

Fee Shifting in US & Abroad: Lessons for Reform?

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Overview

- **Current Reform Debates in US**
 - Push to Rein in “Patent Trolls”
- **Judicial Front in Parallel with Leg. Front**
 - U.S. Supreme Court Reviewing 2 Cases
- **Fee Shifting Outside US**
- **Global Lessons for Patent Reform?**

Fee Shifting Under U.S. Law: “Am. Rule” + 35 U.S.C. § 285

- **“American Rule” (“Am.-Japanese Rule”?)**
 - Each party bears own attorney fees.
 - Various exceptions
- **Current 35 U.S.C. § 285**
 - “The court in exceptional cases may award reasonable attorney fees to the prevailing party.”

Fee Shifting in U.S. Courts:

2 U.S. Supreme Court Cases

- ***Octane Fitness v. Icon H.&F.*, 12-1184**
 - Q: Test for fee-shifting due to case weakness
 - CAFC: Objectively baseless + Bad faith + C&C evid.
 - US as Amicus: Gross injustice
- ***Highmark v. Allcare H'ltH M.S.*, 12-1163**
 - Q: Standard of review for district court ruling
 - CAFC: Objective baselessness → de novo review
 - US as Amicus: Abuse of discretion across board
- Both argued Feb. 26, 2014

Fee Shifting Abroad: “Loser Pays” Variants

- **Judicial Discretion**
 - **Australia (50%); Canada (15-33%), UK (60-65%)**
- **Tariff**
 - **Germany:** statutory formula tied to case value
- **Differentiation Between Attorney-Fee Types**
 - **France:** legally necessary v. discretionary fees
- **One-Way v. Two-Way**
 - **Japan:** % comp. damages (e.g., 10%) for patentee
- Refs.: T.F. COTTER, *COMPARATIVE PATENT REMEDIES* (2013);
M.RIEMANN, *in* *COST & FEE ALLOCAT’N IN CIV.PRO.* (2012);
THE COSTS & FUNDING OF CIV.LITIG. (HODGES ET AL., 2010)

Concluding Questions

- Are “textbook” descriptions accurate?
- Are there other notable variants?
- What has been experience with variants?
- What lessons are there for reform debates?