

*Patent Law As Public Law*

Historically, patent litigation has been viewed and treated primarily as private law litigation, as opposed to public law litigation. This paradigm has begun to shift, however, as various stakeholders have come to acknowledge the profound impact that the patent system – and particularly invalid patents – have on the public at large. Yet, in order for a public law regime to succeed, there must be a host of enforcement mechanisms available, including the opportunity for privately initiated litigation.

Public interest organizations have played a prominent role in the enforcement of certain public rights, such as free speech, equal protection, and environmental laws. While such organizations showed little interest in the patent system in the past, that is changing. In recent years, the ACLU and Public Patent Foundation have initiated large-scale public impact litigation pursuant to the Declaratory Judgment Act challenging the validity of patents relating to human genes and genetically-modified seed. Like many plaintiffs before them, though, these organizations have discovered that the Federal Circuit’s patent declaratory judgment jurisprudence makes it very difficult – if not impossible – to challenge potentially invalid patents.

This article argues that, because the Federal Circuit improperly views patent declaratory judgment actions through the lens of a private law model, the court has created doctrine that improperly elevates the rights of private parties above those of the public. In particular, the court’s standing and personal jurisdiction jurisprudence often pose insurmountable procedural obstacles that lead to the early dismissal of patent declaratory judgment actions. Because the merits of these suits are left unaddressed, invalid patents remain in force and the public is harmed. This article proposes that this flawed doctrinal architecture will be fixed once the Federal Circuit recognizes and treats patent validity challenges as public law litigation, as many other participants in the patent system have already done.