V. ATTORNEYS' FEES

35 U.S.C. §285

- "The court in exceptional cases may award reasonable attorney fees to the prevailing party."
- Key question is what constitutes an "exceptional" case

Recent Pair of Supreme Court Rulings

- Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749 (2014)
  - Rejected Federal Circuit's Brooks Furniture test for an exceptional case as requiring both being "brought in subjective bad faith" and "objectively baseless."
  - "We hold, then, that an 'exceptional' case is simply one that stands out from others with respect to the substantive strength of a party's litigating position . . . or the unreasonable manner in which the case was litigated."
  - Decision is made within the discretion of the district court on a case-by-case basis, based on the totality of the circumstances
  - Just like eBay, smears a bright-line Federal Circuit rule.
- Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 134 S. Ct. 1744 (2014)
  - The decision to determine whether a case is exceptional is within the district court judge's discretion
  - Because of that, the standard of review of such a decision is abuse of discretion

What Changed as a Result?

- Attorney fees grant rates have increased when compared to under Brooks Furniture
- BNA study of cases requesting fees (http://www.bna.com/recent-supreme-court-n17179921906/):
  - Pre-Brooks grant rate (100 random cases): ~42%
  - Brooks (pre-Octane) grant rate (100 random cases): ~32%

- Post-Octane grant rate (all 40 cases through September 2014): 45%

- Federal Circuit Bar Association study of Defendant's motions for fees (http://www.iplawtracker.com/data-shows-spike-patent-attorney- fee-motions-awards-octane/)
  - Grant rate for one year pre-Octane: 13%
  - Grant rate post-Octane (through March 2015): 36%
    - Claims grant rate through August 2014 was 31% and through December 2014 was also 31%

Post Octane and Highmark—What Qualifies as Exceptional?

- Very fact specific, Judge has significant discretion
- Example cases found to be exceptional
  - Bad faith findings on the merits
    - Inequitable conduct
      - Intellect Wireless Inc. v. Sharp Corp., 45 F. Supp. 3d 839 (N.D. Ill. 2014)
        - Court found inequitable conduct by the patentee.
        - Purpose of §285 is "not to punish the losing party, but rather to compensate the prevailing party for the costs incurred due to the losing party's unreasonable conduct"
        - Held that not all cases of inequitable conduct are "necessarily exceptional," but here found enough to grant attorney's fees to defendants
    - Patent misuse
      - Patent misuse "is highly probative of Plaintiff's bad faith in bringing the patent infringement claim to begin with" and justified granting fees. Home Gambling Network, Inc. v. Piche, No. 2:05-CV-610-DAE, 2014 U.S. Dist. LEXIS 71071, *25–28 (D. Nev. May 22, 2014).
    - Willful infringement

- Granted attorney's fees to plaintiff in PVPA case due to defendant's willful infringement. AGSouth Genetics LLC v. Georgia Farm Servs. LLC, 1:09-CV-186 (WLS), 2014 U.S. Dist. LEXIS 69471, *14 (M.D. Ga. May 21, 2014)

- Unreasonable manner in which the case was litigated
  - Can be due to "unethical or unprofessional conduct by a party or his attorneys" Old Reliable Wholesale Inc. v. Cornell Corp., 635 F.3d 539, 549 (Fed. Cir. 2011).
  - Taking opposing litigation positions in front of the BPAI during inter partes reexamination and in district court litigation. Kilopass Tech. Inc. v. Sidense Corp., No. 3:10-cv-02066-SI, 2014 U.S. Dist. LEXIS 112321 (N.D. Cal. Aug. 12, 2014).
  - A finding of baselessness alone can be sufficient to merit an award of attorney's fees. Classen Immunotherapies Inc. v. Biogen Idec, CIVIL No. WDQ-04-2607, 2014 U.S. Dist. LEXIS 67169 (D. Md. May 14, 2014)
  - Totality of circumstances made case stand out as exceptional: Litigation tactics designed to increase costs, no pre-filing infringement analysis, improper motivation reflected in emails, and an uncommercialized patent. Icon Health & Fitness, Inc. v. Octane Fitness, LLC, 09-319 ADM/SER, 2015 U.S. Dist. LEXIS 85571, *15–25 (D. Minn. July 1, 2015).
- Weakness of Litigation Position
  - "In comparing this case to the many patent cases over which this Court has presided during the past 22 years as a federal judge, Icon's litigation position stands out as a particularly and unusually weak case on the merits. The arguments advanced by Icon bore no relation to what the '710 patent disclosed and covered. The claim language, specification, prosecution history, inventor testimony, and Icon's own expert testimony posed major obstacles to Icon's success on the merits. Icon must have known that the odds of winning this lawsuit were very slim." Icon Health & Fitness, Inc. v. Octane