

## *Patent Standing*

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This paper articulates a framework for determining when a plaintiff has standing to sue for a declaration that a patent is invalid. Standing to challenge the validity of an issued patent has not traditionally been a contested issue in patent litigation. Typically, a plaintiff patent holder sues a defendant for infringement; the defendant can then counterclaim for a declaration that the patent is invalid. In that circumstance, there is no question that the defendant has raised a “case or controversy” sufficient for Article III standing. Two developments, however, are likely to expand the pool of potential patent challengers and present new questions about the conditions under which a plaintiff may sue for a declaratory judgment of patent invalidity. The first is the rise of interest group litigation in the patent arena, such as the *Association for Molecular Pathology* case challenging the validity of gene patents. The second is the increasing scholarly and political support for third party post-grant review proceedings in the PTO that can then be appealed to a court.

Despite the Supreme Court’s rejection of a patent-specific test for standing, the Federal Circuit’s patent standing jurisprudence remains idiosyncratic and largely fails to engage with the Court’s well-developed standing doctrine. This paper situates the problem of patent standing in the broader doctrinal and theoretical debates over the proper scope of federal court jurisdiction. A claim that a particular patent is invalid is in part a vindication of a “private right” to be free from the shadow of infringement litigation – akin to a suit in real property to quiet title – and in part an assertion of a “public right” to be certain that only valid patents encumber the public domain. The hybrid nature of the relief sought in patent declaratory judgment actions suggests that standing to bring such actions should be broad. That conclusion is both justified as a matter of current doctrine and normatively desirable.

The paper concludes with several suggestions about what standing might tell us about patents, and what patents might tell us about standing. Analysis of patent standing informs the ongoing debate in patent scholarship over the extent to which patents are more properly conceived as a form of property or regulation. The hybrid nature of patents, in turn, suggests that theorists of standing and federal jurisdiction may be drawing too sharp a distinction between public and private rights, at least in the limited context of claims that implicate both concerns.