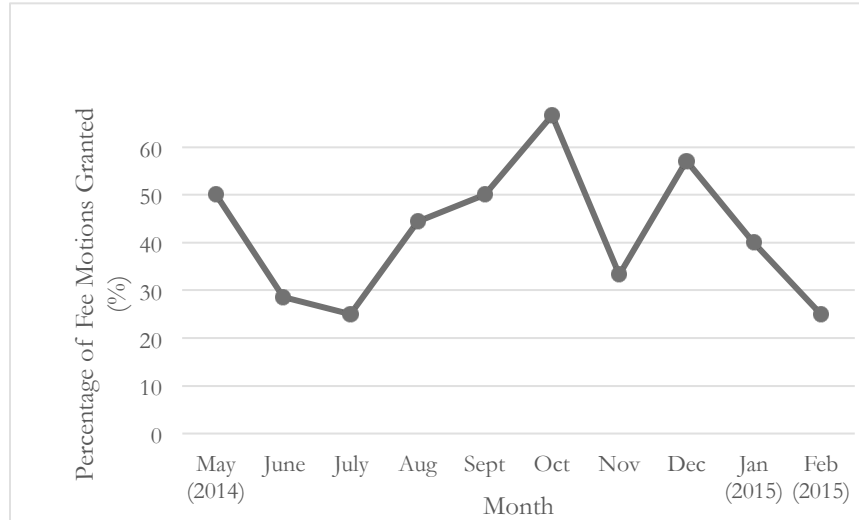
Figure 2 – Proportion of § 285 Motions Granted Over Time Post-*Octane Fitness*

Figure 2 examines the percentage of § 285 motions granted over time after *Octane Fitness*. Each month, the percentage of § 285 motions granted has stayed above the twenty percent yearly average in 2002 and 2011, as calculated in the discussion of Table 1. However, there is still not enough data to make any statistically significant determinations. The proportion of § 285 motions brought each month may be affected by other variables: a district judge's availability, the load of a district court's docket, and the status of the litigation.

Figure 3 – Histogram of § 285 Fees Awarded



Finally, Figure 3 shows the distribution of attorneys' fees with respect to the total amount awarded for post-*Octane Fitness* cases where fees have been granted. Most of the cases in which § 285 motions have been granted have not yet determined the amount of attorneys' fees to be awarded to the prevailing party. As of March 1, 2015, courts have determined the actual fee award in only twelve cases. Although there have been a few outlier cases resulting in judgments awarding over one million dollars, the majority of § 285 awards thus far have ranged from \$200,000 to \$300,000.

Figure 4 – Apportionment of § 285 Attorneys' Fees

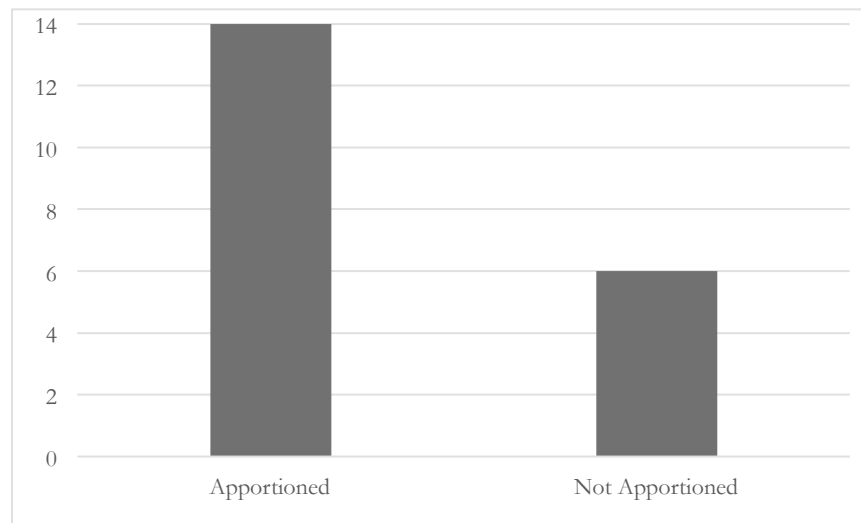


Figure 4 shows the number of cases where the court specifically limited attorneys' fees awards to remedy litigation misconduct ("apportioned") and the number of cases where the court granted attorneys' fees for the entire case without any apportionment specifically to the "exceptional" behavior. A fee award was considered "apportioned" or "not apportioned" if a court stated in its holding whether or not the fee award would be for the entire case or for the specific time period when the exceptional conduct occurred, even if the actual amount awarded was not determined. There are a limited number of cases in which the district courts have determined the extent to which attorneys' fees will be awarded after granting a § 285 motion. Therefore, no conclusive inferences can be made about Figure 4.

Table 2 below summarizes the cases in which an NPE was involved and whether a court awarded attorneys' fees under § 285.⁹¹ Although courts have specifically discussed how a party's status as an NPE can influence an "exceptional" case finding,⁹² it does not appear to be an automatic determination of an "exceptional" case.

Table 2 – Fee-Shifting Against NPE Parties

Case	Date	Court	Fees Awarded?	Type of NPE
EON Corp. IP Holdings, LLC v. FLO TV Inc. ⁹³	27-May-14	D. Del.	No	EON - Patent holding co.
EON Corp. IP Holdings, LLC v. Cisco Sys. Inc. ⁹⁴	25-Jul-14	N.D. Cal.	No	EON - Patent holding co.
Gametek LLC v. Zynga, Inc. ⁹⁵	2-Sep-14	N.D. Cal.	No	Gametek - Large aggregator

91. Whether or not a party was considered a patent-assertion entity or "NPE" was determined by comparing each party to a dataset compiled by Christopher A. Cotropia et al., 2010 Patent Holder and Litigation Dataset, *available at* <http://npedata.com> (last updated May 28, 2014). The dataset consists of all patent litigation cases during 2010 and 2011. *Id.* Using the definitions given in the Cotropia paper *Unpacking Patent Assertion Entities (PAEs)*, a party was considered a PAE or NPE if it was categorized as a patent holding company or a large aggregator. *See* Christopher A. Cotropia et al., *Unpacking Patent Assertion Entities (PAEs)*, 99 MINN. L. REV. 649 (2014).

92. *See* discussion *infra* Section IV.B.

93. EON Corp. IP Holdings, LLC v. FLO TV Inc., No. 10-812-RGA, 2014 U.S. Dist. LEXIS 71753 (D. Del. May 27, 2014).

94. EON Corp. IP Holdings, LLC v. Cisco Sys. Inc., No. 12-cv-01011-JST, 2014 U.S. Dist. LEXIS 101923 (N.D. Cal. July 25, 2014).

Case	Date	Court	Fees Awarded?	Type of NPE
Stragent LLC v. Intel Corp. ⁹⁶	6-Aug-14	E.D. Tex.	No	Stragent - Patent holding co.
H-W Tech., L.C. v. Overstock.com, Inc. ⁹⁷	15-Aug-14	N.D. Tex.	No	H-W Tech. - Patent holding co.
Intellect Wireless, Inc. v. Sharp Corp. ⁹⁸	30-May-14	N.D. Ill.	Yes	Intellect Wireless - Patent holding co.
Inventio AG v. Thyssenkrupp Elevator Corp. ⁹⁹	6-Nov-14	D. Del.	No	Inventio AG - Patent holding co.
Lumen View Tech, LLC v. Findthebest.com, Inc. ¹⁰⁰	23-Oct-14	S.D.N.Y.	Yes	Lumen View - Patent holding co.
Parallel Iron LLC v. NetApp Inc. ¹⁰¹	12-Sep-14	D. Del.	No	Parallel Iron LLC - Patent holding co.
Pragmatus Telecom LLC v. Newegg Inc. ¹⁰²	25-Jul-14	D. Del.	No	Pragmatus Telecom LLC - Patent holding co.
Site Update Solutions, LLC v. Accor North America, Inc. ¹⁰³	11-Feb-15	N.D. Cal.	No	Site Update Solutions - Large aggregator

95. Gametek LLC v. Zynga, Inc., No. CV 13-2546, 2014 U.S. Dist. LEXIS 122834 (N.D. Cal. Sept. 2, 2014).

96. Stragent LLC v. Intel Corp., No. 6:11-cv-421, 2014 U.S. Dist. LEXIS 169080 (E.D. Tex. Aug. 6, 2014).

97. H-W Tech., L.C. v. Overstock.com, Inc., No. 3:12-CV-636-G, 2014 U.S. Dist. LEXIS 122667 (N.D. Tex. Aug. 15, 2014).

98. Intellect Wireless, Inc. v. Sharp Corp., No. 10 C 6763, 2014 U.S. Dist. LEXIS 73653 (N.D. Ill. May 30, 2014).

99. Inventio AG v. Thyssenkrupp Elevator Corp., No. 08-00874-RGA, 2014 U.S. Dist. LEXIS 157448 (D. Del. Nov. 6, 2014).

100. Lumen View Tech, LLC v. Findthebest.com, Inc., No. 13cv3599, 2014 U.S. Dist. LEXIS 150444 (S.D.N.Y. Oct. 23, 2014).

101. Parallel Iron LLC v. NetApp Inc., No. 12-769-RGA, 2014 U.S. Dist. LEXIS 127850 (D. Del. Sept. 12, 2014).

102. Pragmatus Telecom LLC v. Newegg Inc., No. 12-1533-RGA, 2014 WL 3724138 (D. Del. July 25, 2014).

103. Site Update Solutions, LLC v. Accor N. Am., Inc., No. 5:11-cv-3306-PSG, 2015 U.S. Dist LEXIS 17603 (N.D. Cal. Feb. 11, 2015).

The data presented above is only an early glimpse of the results and trends in the post-*Octane* landscape. Although there is not enough information to draw any conclusive determinations, courts overall appear to be more willing to grant § 285 motions after *Octane Fitness*. The variability in award amounts, apportionment, and district determinations is potentially a result of the discretion afforded to district courts in an “exceptional” case determination. It is helpful to examine how district courts have responded to *Octane Fitness* and possible ramifications of these variable results.

B. WHAT IS AN “EXCEPTIONAL” CASE?

Although the Supreme Court in *Octane Fitness* stated that the Federal Circuit’s standard was too stringent and inflexible, the Court did not define the standard for an “exceptional” case.¹⁰⁴ As a result, district courts now know that an “exceptional” case is not limited to circumstances where there has been “material inappropriate conduct,” or where the litigation is both “brought in subjective bad faith” and is “objectively baseless.”¹⁰⁵ Courts have found widely varying cases fit the “totality of the circumstances” for determining whether a case is exceptional.¹⁰⁶

This Section will first discuss the wide range of interpretations of exceptionality. Additionally, the possibility of certain factors increasing the likelihood of an “exceptional” case finding is considered, and apportionment of attorney’s fees in the event of an “exceptional” case determination is discussed.

1. *Wide Range of Interpretations of “Exceptional”*

Following the Supreme Court’s ruling, several district courts have reconsidered rejections of fee-shifting motions made previously under the Federal Circuit’s higher standard. For example, in *Medtrica Solutions Ltd. v. Cygnus Medical, LLC*, the court found that “under the discretionary, flexible framework endorsed by the Supreme Court,” the case was exceptional within the context of § 285.¹⁰⁷ Although there was no evidence of bad faith or litigation misconduct, the case was nonetheless uncommon

104. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755 (2014).

105. *Brooks Furniture Mfg., Inc. v. Dutailier Int’l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005).

106. *Octane Fitness*, 134 S. Ct. at 1756.

107. Order Granting Motion for Reconsideration, No. 2-12-cv-00538-RSL, at *3 (W.D. Wash. July 11, 2014).

because of an “absence of evidence supporting [the Defendant]’s theories of infringement at summary judgment.”¹⁰⁸

Similarly, in *Cognex Corp. v. Microscan Systems*, the court partially granted the plaintiffs’ motion for attorneys’ fees because the defenses offered at trial were “particularly weak and lacked support in the evidence presented to the jury and to the Court.”¹⁰⁹ The defendants made post-trial motions that sought to relitigate issues already decided during trial.¹¹⁰ Furthermore, the defendants engaged in “unreasonable litigation tactics” that wasted the court’s time and increased the plaintiff’s costs.¹¹¹ The court specifically noted that *Octane Fitness* “emphasized that district courts should determine whether a case is exceptional ‘in the case-by-case exercise of their discretion, considering the totality of the circumstances.’”¹¹²

By contrast, the court in *GameTek LLC v. Zynga, Inc.* denied a motion for attorneys’ fees under § 285.¹¹³ In this case, the complainant’s patent was found to be invalid under § 101¹¹⁴ on a judgment on the pleadings, after the district court noted in support of the Federal Circuit’s holding that “it will be rare that a patent infringement suit can be dismissed at the pleading state for lack of patentable subject matter.”¹¹⁵ The defendants argued that the “rare” case in which invalidity was determined on the pleadings ipso facto constituted an “exceptional case.”¹¹⁶ On the § 285 motion, the court found that the substantive arguments did not descend “to the level of frivolous argument or objective unreasonableness.”¹¹⁷ The district court in this case stated that nowhere in *Octane Fitness* did the Supreme Court suggest a shift to the English Rule, and that although the complainant’s conduct suggested an “aggressive litigation strategy,” it fell short of conduct found to justify fee-shifting even post-*Octane Fitness*.¹¹⁸

108. *Id.* at *3–4.

109. *Cognex Corp. v. Microscan Sys.*, No. 13-CV-2027, 2014 U.S. Dist. LEXIS 91203, at *10 (S.D.N.Y. June 30, 2014).

110. *Id.* at *11.

111. *Id.*

112. *Id.* at *10 (quoting *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014)).

113. *Gametek LLC v. Zynga, Inc.*, No. CV 13-2546 RS, 2014 U.S. Dist. LEXIS 122834, at *17 (N.D. Cal. Sep. 2, 2014).

114. 35 U.S.C. § 101 (2012).

115. *Gametek*, 2014 U.S. Dist. LEXIS 122834, at *17 (quoting *Ultramercial, Inc. v. Hulu, LLC*, 722 F.3d 1335, 1338 (Fed. Cir. 2013)).

116. *Id.* at *10.

117. *Id.* at *12.

118. *Id.* at *10–13.

Furthermore, district courts have ruled that a case is not “exceptional” even in circumstances where the court held that a party asserted some frivolous arguments and motions during litigation.¹¹⁹ For example, in *TransPerfect Global, Inc. v. Motionpoint Corp.*, the district court acknowledged that defendant MotionPoint “asserted some frivolous arguments and filed some frivolous motions” during the litigation.¹²⁰ Nevertheless, the court exercised its discretion and denied the § 285 motion.¹²¹ The district court noted that MotionPoint’s alleged discovery abuses did not appear to have been committed in bad faith and “its alleged mis-statements of fact and disclosures of confidential information were relatively minor.”¹²²

The wide variation in exceptionality determinations makes the legal process more unpredictable and may weaken the ability of § 285 to deter certain abusive practices. For example, an NPE may not be discouraged from bringing frivolous arguments if it knows that there is a greater possibility that certain district courts or judges will not rule that a case is “exceptional.” However, the advantages of giving courts greater flexibility and discretion may outweigh the disadvantage of unpredictable outcomes because district courts can award fees on a case-by-case basis, without being limited to a set of standards that may not fit all situations.

In light of this wide variation in interpreting *Octane Fitness*, it would be reasonable to see if an appeal at the Federal Circuit clarifies the “exceptional” standard. Unfortunately, the Federal Circuit’s ability to review a determination of “exceptionality” is limited by the *Highmark* decision. In *Highmark*, the Supreme Court stated that a § 285 decision was a “matter of discretion” and that the exceptional-case determination should be reviewed only for abuse of discretion.¹²³ This decision severely limits the Federal Circuit’s power to review appeals of § 285 fee awards. The Federal Circuit cannot elucidate the “exceptional” standard because *Highmark* makes it clear that the appellate court should only review § 285 district court determinations for an abuse of discretion.

119. *TransPerfect Global, Inc. v. Motionpoint Corp.*, No. C 10-2590 CW, 2014 U.S. Dist. LEXIS 159805, at *25 (N.D. Cal. Nov. 13, 2014).

120. *Id.*

121. *Id.*

122. *Id.* at *24.

123. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) (citing *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 134 S. Ct. 1744, 1747 (2014)).

2. *Do Certain Outcomes Associated with the Case Increase the Likelihood of an “Exceptional” Case Finding Under § 285?*

Octane Fitness has led to multiple questions on what factors may lead a court to find that a case is exceptional. As the post-*Octane Fitness* caselaw develops, it is becoming increasingly apparent that there is still significant uncertainty about whether particular motions must be made before a case is considered exceptional, or if there are certain cases that automatically qualify for attorneys’ fees under § 285.

a) Motion for Summary Judgment

For example, in *Stragent LLC v. Intel Corp.*, Federal Circuit Judge Timothy B. Dyk, sitting by designation in Texas federal court, declined to award attorneys’ fees to Intel Corp. after a jury found the patent asserted by Stragent invalid and did not infringe.¹²⁴ Dyk stated that Stragent’s argument was “certainly a weak one,” but added that Intel could have pursued summary judgment to reduce litigation efforts and costs.¹²⁵ This leads to an inevitable question about where it is necessary to use a motion for summary judgment in order to build a case for exceptionality.

However, other cases have indicated that certain factors such as a defendant’s summary judgment win may not be sufficient alone to render a case exceptional.¹²⁶ For example, in *Gevo, Inc. v. Butamax Advanced Biofuels LLC*, the district court did not award attorneys’ fees to the plaintiffs even though the court granted the plaintiffs’ motion for summary judgment of non-infringement of the patents at issue and even found certain claims of one of the patents invalid.¹²⁷ The district court stated that the defendant’s conduct in the case was not unreasonable and there was no evidence of subjective bad faith.¹²⁸ Although the defendant did not prevail on summary judgment, the district court stated that the defendant’s claims were not “exceptionally meritless.”¹²⁹

While summary judgment may be an indication of how a defendant views the strength of a plaintiff’s allegations, a party should not be required to pursue summary judgment in order to qualify for attorneys’

124. *Stragent LLC v. Intel Corp.*, No. 11-421, 2014 U.S. Dist. LEXIS 169080, at *16 (E.D. Tex. Aug. 6, 2014).

125. *Id.*

126. *CreAgri Inc. v. Pinnaclife Inc.*, No. 11-cv-06635-LHK-PSG, 2014 WL 2508386 (N.D. Cal. June 3, 2014).

127. *Gevo, Inc. v. Butamax Advanced Biofuels LLC*, No. 13-576-SLR, 2014 WL 4247735, at *1 (D. Del. Aug. 26, 2014).

128. *Id.* at *2.

129. *Id.*

fees under § 285. Additional factors irrelevant to the § 285 analysis influence a litigator's decision to file a motion for summary judgment. For example, parties may feel more or less inclined to make summary judgment motions depending on the likelihood of the motion being granted. Studies have shown that the proportion of summary judgment motions granted vary from district to district, and a party may choose not to waste time and resources on a motion that will most likely fail.¹³⁰ Additionally, "exceptional" case determinations are issued at the court's discretion, and a local Eastern District of Texas judge may not look at the same factors when considering a § 285 award as a visiting Federal Circuit judge.

b) Factors Previously Considered Sufficient for an "Exceptional" Case Ruling under the *Brooks Furniture* Standard

Based on the district court to-date rulings post-*Octane Fitness*, any factors that were considered sufficient for an "exceptional" case finding under the Federal Circuit's standard are still sufficient under the new standard established in *Octane Fitness*. For example, district courts have held that a case is "exceptional" if the losing party willfully infringed the patent or if there was inequitable conduct during prosecution of the patent, both of which were considered "material inappropriate conduct" under the Federal Circuit standard in *Brooks Furniture*.¹³¹

i) Willfulness

In *Keystone Global LLC v. Auto Essentials Inc.*, the district court found that one of the defendants, Décor Essentials, willfully infringed the patents-in-suit after they continued to distribute the infringing product despite being notified of its infringing conduct on two separate occasions.¹³² The district court awarded Keystone Global's motion for attorneys' fees under § 285 because "an express finding of willful infringement is a sufficient basis for classifying a case as 'exceptional,' and

130. See generally Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. OF EMPIRICAL LEGAL STUD. 861 (2007), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1740-1461.2007.00109.x/full>; see generally Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. OF EMPIRICAL LEGAL STUD. 591 (2004), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1740-1461.2004.00016.x/full>.

131. *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005).

132. *Keystone Global LLC v. Auto Essentials Inc.*, No. 12 Civ. 9077, 2014 U.S. Dist. LEXIS 141044, at *11-12 (S.D.N.Y. Oct. 1, 2014).

indeed, when a trial court denies attorney fees in spite of a finding of willful infringement, the court must explain why the case is not ‘exceptional’ within the meaning of the statute.”¹³³

On the other hand, in *IPVX Patent Holdings v. Taridium, LLC*, the district court declined to award attorneys’ fees to the plaintiff, specifically noting that there were no allegations of willful infringement though the defendant was liable because of a default judgment.¹³⁴ Although the district court cited *Octane Fitness* and the “totality of the circumstances” holding, the court also referenced another district court in the Second Circuit that considered the jury’s willful infringement finding in its decision to award attorneys’ fees when applying the *Octane Fitness* standard.¹³⁵ The district court then stated that the plaintiff did not extend any argument as to why the case should be designated “exceptional.”¹³⁶ However, willfulness is just one of the factors considered to be “material inappropriate conduct” under *Brooks Furniture* that has also been factored into district courts’ “exceptional” case determinations post-*Octane Fitness*.

ii) Inequitable Conduct

For cases involving § 285 motions since *Octane Fitness*, inequitable conduct appears to be another factor in the “totality of the circumstances” considered by courts in an “exceptional” case determination. For example, in *Intellect Wireless, Inc. v. Sharp Corp.*, the district court agreed with defendants Sharp Corp. that the plaintiff’s inequitable conduct before the PTO made the case exceptional under § 285.¹³⁷ The court clarified that although inequitable conduct may serve as grounds for finding a case exceptional, it was not a *per se* rule of exceptionality.¹³⁸ However, the court stated that there were circumstances in which a patentee’s inequitable conduct was sufficient to support a finding of an exceptional case.¹³⁹

133. *Id.* (quoting *BIC Corp. v. First Prominence Co.*, No. 00 Civ. 7155, 2001 U.S. Dist. LEXIS 20734, at *4 (S.D.N.Y. Dec. 10, 2001)); *see also* *Rubbermaid Commercial Prods., LLC v. Trust Commercial Prods.*, 2014 U.S. Dist. LEXIS 142745, at *15 (D. Nev. Aug. 22, 2014) (finding that the plaintiff was eligible for attorneys’ fees under § 285 after a default judgment found that the infringement was willful).

134. *IPVX Patent Holdings, Inc. v. Taridium, LLC*, No. 12-CV-5251, 2014 U.S. Dist. LEXIS 127550, at *14 (E.D.N.Y. Aug. 6, 2014).

135. *Id.* (citing *Cognex Corp. v. Microscan Sys., Inc.*, No. 13-CV-2027, 2014 U.S. Dist. LEXIS 91203 (S.D.N.Y. June 30, 2014)).

136. *Id.*

137. *Intellect Wireless, Inc. v. Sharp Corp.*, No. 10 C 6763, 2014 U.S. Dist. LEXIS 73653, at *24 (N.D. Ill. May 30, 2014).

138. *Id.* at *25.

139. *Id.* at *26.

Similarly, in *Ohio Willow Wood Co. v. ALPS South, LLC*, the district court held that the defendant was entitled to attorneys' fees because the plaintiff obtained or preserved several unwarranted patents by engaging in inequitable conduct, and the defendant prevailed on the defendant's infringement cross-claims.¹⁴⁰

While it is reasonable to assume that certain factors sufficient for an "exceptional" case finding under the Federal Circuit's "overly rigid" standard would also be sufficient under the new standard established by *Octane Fitness*, courts should be cautious about inadvertently returning to the Federal Circuit's standard. In fact, some courts appear to be sticking to the Federal Circuit's stricter standard despite the *Octane Fitness* holding. In *Technology Advancement Group, Inc. v. IvySkin, LLC*, the Eastern District of Virginia failed to cite *Octane Fitness* at all, and held that "only a limited universe of circumstances warrant a finding of exceptionality in a patent case: inequitable conduct before the PTO; litigation misconduct; vexatious, unjustified, and otherwise bad faith litigation; a frivolous suit[;] or willful infringement."¹⁴¹ The above examples listed by the court are the same as the independently sanctionable conduct described in the Federal Circuit's holding in *Brooks Furniture*.¹⁴² However, the Supreme Court explicitly stated that independently sanctionable conduct was not an appropriate benchmark for fee awards, and that a party's unreasonable conduct need only be "exceptional" to justify an award of attorneys' fees even where that conduct may not have been independently sanctionable.¹⁴³

c) Party

Finally, recent cases have suggested that courts consider the party's litigating behavior, as well as the size of the party, when making a § 285 determination. Notably, courts have considered whether the losing party has a history of "NPE" behavior, the experience of the litigants, and the litigation misconduct of the party.

140. *Ohio Willow Wood Co. v. ALPS South, LLC*, No. 2:04-cv-1223, 2014 U.S. Dist. LEXIS 137485, at *125 (E.D. Ohio Sept. 24, 2014). *Cf.* *Inventio AG v. Thyssenkrupp Elevator Corp.*, No. 08-00874-RGA, 2014 U.S. Dist. LEXIS 157448, at *40 (D. Del. Nov. 6, 2014) (holding that the case was not exceptional because the defendant's only basis for an exceptional finding was inequitable conduct, and the court found no inequitable conduct in this case).

141. *Tech. Advancement Grp., Inc. v. IvySkin, LLC*, No. 2:13cv89, 2014 U.S. Dist. LEXIS 96257, at *16-17 (E.D. Va. July 14, 2014) (quoting *Wedgetail Ltd. v. Huddleston Deluxe, Inc.*, 576 F.3d 1302, 1304-05 (Fed. Cir. 2009)).

142. *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.*, 393 F.3d 1378, 1381 (Fed. Cir. 2005).

143. *See* discussion Section IV.A *supra*.

i) An NPE or Patent-Assertion Entity Case

Although Table 2 in Section IV.A does not show a positive correlation between NPE status and § 285 awards, district courts have directly addressed how a party's status as an NPE or "patent troll" may influence a court's "exceptional" case determination.¹⁴⁴ Certain district courts have noted that "[t]he need for the deterrent impact of a fee award is greater where there is evidence that the plaintiff is a 'patent troll' or has engaged in extortive litigation."¹⁴⁵ If the plaintiff's conduct was "part of a predatory strategy aimed at reaping financial advantage from the inability or unwillingness of defendants to engage in litigation against even frivolous patent lawsuits," a judge may be more likely to award attorneys' fees under § 285.¹⁴⁶ In *LendingTree, LLC v. Zillow, Inc.*, the district court stated that the case was "readily distinguishable from those cases involving non-practicing entities whose sole business model is to acquire patents and litigate rights associated with the patents, usually in an attempt to obtain a settlement or license with the allegedly infringing company."¹⁴⁷

ii) Litigation Experience of the Non-Motioning Party

Courts also look at the litigation experience of the losing party in a § 285 motion. If a party is an experienced litigant but fails to conduct an "adequate pre-filing investigation," a court may factor this into an "exceptional" case determination.¹⁴⁸ Furthermore, if the opposing parties are direct competitors, courts may find that the litigation experience is a "legitimate fight" over the breadth of the patents and not an "exceptional" case.¹⁴⁹

iii) Litigation Misconduct

Finally, courts consider whether the losing party engaged in litigation misconduct during the case. If a party's "entire litigation strategy" is devoted to "stringing out the case," a court may rule that the case is

144. *Small v. Implant Direct Mfg., LLC*, No. 06 Civ. 683 (NRB), 2014 U.S. Dist. LEXIS 154468, at *9–10 (S.D.N.Y. Oct. 22, 2014).

145. *Id.*; see also *Lumen View Tech., LLC v. Findthebest.com, Inc.*, 24 F. Supp. 3d 329, 336 (S.D.N.Y. 2014).

146. *Lumen View Tech.*, 24 F. Supp. 3d at 336.

147. *LendingTree, LLC v. Zillow, Inc.*, No. 3:10-cv-00439-FDW-DCK, 2014 U.S. Dist. LEXIS 146336, at *36–37 (W.D.N.C. Oct. 9, 2014).

148. *Yufa v. TSI Inc.*, No. 09-cv-01315-KAW, 2014 U.S. Dist. LEXIS 113148, at *7–8 (N.D. Cal. Aug. 14, 2014).

149. *LendingTree*, 2014 U.S. Dist. LEXIS 146336, at *36–37.

“exceptional.”¹⁵⁰ If a plaintiff knows or should have known that its claims are meritless, then “continuing to hold these groundless claims over [d]efendants’ heads to increase potential settlement amounts” can warrant an award of attorneys’ fees.¹⁵¹ Furthermore, attorneys’ fees may be granted not only for the litigation misconduct itself but also as deterrence for such “reckless and wasteful litigation in the future.”¹⁵²

It is apparent that there are a myriad of factors that district courts appear to consider when making an “exceptional” case determination. These factors include, but are not limited to, whether a motion for summary judgment was made before the § 285 motion, if the case would be considered “exceptional” under the overturned Federal Circuit standard, and the litigating behavior and experience of the parties involved. Additionally, there is no dispositive factor that clarifies the ambiguous “exceptional” standard under *Octane Fitness*. Unsurprisingly, courts have varied not only in their “exceptional” case determinations, but also in the amount of their § 285 attorneys’ fees awards.

3. Fee Apportionment

In the number of cases in which attorneys’ fees have actually been determined,¹⁵³ courts have varied on how much of the award is apportioned specifically towards the misconduct or abusive behavior itself. Although there is not enough data at the moment to make any conclusive determinations on fee apportionment, some courts appear to be much more flexible on how much of the attorneys’ fee award has to be limited specifically to the litigation misconduct or behavior. In *Homeland Housewares, LLC v. Sorensen Research & Development Trust*, the Federal Circuit held that a district court was not required to limit the award to the costs that the prevailing party incurred in responding to specific acts of litigation misconduct because it was the “totality of the circumstances,” and not just discrete acts of litigation conduct, that justify the court’s

150. *Chalumeau Power Sys. LLC v. Alcatel-Lucent Holding Inc.*, No. 11-1175-RGA, 2014 WL 4675002, at *3 (D. Del. Sept. 12, 2014).

151. *Linex Techs., Inc. v. Hewlett-Packard Co.*, No. C 13-159 CW, 2014 U.S. Dist. LEXIS 129717, at *18 (N.D. Cal. Sept. 15, 2014).

152. *Summit Data Sys., LLC v. EMC Corp.*, No. 10-749-GMS, 2014 U.S. Dist. LEXIS 138248, at *14 (D. Del. Sept. 25, 2014).

153. See Figure 3, *supra* Section IV.A (several of the cases in which attorneys’ fees have been granted have not yet determined the exact amount of attorneys’ fees awarded to the prevailing party).

award of fees.”¹⁵⁴ The Southern District of New York held that the attorneys’ fees and non-taxable expenses that a prevailing party could collect were limited to the fees and expenses that were “causally-related to the misconduct or frivolous arguments” leading to the “exceptional” case determination.¹⁵⁵

C. RAMIFICATIONS

As is evident from the wide range of district court approaches to fee award determinations, the consequences of *Octane Fitness* are still developing.¹⁵⁶ However, based on the data to date, *Octane Fitness* could significantly affect litigation behavior and patent reform. This Section first considers how the variability in the § 285 granted awards will affect forum shopping and will increase the importance of declaratory motions and the forum in which they are brought. It then discusses how NPEs may change their litigation tactics in light of *Octane Fitness*. It concludes by assessing the potential effects of the *Octane Fitness* decision on patent reform legislation.

1. *Forum Shopping*

Studies have shown that “patent cases are not dispersed evenly throughout the ninety-four judicial districts, nor dispersed according to the relative size of the court’s civil docket generally, but rather consolidated in a few selecting particular forums.”¹⁵⁷ The lack of uniformity suggests that patent holders are actively selecting particular forums to bring claims.¹⁵⁸ Unfortunately, forum shopping may reflect inequity in the legal system, and can be an inefficient use of legal resources.¹⁵⁹ Commentators argue that forum shopping overburdens

154. *Homeland Housewares, LLC v. Sorensen Research & Dev. Trust*, No. 2013-1537, 2014 U.S. App. LEXIS 17300, at *9 (Fed. Cir. Sept. 9, 2014) (quoting *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014)).

155. *TNS Media Research, LLC v. TiVo Research & Analytics, Inc.*, No. 11 Civ. 4039, 2014 U.S. App. LEXIS 155914, at *38–39 (S.D.N.Y. Nov. 4, 2014).

156. Sean Murray, *Why Patent Defendants Shouldn’t Litigate Too Aggressively*, LAW360 (Sept. 24, 2014, 9:51 AM), http://www.law360.com/ip/articles/576313?nl_pk=2dbdccc-dc-ef40-4b65-8b1d-5337bb6be39e&utm_source=newsletter&utm_medium=email&utm_campaign=ip.

157. Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 83 J. PAT. & TRADEMARK OFF. SOC’Y 558, 561 (2001); see generally Megan Woodhouse, *Shop ‘til You Drop: Implementing Federal Rules of Patent Litigation Procedure to Wear Out Forum Shopping Patent Plaintiffs*, 99 GEO. L.J. 227 (2010).

158. Moore, *supra* note 157, at 589.

159. *Id.*

preferred courts with a flood of patent cases.¹⁶⁰ However, there is a very strong perception that there is an advantage to filing a declaratory judgment against the patentee, rather than waiting for the patentee to file an infringement suit. In fact, empirical evidence has substantiated the advantage forum selection has for parties.¹⁶¹ In cases in which the defendant was able to choose the forum (as with declaratory judgment actions) rather than the patent holder (as in infringement suits), the defendant was much more likely to win.¹⁶²

Although there is not enough data to make any conclusive inferences about a specific district's § 285 grant rate, the variation among districts in § 285 determinations will likely encourage forum shopping for both accused infringers and patent holders.¹⁶³ For accused infringers, a declaratory judgment case may be stronger if a patent holder's potential claims against the accused infringer would be considered frivolous and "exceptional" under § 285. If certain districts exhibit a stronger propensity to grant § 285 motions, accused infringers would benefit from selecting forums that are more likely to award attorneys' fees when filing a declaratory judgment case. On the other hand, patent holders utilizing aggressive litigation strategies or behaviors that could factor into an "exceptional" case determination may prefer districts that are less likely to grant § 285 motions.

2. *Non-Practicing Entities in Litigation*

Unintentional consequences of *Octane Fitness* such as forum shopping will likely affect how NPEs pursue certain cases. The Supreme Court's decision made it easier for courts to affirm or grant fee awards in light of frivolous claims with cost of defense settlements. *Octane Fitness* may encourage defendants to litigate rather than settle if they thought they had a better chance of recouping their fees. Furthermore, as discussed earlier in this Note, courts do consider the NPE status of a party as well as prior litigation behavior when determining whether or not a case is exceptional.¹⁶⁴

160. Harvard Law Review Association, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1684 (1990).

161. Moore, *supra* note 157, at 585.

162. *Id.* at 586 ("When the patent holder selects the forum, the patent holder wins 58% of the claims. When the accused infringer brings a declaratory judgment action and thereby chooses the forum, the patent holder win rate drops to 44%.").

163. See Figure 1, *supra* Section IV.A.

164. See discussion *supra* Section IV.B.2.

However, this does not mean that parties are automatically entitled to attorneys' fees if they prevail against a non-practicing entity. Courts still look at the substantive strength of a party's litigation position and the manner in which the case was litigated.¹⁶⁵ As a result, there still may be a lot of pressure on accused infringers to settle for well under the cost of litigation if the NPE does not engage in litigation misconduct or assert claims that are extremely weak or baseless. The willingness of NPEs to avoid bringing suit and the willingness of defendants to litigate rather than settle may only change at the margins.

3. *The Octane Fitness Decision May Influence Reform Legislation Proposed by Congress*

The political background of the *Octane Fitness* holding is significant because the decision was issued during a time where the push for patent reform to discourage frivolous patent litigation and curb NPE litigation behavior was high.¹⁶⁶ A common criticism of the patent system is that NPEs do not have to worry about counter-suits for infringement, and therefore, will not settle on reasonable terms.¹⁶⁷ Multiple congressional proposals addressing fee-shifting in patent litigation indicate the growing concern of litigation abuse in an area where the median patent infringement litigation costs increase every year.¹⁶⁸ Congressional subcommittees in both the House of Representatives and the Senate have advocated for patent reform, seeking to relieve the pressure many corporations experience from non-practicing entities and litigation

165. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014).

166. *Goodlatte and Eshoo Call on the Senate to Pass Innovation Act*, *supra* note 41. Goodlatte and Eshoo stated:

At its core, abusive patent litigation is a drag on our economy and stifles innovation . . . The time is now, and the Innovation Act has helped set a clear bipartisan road map toward eliminating the abuses of our patent system, discouraging frivolous patent litigation and keeping U.S. patent laws up to date.

Id.

167. Michael Risch, *Patent Portfolios as Securities*, 63 DUKE L.J. 89, 96 (2013); Daniel Roth, *Patent Litigation Attorneys' Fees: Shifting from Status to Conduct*, 13 CHI.-KENT J. INTELL. PROP. 257, 261 (2013).

168. Bessen & Meurer, *supra* note 25, at 399. The direct costs of NPE patent litigation are "substantial, totaling about \$29 billion accrued cost in 2011." *Id.* at 422. A substantial portion of the stated \$29 billion is a "deadweight loss to society." *Id.* at 400; *see also* Am. Intell. Prop. Law Ass'n, Report of the Economic Survey 34 (2013); H.R. 6245, 112th Cong. (2012); H.R. 3309, 113th Cong. (as referred to the S. Comm. on the Judiciary, Dec. 9, 2013); S. 1013, 113th Cong. (2013).

misconduct.¹⁶⁹ Former Federal Circuit Chief Judge Rader has urged judges to use their authority from § 285 of the Patent Act and Rule 11 of the Federal Rules of Civil Procedure to “make trolls pay for abusive litigation.”¹⁷⁰ Because many non-practicing entities use lawyers to represent them on a contingent-fee basis, a greater risk of fee-shifting in the event of abusive litigation may deter these parties from filing abusive patent-infringement lawsuits with frivolous demands.¹⁷¹ If legislators believe that fee-shifting is a deterrent to these abusive practices, the Supreme Court’s holding in *Octane Fitness* could reduce reform legislation proposed by Congress.

For the time being, Congress appears to have paused its efforts on patent reform legislation.¹⁷² In a press release issued May 21, 2014, Senator Patrick Leahy announced that he was taking the patent bill off the Senate Judiciary Committee agenda until stakeholders were “able to reach a more targeted agreement that focuses on the problem of patent trolls.”¹⁷³ Although the Innovation Act passed the House on December 5, 2013, the momentum for patent reform legislation seems to have halted.¹⁷⁴ However, political expediency in the face of midterm elections may also have had an impact on the decision to pull patent reform from the Judiciary Committee agenda.¹⁷⁵ Critics have argued that the Court may have seen *Octane Fitness* as an opportunity to fix the statute, give district

169. *Promoting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse*, United States Senate Comm. on the Judiciary (Dec. 17, 2013, 10:00 AM), <http://www.judiciary.senate.gov/meetings/protecting-small-businesses-and-promoting-innovation-by-limiting-patent-troll-abuse>; *Trolling for a Solution: Ending Abusive Patent Demand Letters*, United States House of Representatives Energy & Commerce Comm. (Apr. 8, 2014, 10:00 AM), <http://energycommerce.house.gov/hearing/hearing-notice-subcommittee-commerce-manufacturing-and-trade>.

170. Rader et al., *supra* note 26.

171. *Id.*

172. Senator Patrick Leahy, *Comment of Senator Patrick Leahy (D-Vt.), Chairman, Senate Judiciary Committee, On Patent Legislation*, PATRICK LEAHY UNITED STATES SENATOR FOR VERMONT (May 21, 2014) available at http://www.leahy.senate.gov/press/comment-of-senator-patrick-leahy-d-vt_chairman-senate-judiciary-committee-on-patent-legislation.

173. *Id.*

174. Bill Summary & Status 113th Congress (2013–2014) H.R. 3309 – Innovation Act, available at <https://www.congress.gov/bill/113th-congress/house-bill/3309> (last visited Jan. 12, 2015) (The latest action was in December 2013, where the bill was read in the Senate and referred to the Committee on the Judiciary).

175. Erin Mereshon and Tony Romm, *Patent reform hits dead end in Senate*, POLITICO (May 21, 2014), <http://www.politico.com/story/2014/05/patent-reform-senate-106968.html>.

courts more discretion, and alleviate the need for legislation.¹⁷⁶ They argue that Congress may view this decision as a solution to the problem, and that consequently, patent reform in general may not be brought back to the table at least for a few years.

After the midterm elections and the resulting emergence of a Republican Senate in 2014, conversations about patent reform resurfaced, and congressional representatives have championed strong legislative patent reforms that include a presumption of attorney fee-shifting.¹⁷⁷ Commentators are optimistic that legislation to block “patent trolls” will be one of the first issues the Senate takes up this year.¹⁷⁸ At the moment, the Innovation Act as passed by the House will create a presumption of fee-shifting and the ability to join “interested” parties to pay fees when a losing-patentee is undercapitalized. On February 5, 2015, Representative Goodlatte reintroduced the Innovation Act to the House, retaining the requirement to award attorney fees to the prevailing party unless the judge finds reasonable justification or special circumstances that would make the award unjust.¹⁷⁹ *Octane Fitness* is just one of a few positions taken by the Supreme Court that have strengthened defendant positions in patent infringement cases.¹⁸⁰

Because the meaning of “exceptional” is still ambiguous and discretion may lead to forum shopping in districts where fee awards are more or less likely under *Octane Fitness*, the “exceptional” case standard could benefit from further explanation. However, due to the abuse of discretion standard of review imposed by the Supreme Court in *Highmark*, the Federal Circuit may not be able to substantively clarify the meaning of exceptionality. Any steps towards further patent reform would be most effective through legislation—Congress can clarify the fee-shifting

176. *Supreme Court IP Review (SCIPR)*, IIT CHICAGO-KENT COLLEGE OF LAW (Sept. 12, 2014), <http://www.kentlaw.iit.edu/scipr> (describing a panel where David Clough, Dominic Perella, Rudolph Telscher, Constantine Trela, Jr., & Professor David Schwartz discussed when a case is “exceptional” for an award of fees.)

177. Crouch, *What is an Exceptional Case*, *supra* note 175.

178. Julian Hatttem, *Senate primed to act on ‘patent trolls’ in 2015*, THE HILL (Nov. 13, 2014, 04:30 PM) <http://thehill.com/policy/technology/224092-patent-reform-primed-for-early-2015>.

179. Dennis Crouch, *Patent Reform: Innovation Act of 2015*, PATENTLYO (Feb. 5, 2015), <http://patentlyo.com/patent/2015/02/patent-reform-innovation.html>.

180. *See also* Alice Corp. Pty. Ltd. v. CLS Bank Int’l, 134 S. Ct. 2347 (2014) (holding that implementing abstract claims on a computer was not enough to transform an idea to a patentable invention) and *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014) (holding that to be valid, patent claims must provide reasonable certainty regarding the claim scope).

provision and provide a standard of exceptionality. Furthermore, the Supreme Court's interpretation of an "exceptional" case places a strong emphasis on the discretion of the district courts despite the removal of the "discretion" element in the 1952 Act. If Congress wants to elucidate or maintain the Supreme Court's reintroduction of discretion, it should not wait for litigation; Congress can correct or support the decision with further legislative action.

IV. CONCLUSION

The Supreme Court's recent decision in *Octane Fitness* signals a new era in the granting of attorneys' fees in patent litigation. District courts now possess substantially greater discretion in shifting attorneys' fees. Although we are still in the early days of seeing how that discretion will be exercised, the first wave of post-*Octane* cases indicates that there has been a significant increase in the proportion of fees awarded under § 285, that district courts vary in their interpretation of exceptionality as well as award amount determinations, and that the status of a party does not directly correlate with a § 285 award. There are certain factors that may lead to more favorable outcomes in a § 285 motion, but the wide range of interpretations demonstrates that there is still a significant amount of uncertainty remaining in the exceptionality standard.

While affording district courts greater discretion awarding attorneys' fees in patent cases, the Supreme Court's *Octane Fitness* decision should not be viewed as a panacea for addressing serious concerns about abusive patent litigation or a substitute for legislative consideration of other ways to clarify and improve the patent system.