

OCTANE FITNESS: THE SHIFTING OF PATENT ATTORNEYS' FEES MOVES INTO HIGH GEAR

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In 2014, the United States Supreme Court decided Octane Fitness, LLC v. ICON Health & Fitness, LLC, significantly altering the standard for granting attorneys' fees shifting at the close of a patent litigation. Combine with precedent announced on the same day in Highmark Inc. v. Allcare Health Management Systems, scholars have opined that under the new regime, the standard for proving entitlement to attorneys' fees in patent litigations will be considerably relaxed. Despite the widespread acceptance of the viewpoint, few empirical analyses—if any—have objectively confirmed it.

This paper provides a first glimpse into whether the Supreme Court's decision in Octane changed the attorneys' fees standard in practice. By investigating the rate at which courts have granted attorneys' fees motions before and after Octane, broken down by whether the movant was a patentee or accused infringer, the technology of the patent asserted, the circuit and district where the suit was decided, and what factors were considered by each court in its opinion, this research confirms that Octane's reinterpretation of § 285 has had observable effects. In particular, this study finds a statistically significant increase in the rate of attorneys' fee shifting after Octane, particularly for motions filed by accused infringers and in motions concerning electronics and software patents. The results of this study shed light on meaningful and recent changes to the patent litigation incentive structure and will be helpful in predicting future changes to the patent litigation landscape.

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I. INTRODUCTION

The cost of attorneys’ fees in patent litigations can be enormous.¹ Under 35 U.S.C. § 285, however, if a case is exceptional, a party need not bear the expense of its attorneys’ fees.² This fee shifting can be quite advantageous. It gives parties that might otherwise be unable to afford trial the means to litigate or the leverage to settle early.

In 2014, the United States Supreme Court decided *Octane Fitness, LLC v. ICON Health & Fitness, LLC*,³ announcing a watershed change in the standard for awarding attorneys’ fees in patent litigations. The Court rejected the prior existing standard for awarding attorneys’ fees to prevailing parties in patent litigations. Under *Octane*, a district court can award attorneys’ fees in any case deemed “exceptional”; the case need only be “one that stands out from others.”⁴ In addition, the Supreme Court lowered the burden of proof from a “clear and convincing evidence” to a “preponderance of the evidence” standard.⁵ As a result of these changes, many predicted an increase in the frequency and amount of attorneys’ fees granted.

Given the astronomical cost of litigating a patent to trial, the increased potential for attorneys’ fees would change a would-be litigant’s calculus in deciding whether to file or defend a suit. This could have far reaching consequences in patent litigation. For example, if the attorneys’ fee standard is lenient enough, it may become worthwhile to defend a suit against a patent troll

1. The 2013 Report of the Economic Survey, released by the American Intellectual Property Law Association found that the average cost of litigating a patent lawsuit through the end of discovery ranges from \$530,000 to \$3,600,000 depending on the amount in controversy. INTELL. PROP. INS. SERVS. CORP., 2013 AIPLA REPORT OF THE ECONOMIC SURVEY 1 (2013), <http://www.patentinsurance.com/custdocs/2013aipla%20survey.pdf> [perma.cc/D2NH-RAZU]. The cost of litigating through trial ranges from \$970,000 to \$5,900,000. *Id.* See also Saurabh Vishnubhakat, *What Patent Attorney Fee Awards Really Look Like*, 63 DUKE L.J. ONLINE 15, 18 (2014), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1001&context=dlj_online [perma.cc/D8QV-DGN3].

2. 35 U.S.C. § 285 (2015) (“The court in exceptional cases may award reasonable attorney fees to the prevailing party.”).

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

4. *Id.* at 1756.

5. *Id.* at 1758.

where before it was economically rational to settle. Even if the increased lenience of the standard does not make litigating a suit rational, the change in standard increases a defending party's leverage in settlement negotiations.

This research provides a first glimpse into whether *Octane* changed the attorneys' fees standard in practice. By investigating the rate at which courts have granted attorneys' fees motions before and after *Octane*, broken down by whether the movant was a patentee or accused infringer, the technology of the patent asserted, and the circuit and district where the suit was decided, this research exposes whether *Octane's* reinterpretation of § 285 has had observable effects. Additionally, this research investigates the factors considered by courts in making decisions under § 285. This sheds light on whether judges are remaining tethered to the old tests for attorneys' fees or exercising the discretion granted to them by *Octane* by considering new factors. Likewise, this study examines the rate of partial fee shifting to observe whether judges are exercising their discretion by crafting new fee-shifting remedies. Together, this data will provide insight into the way § 285 is currently being applied.

This research compiles one of the first comparative samples of the treatment of attorneys' fees since the decision. The study finds a statistically significant increase in the rate of attorneys' fee shifting after *Octane*, particularly for motions filed by accused infringers and in motions concerning electronics and software patents. This comparative data will illuminate how courts are actually responding to *Octane*. The results of this survey may help to predict how nuisance patent lawsuits will be filed in the future.

II. DOCTRINAL BACKGROUND

A. *Fee Shifting in General*

Fee-shifting provisions are a response to the American litigation scheme, which requires each litigant to pay his or her own attorneys' fees.⁶ The American litigation scheme has the potential to incentivize abusive litigation by plaintiffs "because it forces defendants to either settle quickly or defend claims at a significant cost"—their attorneys' fees.⁷ For example, a patent owner could file "a patent infringement claim seeking to license a patent for royalty payments small enough that" defendants decide it is irrational to go to court.⁸ Even if a plaintiff is unwilling to go to trial, it is still profitable for the plaintiff to file a nuisance claim whenever the plaintiff's cost of filing is less than the defendant's cost of defense, because the defendant will be willing to pay the plaintiff a settlement of any

6. See, e.g., Daniel Roth, *Patent Litigation Attorneys' Fees: Shifting from Status to Conduct*, 13 CHI.-KENT J. INTELL. PROP. 257, 265 (2013).

7. *Id.*

8. *Id.*

amount up to the defendant's would-be defense costs.⁹ Relatedly, under the American Rule, a plaintiff with a low likelihood of prevailing will file a claim more often.¹⁰

By forcing the losing party to pay the attorneys' fees of the prevailing party, a fee-shifting regime incentivizes defending parties to litigate meritorious cases even where the potential cost of litigation would otherwise make it rational for them to settle.¹¹ The advantage of fee shifting is even more pronounced in large litigations, like patent litigations, which are initially more burdensome on defendants.¹² Normally, a defendant is required to produce a large amount of documentation at the beginning of a patent lawsuit.¹³ This is expensive compared to the cost of filing a lawsuit.¹⁴ At the beginning of a lawsuit, before much investigation has occurred, a defendant is unlikely to have a sophisticated understanding of the likelihood of winning the lawsuit. Thus a defendant is balancing the certain cost of producing a large number of documents against the uncertain ultimate cost of the litigation. If, however, the litigation has the potential to compensate them completely for attorneys' fees, the initial cost of document production may be less daunting for defendants.¹⁵

B. *Fee Shifting in Patent Litigation Under 35 U.S.C. § 285*

To deter nuisance patent lawsuits further, Congress has provided for attorneys' fee shifting in patent lawsuits beyond Rule 11.¹⁶ Under 35 U.S.C. § 285, "[t]he court in exceptional cases may award reasonable attorney fees to the

9. David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 3-4 (1985).

10. *Id.* at 5, 9.

11. See Roth, *supra* note 6, at 265.

12. See, e.g., THE INTERNET ASS'N, MEANINGFUL PATENT REFORM MUST STOP THE ABUSE OF DISCOVERY IN PATENT LITIGATION 1 (2014), http://internetassociation.org/wp-content/uploads/2014/04/IA_Discovery-3-1.pdf [<https://perma.cc/32WK-R4XS>].

13. *Id.*

14. *Id.* See also INTELL. PROP. INS. SERVS. CORP., 2013 AIPLA REPORT OF THE ECONOMIC SURVEY 1 (2013), *supra* note 1, <http://www.patentinsurance.com/custdocs/2013aipla%20survey.pdf> [perma.cc/D2NH-RAZU].

15. The possibility that attorneys' fees may be shifted also means that defendants may be subjected to heightened liability. As long as attorneys' fees are only shifted when one party's arguments are particularly weak, however, defendants only need to conduct normal pre-suit due diligence to avoid—for the most part—the possibility of an attorneys' fees award against them.

Nonetheless, even an attorneys' fees provision that is only shifted for weak arguments requires a potential defendant to do a costly pre-suit investigation. If the cost of the pre-suit investigation is greater than the settlement offered by the plaintiff, a rational plaintiff may not bring an otherwise meritorious suit.

16. See Emily H. Chen, *Making Abusers Pay: Detering Patent Litigation by Shifting Attorneys' Fees*, 28 BERKELEY TECH. L.J. 351, 362-63 (2013).

prevailing party.”¹⁷

This provision breaks into four requirements. First, the court must determine whether the moving party is the prevailing party.¹⁸ The Federal Circuit has held that to be a prevailing party, “one must receive at least some relief on the merits, which alters . . . the legal relationship of the parties.”¹⁹ If a party has prevailed, the court next determines whether the case is exceptional within the meaning of 35 U.S.C. § 285. The jurisprudence regarding exceptionality has changed recently when the United States Supreme Court announced its decision in *Octane*.²⁰ The test for exceptionality before and after *Octane* will be discussed below beginning in Subpart 1 *infra* at 335. Even if a case is deemed exceptional, an award of attorneys’ fees to the prevailing party is discretionary.²¹ The trial court may determine that attorneys’ fees need not be awarded.²² Last, the court must ensure that the amount of the attorneys’ fees award is reasonable.²³

On April 29, 2014, the United States Supreme Court issued decisions in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*²⁴ and *Highmark Inc. v. Allcare Health Management Systems, Inc.*²⁵ These two cases represent a sea-change in attorneys’ fees jurisprudence, clarifying what constitutes an “exceptional case” and the appropriate standard that the Federal Circuit is to apply when reviewing a district court’s award of attorneys’ fees under § 285.

17. 35 U.S.C. § 285 (2015).

18. *Pragmatus Telecom LLC v. Newegg Inc.*, No. CV 12-1533-RGA, 2014 WL 3724138, at *1 (D. Del. July 25, 2014), *rev’d*, No. 2014-1777, 2015 WL 4603727 (Fed. Cir. 2015).

19. *Inland Steel Co. v. LTV Steel Co.*, 364 F.3d 1318, 1320 (Fed. Cir. 2004). *See also Vehicle Operation Techs. LLC v. Ford Motor Co.*, No. CV 13-539-RGA, 2015 WL 4036171, at *1 (D. Del. July 1, 2015) (explaining that the Federal Circuit, in *Inland Steel*, “followed the Supreme Court’s definition of a prevailing party as used in other fee-shifting statutes”).

20. *Octane*, 134 S. Ct. 1749.

21. This discretionary inquiry was present before *Octane* and remains present after. *See Brooks Furniture Mfg., Inc. v. Dutailier Int’l, Inc.*, 393 F.3d 1378, 1382 (Fed. Cir. 2005) (“Even for an exceptional case, the decision to award attorney fees and the amount thereof are within the district court’s sound discretion.”) (the discretionary standard pre-*Octane*); *Octane*, 134 S. Ct. at 1755-56 (noting that “district courts’ discretion to award attorney’s fees in patent litigation” is limited only in that it “is reserved for ‘exceptional’ cases”) (the discretionary standard post-*Octane*).

22. *ICON Health & Fitness, Inc. v. Octane Fitness, LLC*, 576 F. App’x 1002, 1005 (Fed. Cir. 2014) (“The Supreme Court’s decision in *Octane* did not, however, revoke the discretion of a district court to deny fee awards even in exceptional cases.”). *See also Gardco Mfg., Inc. v. Herst Lighting Co.*, 820 F.2d 1209, 1215 (Fed. Cir. 1987) (“After the district court determines that a case is exceptional, there remains in every case its freedom to exercise its discretion informed by the court’s familiarity with the matter in the litigation and the interest of justice.” (internal quotations omitted)).

23. *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056 (Fed. Cir. 1983) (“In determining the reasonableness of the award, there must be some evidence to support the reasonableness of, *inter alia*, the billing rate charged and the number of hours expended.”).

24. 134 S. Ct. 1749 (2014).

25. 134 S. Ct. 1744 (2014).

1. *Attorneys' Fees Pre-Octane*

Prior to *Octane*, the Federal Circuit had established a rigid framework for awarding attorneys' fees.²⁶ In *Brooks Furniture Manufacturing, Inc. v. Dutilleul International, Inc.*,²⁷ the Federal Circuit held that a case is "exceptional" under § 285 only "when there has been some material inappropriate conduct related to the matter in litigation, such as willful infringement, fraud, or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates Fed. R. Civ. P. 11, or like infractions."²⁸ The Federal Circuit continued that fees may be imposed against the patentee if both "the litigation is brought in subjective bad faith, and . . . the litigation is objectively baseless."²⁹ Under this standard, litigants had to prove exceptionality by clear and convincing evidence.³⁰

2. *Changes to Exceptionality Post-Octane and Highmark*

In *Octane*, the Supreme Court reversed the Federal Circuit's formulation as unduly rigid and "so demanding that it would appear to render § 285 largely superfluous."³¹ Justice Sotomayor, writing for the Court in *Octane*, held that Section 285 imposes "one and only one constraint on district courts' discretion to award attorneys' fees in patent litigation: The power is reserved for 'exceptional' cases."³² Since the statute did not define exceptional, the court held that the term should be given its ordinary meaning in 1952, when Section 285 was codified, as well as its meaning today.³³ Thus, an exceptional case is "simply one that stands out from others with respect to the substantive strength of a party's litigation position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated."³⁴

The Court further held that the determination of exceptionality is to be made on a case-by-case basis considering the totality of the circumstances.³⁵ In establishing this new standard, the Court squarely rejected the Federal Circuit's *Brooks Furniture* framework as "overly rigid."³⁶ The Court suggested that district courts should look to a "nonexclusive" list of factors that it had proposed for consideration concerning a similar provision of the Copyright Act, including

26. Jennifer H. Wu & Jenny C. Wu, *Giving Teeth to 35 U.S.C. S 285 to Award Attorneys' Fees Against Vexatious Plaintiff Patentees*, FED. LAW., January/February 2015, at 44, 46.

27. 393 F.3d 1378 (Fed. Cir. 2005).

28. *Id.* at 1381.

29. *Id.*

30. *Id.* at 1382.

31. *Octane*, 134 S. Ct. at 1758.

32. *Id.* at 1755-56.

33. *Id.* at 1756.

34. *Id.* at 1756-57.

35. *Id.* at 1756.

36. *Id.*

“frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.”³⁷ Furthermore, the Court held that a case may be exceptional even if the party’s unreasonable conduct is not “independently sanctionable.”³⁸

Despite reaffirming that exceptionality is to be considered as to each case, the Court laid out some circumstances where exceptionality may be found. (1) A district court may award fees where “a party’s unreasonable conduct—while not necessarily independently sanctionable—is nonetheless so ‘exceptional’ as to justify an award of fees.”³⁹ (2) A case “presenting either subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee award.”⁴⁰

The Court also relaxed the standard of proof necessary to prove that attorneys’ fees are warranted. The prior “clear and convincing evidence” standard was lowered to a simple “preponderance of the evidence” standard.⁴¹ Section 285, the Court reasoned, “demands a simple discretionary inquiry; it imposes no specific evidentiary burden, much less a high one.”⁴²

In *Highmark*, the Court further altered the attorneys’ fees calculus. The Court stated that a determination of exceptionality is within the discretion of the district court.⁴³ Consequently, the Court held that the Federal Circuit should apply an “abuse-of-discretion standard,” not a de novo standard of review, “in reviewing all aspects of a district court’s § 285 determination.”⁴⁴ Though questions of law may be relevant to a Section 285 inquiry, the decision is, “at heart, ‘rooted in factual determinations’”⁴⁵

3. *Fee Shifting Practices Might Change with Octane*

Given *Octane’s* loosening of the “exceptionality” standard, it is possible that there will be an increase in the frequency of attorneys’ fees awarded. Indeed, the Supreme Court noted that because of the old standard’s rigid requirements, it was hard to satisfy and largely superfluous in light of the Rule 11 standard.⁴⁶ A § 285 standard which could be applied more often would mean that lawsuits which are not captured by the lenient Rule 11 standard might still be deterred. A less strict standard would widen the range of lawsuits which pass the Rule 11 bar but still

37. *Id.* at 1756 n.6.

38. *Id.* at 1757.

39. *Id.*

40. *Id.*

41. *Id.* at 1758.

42. *Id.*

43. *Highmark*, 134 S. Ct. at 1748.

44. *Id.* at 1749.

45. *Id.*

46. *Octane*, 134 S. Ct. at 1758.

require attorneys' fee shifting under § 285.

The new standard is certainly less strict. Instead of requiring the satisfaction of rigid tests, the new standard requires only that the case be exceptional. Notably the standard of proof required for a shift in attorneys' fees has been reduced from "clear and convincing" to a "preponderance" standard.

Nonetheless, the heightened discretion required by the new standard might also mean that attorneys' fees are granted less often. Trial courts are required to review each case individually, considering the totality of the circumstances. Clear-cut requirements for when attorneys' fees will be awarded are less likely to develop and, as a result of the uncertainty, litigants might not motion for attorneys' fees as often. Even if informal standards develop, they may vary by district, with some districts being more or less inclined to grant fees. In addition, post-*Highmark*, trial courts are insulated in their attorneys' fees awards. Since the Federal Circuit must now review grants of attorneys' fees for abuse of discretion rather than *de novo*, aberrations in fee award determinations are more likely to occur and be unremedied.

Trial courts also might not exercise this new discretion as often as they could. The Federal Circuit in *Octane*, on remand from the Supreme Court, made clear that it believed that, although trial courts were granted additional discretion, they need not use it.⁴⁷ It warned that the "Supreme Court's decision in *Octane* did not . . . revoke the discretion of a district court to deny fee awards even in exceptional cases."⁴⁸

The goal of this paper is to investigate whether the new *Octane* standard has empirically altered the standard for granting attorneys' fees as applied in practice by looking at the frequency of attorneys' fees awards before and after the change in jurisprudence as well as the reasoning employed by courts.

III. EMPIRICAL METHODOLOGY

This research aims to test whether fees are shifted more often under 35 U.S.C. § 285 after the issuance of *Octane*. Ideally, this would be investigated by taking a motion filed before *Octane* and determining whether attorneys' fees would be awarded before the standard was changed, and making the identical determination after the standard was changed. This is, of course, impossible.

47. *Icon Health & Fitness, Inc. v. Octane Fitness, LLC*, 576 F. App'x 1002, 1005 (Fed. Cir. 2014).

48. *Id.*

A. *Investigation of the Change in Standard Based on Comparing Results for Motions Filed of the Same Strength*

1. *Judging Motions of the Same Strength*

This experiment aims to consider motions of the same strength. While it is impossible to assess the objective “strength” of a case, there are some indications of subjective evaluations of strength. For example, all cases filed within the last few years were filed subject to the potential attorneys’ fees shifting penalty. A patent litigant will only take a position if they believe that it would not be deemed exceptional under § 285. Thus, whether a party files a motion is an indication of whether a party believes that their lawsuit meets their understanding of the § 285 standard.

A party’s subjective evaluation of the strength of its motion is a good measure of the strength of that motion. A party has the most information about its case and is therefore in the best position to make an honest evaluation of it. While parties are sometimes apt to overestimate the strength of their case, the potential cost of a patent litigation is likely a good deterrent against irrational decision making. In particular, the potential cost of the other party’s attorneys’ fees in defending a motion is a good deterrent against irrational decision making. In addition, the fact that a party does not have knowledge of their counterparty’s case is irrelevant in determining whether a motion will clear the § 285 bar. Section 285 only punishes parties that bring exceptionally unmeritorious cases. Importantly, parties know this. Thus, all motions filed by a party should, in theory, be deemed by that party to not be either exceptionally unmeritorious or worth the risk.

Accordingly, this experiment assumes that suits filed in the same time period—barring any change to the § 285 standard—are deemed to be at least above a certain strength level.⁴⁹ By capturing suits filed in a particular time period where there was no change in the § 285 standard, we obtain a swath of motions of varying strengths, but all deemed to be at least strong enough to withstand § 285.

This broaches the question of what constitutes a change in standard. The § 285 standard was changed when the Supreme Court announced *Octane*. The important question, however, is not when the standard actually changed, but rather, when did litigants perceive that a change occurred or that their cases would be judged under a different standard. The Supreme Court granting certiorari to *Octane* would have alerted litigants to the potential future change in the § 285 standard and, more importantly, have made them wonder if judges would adjudicate the attorneys’ fees shifting standard differently.

The aim of this study is to compare the attorneys’ fee standard before and after *Octane*. To do this, the group of cases observing the standard before the

49. More precisely, all suits filed during the same time period have some probability of being above a certain strength level.

Supreme Court decision must be collected before the specter of a change in attorneys' fees standard arose. To avoid such a shadow, this study considered only cases that were filed before *Octane* was granted certiorari. From this point forward, the paper will refer to the cases decided before *Octane* was granted certiorari as the cases before *Octane*. Likewise, the cases decided after *Octane* was decided are the cases after *Octane*.

2. *Comparing Cases of the "Same" Litigation Strength*

Thus, a method for finding cases of the "same" litigation strength has been outlined. The remaining piece is to compare how the § 285 standard is applied to cases of the same strength before and after *Octane*. This is relatively easy. Since attorneys' fees are in fact sometimes awarded, some parties must misjudge the strength of their case. It is probably safe to assume that, absent any change in legal standards, attorneys in general are relatively consistent over time in their ability to judge the strength of a case.⁵⁰ Thus, under the same attorneys' fee standard, two samples of cases taken at different times should have the same rate of fees shifted because the rate of misjudgment of case strength should stay constant. By comparing the rate at which fees are shifted during two time periods, one can evaluate a change in the deciding standard, as long as the cases were filed according to the same initial standard.

This study considered only cases filed before certiorari was granted in *Octane*. This ensures that all cases were filed with the assumption that they at least met the pre-*Octane* attorneys' fees standard. The study then selected all of the decisions which decided an attorneys' fees shifting motion under § 285 nine months before certiorari was granted and also after *Octane* was decided. The study compared the number of times that fees were granted to the total number of such decisions for each time period. By comparing this ratio for both time periods the study investigated how cases of the same "strength" were judged under potentially different attorneys' fees standards.⁵¹

50. It is true that some relevant legal standards have changed since before certiorari was granted in *Octane* and after the case was decided. See, e.g., *Alice Corp. Pty. Ltd v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014). Nonetheless, there is at least one reason why cases lost due to a change in the substantive law are unlikely to be deemed "exceptional" for the purposes of § 285. Since many cases are decided on the basis of a changed legal standard, losing as a result of a changed legal standard is not an exception but rather the rule. On the other hand, continuing to pursue litigation after a changed legal position makes a case untenable may make a case exceptional. Thus, any cases that were of adequate strength when filed but then became weak due to changes in substantive law can still be considered because the party chose to continue litigating the case.

51. The number of motions for attorneys' fees filed before and after *Octane* was not used as an indication of the strength of the *Octane* standard because it only examines the perceptions of patent litigants and not the comparative strength of the § 285 standard pre- and post-*Octane*. If more parties are filing for attorneys' fees after *Octane*, that means either the parties think the standard has become less strict or they think the standard has changed and are willing to risk testing whether the standard is less strict. This does not inform whether the standard has

This study includes all cases decided nine months before and after *Octane*. The cases that were found before certiorari was granted are all cases from January 1, 2013 until September 31, 2013. The cases after the decision was made are the cases found from April 29, 2014 to February 1, 2015. Ninety cases cited the statute in the selected time period before certiorari was granted and ninety-one cited the statute in the time period after the decision.

It is important that the time interval from which cases were selected before and after is the same. The goal is to select intervals where there is little to no variation in the governing § 285 standard interpretation. Since not all cases are decided simultaneously, a time range large enough to capture many cases had to be selected. The nine-month interval was selected because this study was started nine months following *Octane*. By selecting the same interval before and after, both ranges are more likely to have the same theoretical variation in interpretation of standard.⁵²

The cases considered in the study are potentially not a complete population of all cases filed in the time periods selected. WestlawNext was employed to find the cases, and all cases citing 35 U.S.C. § 285 during the appropriate time periods were recorded. Nonetheless, there are three ways that this method could have missed some cases. WestlawNext may not contain all decisions concerning § 285 motions, not all cases deciding 35 U.S.C. § 285 motions properly reference the statute in a way that Westlaw recognizes, and not all motions could have been decided with an opinion.

First, data concerning when and/or how Westlaw determined to include any decision is unavailable. It is possible, for example, that Westlaw does not include opinions that are shorter than a certain length, or more recent than some period. Likewise, Westlaw may vary its rate of opinion publication by district, or case

actually changed in strength. By examining the rate at which attorneys' fees are actually shifted, this study investigates the change in strength of the standard.

Moreover, if parties are motioning for attorneys' fees now when before *Octane* they would not have, that means that the proportion of weaker motions for attorneys' fees has increased. If parties believed that the standard had become stricter, no party that was on the margin before (i.e., was unsure whether to motion for attorneys' fees) would file after *Octane*. If, on the other hand, parties believe that the standard has or might have become weaker, a party that was on the margin will now motion for fees. Parties that had strong motions would file regardless of the change created by *Octane*.

Given that weaker motions are potentially submitted, any increase in the rate of fees being shifted would still indicate that the standard allows fee shifting more often than before *Octane*. In fact, given that the results indicate an increase in the rate of granting fee motions, the possibility that the post-*Octane* motions include weaker arguments would mean that the results underestimate how drastic the change in the § 285 standard has been.

52. There is no data on the rate at which legal standards change with respect to time. Traditionally, standards are known to evolve over time which is why the same time period was selected before and after. Since there were no cases that significantly altered the interpretation of § 285 during the before and after time periods, it is unlikely that the standard would change differently during the periods. Thus, by keeping the time period length the same before and after, I account for the possibility of some legal drift.

type. Knowledge of how Westlaw decides to include an opinion would allow for an estimation of the number of § 285 motions that were actually decided by looking to the number of opinions recorded in Westlaw. For example, if § 285 cases are more likely to produce short opinions, then Westlaw would be unlikely to record many of the decisions and the data-gathering approach used in this survey would be under-representative.⁵³

Second, there is no data on how frequently cases mention a statute that has been tagged inappropriately by Westlaw. Nonetheless, the dataset likely represents all opinions in Westlaw that have the statute written in the opinion. This was confirmed by searching, in the relevant time periods, for all district cases with the exact phrase “35 U.S.C. § 285.” The search returned a subset of the cases that were recorded using the previous method. Likewise, searching for “patent” together with “attorneys’ fees” yielded no additional relevant cases.

Third, the research had no data concerning how often judges publish opinions regarding 35 U.S.C. § 285. It is possible that judges often only publish an order which decides several issues before it in either the affirmative or negative and attorneys’ fees awards is regularly one of them.

Despite the abovementioned complications, given the value at stake in attorneys’ fees determinations, it is likely that parties will contest a § 285 motion when such a motion is filed against them. Furthermore, it makes sense that such a motion would be written to appropriately discuss the various legal complexities of the § 285 doctrine. Given that the issue is likely to be complex and valuable, it is probable that parties will contest a § 285 motion in briefing. That being the case, it is likely that judges will issue an opinion discussing its determination. While this is of course not absolute, it does make sense that a large portion of attorneys’ fees awards will be decided in a formal opinion and, subject to the exceptions above, these opinions will be captured by the search performed in this experiment.

By reading each of the cases returned by the search, the researcher was able to determine which cases were deciding § 285 motions. Some cases, for example, mentioned § 285 in discussing other Acts.⁵⁴ Other cases mentioned § 285 in discussing the Patent Acts other provisions for heightened fees.⁵⁵ After eliminating cases which were not important for the dataset—i.e. all cases which were not directly deciding a motion for attorneys’ fees under § 285—the pre-*Octane* dataset contained 39 motions for attorneys’ fees and the post-*Octane* dataset

53. If WestlawNext does prefer longer opinions, it is likely that more results would be found after *Octane* than before because district courts are more likely to author opinions explaining the application of a new standard. This is another motivator to not use the change in the total number of motions for attorneys’ fees before and after *Octane* as a measure of a change in the standard.

54. Some cases discussed the Lanham Act. *See, e.g.,* *Lamborghini v. Johnson*, No. 5:13-CV-1136-TMP, 2014 WL 4388425, at *1 (N.D. Ala. Aug. 29, 2014).

55. *See, e.g.,* *Apple, Inc. v. Samsung Elecs.’ Co.*, No. 12-CV-00630-LHK, 2014 WL 6687122, at *3 (N.D. Cal. Nov. 25, 2014) (discussing the heightened fees imposed by §§ 284-85).

contained 59 motions for attorneys' fees.

B. *Data Collected for Each Case*

Some decisions contained motions by multiple parties for attorneys' fees. Since the purpose of this study is to examine the § 285 standard applied under different circumstances, the results were separated so that there was one entry for each motion for attorneys' fees.

For each motion in the dataset, various data points were recorded. For identification, the case name and citation were collected. The other information that was collected for each motion is listed below. The statistical analysis is based on the factors discussed below.

3. *Decisional Information*

a. *Attorneys' Fees Shifting*

First and foremost, this study reviewed each motion for attorneys' fees and recorded whether fees were shifted. If any of a party's requested fees were shifted, the motion was recorded as successful and fees were considered shifted. That means that partial fee shifting, where a fee award was granted in part and denied in part, was counted the same as fees fully shifted.

Fees were counted this way for two reasons. First, it is not clear that when parties file a § 285 motion, they believe that each claim will succeed. A rational party would never file a motion unless there was some expected benefit. The movant likely expects at least one claim in its motion to succeed.⁵⁶ However, since we cannot be sure of a moving party's evaluation of each part of its motion, it does not make sense to separate motions into parts arbitrarily.

Second, as a practical concern, if each part of the motions which were granted in part and denied in part was counted separately, it would be difficult to appropriately count the motions where attorneys' fees were granted for the entire case. There are various ways that some cases were granted fees only in part. In some cases, attorneys' fees were granted only for portions of the litigation conducted after discovery.⁵⁷ In others, attorneys' fees were only granted for certain claims that were made.⁵⁸ To count these as multiple motions would mean that all other motions had to be divided in the same way. Thus, if attorneys' fees were not granted for an entire litigation, there would be separate non-grants for

56. It is also possible that some parties file fees motions to gain an intimidating reputation. If this is the case, it is another reason not to look to the individual parts of any fee motion.

57. See *Yufa v. TSI Inc.*, No. 09-CV-01315-KAW, 2014 WL 4071902, at *4 (N.D. Cal. Aug. 14, 2014).

58. See *Cognex Corp. v. Microscan Sys., Inc.*, No. 13-CV-2027 JSR, 2014 WL 2989975, at *4 (S.D.N.Y. June 30, 2014).

each “period of the litigation” (however that would be defined), and each claim filed.

To divide all of these cases becomes even more difficult because the opinions do not provide enough information to make all of the appropriate divisions. Most motions for attorneys’ fees neither discuss which claims were made during the litigation, nor which portions of the litigation had occurred.

Moreover, most courts do not consider each part of the case separately in their decisions. The decision to shift attorneys’ fees is made as a whole unless some exceptional factor draws attention to portions of the case. Thus, the method of recording the data reflects this.

The study also did not examine how much money was shifted. This was motivated by two concerns, one theoretical and one practical. Theoretically, the value of the fees shifted does not bear much on whether the standard was met. Practically, not all decisions listed the amount shifted, and, without further docket access, this information was unavailable.

b. *Partial Fee Shifting*

The study also recorded deviations from full fee shifting awards. The study recorded whether there was a partial fee award and for which portion of the case (e.g., certain claims, certain time periods) the fees were shifted. Since *Octane* gives judges additional discretion to make fee awards, it is possible that they will exercise that discretion through new forms of fee awards. By comparing the types of fee shifting before and after *Octane* as well as the frequency of partial fee shifting before and after *Octane* this experiment will investigate whether the increased discretion is exercised in this way.

c. *Variations in Judicial Reasoning*

The main form of judicial discretion that was expected was the consideration of different factors than the previous mandatory *Brooks Furniture* standard. Under *Brooks Furniture*, a movant had to prove that there was either “material inappropriate conduct” in the litigation or prosecution of the patent or that the case was “objectively baseless” and “brought in subjective bad faith.”⁵⁹ Under *Octane*, judges need only find that a case is “simply one that stands out from others with respect to the substantive strength of a party’s litigation position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.”⁶⁰ Given this, the study investigated whether new tests were employed to justify awarding attorneys’ fees.

Each motion for attorneys’ fees was read and examined for which tests were

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

60. *Octane*, 134 S. Ct. at 1756.

discussed in making the fee shifting decision. Whether the judge discussed the *Brooks Furniture* tests or similar tests was recorded. Likewise, we recorded whether an award of fees was justified by one of the old tests or a similar test being satisfied. As a result, this study can examine (a) the frequency with which the *Brooks Furniture* factors were discussed pre- and post-*Octane*, (b) which new factors were being discussed, and (c) the frequency of discussing and relying upon those new factors. This is useful to identify whether judges have adjusted their § 285 decision-making processes.

Finally, some motions were not decided on the basis of the new *Octane* exceptionality standard. For example, where the defendant was not the prevailing party, no consideration of the exceptionality of the case was made.⁶¹ In order to investigate only the change in the § 285 standard, these motions were excluded. As a result, the ratio of fees awarded to fees denied before and after *Octane* only reflects a difference in the exceptionality standard.

4. *Categorical Differences*

a. *Variation by Geographical Location*

It is possible that different judges or courts in different geographical areas interpret or use their discretion under *Octane* in different ways. To investigate, this study recorded the judge who decided each case, the district in which it was decided, and the circuit in which the district sits. By comparing the rate of attorney fee awards among judges, districts, and circuits, before and after *Octane*, this experiment observed whether different jurisprudence was developing categorically.

b. *Variation by Technology at Issue*

Additionally, the study recorded the U.S. classifications for the patents asserted in each lawsuit. For each U.S. classification, the study recorded the number of motions won and lost where a patent of that classification had been asserted. Because there are over 1,000 potential classifications and the dataset included, at most, a few motions asserting any particular classification, the classifications were grouped into eight broader categories. The study used, as a baseline, seven broad classifications for patents.⁶² These classifications are electrical engineering and electronics (ELEC); instruments (INST); chemicals and materials (CHEM); pharmaceuticals and biotechnology (PHAR); industrial processes (INDUS); machines and transportation (MACH); and consumer goods

61. See, e.g., *Parallel Iron LLC v. NetApp Inc.*, 70 F. Supp. 3d 585 (D. Del. 2014).

62. OBSERVATOIRE DES SCIENCES ET TECHNIQUES, INDICATEURS DE SCIENCE ET DE TECHNOLOGIES: EDITION 2010, at 507, http://www.obs-ost.fr/sites/default/files/R10_Complet_1.pdf (April 13, 2015), [<https://perma.cc/LUC6-S65K>].

and civil engineering (CONS).⁶³ Due to the prevalence of software related patents in my dataset, I separated some patents into a software (SOFT) category. Use of the OST classification system is not uncommon in patent scholarship to examine general trends in the treatment of patents by courts.⁶⁴

The technology group of the patent at issue in the case is the best indicator of the type of technology at issue in the case. Knowledge of the technologies at issue is important for two reasons. First, it allows observation as to whether the changes to § 285 from *Octane* had a varying effect on different types of patents. For example, judges may use their increased discretion more often on software patents than on biological and pharmaceutical patents.

The second advantage of this classification was that it would help expose whether the composition of lawsuits in the dataset had changed between the two datasets. This is important because, if the dataset reported a large increase in attorneys' fees granting post-*Octane*, that increase might be due to the disproportionate number of electronics suits which have a high rate of fee shifting associated. Thus, recording the technology of the patents-in-suit allowed the study to tease out potential confounding variables.

c. *Variation by Movant*

The study also recorded whether the patentee or accused infringer moved for fees. By doing this, the study was able to examine whether the relative rate of fee shifting between patentees and accused infringers increased with *Octane*. In addition, for technology types that were litigated frequently enough before and after *Octane*, the study examined whether the relative rate of fee shifting between patentees and accused infringers changed in those technology groups.

C. *Small Sample Size*

While this study is conducted with a relatively small sample size of cases, it was done so by design. First, the requirement that cases had to be filed before *Octane* was granted certiorari and decided after *Octane* constrained this study. Second, it was important that this study be completed relatively soon after the *Octane* decision so that its results would remain significant. Nonetheless, some of the parameters investigated will have too few data points to perform statistical

63. *Id.*

64. *Accord, e.g.,* Stuart J.H. Graham & Nicolas Van Zeebroeck, *Comparing Patent Litigation Across Europe: A First Look*, 17 STAN. TECH. L. REV. 655, 697 (2014). While the OST Classification system is primarily used to classify international—specifically European—patents, it makes sense to use it in this context. The purpose of the OST Classification System is to allow the comparison of patents from different countries by general type. While countries each have their own narrow classification systems, the OST categories group patents into large swaths of similar patents so that the differing treatment of substantially similar patents can be observed. That is precisely the use intended here: the examination of differing treatment for substantially similar patents.

analysis. This is an unfortunate side effect that is believed to be outweighed by the benefit of having some indication of the effect of *Octane* soon after the decision's release.

IV. EMPIRICAL RESULTS

Even though all⁶⁵ motions filed in the nine-month windows described were collected, the average value of any of the parameters collected cannot be assumed to be the "true" theoretical value of that parameter. For example, the average rate of fee shifting for all cases decided in a certain time period is not the "true" theoretical fee shifting rate for that time period. The "true" fee shifting rate for that time period would be the rate of attorneys' fees awards for all possible cases before all possible judges. The number of times that fees have actually been shifted is only the observed rate of fee shifting. Since all possible cases can never occur, this study chose the second best option by taking all cases that have occurred and using that rate of fee shifting for that sample to predict the "true" fee shifting rate. The average of each parameter recorded in this experiment is therefore only a sample average that has some probability of relatedness to the true theoretical value of the parameter being investigated.

The two results we are interested in are (1) some measure of the parameter's true value, and (2) the likelihood of the parameter's true value having changed before and after the *Octane* decision. The first of these is reported through a 95% confidence interval.⁶⁶ The second is reported through the probability that the two samples do not share the same true value for a given parameter.⁶⁷

Below the results are reported for the 95% confidence intervals of the parameters observed before and after *Octane*, in addition to the likelihood that the true value of each parameter has changed with *Octane*. The parameters considered are: (A) the percentage of motions awarding fees in full or in part, generally and for each district, circuit and technology, and the rate of fee awards for patentees compared to accused infringers; and (B) the change in reliance on *Brooks Furniture* or similar factors.

Of the motions in the time periods, three cases before *Octane* and five cases after *Octane* were decided on other grounds. Those cases were excluded from the

65. "All" is of course qualified by the caveats I discussed above in Part III.A.2, where the potential shortcomings of the WestlawNext search are noted.

66. A confidence interval of some percentage p for a parameter, is a range of values of the parameter such that, if another randomly selected sample was chosen, the mean value of the parameter in the second sample would have a p percent chance of falling within the confidence interval of the first sample. A confidence interval with a high probability is thus an indication of where the true value of the parameter is likely to be. See, e.g., COX, D. R. & STUART, D. G., THEORETICAL STATISTICS 49, 209 (Chapman & Hall 1974).

67. In particular I use Welch's t -test which is appropriate for testing the likelihood that the true means of a parameter in two independent samples are equal. See generally Welch, B. L., *The generalization of "Student's" problem when several different population variances are involved*, 34 BIOMETRIKA 28 (1947) for more information on Welch's t -test and its applicability.

analysis because, as explained above in Part III.A.2 *supra* at 339, they are not relevant for considering the change in the exceptionality standard announced by *Octane*. As a result, 36 motions were considered to investigate the standard before *Octane* and 54 were considered to investigate the standard after.

D. *Fee Shifting Awards*

5. *Fee Shifting in General*

The rate of fee shifting is of chief importance in this study. Of the 36 cases that occurred before *Octane*, this study found that 31% of cases shifted fees in whole or in part—with a sample standard deviation of 47%. For the 54 cases considered after *Octane*, 44% shifted fees in some form with a standard deviation of 50%. Using this data, 95% confidence intervals for the rate of fee shifting in whole or in part both before and after *Octane* were constructed. Recall that a 95% confidence interval is the interval such that 95% of samples taken from the same population would have a mean in that interval. These confidence intervals are summarized in Table 1 below. By comparing the samples from before and after *Octane* and using the Welch’s two sample *t*-test, this study concludes that there is an 82% chance that the attorneys’ fees shifting rate has changed with *Octane*.⁶⁸

The same analysis was performed for the rate of partial fee shifting. The mean and standard deviation of the sample cases taken before and after *Octane* are, respectively: Pre-*Octane*, 5.6% with a standard deviation of 23%; Post-*Octane*, 11% with a standard deviation of 31%. Again the study calculated 95% confidence intervals that are reported in Table 1 below. The same two-sample analysis as above was performed again to investigate the likelihood that the partial fee shifting regime has changed with *Octane*. This information is found in Table 1.

TABLE 1 – FEE SHIFTING AND PARTIAL FEE SHIFTING BEFORE AND AFTER *OCTANE*

	Pre-<i>Octane</i>	Post-<i>Octane</i>	Probability of a
	Confidence Interval	Confidence Interval	Change in the Fee
			Shifting Award
			Rate
Any Fee Shifting (rate)	31% ± 16%	44% ± 14%	82%

68. To be precise, the Welch’s two sample *t*-test concludes that, if the § 285 standard did not change with *Octane*, and if one group of 36 random cases decided before *Octane* was taken and one group of 54 random cases decided after *Octane* was taken, the probability that those samples would have as dramatically different fee shifting rates as those observed in this study, is 18%.

Partial Shifting (rate)	Fee	5.6% ± 7.9%	11% ± 9%	66%
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The ways in which fees were shifted partially before and after *Octane* were collected and are listed in Table 2.

TABLE 2 - METHODS OF AWARDING PARTIAL ATTORNEYS' FEES

<i>Pre-Octane</i> Method of Partial Shifting	<i>Post-Octane</i> Method of Partial Shifting
Only for certain claims	Only for certain claims (x 3)
Only after a certain time period Discovery finished	Only after a certain time period (x 2) Second lawsuit filed Discovery finished Only for certain expenses Legal but not IT or paralegal

6. *Fee Shifting by Geographical or Technological Category*

For the data to yield meaningful results about the changes from before to after *Octane*, it must contain multiple motions filed in a particular category before and after this decision.⁶⁹ Not all of the categories had enough data points to satisfy this criterion, and appropriate statistical inferences could therefore not be drawn.⁷⁰

d. *Fee Shifting by District*

Likewise, most districts yielded motions in the sampled time periods so infrequently that statistical analysis could not be performed on them. Only two districts, the Northern District of California and the Eastern District of Texas,

69. In particular, both finding a confidence interval and finding the likelihood that the two samples originate from the same population require finding a standard deviation for each sample. If a sample has only one element, the standard deviation cannot be calculated and no statistics may be performed on the sample. Thus, at the bare minimum, we must use samples that have at least two elements.

70. For example, the experiment did not return enough cases to have statistically significant information for individual judges. Most judges appeared only once. The most frequent judge in the data set appeared only four times. As a result, no information is reported regarding judges tendencies to award attorneys' fees under § 285.

heard multiple motions during the measured periods before and after *Octane*. The results for motions in these districts are considered in turn. Note, however, due to the extremely small number of cases that these districts heard overall, the results are of limited statistical significance.⁷¹

The Northern District of California decided fourteen motions in the dataset, six before and eight after *Octane*. The district refused to shift fees in all cases before *Octane* was granted certiorari.⁷² After *Octane*, the district shifted fees in half of the cases with a standard deviation of 53%. The confidence intervals for both time periods and the probability that there was a change in the fee shifting award rate before and after *Octane* were computed. These results are summarized in Table 3.

The Eastern District of Texas heard six motions, three before and three after *Octane*. In contrast with the Northern District of California, all cases heard by the Eastern District after *Octane* rejected fee shifting while one of the three cases heard before *Octane* granted fee shifting.⁷³ This yielded the following mean fee award rate and associated standard deviations: Pre *Octane*, 33% with standard deviation 58%; Post *Octane*, 0% with standard deviation 0%. The confidence intervals and the likelihood that the Eastern District of Texas has changed its fees standard are summarized in Table 3.

TABLE 3 – FEE SHIFTING BEFORE AND AFTER OCTANE BY DISTRICT

District	Pre- <i>Octane</i> Confidence Interval	Post- <i>Octane</i> Confidence Interval	Probability of a Change in the Fee Shifting Award Rate
Northern District of California (rate of fee shifting)	0% ± 0%	50% ± 47%	97%
Eastern District of Texas	33% ± 143%	0% ± 0%	42%

71. The effect of the small sample size is seen by the large confidence interval range. For example, pre-*Octane*, the confidence interval in the Eastern District of Texas is 286%. With such a large confidence interval it is difficult to make any conclusion about the value of the true population mean.

72. The fact that a district refused to award attorneys' fees for all cases is reason to doubt the accuracy of any statistical conclusions drawn from the set. It is unlikely, as the statistics reflect, that 95% confidence interval for rate of fee shifting in Northern California is 0% with a confidence interval of width 0%. It is unlikely that the true rate of fee shifting in the Northern District of California, pre-*Octane* is known with perfect certainty to be 0%. Because of the small sample size, however, only denied motions were recorded, leading to this odd statistical result. This is an example of a place where more data would be necessary to have more accurate and meaningful statistical inferences.

73. As in the previous note, the fact that all cases in a particular time period share the same result is a reason to doubt the legitimacy of statistical inferences from this dataset.

(rate of fee shifting)

e. *Fee Shifting by Circuit*

Here, district courts were grouped together based on the geographical circuits in which they sit to see if any large-scale geographical trends have emerged. As in the Subpart above, this study examines only the circuits that heard multiple motions both before and after *Octane*. Table 4 summarizes for each circuit the number of motions heard before and after *Octane*, the rate of fee shifting in each circuit, and the standard deviation of that win rate. Table 5 lists confidence intervals for the rate of fee shifting in each circuit before and after *Octane* and notes the calculated probability that the true fee shifting rate has changed since *Octane*.

TABLE 4 – FEE SHIFTING SAMPLE INFORMATION BY CIRCUIT

Circuit	Sample Size		Fee Shifting Statistics (rate of fee shifting)			
			Pre- <i>Octane</i>		Post- <i>Octane</i>	
	Before, After	Total	Mean	Standard Deviation	Mean	Standard Deviation
1st	-	-	-	-	-	-
2nd	2, 7	9	0%	0%	43%	53%
3rd	3, 9	12	0%	0%	56%	53%
4th	2, 6	8	0%	0%	50%	55%
5th	4, 4	8	25%	50%	0%	0%
6th	2, 2	4	100%	0%	100%	0%
7th	-	-	-	-	-	-
8th	2, 2	4	50%	71%	0%	0%
9th	13, 13	26	31%	48%	54%	52%
10th	5, 3	8	40%	55%	0%	0%
11th	-	-	-	-	-	-
DC	-	-	-	-	-	-

Note that in both Table 4 and Table 5 all information for the 1st, 7th, 11th and DC Circuits is omitted. This is because those circuits did not have at least two motions filed in both observation periods. It is also important that, because of the small sample size for all circuits, the statistical significance of the confidence interval and calculation of the likelihood of a change in standard with *Octane* is of limited significance. Even the Ninth Circuit, which has twenty-six motions, is of limited statistical significance because each sample is only thirteen. Such a small

sample should give the reader pause before drawing any conclusions from the statistical figures which were produced.⁷⁴

TABLE 5 – FEE SHIFTING BEFORE AND AFTER OCTANE BY CIRCUIT

Circuit (rate of fee shifting)	Pre-Octane Confidence Interval	Post-Octane Confidence Interval	Probability of a Change in the Fee Shifting Award Rate
1st	-	-	-
2nd	0% ± 0%	43% ± 49%	92%
3rd	0% ± 0%	56% ± 41%	99%
4th	0% ± 0%	50% ± 57%	92%
5th	25% ± 80%	0% ± 0%	61%
6th	100% ± 0%	100% ± 0%	N/A*
7th	-	-	-
8th	50% ± 635%	0% ± 0%	50%
9th	31% ± 29%	54% ± 31%	75%
10th	40% ± 68%	0% ± 0%	82%
11th	-	-	-
DC	-	-	-

* samples from both time periods are identical

f. *Fee Shifting by Technology*

The confidence interval and likelihood of a change in attorneys' fees shifting standard was also broken down for each technology category. As before, each category needs to have at least two motions in each time period to be included. Neither the INST nor the CHEM categories satisfied this requirement and therefore statistics were not performed on these categories.

74. See *supra* notes 70-72 and accompanying text.

TABLE 6 – FEE SHIFTING SAMPLE INFORMATION BY TECHNOLOGY

Circuit	Sample Size		Fee Shifting Statistics (rate of fee shifting)			
			Pre-Octane		Post-Octane	
	Before, After	Total	Mean	Standard Deviation	Mean	Standard Deviation
ELEC	14, 14	28	14%	36%	57%	51%
INST	-	-	-	-	-	-
CHEM	-	-	-	-	-	-
BIO	7, 22	29	29%	36%	23%	16%
INDUS	2, 3	5	0%	0%	33%	58%
MACH	2, 6	8	0%	0%	50%	55%
CONS	11, 8	19	36%	50%	38%	52%
SOFT	16, 19	35	19%	40%	63%	50%

Importantly, the total sample size considered here was larger than for other categorical divisions. This is because multiple patents of different categories can be asserted in the same suit. Thus, multiple categories may record a successful fee shift as a result of fees being shifted in only one case. I used the same statistical analysis as the previous Subpart, which analyzed fee shifting in different circuits. The data is recorded in Tables 6 and 7.

TABLE 7 – FEE SHIFTING BEFORE AND AFTER OCTANE BY TECHNOLOGY

Technology (rate of fee shifting)	Pre-Octane Confidence Interval	Post-Octane Confidence Interval	Probability of a Change in the Fee Shifting Award Rate
ELEC	14% ± 21%	57% ± 30%	98%
INST	-	-	-
CHEM	-	-	-
BIO	29% ± 45%	23% ± 19%	22%
INDUS	0% ± 0%	33% ± 143%	58%
MACH	0% ± 0%	50% ± 57%	92%
CONS	36% ± 34%	38% ± 43%	3.7%
SOFT	19% ± 21%	63% ± 24%	99%

g. *Fee Shifting by Movant*

TABLE 8 – FEE SHIFTING SAMPLE INFORMATION BY MOVANT

<i>Technology</i>	Number of Motions Filed by: Patentees, Accused Infringers: <i>Before:</i> <i>After</i>		Fee Shifting Statistics (rate of fee shifting)			
			Pre-Octane		Post-Octane	
			Patentee Mean	Accused Infringer Mean	Patentee Mean	Accused Infringer Mean
All Motions	14, 22	11, 43	36%	27%	27%	49%
ELEC	3, 7	2, 11	33%	14%	0%	45%
SOFT	3, 9	3, 15	33%	22%	33%	60%
ELEC or SOFT	6, 12	4, 24	33%	25%	25%	58%

The confidence interval and likelihood of a change in attorneys' fee shifting standard broken down by whether the movant was a patentee or an accused infringer was also calculated. The study considered these parameters in general (i.e., for all cases filed), as well as for suits that contained ELEC patents, SOFT patents, or at least one ELEC or SOFT patent. The ELEC and SOFT categories were selected because they were the only technology categories which appeared frequently enough before and after *Octane* to yield statistically significant information. The data is recorded in Tables 8 and 9.

TABLE 9 – FEE SHIFTING BEFORE AND AFTER *OCTANE* BY MOVANT

Technology		Pre- <i>Octane</i> Fee Shifting Rate Confidence Interval	Post- <i>Octane</i> Fee Shifting Rate Confidence Interval	Probability of a Change in the Fee Shifting Award Rate
All Motions	Patentee	36% ± 29%	27% ± 31%	33%
	Accused Infringer	27% ± 20%	49% ± 16%	91%
ELEC	Patentee	33% ± 140%	0% ± 0%	58%
	Accused Infringer	14% ± 35%	45% ± 35%	84%
SOFT	Patentee	33% ± 140%	33% ± 140%	0%
	Accused Infringer	22% ± 34%	60% ± 28%	93%
ELEC or SOFT	Patentee	33% ± 54%	25% ± 80%	19%
	Accused Infringer	25% ± 29%	58% ± 21%	94%

Note that there are several warning signs in the ELEC and SOFT data in Table 9. First, the small sample size for motions filed by patentees means that statistical inferences drawn from those samples are unlikely to be of much value. This is demonstrated by the confidence interval of 280%. Likewise, it is misleading that the SOFT cases filed by patentees before and after *Octane* had the same fee shifting rate because only three cases were recorded before and after. As a result of the insufficient size of patentee filings for each of these categories individually, any inferences we draw about the ratio of patentee filed fee shifting to accused infringer filed fee shifting are of limited significance. The number of cases that have either a SOFT or an ELEC patent is, however, statistically significant.

E. *Changes in Judicial Reasoning*

The final way that the increased discretion granted by *Octane* was observed was by looking to the reasoning used by courts in making their fee determinations. This experiment observed the use of the *Brooks Furniture* tests for determining exceptionality as well as the use of similar tests.⁷⁵ The parameters

75. Recall that the tests, laid out in Part II.B.1 are (1) whether there was material inappropriate conduct in the litigation or prosecution of the patent, and (2) whether the case was both objectively baseless and subjectively in bad faith.

investigated are the rate at which both tests were discussed, at least one test was discussed, at least one similar test was discussed, at least one test was satisfied, at least one similar test was satisfied, and at least one test or similar test was satisfied. Confidence intervals and Welch's two-sample *t*-test were calculated for each parameter. The results are displayed in Tables 10 and 11. Note that, unlike the categorical analysis above, this analysis reviews the reasoning of the entire data. As a result, the sample size is the full original 36 motions before *Octane* and 54 motions after *Octane*.

TABLE 10 – FEE SHIFTING SAMPLE INFORMATION BY REASONING

<i>Circuit</i>	Fee Shifting Statistics (rate of fee shifting)			
	Pre-<i>Octane</i>		Post-<i>Octane</i>	
	<i>Mean</i>	<i>Standard Deviation</i>	<i>Mean</i>	<i>Standard Deviation</i>
Discussed both Tests	39%	49%	13%	34%
Discussed at least one test	89%	32%	55%	16%
Discussed at least one similar test	25%	44%	59%	50%
Satisfied at least one test	28%	45%	25%	44%
Satisfied at least one similar test	5%	23%	28%	45%
Satisfied at least one test or similar test	28%	45%	43%	50%

TABLE 11 – FEE SHIFTING BEFORE AND AFTER OCTANE BY REASONING

Circuit (rate of fee shifting)	Pre-Octane Confidence Interval	Post-Octane Confidence Interval	Probability of a Change in the Fee Shifting Award Rate
Discussed both Tests	39% ± 17%	13% ± 9%	99%
Discussed at least one test	89% ± 11%	55% ± 14%	99%
Discussed at least one similar test	25% ± 15%	59% ± 14%	99%
Satisfied at least one test	28% ± 15%	25% ± 13%	22%
Satisfied at least one similar test	5.6% ± 7.9%	28% ± 13%	99%
Satisfied at least one test or similar test	28% ± 15%	43% ± 14%	87%

The study recorded the tests used by courts that were similar to the *Brooks Furniture* tests and lists them in Table 12.

TABLE 12 – TESTS USED BY COURTS SIMILAR TO THE *BROOKS FURNITURE* FACTORS

Pre-Octane Similar Test	Post-Octane Similar Test
Meritless Claim (x 4)	Weak/Objectively Baseless Position (x 23)
Willful Infringement (x 5)	Should Have Known the Position was Weak (x 2)
	Manner of Litigation (x 6)
	Inequitable Conduct (x 3)

F. *Corroboration of this Paper's Results with Data from Other Studies*

Other patent attorneys' fees shifting studies record similar rates for attorneys' fees shifting pre-*Octane*. One study recorded the fee-shifting rate in 2013 and 2014 to be respectively 35% and 37%.⁷⁶ Both of these are within the 95% confidence interval found by this study of $31\% \pm 16\%$.

It is worth noting that the sample size of this study appears smaller than the sample size for some prior studies. Saurabh Vishnubhakat, using PACER, found 216 attorneys' fee awards under § 285 between 2003 and 2013.⁷⁷ Thus, according to that dataset, there are roughly 20.6 attorneys' fee awards per year. Likewise, Liang & Berliner, using Lex Machina, found approximately 208 attorneys fee awards from 2003 to May 15, 2013.⁷⁸ That equates to 19.3 attorneys' fee awards per year. This study recorded only 11 instances where attorneys' fees were shifted pre-*Octane*. Extrapolated from nine months to one year, this equates to only 14 attorneys' fee awards annually or between 70% and 75% of that recorded by the prior studies. It is especially concerning when considering the trend of increasing number of cases in which attorneys' fees were granted between 2003 and 2013 as noted by some empirical investigations.⁷⁹

This disagreement between the numbers of attorneys' fees motions decided is somewhat problematic. It could indicate that the study was under inclusive; i.e. that many motions were missed by the WestlawNext search. It could also indicate that fewer than normal attorneys' fee motions were decided in the nine months leading up to *Octane*. If the latter is true, that could explain the smaller sample size but may also indicate a symptomatic change in the way practitioners viewed the attorneys' fees standard. After all, if fewer filings than normal are occurring, then it is likely that some change happened. One possible explanation is that the standard changed.

Despite this disagreement in sample size, this study's result for the rate of attorneys' fees granted is duplicated in other studies which reported a larger sample size.⁸⁰ The purpose of the study is to compare the rate of attorneys' fee shifting before and after *Octane*. Since this rate is replicated in both studies it seems plausible to assume that the comparative power of this study is not diminished. In particular, any conclusions about the increase or decrease in rate of

76. Michael Renaud et al., *A "Solution" in Search of a Problem?: The Innovation Act of 2015 and Trends in Fee-Shifting in Patent Litigation*, MINTZ LEVIN (Mar. 13, 2015), <http://www.mintz.com/newsletter/2015/Advisories/4766-0315-NAT-IP/> [<https://perma.cc/W4Y9-5LE6>].

77. Saurabh Vishnubhakat, *What Patent Attorney Fee Awards Really Look Like*, 63 DUKE L.J. ONLINE 1, 24 (2014), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1001&context=dj_online [<https://perma.cc/UR5H-RAVS>].

78. Mark Liang & Brian Berliner, *Fee Shifting in Patent Litigation*, 18 VA. J.L. & TECH. 59, 87 (2013).

79. Renaud, *supra* note 76. Note that this study used DocketNavigator to collect sources.

80. *Id.*

granting attorneys' fees remain justified.

V. IMPLICATIONS

A. *Conclusions from the Data*

1. *Fee Shifting Generally*

As a practical matter, this data supports the conclusion that motions for attorneys' fees motions are granted more often after *Octane*. As recorded in Table 1, the 95% confidence interval for the rate at which fees were shifted before *Octane* was $31\% \pm 16\%$. The same confidence interval calculated for motions decided after *Octane* is $44\% \pm 14\%$. The center of the confidence interval has risen 13% since *Octane* was decided. In other words, the change in confidence intervals represents nearly a 50% increase in the rate at which attorneys' fees motions are granted.

The increase is reflected by the comparison of the two samples. Under Welch's two-sample *t*-test, if the standard has truly remained unchanged in practice, only 18% of case samples like this one would reflect a change in the rate of attorneys' fees granted as drastic as is observed here. Therefore, the likelihood that the motions decided before *Octane* and after *Octane* were decided under a different § 285 standard is 82%.

One possible reason for the variation in fee awards is a discrepancy in the composition of motions decided before and after *Octane*. A change in composition of cases, however, is belied by the data. The two most prolific districts decided roughly the same number of motions during both relevant time periods. The Northern District of California decided six before and eight after. The Eastern District of Texas decided three before and three after. Since neither of these districts were included disproportionately during one of the observed time periods, any potential bias that a district has toward granting or denying motions under § 285 would not make the post-*Octane* data favor granting attorneys' fees significantly more than not granting fees.

Likewise, the disproportionate inclusion of decisions from certain circuits also does not explain the increase in granting attorneys' fees. It is true that the post-*Octane* data included more decisions from the Second, Third, and Fourth Circuits. It is also true that, these circuits reported a high rate of granting attorneys' fees post-*Octane*. Nonetheless, there is insufficient evidence to conclude that such a drastic increase in attorneys' fees granting is indicative of the true rate of grants before and after *Octane*. There were only 2-3 cases decided in each of these circuits before *Octane* and no more than 12 decided after *Octane*. These values are not large enough to make statistical determinations about the rate of attorneys' fees granting in those circuits. It is for this reason (small sample size giving insignificant statistical power) that the 95% confidence ranges for these circuits, post-*Octane*, ranged between 80% and 115%.

More importantly, even if the data from these circuits was statistically

relevant, these circuits experienced a surge in attorneys' fees grants post-*Octane*. If these circuits had been as prevalent in the dataset before *Octane* as they were after *Octane*, the comparative change in the rate of fee shifting would have been even larger. Thus the increase in attorneys' fees shifting rate is not caused by disproportionate inclusion of these circuits.

Lastly, the technological composition of cases decided pre- and post-*Octane* is roughly the same. That is to say, the number of cases decided in each technology group before and after *Octane* stayed roughly the same. Only biological and pharmaceutical (BIO) cases experienced an increase in representation: seven motions contained patents in the BIO classification before *Octane* while twenty-two motions concerned BIO patents afterwards. Nonetheless, the confidence interval for BIO decreased from $29\% \pm 45\%$ to $23\% \pm 19\%$. Both confidence intervals are centered around values below the rate of fee shifting pre-*Octane*. Thus, the over-representation of BIO patent fee shifting motions in the period after *Octane*, if anything, would tend to skew the rate of granting attorneys' fees downward. Any correction due to overrepresentation would increase the rate of fee shifting post-*Octane*.

More research is necessary to determine whether the composition of cases has changed in other ways between the observed time periods. For example, the change in fee award may be due to a disproportionate number of certain types of defendants or plaintiffs in one-time period. Likewise, the type of claim filed may have changed before and after *Octane*. This change could potentially lead to more attorneys' fees being granted. As always, a larger sample size would be helpful to determine more statistically relevant values for the rates of shifting by circuit and by technology.

2. *Partial Fee Shifting*

Courts did not appear to use their new discretion to shift fees partially more often than they had before. The confidence interval for the rate of partial fee shifting changed marginally from $5.5\% \pm 7.8\%$ before *Octane* to $11\% \pm 9\%$ after. This marginal shift is reflected in the results of the Welch's two-sample *t*-test. There was a 44% chance that the standard for determining whether to shift fees partially had not changed.

One possible explanation for the lack of increase in judicial discretion in this area is that judges were already shifting fees partially as they saw fit. The § 285 standard gives judges leeway to not award fees, even when the case is otherwise exceptional, if they deem it imprudent. Judges may already have been using that discretion in refusing to shift fees for certain time periods during a case (e.g., only fees incurred after discovery), or for certain claims asserted. The increased discretion granted by *Octane*, therefore, may not have been necessary in this particular outlet and therefore there may be a minimal change in partial fee awards.

3. *Fee Shifting by Categories*

Investigation of the fee-shifting rates of patentees relative to accused infringers before and after *Octane* revealed that *Octane* has been relatively friendly for accused infringers. The rate of fee shifting for patentees has remained stable, the 95% confidence interval shifting only from $36\% \pm 29\%$ to $27\% \pm 31\%$. Analysis suggests that there is only a 33% chance that the standard for fee shifting for patentees has changed. On the other hand, analysis suggests that there is a 91% chance that the standard for fee shifting for accused infringers has changed. This is demonstrated by the shift from $27\% \pm 20\%$ to $49\% \pm 16\%$ in the 95% confidence intervals. While fees were shifted for accused infringers at $\frac{3}{4}$ the rate of patentees before *Octane*, they are now being shifted at nearly double the rate of patentees after *Octane*.

The ELEC (electrical engineering and electronics) category and the SOFT (software) category are the two technological categories that have sufficient sample size before and after *Octane* to perform statistical analysis. Interestingly, both of these categories of patents experienced an enormous increase in the rate of attorneys' fees being granted. ELEC patents increased from a 95% confidence interval of $14\% \pm 21\%$ to $57\% \pm 30\%$. Likewise, SOFT patents increased from a 95% confidence interval of $19\% \pm 21\%$ to $63\% \pm 24\%$. This is reflected in the Welch's *t*-test result that there is a 98% chance that the ELEC motions were decided under a different standard after *Octane* and a 99% chance that the SOFT motions were decided under a new standard.

Furthermore, analysis of the ELEC and SOFT categories by movant suggests that the increase in fee shifting in these categories may be largely due to a friendlier standard for accused infringers. Considering cases that included at least one patent in the ELEC or SOFT categories, the 95% confidence interval for fee shifting when the patentee moved decreased slightly: $33\% \pm 54\%$ to $25\% \pm 80\%$. The likelihood of a change in standard is only 19%. But the rate of fee shifting in these categories increased dramatically for cases filed by accused infringers: $25\% \pm 29\%$ to $58\% \pm 21\%$. Thus the rate of fee shifting more than doubled, supporting the conclusion that the likelihood of a change in standard is 94%. The increased fee shifting rate for ELEC and SOFT patent cases, therefore, seems to stem from motions filed by accused infringers.

4. *Fee Shifting Reasoning*

The results also illuminated the changes in judicial reasoning since the *Octane* decision. The *Octane* opinion directs courts to use a non-formulaic approach to determine exceptionality under § 285. Courts are no longer required to employ the *Brooks Furniture* framework. The results bear out this distinction. Post-*Octane* there has been a significant decrease in the rate of discussing at least one of the *Brooks Furniture* tests: The confidence interval decreased from $89\% \pm 11\%$ to $55\% \pm 14\%$. Analysis of this decrease suggests that 99% of the time, this decrease would mark a change in the standard applied.

Likewise, the discussion of tests similar to, but not the same as, the *Brooks Furniture* tests, and the reliance on these tests to decide if a case is exceptional increased. The confidence intervals for the rate of discussion of at least one similar test increased from $25\% \pm 15\%$ to $59\% \pm 14\%$. The reliance on a similar test to decide a case also increased from $5.6\% \pm 7.9\%$ to $28\% \pm 13\%$. Both of these increases are so drastic that there is a 99% chance that the standard has changed to allow for more creative arguments for exceptionality.

B. *Effect on Patent Litigation Generally*

This study supports the belief that the rate of attorneys' fee shifting in patent litigation post-*Octane* will increase. Given that fees are being shifted more often, it is likely that there will be an increase in motions for fees under § 285 accompanied by a simultaneous decrease in the filing of weak claims by plaintiffs. Patent litigators will clamor to test the limits of the new, more lenient, fee shifting standard.

Furthermore, the § 285 standard seems to have shifted asymmetrically with regard to patentees vs accused infringers. While patentees have seen a slight decrease in the rate of fees shifted, accused infringers have seen a large increase in the rate of fees shifted. In fact, motions for fees filed by accused infringers are now granted more often than motions filed by patentees. This suggests that the increase in fees motions will originate from accused infringers.

Also, the data reveals that judges tend to exercise the increased discretion granted under *Octane*. As seen above, because judges no longer have to satisfy the *Brooks Furniture* tests, they are accepting new, discretionary, arguments more often. Therefore, this study confirms that the courts are following the Supreme Court's order to deliberate each motion on a case-by-case basis, considering the totality of the circumstances. In contrast, the Federal Circuit's plea that courts need not award attorneys' fees more frequently with their increased discretion seems to have fallen upon deaf ears.

Of note, however, is that the varieties of partial fee shifting have not changed significantly post-*Octane*. Although devising new methods might have been a way for judges to exercise their discretion, it appears as though they are awarding partial fees in much the same way as before *Octane*. This could be the result of judges already having had discretion to award partial fee judgments or of courts not reading *Octane* to grant additional discretion in this area. This study cannot conclude which is more likely to be true. In either case, practitioners will likely continue to ask for the same forms of partial fee shifting.

C. *Large-Scale Effects*

By increasing the rate at, and the circumstances under which, attorneys' fees may be granted, the Supreme Court has changed the decision-making calculus of defendants served with a complaint for patent infringement. The increased likelihood that the plaintiff might pay the defendant's attorneys' fees may

incentivize more defendants to litigate nuisance patent lawsuits. Even in the absence of litigation, these defendants will now have additional bargaining leverage in settlements. The economic result of this change will likely be that fewer patent lawsuits are filed and that the settlements will be less skewed toward plaintiffs (at least when the settlements occur early).

This result is supercharged by the fact that *Octane* drastically increased the rate that accused infringers' motions are being granted, while slightly decreasing the rate that patentees' fees motions are being granted. Asymmetric fees treatment means that accused infringer defendants should rationally be emboldened to litigate a suit, while patentee plaintiffs will rationally be more hesitant to file suits.

This is particularly relevant for patent trolls. A decrease in the rationality of nuisance patent lawsuits may change the behavior of patent trolls. Both the software patent and electronics patent lawsuits experienced a large increase in the rate of fee awards. These are the two areas where troll lawsuits are conventionally thought to be most prevalent.⁸¹ Importantly, the increase in fee shifting in these areas is largely due to an increase in fee shifting for accused infringers—i.e., troll targets. Depending on the extent of the change in rate of awarding fees post-*Octane*, it may no longer be viable to file relatively weak patent lawsuits to extract a small settlement from defendants.

VI. CONCLUSION

Patent litigation attorneys' fees are not small. That is why Congress enacted 35 U.S.C. § 285. The statute aims to use attorneys' fees to discourage parties from bringing exceptional patent lawsuits. The Supreme Court, in *Octane*, granted district courts increased discretion to award attorneys' fees, potentially supercharging the disincentive to file nuisance patent lawsuits. Paired with the Supreme Court's decision in *Highmark*, which raised the standard of judicial review on attorneys' fees shifting decisions, these cases paved the way to change the landscape of § 285 motions. This study supports the conclusion that district courts are indeed exercising their increased discretion. In spite of the Federal Circuit's plea that district courts need not exercise additional discretion, district courts have increased both the rate at which they award fees and the number of arguments which persuade them to make such an award.

More research and a larger sample size are necessary to confirm that this study is not skewed by a change in the composition of cases before and after *Octane*. While some investigation in the number of motions filed by circuit and technology was made, a much larger dataset is necessary to obtain reliable statistical information on how *Octane* has affected attorneys' fees jurisprudence in

81. See Robin Feldman & W. Nicholson Price II, *Patent Trolling: Why Bio & Pharmaceuticals Are at Risk*, 17 STAN. TECH. L. REV. 773, 785-90 (2014) (discussing the arguments behind the conventional wisdom that patent trolls are generally active only in the technology sector).

each of these areas. Furthermore, an investigation into the type of party, and the type of claims which led to attorneys' fees awards might also have conflated the data. If either of those factors are linked with heightened rate of attorneys' fees grants, then their over inclusion after *Octane* would lead to an inflated attorneys' fees shifting rate. More investigation into these areas would therefore be helpful to ensure that the results of this study are sound.

Future studies may also investigate the extent to which *Highmark* is actually shielding district court judges. For example, the rate at which attorneys' fees motions are appealed and the rate at which the judgment is overturned before and after *Highmark* would shed light on whether the district courts are actually free to exercise their heightened discretion.

Nonetheless, this study represents one of the first comparative empirical looks at courts' behavior in awarding § 285 attorneys' fees after the standard was changed in *Octane*. The change in the frequency and circumstances in which patent litigants are awarded attorneys' fees observed could have far reaching effects on the patent litigation landscape. Likewise, the increase in the rate of fee shifting for accused infringers, particularly in suits containing electronic and software patents, may signal the arrival of a judicial remedy to the patent troll problem. By measuring the change in the attorneys' fees standard and publishing it to the public, this study paves the way for future research testing the correlation between a changed attorneys' fees standard and the deterrence of nuisance suits.