

PATENT STANDING

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Standing has traditionally not been a subject of serious dispute in patent cases. In the typical case, a patentholder sues another party for infringement. The infringement defendant can assert the invalidity of the patent as a defense or counterclaim. In this traditional posture, the two parties are plainly adverse with respect to two legal questions of unquestionable immediacy: infringement and validity. Two developments, however, are putting pressure on that traditional model of patent litigation and raising novel questions about who has standing to initiate judicial proceedings to invalidate a patent. 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 significant expansion of post-grant administrative review proceedings that Congress enacted as part of the Leahy-Smith America Invents Act, under which any person may challenge a patent before the PTO and then appeal the PTO's decision in federal court.

The Federal Circuit has struggled to develop a coherent framework for determining when there is standing to sue to challenge the validity of a patent. As the class of potential plaintiffs (or appellants) expands, that court's jurisprudence is becoming increasingly anachronistic. In this paper, I argue that the Federal Circuit's approach to standing issues in validity cases is flawed and results in arbitrary and confusing standing rules that unduly restrict the class of persons who can challenge the validity of patents. The Federal Circuit fails to draw a meaningful distinction between validity and infringement, and therefore focuses on the wrong types of injuries. The court also conflates several of the Supreme Court's justiciability doctrines, thereby elevating prudential concerns into constitutional limitations on jurisdiction. In this paper, I seek to correct those errors by refocusing the inquiry on standing to challenge the validity of patents and situating this problem within the broader context of the Supreme Court and other courts of appeals' standing jurisprudence. Doing so yields a broader conception of standing than current Federal Circuit doctrine allows. I defend this broad conception as a normative matter, arguing that it is consistent with sound patent policy and with the concerns that animate constitutional limitations on federal court jurisdiction. To the extent that valid concerns with broad standing remain, I argue that they are better addressed through the application of more prudential doctrines such as ripeness.

I conclude with some observations about what standing might tell us about patents and, conversely, what patents might tell us about standing doctrine.