Duke Law Journal Online

VOLUME 63 APRIL 2014

WHAT PATENT ATTORNEY FEE AWARDS REALLY LOOK LIKE

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This Essay provides an empirical account of attorney fee awards over the last decade of patent litigation. Given the current attention in legislative proposals and on the Supreme Court's docket to more liberal fee shifting as a check on abusive patent litigation, a fuller descriptive understanding of the current regime is of utmost importance to forming sound patent-litigation policy. Following a brief overview of judicial experience in patent cases and trends in patent-case filing, this study presents analysis of over 200 attorney fee award orders from 2003–2013.

This study confirms the commonsense view that, in patent litigation, plaintiffs tend to receive attorney fee awards more often than defendants do, and that such awards are generally larger when defendants receive them. Notably, attorney fee awards are generally an order of magnitude lower than prior studies have estimated. Attorney fee awards also vary, in magnitude and distribution, according to the technology area of the patents involved in the dispute. Finally, attorney fee awards in patent litigation often follow systematic calculation and discounting with explanatory discussion, reflecting a pattern of fact-intensive evaluation by district judges of such awards.

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INTRODUCTION

After years of reform efforts, the Leahy-Smith America Invents Act (AIA)[1] has changed much about the patent system—but perhaps not its reputation. A vocal debate persists about business models that are perceived to rely principally on asserting patents rather than on practicing their underlying technology through manufacturing or licensing. A decade after Intel general counsel Peter Detkin coined the term "patent troll" describing "somebody who tries to make a lot of money off a patent that they are not practicing and have no intention of practicing and in most cases never practiced,"[2] the AIA itself created a host of legal mechanisms to respond to this set of business models. In administrative practice, such mechanisms include (1) amended *inter partes* review and a new post-grant review to invalidate existing patents of dubious quality,[3] (2) a transitional program for challenging the validity of certain business method patents[4] (which figure in abusive litigation to a debated extent[5]), (3) and an ability for third parties to submit prior art for consideration toward pending applications to improve patent quality going forward.[6] In litigation, such mechanisms include (1) stricter joinder rules to discourage shackling numerous unrelated defendants to each other in a single lawsuit,[7] (2) an infringement defense based on prior

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1. Leahy-Smith America Invents Act, Pub. L. No. 112–29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 15, 28, 35, 42, and 51 U.S.C.).

2. *See* Brenda Sandburg, *You May Not Have a Choice. Trolling for Dollars*, THE RECORDER (July 30, 2001), *available at* http://www.phonetel.com/pdfs/LWTrolls.pdf.

3. *See* Leahy-Smith America Invents Act § 6, 125 Stat. at 299–313 (codified as amended in scattered sections of 35 U.S.C.) (amending the *inter partes* review provisions in Chapter 31 of Title 35 and creating a new set of post-grant review provisions in a new Chapter 32).

4. *See id.* § 18, 125 Stat. at 329–31.

5. *Compare, e.g.*, Bernard Chao, *Finding the Point of Novelty in Software Patents*, 28 BERKELEY TECH. L.J. 1217, 1227 (2013) (arguing that "the non-practicing entity problem is greater with respect to business method patents than to industrial software patents"), *with* Michael Risch, *Patent Troll Myths*, 42 SETON HALL L. REV. 457, 477 (2012) (arguing that "business methods are a relatively small part of NPE litigation").

6. *See* Leahy-Smith America Invents Act § 8, 125 Stat. at 316 (codified at 35 U.S.C. § 122(e)).

7. *See id.* § 19(d)(1), 125 Stat. at 332–33 (codified at 35 U.S.C. § 299). The new joinder rule prohibits jointly suing multiple defendants in a single infringement action based solely on the assertion of a patent or set of patents common to all. *Id.* Prior to the AIA, this tactic often hobbled the ability of defendants to coordinate litigation strategy or vindicate individual interests. An interesting effect of the new joinder rule has been a rise in separate patent lawsuits, and a recent empirical study has shown that this rise is an artifact of § 299 rather than a genuine rise in litigation. *See* Christopher A. Cotropia, Jay P. Kesan & David L. Schwartz, Unpacking Patent Assertion Entities (PAEs) 37 (Nov. 10, 2013) (unpublished manuscript),

commercial use to strengthen the hand of firms already practicing later-patented technology,[8] (3) and a bar on using a defendant's failure to obtain advice of counsel as evidence of willful or induced infringement.[9]

Yet for all these patent-specific reforms, structural criticisms linger that patent trolls are largely immune from countersuit precisely because they do not practice but only threaten and sue[10] and that the high cost of patent litigation creates a settlement threshold below which rational firms will pay to avoid dubious or even frivolous claims rather than bear the higher costs of litigation to vindication.[11] A notable manifestation of this latter criticism is renewed interest in fee shifting as a policy lever, and in 35 U.S.C. § 285, which provides for fee shifting in "exceptional" cases.

I. LITIGATION TRENDS AND THE ENTHUSIASM FOR PATENT FEE SHIFTING

Much of this renewed interest proceeds from the famously high cost of patent litigation against the backdrop of the experience of judges with patent cases. Patent litigation has a history of forum shopping[12] as well as a reputation for favored judicial districts and

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available at http://ssrn.com/abstract=2346381.

8. *See* Leahy-Smith America Invents Act § 5, 125 Stat. at 297–99 (to be codified at 35 U.S.C. § 273). The nontransferable, *in personam* nature of the defense underscores its objective as a shield for economically productive activity rather than as a general weapon against patent rights.

9. *See id.* § 17, 125 Stat. at 329 (to be codified at 35 U.S.C. § 298).

10. *E.g.*, James Bessen & Michael J. Meurer, *The Direct Costs from NPE Disputes*, 99 CORNELL L. REV. 387, 413 (2014). *But see* David L. Schwartz & Jay P. Kesan, *Analyzing the Role of Non-Practicing Entities in the Patent System*, 99 CORNELL L. REV. 425, 430 n.28 (2014) (observing that "practicing-entity patent plaintiffs have several additional avenues of settlement available that NPEs do not," such as cross-licensing among industry actors and leveraging outside business relationships).

11. *See* Colleen V. Chien, *Startups and Patent Trolls*, 17 STAN. TECH. L. REV. (forthcoming 2014) (manuscript at 1–2), *available at* http://ssrn.com/abstract=2146251. Pure nuisance-value suits are only one kind of such abusive litigation, and perhaps not the most troubling. *See* Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2170 (2013) (observing that "[w]hile trolls do appear more likely to engage in abusive conduct like nuisance-value litigation, not all trolls engage in such conduct, and practicing entities also engage in their own forms of abusive conduct").

12. For detailed empirical discussion of forum shopping in patent litigation, see generally Scott E. Atkinson, Alan C. Marco & John L. Turner, *The Economics of a Centralized Judiciary: Uniformity, Forum Shopping, and the Federal Circuit*, 52 J.L. & ECON. 411 (2009); Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 558 (2001).

"rocket dockets."[13] Indeed, the majority of attorney fee awards analyzed in this study arose in just such a concentration of judicial districts.[14] Thus, the exposure of judges to patent cases has also been heterogeneous. Of the nearly 1,000 judges who presided over patent cases from 1995–2003, for example, a few saw over 100 cases, but nearly 40 percent saw fewer than a handful:

Table 1. Categories of Judges by Patent Cases Heard (1995–2003)[15]

Cases Heard	> 100	51–100	21–50	10–20	5–9	< 5
Judges	4 (0.3%)	34 (2.9%)	215 (18.1%)	254 (21.4%)	215 (18.1%)	467 (39.3%)

As for the cost of patent litigation, much empirical literature has relied on the American Intellectual Property Law Association's biannual survey regarding attorney incomes, demographics, billing rates, and other economic data for a benchmark.[16] The most recent survey reports the median expense of patent litigation, inclusive of all costs, as follows:

Table 2. Median Patent-Infringement Litigation Costs (Thousands)[17]

Amount at Risk	**2005**	**2007**	**2009**	**2011**	**2013**
< $1M	$650	$600	$650	$650	$700
$1M-$10M	n/a	n/a	n/a	n/a	$2,000
$10M-$25M	n/a	n/a	n/a	n/a	$3,325
$1M-$25M	$2,000	$2,500	$2,500	$2,500	$2,600
> $25M	$4,500	$5,000	$5,500	$5,000	$5,500

13. Saurabh Vishnubhakat, *Reconceiving the Patent Rocket Docket: An Empirical Study of Infringement Litigation 1985–2010*, 11 J. MARSHALL REV. INTELL. PROP. L. 58, 60 (2011).

14. *See infra* Part II.B tbls.6–8 and accompanying discussion.

15. Jay P. Kesan & Gwendolyn G. Ball, *Judicial Experience and the Efficiency and Accuracy of Patent Adjudication: An Empirical Analysis of the Case for a Specialized Patent Trial Court*, 24 HARV. J.L. & TECH. 393, 447 (2011).

16. *See, e.g.*, Bessen & Meurer, *supra* note 10 at 393; Lemley & Melamed, *supra* note 11 at 2126; Schwartz & Kesan, *supra* note 10 at 438 n.65. *See also, e.g.*, Thomas F. Cotter, *Four Principles for Calculating Reasonable Royalties in Patent Infringement Litigation*, 27 SANTA CLARA COMPUTER & HIGH TECH. L.J. 725, 741 (2011); Einer Elhauge & Alex Krueger, *Solving the Patent Settlement Puzzle*, 91 TEX. L. REV. 283, 305 (2012).

17. AM. INTELL. PROP. LAW ASS'N, REPORT OF THE ECONOMIC SURVEY 34 (2013) [hereinafter AIPLA Survey].

Under the American Rule, each side pays its own costs.[18] The rise in costs has led to recent literature revisiting the appropriate role of the American Rule in patent litigation.[19]

A. In the Congress

For its part, Congress has been receptive to this literature, with three House bills and two Senate bills in the last two years providing for some form of fee shifting as a check on patent litigation abuse. Even the brief time in which these bills have emerged has produced striking evolution in the approach of Congress to fee-shifting, from early attempts at targeted change to broader but more well-developed proposals for systemic reform.

In the House of Representatives, the Saving High-Tech Innovators from Egregious Legal Disputes (SHIELD) Act was first introduced in August, 2012, to address litigation over "computer hardware or software" patents.[20] For reasons including the difficulty of defining such patents *ex ante*, the bill was reintroduced in April, 2013, to address all patent litigation.[21] The current bill singles out patentees who neither (1) had a hand in obtaining the patent, nor (2) have substantial documented investment in practicing the patent, nor (3) are universities or technology transfer organizations—and *requires* attorney fees for any challenger of patent validity or infringement who prevails over these patentees unless exceptional circumstances exist.[22] Thus, it reverses the current § 285 presumption and asymmetrically penalizes only a nonprevailing patentee. Notably, the bill does not furnish its own definition of "exceptional" cases, leaving intact the existing common law.[23]

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18. *See generally* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993).

19. *Compare, e.g.*, Emily H. Chen, Note, *Making Abusers Pay: Deterring Patent Litigation By Shifting Attorneys' Fees*, 28 BERKELEY TECH. L.J. 351, 381 (2013) (supporting mandatory fee shifting), *with* Mark Liang & Brian Berliner, *Fee Shifting in Patent Litigation*, 18 VA. J.L. & TECH. 59, 66 (2013) (arguing that fee shifting should not be the default rule, only used more liberally under 35 U.S.C. § 285 where appropriate).

20. H.R. 6245, 112th Cong. (2012).

21. H.R. 845, 113th Cong. (2013). *See* Colleen V. Chien, *Reforming Software Patents*, 50 HOUS. L. REV. 325, 358 (2012) (discussing the broad, potentially overbroad, definition of software patents proposed by H.R. 6245).

22. H.R. 845 § 2.

23. *See* Part I.B, *infra*.

Even more recent and further along in the legislative process is the Innovation Act, introduced in late October 2013.[24] Following passage by the House six weeks later, it is currently before the Senate Committee on the Judiciary.[25] The Innovation Act also reverses the § 285 presumption in favor of fee shifting, but symmetrically applies to non-prevailing parties regardless of litigant posture and provides additional safeguards, including an exception for economic hardship and a requirement for a party to certify its ability to pay shifted fees if it does not prevail.[26] Moreover, the bill does specify that a non-prevailing party may overcome the new presumption by showing that its legal position and conduct were "reasonably justified" in law and fact.[27]

The Senate counterparts to these bills have proceeded similarly. The Patent Abuse Reduction Act of 2013, introduced in May 2013, departed just as the Innovation Act later would from asymmetric fee shifting, to apply broadly to all parties.[28] It, too, reverses the § 285 presumption and specifies that a non-prevailing party may overcome it if its legal position and conduct were "objectively reasonable and substantially justified," or "exceptional" circumstances exist.[29] Likewise, the Patent Litigation Integrity Act of 2013[30] requires a legal position and conduct that were "substantially justified" or that "special" circumstances exist.[31] Most recently, the substance of both Senate bills was the subject of a hearing last December before the full Judiciary Committee.[32]

In support of these Congressional proposals, the White House has also advocated greater liberality in statutory fee shifting. This has occurred both in the form of a legislative recommendation for greater

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24. H.R. 3309, 113th Cong. (as referred to the S. Comm. on the Judiciary, Dec. 9, 2013).

25. ACTIONS: H.R. 3309—113TH CONGRESS (2013-2014), http://beta.congress.gov/bill/113th-congress/house-bill/3309/all-actions/ (last visited Mar. 18, 2014).

26. H.R. 3309, 113th Cong. § 3 (as referred to the S. Comm. on the Judiciary, Dec. 9, 2013).

27. *Id.* § 3(b)(1). The requirement as to litigation "conduct" was added in a Manager's Amendment. H. Amdt. 520, 113th Cong. (2013).

28. S. 1013, 113th Cong. (2013).

29. *Id.* § 5(a).

30. S. 1612, 113th Cong. (2013).

31. *Id.* § 101(a).

32. *Protecting Small Businesses and Promoting Innovation by Limiting Patent Troll Abuse: Hearing on S. 1013 and S. 1612 Before the S. Comm. on the Judiciary*, 113th Cong (2013).

judicial discretion under § 285,[33] as well as an endorsement of the Innovation Act, including that bill's provisions for "reducing unnecessary costs of patent litigation."[34]

Thus, together with other structural legislation such as proposed heightened pleading standards for patent cases[35] and with executive actions such as recently proposed requirements for ongoing disclosure of the real parties in interest behind patent owners of record,[36] fee shifting in patent litigation appears to be arriving at a stable consensus in Congress—indeed, both political branches—on its desirability, substantive standards, and applicable scope. Even so, the current regime of § 285 is also before the Supreme Court as to these same questions of standard and scope.

B. In the Courts

The standard under § 285—what is an "exceptional" case?—is the subject of *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*[37] Both firms manufacture elliptical exercise machines, in which a stroke rail connecting the mobile foot rail to the front frame is the subject of Icon's U.S. Patent No. 6,019,710.[38] The U.S. District Court for the District of Minnesota granted Octane summary judgment of noninfringement[39] and found the case unexceptional.[40] The Federal Circuit affirmed and declined what it saw as Octane's invitation to "lower the standard for exceptionality to 'objectively unreasonable' to rebalance what it alleges is the power of large companies over

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33. *See* Press Release, White House Office of the Press Sec', Fact Sheet: White House Task Force on High-Tech Patent Issues (June 4, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues.

34. *See* Press Release, Exec. Office of the President, Statement of Administration Policy on H.R. 3309–Innovation Act (Dec. 3, 2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr3309r_20131203.pdf.

35. *See* S. 1013, 113th Cong. § 2 (2013); H.R. 3309, 113th Cong. § 3 (as referred to the S. Comm. on the Judiciary, Dec. 9, 2013).

36. Changes To Require Identification of Attributable Owner, 79 Fed. Reg. 4105 (proposed Jan 24., 2014) (to be codified at 37 C.F.R. pt. 1).

37. Icon Health & Fitness, Inc. v. Octane Fitness, LLC, 496 F. App'x 57 (Fed. Cir. 2012), *cert. granted*, 81 U.S.L.W. 3567 (U.S. Oct. 1, 2013) (No. 12-1184).

38. *Id.* at 59–60.

39. Icon Health & Fitness, Inc. v. Octane Fitness, LLC, No. 09-319, 2011 WL 2457914, at *1 (D. Minn. June 17, 2011).

40. Icon Health & Fitness, Inc. v. Octane Fitness, LLC, No. 09-319, 2011 WL 3900975, at *4 (D. Minn. Sept. 6, 2011).

smaller companies" in patent litigation.[41] Octane contests the Federal Circuit's "rigid and exclusive two-part test" as an intrusion on district judge discretion and an asymmetric burden on accused infringers.[42]

The practical scope of § 285—via deference to district court findings on exceptionality—is the subject of *Highmark Inc. v. Allcare Health Management Systems, Inc.*[43] The case is between Pennsylvania insurance firm Highmark and accused patent troll Allcare, which unsuccessfully asserted against Highmark Allcare's U.S. Patent No. 5,301,105 directed to certain managed health care systems.[44] The U.S. District Court for the Northern District of Texas found the case exceptional and awarded Highmark attorney fees.[45] Reviewing exceptionality *de novo*, the Federal Circuit reversed in part, concluding that because certain of Allcare positions were not "objectively unreasonable"[46] and Allcare had not engaged in litigation misconduct,[47] the case was not exceptional in those respects.[48] Highmark contests *de novo* scrutiny as the incorrect standard of review for § 285.[49]

Given the postures of the cases in relation to each other, it would certainly be appropriate for the legal standard for § 285 that emerges from *Octane Fitness* to influence or even determine the standard of review that emerges from *Highmark*. That is, a broader grant of discretion to district court judges in finding cases exceptional under § 285, as Octane proposes, is consistent with a grant of greater deference to those findings, as Highmark proposes—indeed, these are the very positions that the United States as *amicus curiae* has taken in the respective cases.[50]

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41. *Icon Health*, 496 F. App'x. at 65.

42. Petition for Writ of Certiorari, *Icon Health*, 496 F. App'x 57 (No. 12-1184).

43. Highmark, Inc. v. Allcare Mgmt. Sys. Inc., 687 F.3d 1300,(Fed. Cir. 2012), *cert. granted*, 81 U.S.L.W. 3562 (U.S. Oct. 1, 2013) (No. 12-1163).

44. *Id.* at 1306.

45. Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc., 706 F. Supp. 2d 713, 738 (N.D. Tex. 2010). The court relied on § 285 as well as Rule 11. *Id.* at 735–37.

46. Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc., 687 F.3d 1300, 1313–14 (Fed. Cir. 2012), *cert. granted*, 81 U.S.LW. 3562 (U.S. Oct. 1, 2013) (No. 12-1163).

47. *Id.* at 1316–18.

48. *Id.* at 1319.

49. Petition for Writ of Certiorari, *Highmark*, 687 F.3d 1300 (No. 12-1163).

50. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, Icon Health & Fitness, Inc. v. Octane Fitness, LLC, 496 F. App'x 57 (Fed. Cir 2012) (No. 12-1185); Brief for the United States as Amicus Curiae Supporting Petitioner, *Highmark*, 687 F.3d 1300 (Fed. Cir. 2012) (No. 12-1163).

Thus, Octane's descriptions of Icon as a large patent-holding interest restraining competition and Highmark's accusations of trolling behavior by Allcare are of a piece with the broader narrative of economic harm from abusive patent assertion. Yet apart from patent doctrine and statutory construction, ongoing commentary has also pointed out that Icon is a significant market actor and producer, not the generally assertion-oriented troll that Octane addresses in its larger policy argument.[51]

What is more, Octane's proposed looser standard contemplates only one basis for finding a case exceptional under § 285—that of "vexatious and unjustified" litigation—and ignores fee awards that punish litigation misconduct, willful infringement, or fraud on the USPTO.[52] Though litigation misconduct is at issue in *Highmark*, the logically prior question presented in *Octane Fitness* leaves open the question of precisely how forceful a policy response to abusive patent litigation the facts in these two cases can support.

In both the legislative and judicial settings, however, the debate over how much more effective a mechanism fee shifting ought to be for mediating patent litigation invites a descriptive account of its current use.

II. TEN YEARS OF ATTORNEY FEE AWARDS IN PATENT LITIGATION

A. Data, Methodology, and Prior Estimates

To provide such an account, this study evaluated attorney fee award data from the DocketNavigator litigation research service,[53] which draws all of its underlying patent litigation docket information and court documents from the Public Access to Court Electronic Records (PACER) service.[54]

A search of DocketNavigator produced 243 cases in which a U.S. district court in a patent case awarded attorney fees. By comparison to original court filing information from PACER, DocketNavigator's coverage of patent case filings prior to the early 2000s is somewhat

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51. *See, e.g.*, Ronald Mann, *Argument Preview: Justices To Assess Attorney's Fees in Patent Litigation (Twice in One Day!)*, SCOTUSBLOG (Feb. 24, 2014), http://www.scotusblog.com/2014/02/argument-preview-justices-to-assess-attorneys-fees-in-patent-litigation-twice-in-one-day/.

52. *Id.*

53. DocketNavigator, *available at* http://home.docketnavigator.com/.

54. PACER, *available at* http://www.pacer.gov/.

poor, though its coverage steadily improves up to current calendar years.[55] For that reason, the 16 oldest data points were dropped so that the observation window became 2003–2013, leaving 227 attorney fee awards. In addition to limiting the observation, the study also omitted those attorney fee awards which the fee award orders expressly identified as remedying litigation misconduct unrelated to 35 U.S.C. § 285 (e.g., under Rule 11), though these are arguably still relevant to the dynamics of patent litigation expense for plaintiffs and defendants. These totaled 11 further removals from the data, leaving 216 attorney fee awards.

Notwithstanding the question of DocketNavigator's *general* data coverage, for attorney fee awards in particular, the current data closely matches that of a prior empirical study on the incidence (but not amounts) of attorney fee awards over the same time period.[56] Liang & Berliner found 208 attorney fee awards from 2003 to May 15, 2013,[57] compared to this study's 216. This independent confirmation of the number of relevant exceptional case findings assures against biased or nonrandom omissions of attorney fee awards in the present study.

Relatedly, a summary examination of attorney fee awards in patent litigation from 1985–2004 found partial data on the set of 137 fee awards: award amounts were apparent in 87 cases.[58] From this data, Professors Bessen and Meurer observed median attorney fee awards of $400,000 for patentees who prevail at summary judgment, of $780,000 for patentees who prevail at trial, of $300,000 for alleged infringers who prevail at summary judgment, and of $980,000 for alleged infringers who prevail at trial.[59] Their finding, notably, was consistent with AIPLA Survey data from 2001.[60]

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55. Coverage refers to data available in DocketNavigator as compared to the source data available in PACER. A comparison of data on overall annual patent case filings shows that DocketNavigator's annual coverage is less than 30 percent for cases filed before 2001, but is over 80 percent for cases 2006 onward and over 90 percent for 2008 onward.

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

57. *Id.* at 87.

58. James Bessen & Michael J. Meurer, *The Private Costs of Patent Litigation*, 9 J.L. ECON. & POL'Y 59, 80–82 (2012).

59. *Id.* at 81 tbl.6.

60. *Id.* The 2001 AIPLA Survey estimated that litigation cost through trial was $499,000 when the stakes were less than $1 million, $1,499,000 when the stakes were between $1 million and $25 million, and $2,992,000 when the stakes were greater than $25,000,000. *Id.* at 81–82; *cf. supra* note 17, and accompanying table (showing a marked increase from 2001).

B. Discussion

Consistent with Liang and Berliner and with Bessen and Meurer, this study finds that about 71% of attorney fee awards go to plaintiffs and about 29% to defendants.[61] Inconsistent with Bessen and Meurer, however, the magnitudes of fee awards more clearly favor defendants from 2003–2013.[62] At the median, attorney fee awards made to defendants were about 2.4-fold more than those to plaintiffs. Adding back in the 11 attorney fee awards for non-§ 285 reasons such as litigation misconduct, plaintiffs' median remains about the same, but defendants' median rises by nearly 50%, leading to a 3.3-fold disparity. These findings are further illustrated in Tables 3 and 4 and Figure 1.

Table 3. Median Attorney Fee Awards in Patent Litigation for Plaintiffs and Defendants (2003–2013)

	Based on § 285 (n = 216 cases)	**Also Including Non-§ 285** (n = 227 cases)
Plaintiffs	$46,354.00	$45,287.00
Defendants	$109,466.00	$148,430.00
Disparity	2.4-fold higher for defendants	3.3-fold higher for defendants

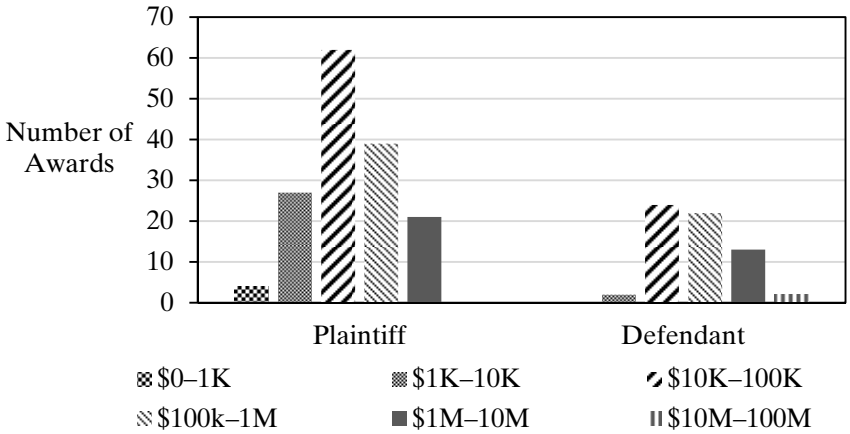
61. Liang and Berliner found a 68%-32% split (142 plaintiff awards and 66 defendant awards). *See* Liang & Berliner, *supra* note 56, at 87–88. Bessen and Meurer also found a 68%–32% split (59 patentee awards and 28 alleged infringer awards). *See* Bessen & Meurer, *supra* note 58, at 81 tbl.6.

62. Bessen and Meurer found only a 1.26-fold difference for post-trial fee awards to alleged infringers versus patentees during 1985–2004. *See* Bessen & Meurer, *supra* note 58, at 81 tbl.6.

Table 4. Distribution of Attorney Fee Awards for Plaintiffs and Defendants (2003–2013)

Range	Plaintiff	Defendant
$0–1K	4	0
$1K–10K	27	2
$10K–100K	62	24
$100K–1M	39	22
$1M–10M	21	13
$10M–100M	0	2
All	153 (70.8%)	63 (29.2%)

Figure 1. Distribution of Attorney Fee Awards in Patent Litigation for Plaintiffs and Defendants (2003–2013)



In a marked departure from Professors Bessen and Meurer's findings, observed median attorney fee awards from 2003–2013 were about an order of magnitude lower than the seven-figure estimates that correspond with 2001 AIPLA data.[63] This discrepancy between fees charged and fees awarded suggests that district judges may apply discounting as well.

Attorney-fee-award amounts also varied by technology. Using the well-established Hall-Jaffe-Trajtenberg (HJT) typology[64] that

63. *See supra* notes 59–60 and accompanying text.

64. *See generally* Bronwyn H. Hall, Adam B. Jaffe & Manuel Trajtenberg, *The NBER*

maps U.S. Patent Classification categories[65] to six broad technology categories, each patent case is identifiable by the technology classifications of the patents involved in that case.[66]

Comparing across technologies as shown in Table 5 and Figure 2, the distributions of attorney fee awards vary in both magnitude and skew. For example, "Chemical" cases saw 10 fee awards, but "Computers & Communications" cases saw 42. Fee awards skewed toward the $1K–$10K range for "Computers & Communications" and "Drugs & Medical" cases, but "Mechanical" cases saw more $100K–1 million awards, and "Electrical and Electronic" cases saw more awards over $10 million.

Table 5. Distribution of Attorney Fee Awards in Patent Litigation for Plaintiffs and Defendants (2003–2013)

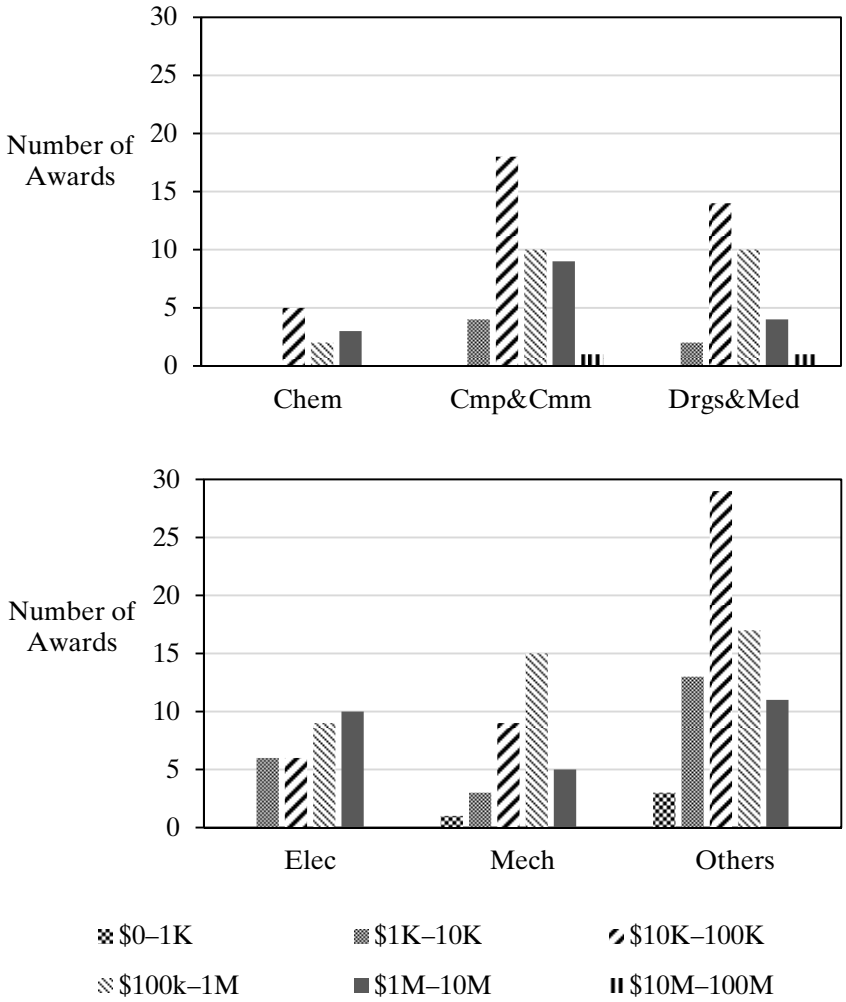
Range	Chemical	Computers & Communications	Drugs & Medical	Electrical & Electronic	Mechanical	Others
$0–1K	0	0	0	0	1	3
$1K–10K	0	4	2	6	3	13
$10K–100K	5	18	14	6	9	29
$100k–1M	2	10	10	9	15	17
$1M–10M	3	9	4	10	5	11
$10M–100M	0	1	1	0	0	0
All	10 (4.5%)	42 (19.1%)	31 (14.1%)	31 (14.1%)	33 (15.0%)	73 (33.2%)

Patent Citation Data File: Lessons, Insights and Methodological Tools, NBER Working Paper 8498 (2001), *available at* http://www.nber.org/papers/w8498.

65. *See generally* U.S. PATENT & TRADEMARK OFFICE, Office of Patent Classification, *available at* http://www.uspto.gov/patents/resources/classification/index.jsp.

66. Though most multi-patent cases fell into a single technology, some multiple-technology designations did occur.

Figure 2. Distribution of Attorney Fee Awards in Patent Litigation by Technology (2003–2013)



Finally, a review of the attorney fee award orders themselves reveals interrelated trends pertaining to judicial experience with patent cases.

First, attorney fee awards in patent cases appear to reflect a distribution of judicial experience similar to that which patent cases reflect more generally. Districts where fee awards originate are much the same as where litigants file patent cases in general. As Table 6 shows, a large plurality of attorney fee awards in patent litigation

during 2003–2013 came from a small number of districts. As Tables 7 and 8 further show, the six districts that produced over 40 percent of fee awards were also among the leading districts in filings.

Table 6. Distribution of Attorney Fee Awards in Patent Litigation Across Judicial Districts (2003–2013)

Awards	1	2–6	7–12	13–18	19–24	25–30	31–36	37–42
Districts	22	24	6	1	0	0	0	1

Table 7. Judicial Districts That Produced the Most Attorney Fee Awards in Patent Litigation (2003–2013)

District	**Awards Based on § 285** (n = 216 cases)	**Awards Based on § 285 and Non-§ 285** (n = 227 cases)
C.D. Cal.	38	40
N.D. Cal.	15	16
N.D. Ill.	11	11
S.D. Cal.	10	11
N.D. Ga.	10	10
E.D. Tex.	8	10
Subtotal	92 (42.6%)	98 (43.4%)

Table 8. Nationwide Rank in Patent Case Filings of Judicial Districts That Produced the Most Attorney Fee Awards in Patent Litigation (2003–2013)

District	**'03**	**'04**	**'05**	**'06**	**'07**	**'08**	**'09**	**'10**	**'11**	**'12**	**'13**
C.D. Cal.	1	1	1	1	2	2	1	4	3	3	3
N.D. Cal.	2	2	2	3	6	4	4	5	4	4	4
N.D. Ill.	3	3	4	6	5	6	6	3	5	5	6
S.D. Cal.	13	15	13	13	9	8	8	13	10	9	5
N.D. Ga.	21	13	11	8	11	11	16	16	17	16	18
E.D. Tex.	15	8	3	2	1	1	2	1	1	1	1

Second, many of the patent attorney fee award orders themselves show systematic calculation of the attorney fees incurred by

prevailing parties as well as subsequent discounting by the district judge, that is, in the interest of fairness or to mitigate perceived overbilling, duplicative work product, and the like. For example, of the patent attorney fee award orders reviewed, 45 orders expressly discuss a lodestar calculation in determining the amount of the fee award.[67] The lodestar method has been the general rule for attorney fee award calculations for over 30 years since the Supreme Court adopted it in *Hensley v. Eckerhart*[68] relying, in turn, on the fact-intensive twelve-part analysis of the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*[69] Given its widespread use, the 45 orders are likely an undercount of how many fee awards overall rely on the lodestar approach implicitly, e.g., through attorney briefings or magistrate recommendations on the issue.

This discursive application of the lodestar method is important because despite the method's well-established usage, a significant portion of fee awards still apply it, not as rote affair, but with deliberate attention to the facts at hand. The 45 orders represent 25 different judicial districts, nearly half (and a disproportionately active half at that) of the 54 districts that produced attorney fee awards in patent litigation from 2003–2013. These 25 districts account for 145 fee awards, or two-thirds of all 216 fee awards. Not least, the six districts that led in attorney fee awards in patent litigation and led among patent case filings more generally[70] were also all represented among the 45 orders that expressly discuss the lodestar method.

CONCLUSION

To a considerable degree, therefore, judges' awards of patent attorney fees reflect their growing experience and familiarity with patent cases as well as their fact-intensive evaluation of litigation costs, notwithstanding the variety of fee awards that results across litigant posture or technology.

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67. For a concise discussion of the lodestar method, see, for example, George B. Murr, *Analysis of the Valuation of Attorney Work Product According to the Market For Claims: Reformulating the Lodestar Method*, 31 LOY. U. CHI. L.J. 599, 602–09 (2000). The lodestar method begins by multiplying the reasonably expended amount of attorney time by a reasonable rate of compensation, followed by adjustment of the initial estimate based on the circumstances of the case.

68. Hensley v. Eckerhart, 461 U.S. 424 (1983).

69. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

70. *See supra* Part II.B tbls.7–8.