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April 13, 2015

Chairman Bob Goodlatte
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member John Conyers, Jr.
Committee on the Judiciary
United States House of Representatives
B-351 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

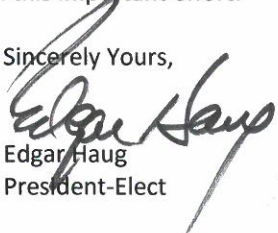
We again write on behalf of the Federal Circuit Bar Association on H.R. 9, The Innovation Act. This Association has worked closely with intellectual property issues since 1985 and has focused on effective litigation techniques, including those in the United States Court of Appeals for the Federal Circuit, the district courts, and other tribunals reviewed by the Circuit. Our membership, both national and international, includes litigators and business representatives and draws from the most sophisticated and experienced intellectual property sectors in the world. When addressing legislative matters we do not speak on behalf of government members. They were not involved in this topic.

We pointed out in our letter of February 20, 2015, (attached) that the recent Supreme Court rulings in *Octane* and *Highmark* (collectively, "*Octane*") relaxed the standard for recovering attorney's fees under section 285, and thus rendered the fee-shifting provisions of H.R. 9 unnecessary. Testimony presented to this Committee on February 12, 2015, incorrectly reported, "in the most recent three months, the rate of full denials of attorneys' fees motions is about the same as it was before the Supreme Court decided *Highmark* and *Octane*." Testimony of Krish Gupta at 12-13.

We have reviewed each district court decision between the date of the *Octane* decision and March 31, 2015, which substantively ruled on a motion for fees under section 285. The results are summarized in the attached paper, "*A Comparison of pre-Octane and post-Octane District Court Decisions on Motions for Attorneys' Fees Under Section 285*." The data establishes that motions for attorney's fees under section 285 after *Octane* were granted at a rate almost three times as high as in the year preceding *Octane*. In addition, the data establishes—contrary to the witness's testimony—that 50% of motions for fees under section 285 filed by accused infringers were granted between January 1, 2015, and March 31, 2015. In contrast, in the 12 months preceding *Octane*, only 13% of such motions were granted.

The mandatory fee-shifting proposed by H.R. 9 materially changes the law and will substantially impair the ability of certain patent holders to enforce their rights. Please contact our Executive Director, James E. Brookshire, at brookshire1@fedcirbar.org, if there is anything we can do assist you or your staff in this important effort.

Sincerely Yours,


Edgar Haug
President-Elect

Enclosures

"Make a Difference"