*Law & Social Inquiry* (2024), **49**, 2380–2397
doi:10.1017/lsi.2024.30

**ARTICLE**

# The False Marking Gold Rush: A Case Study of the Private Enforcement of Public Laws

Zachary D. Clopton

Professor of Law, Northwestern Pritzker School of Law, Chicago, IL, United States
Email: zclopton@law.northwestern.edu

(Received 07 April 2023; revised 11 December 2023; accepted 31 May 2024; first published online 18 September 2024)

## Abstract

Federal law prohibits deceiving the public by falsely marking an item as patented. The "false marking" prohibition has been enforced primarily by private lawsuits on behalf of the United States, with the party plaintiff and the government splitting the penalty. When a court decision dramatically increased the potential recovery for false marking claims, lawyers pounced immediately, filing more cases per week than had previously been filed in years. Indeed, many lawyers who did not previously work on patent cases joined the fray. Within two years, Congress eliminated this type of false marking suit and terminated all pending cases. Using empirical data, interviews with lawyers, legislative history, litigation documents, and news sources, this article tells the instructive history of false marking litigation. This history shows that the supply of private enforcement—lawsuits by private parties to enforce laws in the public interest—is sensitive to market forces. It also shows that, even when concentrated interests encourage Congress to cut back on private enforcement, Congress does not move as quickly as the bar. This matters because once Congress authorizes private enforcement, the maintenance of that system depends on judges and lawyers interpreting private enforcement statutes.

**Keywords:** Civil procedure; litigation; intellectual property

## Introduction

Private enforcement describes the use of private civil lawsuits—rather than, for example, government litigation or taxes—to enforce laws that regulate private behavior. Private enforcement is a central mode of enforcing US laws on antitrust, securities, the environment, and more (Farhang 2011; Glover 2012; Burbank, Farhang,

Thank you to Kevin Clermont, John Golden, Paul Gugliuzza, William Hubbard, Megan La Belle, Mark Lemley, Avery Malinski, Greg Reilly, Sarah Reis, Dave Schwartz, Michael Volkert, and the many attorneys willing to be interviewed for this project.

and Kritzer 2013). In recent times, private enforcement has been invoked as a tool of rights suppression—for example, in laws targeting abortion such as Texas's so-called SB8 (Huq 2023; Michaels and Noll 2023).[1] The qui tam is an early form of private enforcement (Krent 1989, 290–92; Engstrom 2013). For centuries, qui tam suits were brought on behalf of the monarch by the "relator" (or sometimes "informer"), with the recovery going to the Crown minus a bounty to the relator. This historical pedigree aided Justice Antonin Scalia in upholding Article III standing in a qui tam suit even when the private party did not suffer an injury in fact.[2] The qui tam suit remains a major vehicle for enforcing the Federal False Claims Act[3] and many state false claims acts as well.[4] It has attracted the interest of commentators as a potential tool in areas such as tax, privacy, employment discrimination, and more (Rapp 2007; Hertel 2013; Brinn 2019; Ormerod 2022). And it has received recent and ignominious attention in those rights-suppressing laws mentioned above.

Private enforcement and qui tam are neither good nor bad. They are tools that can be used for whatever ends. Evaluating which tool is right for a particular job requires understanding how those tools work. And such evaluation depends on the study of actual private enforcement and qui tam regimes. A recurrent feature of the academic literature on private enforcement is a passing reference to an obscure qui tam provision buried in the patent laws. Leading articles on private enforcement give this provision no more than a footnote (Krent and Shenkman 1993; Stephenson 2005; Engstrom 2014). Even an article about the potential for qui tam in patent law spent only a few paragraphs on the one actual qui tam in patent law (Golden 2013).

This article is a case study of the qui tam provision in the federal statute prohibiting "false marking": the labeling of a product as "patented" when it is not patented, when the patent is expired, or when the marker does not own the applicable patent.[5] The basic idea is that falsely labeling a product as patented is fraud on the consumer and might discourage others from developing competing products for fear of being sued for patent infringement. False marking, when intended to deceive the public, has been prohibited under US law since 1842.[6] Starting in that year, one way to enforce the false marking statute was through a qui tam action. Unlike under the False Claims Act, the false marking relator could proceed without any notice to, or involvement of, the government. Instead, the only necessary role for the government was to receive its share of the fine from the relator.

From its early days, the penalty for false marking was set at one hundred dollars. In 1952, Congress increased the penalty to a whopping five hundred dollars (maximum). The one-hundred-dollar and five-hundred-dollar penalties for this obscure violation did not seem to garner much attention—that is, until a Federal Circuit decision in December 2009 held that the penalty was to be assessed per marked item.[7] So, for example, when almost twenty-two million Solo cups—the red cups ubiquitous at college fraternity parties—were marked with an expired patent number, a potential relator might see

[1] Texas Health and Safety Code § 171.201.

[2] *Vermont Agency of Natural Resources v. US ex rel. Stevens*, 529 U.S. 765 (2000).

[3] 31 U.S.C. §§ 3729–33.

[4] For example, 740 ILCS 175/1 et seq.

[5] 28 U.S.C. § 292.

[6] For a general theory of private attorneys general in intellectual property, see Van Houweling 2009.

[7] *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295, 1298 (Fed. Cir. 2009).

dollar signs.[8] And, indeed, they did. Prior to that Federal Circuit decision, there had been a total of forty-four false marking cases over a period of seven years, roughly one case every other month.[9] The Federal Circuit decision was a "green light."[10] During the less than two years that the Federal Circuit's rule was in place, relators filed 953 false marking cases or roughly forty-five per month.[11] One lawyer, who eventually filed dozens of false marking qui tams, pitched his firm on the opportunity after determining that a consumer product he used was marked with an expired patent number.[12] The firm set up a company to serve as the plaintiff in these cases, and they offered bonuses to firm employees and some local high school students for finding falsely marked products.[13] These lawyers and their allies were not alone. It was, in the words of a lawyer interviewed for this project, a "gold rush."[14] Congress, worried about "frivolous and vexatious litigation,"[15] quickly got into the act. Within two years, Congress removed the qui tam provision from the false marking statute, going so far as to apply this change to pending cases. After that law went into effect, false marking cases dried up.[16]

Using empirical data, interviews with participants, legal filings, legislative history, and news reports, this article tells the story of the rise and fall of the false marking qui tam.[17] The long history of the false marking qui tam before 2011 may be increasingly important as the historically minded Supreme Court of the United States considers the interaction between standing and executive power, with the qui tam action as a central character.[18] More theoretically, the story of the false marking qui tam adds evidence to the claim that the market for private enforcement works as predicted. An increase in the size of the penalty may induce parties and attorneys to seek out and file more enforcement actions. This is consistent with the findings of a leading study on private enforcement markets, in which Sean Farhang (2009) demonstrated that

[8] *Pequignot v. Solo Cup Co.* 608 F.3d 1356 (Fed. Cir. 2010) (finding that Solo had marked the cups with expired patent numbers but concluding that there was no liability because there was no intent to deceive the public, as required by the statute).

[9] These data are drawn from a dataset compiled by the Patent and Trademark Office in collaboration with academic researchers. "Patent Litigation Docket Reports Data," accessed August 29, 2024, https://www.uspto.gov/ip-policy/economic-research/research-datasets/patent-litigation-docket-reports-data.

[10] Anonymous, interview with author, June 28, 2022.

[11] Anonymous, interview with author, June 28, 2022.

[12] Anonymous, interview with author, June 23, 2022.

[13] Anonymous, interview with author, June 23, 2022.

[14] Anonymous, interview with author, June 14, 2022.

[15] 157 Cong. Rec. S1368 (March 8, 2011) (Senator Grassley).

[16] "Patent Litigation Docket Reports Data."

[17] All interviews were conducted anonymously and are on file with the author. Interview subjects were identified by relying on the quantitative data on which lawyers filed the most false-marking cases, supplemented by snowball sampling of interview subjects recommended in the initial interviews.

[18] See *United States, ex rel. Polansky v. Executive Health Resources, Inc.*, 143 S.Ct. 1720 (2023) (Thomas J. dissenting). For more, see Leitner, forthcoming. Critics of private enforcement sometimes suggest that such statutes intrude on executive authority. Defenders of Congress's power to authorize private enforcement then point to the long history of qui tam statutes as private enforcement's "history and tradition." Critics fire back that qui tams like the False Claims Act are different because they involve government injury and government supervision. But the false marking qui tam, since 1842, has neither. This example thus might be relevant to the judicial future of private enforcement.

Congress self-consciously increased the enforcement of civil rights laws by increasing the potential recovery available to private enforcers.

Similarly, the political economy of legislation also worked as expected. Once the potential fines ballooned, and concentrated interests felt threatened, it was not long until Congress stepped in. Congress responded by eliminating the qui tam and terminating pending cases twenty-one months after the Federal Circuit decision, which was relatively quick for the federal legislature but still much slower than the speed with which the private bar assimilates new information. Taken together, these findings demonstrate that, once Congress sets an enforcement regime out into the world, courts and lawyers take on a policy-making role. Prior research has focused on courts making private enforcement more difficult (Burbank and Farhang 2017), but, for false marking, the courts were the policy makers that dramatically increased the enforcement incentives.

This article begins with a brief background on private enforcement and associated literatures. It then tells the history of the false marking qui tam from its origins to its demise. In its final part, this article offers some reflections on the economies of litigation and legislation and on how the division of institutional authority can lead to unexpected changes to private enforcement regimes.

## Background

Private enforcement typically refers to the use of private civil litigation to enforce or induce compliance with substantive laws, often those that in many systems would be enforced by the state (Farhang 2011; Glover 2012; Burbank, Farhang, and Kritzer 2013). Common topics addressed by private enforcement in the United States include civil rights and civil liberties, antitrust, environmental, labor and employment, securities, and consumer protection (Farhang 2009; Clopton 2016). In his path-marking book on the topic, Sean Farhang (2011) found that, at the US federal level, Congress was more likely to turn to private enforcement when a pro-enforcement Congress was paired with an anti-enforcement executive, though at least one study does not find similar results at the state level (Zambrano et al. 2023). Federal courts, too, seem to infuse their judgments of procedural issues related to private enforcement with their substantive preferences on enforcement levels (Burbank and Farhang 2017, 2021). These latter findings also remind that Congress's use of private enforcement enlists judges, who may or may not be faithful agents.

The reasons why pro-enforcement policy makers might favor private enforcement have been well studied. According to one review, private enforcement has several advantages, including the ability to "(1) multiply resources devoted to prosecuting enforcement actions; (2) shift the costs of regulation off of governmental budgets and onto the private sector; [and] (3) take advantage of private information to detect violations" (Burbank, Farhang, and Kritzer 2013, 662). The literature assumes that the pro-enforcement legislators can engage private enforcers through legislation. They do so not only with the creation of a private right of action but also through litigation subsidies, typically provisions on fee shifting and extra-compensatory damages (Resnik 2000; Farhang 2011; Zambrano et al. 2023). As mentioned above, Sean Farhang (2009) found evidence of this effect in the Civil Rights Act of 1991, though at least one prior study found no effect on enforcement from changing the fee-shifting rules (Schwab and Eisenberg 1987–88). Other evidence is limited.

While these studies inquired into whether Congress can increase levels of private enforcement through incentives, the theoretical model also would suggest that Congress could reduce enforcement levels by eliminating or reducing those incentives. Such an approach would not entirely eliminate private enforcement (for example, by eliminating the private cause of action) but make it harder or less remunerative to bring private enforcement actions.[19]

## The false marking qui tam

### *The Pre-History*

The false marking statute began in the Patent Act of 1842.[20] Section 5 of the Act prohibited the false labeling of a product with the name of the patent holder or as "patented," with the intent to deceive the public.[21] According to the statute, doing so was punishable by "a penalty of not less than one hundred dollars, with costs, . . . one half of which penalty, as recovered, shall be paid to the patent fund, and the other half to any person or persons who shall sue for the same."[22] In other words, the statute employed the qui tam mechanism to allow a private party to sue for false marking, splitting the recovery with the US government. The legislative history of the 1842 Act was spare, suggesting that "the bill was intended to . . . protect the rights of patentees."[23] Published case law under the Act was limited as well. In 1853, in *Nichols v. Newell*, the District of Massachusetts explained that the false marking statute had three elements, to be proven beyond a reasonable doubt: (1) the defendant marked the article as patented; (2) the defendant had no applicable patent; and (3) the marking was done with the intent to deceive the public.[24]

With respect to damages, the *Nichols* court stated that damages would be assessed at a minimum of $100 per count.[25] But two years later, in *Stimpson v. Pond*, the same court in an opinion by Circuit Justice Curtis held that damages should not exceed $100, even though the statute said "not less than one hundred dollars."[26] The court reasoned that, as a penal statute, the provision should be read narrowly, and there was no indication that Congress authorized any particular penalty greater than $100.[27] The court also observed that because it is a penalty statute, the jury could not simply look to the plaintiff's injury.[28]

In 1870, Congress revised the patent laws.[29] Section 39 of the Patent Act of 1870 restated the false marking statute in slightly different language but with no major

[19] For example, see 15 U.S.C. § 78u–4 (Private Securities Litigation Reform Act).
[20] Patent Act, 1842, 5 Stat. 543, 544, ch. 263 § 5.
[21] Patent Act, 1842.
[22] Patent Act, 1842.
[23] Cong. Globe, 27th Cong., 2d Sess. 833 (August 6, 1842).
[24] *Nichols v. Newell*, 18 F.Cas. 199 (D. Mass. 1853).
[25] *Nichols*, 18 F.Cas.
[26] *Stimpson v. Pond*, 2 Curt.C.C. 502 (D. Mass. 1855).
[27] *Stimpson*, 2 Curt.C.C.
[28] *Stimpson*, 2 Curt.C.C.
[29] Patent Act, 1870, 16 Stat. 198, 203, ch. 230 § 39.

substantive changes.[30] The new statute provided for "a penalty of not less than one hundred dollars, with costs; one moiety [half] of said penalty to the person who shall - sue for the same, and the other to the use of the United States."[31] The congressional debates said essentially nothing about the false marking provision, instead being mostly preoccupied with patent officials' salaries, patent fees, and other pecuniary matters, plus some florid language about inventing.[32] An 1896 article in the *Harvard Law Review*, written by patent attorney Odin Roberts (1896–97), reviewed the law of false marking under the 1870 Act.[33] Roberts described the tension between protecting patent holders and over-enforcement. On the one hand, "the intent of Congress in enacting [the false marking provision] was presumably to throw a healthful restraint in the way of unscrupulous persons who might be tempted to deceive the public" 268). But, on the other hand, "[d]oubtless many such actions have been brought for the sake of intimidation, not to say black-mail, in cases where the facts did not warrant an information" 268).

Perhaps in light of this concern, courts construed the false marking law narrowly,[34] though some courts relaxed the reasonable doubt standard of earlier cases.[35] The reported cases continued to treat the "not less than one hundred dollars" language as a maximum. Some early cases applied the penalty to each article falsely marked,[36] but courts then pulled back. In *Hotchkiss v. Samuel Cupples Wooden-Ware Company*, the Eastern District of Missouri explained in 1891 that the penalty should apply only to each episode of false marking.[37] The Southern District of Ohio agreed in the 1899 case *Hoyt v. Computing Scale Company*.[38] And the First Circuit, citing *Hotchkiss* and *Hoyt*, followed suit in 1910, in order to avoid "the accumulation of an enormous sum of penalties, entirely out of proportion to the value of the articles."[39]

Congress stepped in again in 1952 with the Patent Law Codification and Revision Act, a large bill addressing many patent issues.[40] The Act reauthorized the false

[30] Patent Act, 1870.

[31] Patent Act, 1870.

[32] See, for example, Cong. Globe, 41st Cong., 2nd Sess. 2679–84 (April 14, 1870); Cong. Globe, 41st Cong., 2nd Sess. 2854–57 (April 20, 1870); Cong. Globe, 41st Cong., 2nd Sess. 2872–80 (April 21, 1870).

[33] Odin Roberts's *New York Times* obituary described him as "one of the foremost patent lawyers in the United States" (*New York Times* 1934, 7).

[34] See, for example, *Wilson v. Singer*, 12 F.57 (N.D. Ill. 1882) (no liability when patent was expired); *Hotchkiss v. Samuel Cupples Wooden-Ware Co.*, 53 F.1018 (E.D. Mo. 1891) (requiring intent at time of marking and discussing requirements of corporate liability); *Smith v. Walton*, 51 F.17 (SDNY 1892) (requiring the false mark to be on the article, not the shipping crate).

[35] Compare *Nichols v. Newell*, 18 F.Cas. 199 (D.Mass. 1853) (reasonable doubt) and *Tompkins v. Butterfield*, 25 F.556 (D. Mass. 1885) (reasonable doubt) with *Howloetz v. Kass*, 25 F.765 (SDNY 1885) ("if the jury are reasonably satisfied upon the evidence as to all material facts") and *Hotchkiss v. Samuel Cupples Wooden-Ware Co.*, 53 F.1018 (E.D. Mo. 1891) (preponderance of the evidence).

[36] *Pentlarge v. Kirby*, 19 F.501 (SDNY 1884) ("a penalty of $100 for each article so stamped"); *Winne v. Snow*, 19 F.507 (SDNY 1884) (one hundred dollars for each of five hundred falsely marked basket-cover fastenings requested); *Tompkins v. Butterfield*, 25 F.556 (D. Mass. 1885) (permitting one penalty per article, though nothing that plaintiff requested only three penalties even though alleging that fifty articles were falsely marked).

[37] *Hotchkiss v. Samuel Cupples Wooden-Ware Co.*, 53 F.1018 (E.D. Mo. 1891).

[38] *Hoyt v. Computing Scale Co.*, 96 F.250 (S.D. Ohio 1899).

[39] *London v. Everett H. Dunbbar Corp.*, 179 F.506 (1st Cir. 1910).

[40] Patent Act Codification and Revision Act, 1952, 66 Stat. 792.

marking statute with a few small changes,[41] including changing the penalty to a fine of "not more than $500 for every such offense."[42] This language conformed to judicial interpretation of the penalty as a maximum, and it increased the amount to five hundred dollars. The legislative history provides that "[t]his change is believed to be desirable in that it will aid the policing of false marking. With the present law the informant bringing a qui tam action rarely receives more than $50, which does not pay him for his time and trouble."[43] Published cases under the 1952 Act consistently interpreted the provision in line with prior versions (Chisum [1944] 1978, 97–103). With respect to the penalty provision, most courts declined to fine defendants five hundred dollars per marking. Some courts, tracking the 1910 First Circuit decision, treated multiple markings as a single continuous offense.[44] Others, tracking nineteenth-century decisions, fined defendants based on the timing of the marks.[45] I was able to locate one decision that imposed a fine for each item falsely marked.[46]

In any event, the overall volume of cases was not great. As discussed in more detail below, a database that purports to include "nearly all" patent cases in the relevant period shows only single-digit false marking cases in each year from 2003 to 2008.[47] The numbers crept up in 2009. In October of that year, two patent attorneys wrote an article for the Federalist Society's legal journal, then called *Engaged*,[48] about what they termed an "explosion" in false marking actions (Copeland and Lydigsen 2009).[49] They suggested that "enterprising attorneys" brought suits based on expired patents to "exploit[] an arcane provision of the Patent Act" 86). Instead of McDonald's coffee, the authors pointed to the Solo cup. The article highlighted litigation in a Virginia federal court in *Pequignot v. Solo Cup Company*,[50] brought by a patent attorney proceeding *pro se* against Solo Cup based on an expired patent (Copeland and Lydigsen 2009). The *Engaged* authors justified their claim of an "explosion" with citations to fourteen cases (Copeland and Lydigsen 2009); the database showed eighteen cases in 2009.[51] The authors, it turns out, were right too soon. There would be an explosion but not just yet.

41 Patent Act Codification and Revision Act § 292; see also S. Rep. no. 82–1979, 31 (1952).

42 Patent Act, 1952, ch. 950 § 292.

43 Patent Law Codification and Revision, Hearings before the Subcommittee no. 3 of the House Judiciary Committee on H.R. 3760, 82nd Cong. 98 (1951).

44 See, for example, *A. G. Design & Assocs., LLC v. Trainman Lantern Co.*, No. C07–5158RBL, 2009 WL 168544, *3 (W.D. Wash. January 23, 2009); *Undersea Breathing Sys., Inc. v. Nitrox Techs., Inc.*, 985 F.Supp. 752, 782 (N.D. Ill.1997); *Sadler-Cisar, Inc. v. Com. Sales Network, Inc.*, 786 F.Supp. 1287, 1296 (N.D. Ohio 1991); *Joy Mfg. Co. v. CGM Valve & Gauge Co.*, 730 F.Supp. 1387, 1399 (S.D. Tex. 1989); *Precision Dynamics Corp. v. Am. Hosp. Supply Co.*, 241 F.Supp. 436, 447 (S.D. Cal. 1965).

45 See, for example, *Icon Health & Fitness, Inc. v. Nautilus Group, Inc.*, No. 1:02 CV 109 TC, 2006 WL 753002, *16 (D. Utah, March 23, 2006) (one penalty per week); *Krieger v. Colby*, 106 F.Supp. 124, 131 (S.D.Cal. 1952) (one penalty per day); see also *Brose v. Sears, Roebuck & Co.*, 455 F.2d 763, 766, n. 4 (5th Cir. 1972) (commenting that the fine could be per day, week, or month).

46 *Enforcer Products, Inc. v. Birdsong*, 1996 WL 592161, *1, n. 1 (Fed. Cir. 1996) (mentioning in passing the district court's decision).

47 "Patent Litigation Docket Reports Data."

48 The publication is now called the *Federalist Society Review*, https://fedsoc.org/federalist-society-review.

49 The authors were not alone, with other writings including Poplin 2009; Rupert 2009; Winston 2009.

50 *Pequignot v. Solo Cup Co.*, Case no. 1:07-cv-897 (E.D. Va.).

51 "Patent Litigation Docket Reports Data."

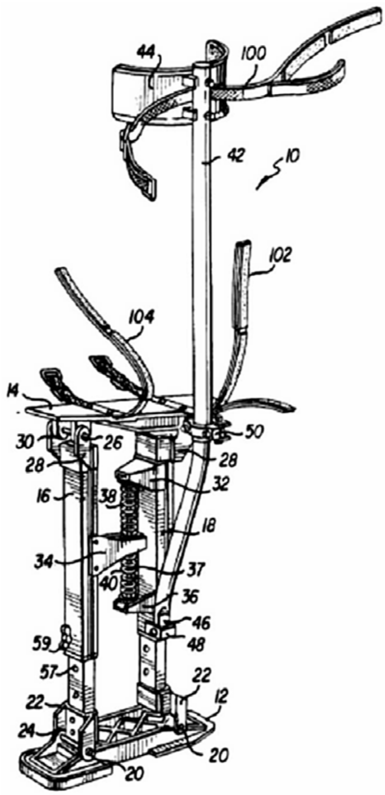


**Figure 1.** Armstrong and Lin Stilt.

### *The Decision*

Things would change because of stilts. Construction workers and artisans sometimes use stilts to increase their reach. William Armstrong and Joe Lin developed a new stilt design for which they received a patent in 1997.[52] The patented stilt made a number of improvements over existing designs of string-loaded parallelogram stilts. Among them was a "resiliently lined yoke," the yoke being the clamp that attaches the shoe platform to the leg support (see Figure 1, no. 50).[53] Armstrong and Lin each created a company to sell stilts covered by the patent.[54] For a while, Bon Tool purchased stilts from Armstrong's company. Eventually, it switched to buying and reselling replica stilts made by Cibon and Honest Tool. Upon learning that Bon Tool was buying and reselling replica stilts, Lin's company (Forest Group) sued Bon Tool and the two manufacturers on December 7, 2005, in the Southern District of Texas.[55] Bon Tool counterclaimed for false marking, among others, asserting that Forest Group's stilts did not conform to the original patent for which they were marked.

[52] *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295, 1298 (Fed. Cir. 2009).

[53] *Forest Group*, 590 F.3d.

[54] *Forest Group*, 590 F.3d.

[55] *Forest Group, Inc. v. Bon Tool Co.*, 2008 WL 2962206 (S.D. Tex.).

The federal court in Texas determined that the patent covered only stilts with resiliently lined yokes, as did a second federal court around the same time.[56] Bon Tool's stilts did not include this feature, so they did not infringe the patent.[57] Interestingly, the court also concluded that Forest Group's stilts, though marked with the relevant patent number, did not have resiliently lined yokes either.[58] The court found that Forest Group placed at least one order for production of these stilts after two courts had determined that the yoke was an essential element of the patent, at which point Forest Group should have known not to mark them as patented. The district court found that this order constituted one instance of false marking and fined Forest Group five hundred dollars.[59]

Bon Tool appealed and, on appeal, argued (among others) that the five-hundred-dollar fine was too low. Supporting Bon Tool as *amicus curiae* in the Federal Circuit was a patent attorney who, one year earlier, had formed Heathcote Holdings Corporation for the purpose of enforcing the false marking statute through qui tam actions.[60] Heathcote had filed an unrelated false marking action in the Eastern District of Texas,[61] and it was mentioned in the Federalist Society article (Copeland and Lydigsen 2009).

The Federal Circuit sided with Bon Tool. It explained (with emphasis) that the statute prohibited the false marking of "*any* unpatented *article*" subject to a fine for "*every* such offense."[62] The court rejected precedent interpreting prior versions of the Patent Act in favor of what it deemed the plain meaning of the statute,[63] repeating the phrase "plain meaning" four times throughout the opinion.[64] In short, the court explained that "the statute clearly requires that each article that is falsely marked with intent to deceive constitutes an offense."[65]

This does not mean, however, that every act of false marking would be fined the full five hundred dollars. According to the court, the statute's five-hundred-dollar maximum "provides district courts the discretion to strike a balance between encouraging enforcement of an important public policy and imposing disproportionately large penalties for small, inexpensive items produced in large quantities."[66] On remand, the district court entered judgment for Bon Tool and fined Forest Group "at the per article rate of $180.00 for each of the 38 stilts for which there was evidence at trial of false marking, for a total fine of $6,840.00."[67]

[56] *Warner Mfg. Co. v. Armstrong*, 504 F.Supp.2d 589 (D. Minn. 2007); *Forest Group*, 2008 WL 2962206.

[57] *Warner Mfg. Co. v. Armstrong*, 2007 WL 3521249 (D. Minn. 2007); *Forest Group*, 2008 WL 2962206.

[58] *Forest Group*, 2008 WL 2962206.

[59] *Forest Group*, 2008 WL 2962206.

[60] *Brief of Amicus Curiae Paul Hletko in Support of Defendant-Appellant Bon Tool Company Urging Reversal*, 2009 U.S. Fed. Cir. Briefs LEXIS 691 (Fed. Cir. Feb. 2. 2009).

[61] *Brief of Amicus Curiae Paul Hletko* (citing *United States ex rel. Heathcote Holdings Corp., Inc. v. Church & Dwight Co., Inc.*, 2:08-cv-349).

[62] *Forest Group*, 590 F.3d, 1301 (quoting section 292) (emphasis in original).

[63] *Forest Group*, 590 F.3d, 1301–2.

[64] *Forest Group*, 590 F.3d, 1301–2, 1304.

[65] *Forest Group*, 590 F.3d, 1301.

[66] *Forest Group*, 590 F.3d, 1304.

[67] *Forest Group*, 2010 WL 1708433, *1.

### ***The Explosion***

*Forest Group, Inc. v. Bon Tool Company* was decided on December 28, 2009. The explosion followed almost immediately thereafter. The best source for information about recent patent litigation is the Patent Litigation Database.[68] Coverage includes "nearly all" patent cases since 1999. I identified all false marking cases in the database from 2003 to 2016. The results are striking. As noted above, 2009 had been the highwater mark with eighteen false marking cases in the dataset. In 2010, the first year after *Forest Group*, 661 false marking cases were filed, on average almost two per day. Another 292 were filed in 2011 before the law changed in September. Many of these cases, it seems, related to the marking of goods with a valid but expired patent number.[69]

Documents made available by the Department of Justice under the Freedom of Information Act show that the government received $3.4 million for false marking cases in 2010 and $7.8 million in 2011.[70] Because the government was entitled to one-half of the penalties, these figures suggest that false marking cases resulted in more than $22 million in penalties during the twenty-one months of the *Forest Group* era.[71] Although fifty-three districts heard at least one case, more than half of the cases—514 to be precise—were filed in the Eastern District of Texas, a hotspot of patent litigation more generally (Klerman and Reilly 2016). The Northern District of Illinois, which includes Chicago, was second on the list with seventy-nine.

Who filed these cases?[72] Numerous law firms got into the game, with twenty-four firms filing ten or more false marking cases under the *Forest Group* regime. Only one of those twenty-four firms had filed even a single false marking case before that decision, having filed three in late 2009. Only one of those firms would file any false marking case after this period, just one more, the same month Congress changed the law. Many of the firms were not major players in patent litigation generally. For example, two of the firms with the most false marking cases under *Forest Group*—Kent Good Anderson & Bush, PC with sixty-five cases, and Martin Walker, PC with fifty-two cases—do not even list intellectual property as a practice area on their websites.[73] These firms had no patent cases in the database prior to 2010, and only a few patent cases after (see Table 1).

The named plaintiffs were mostly LLCs and individuals. My best efforts suggest that many of the LLCs were set up for the purpose of bringing these cases, some set up by patent lawyers themselves[74] and others by what one interview subject called "regular folks."[75] Kilts Resources, LLC, for example, was registered under Texas law on November 15, 2010, by "landman" Chase Florio.[76] Four days later, it filed its first case in the Eastern District of Texas, ultimately filing thirty false marking cases there.

---

68 "Patent Litigation Docket Reports Data."

69 See, for example, America Invents Act, June 1, 2011, H. Rep. no. 112-98, Part 1, 53.

70 "Settlement Payments Received for Section 292 Cases: 2010" (on file with author); "Settlement Payments Received for Section 292 Cases: 2011" (on file with author).

71 "Settlement Payments Received: 2010"; "Settlement Payments Received: 2011."

72 The following information on attorneys is derived from the "Patent Litigation Docket Reports Data."

73 Kent, Anderson, Bush, Frost & Metcalf, PC, accessed August 29, 2024, https://www.kabfmlaw.com; Martin Walker Attorneys at Law, accessed August 29, 2024, https://martinwalkerlaw.com.

74 Anonymous, interview with author, June 22, 2022.

75 Anonymous, interview with author, June 14, 2022.

76 For more on this profession, see Eisenberg 2016.

**Table 1. Law firm cases after *Forest Group***

| | | | |
|---|---|---|---|
| Garteiser Honea PLLC [or Garteiser Law Group] | 78 | Jack L. Siegel PLLC | 41 |
| Antonelli, Harrington & Thompson LLP; | 69 | Sperling & Slater | 37 |
| Stevens Love Hill & Holt PLLC [or Stevens Love] | 69 | Mount, Spelman and Fingerman, P.C. [or Mount & Stoelker] | 33 |
| The Stafford Davis Firm | 67 | Neal Gerber & Eisenberg | 32 |
| Kent Good Anderson & Bush, PC | 65 | Zweber PC | 22 |
| Navarro Huff, PLLC | 53 | Konczal Law Firm PLLC | 20 |
| Martin Walker PC | 52 | Newport Trial Group | 20 |
| Brochstein Law Firm, PLLC; | 47 | Nelson Law Firm | 15 |
| Buckingham, Doolittle & Burroughs, LLP | 46 | Leonid Mikityanskiy, Esq. | 14 |
| Ni Law Firm, PLLC [or Ni, Wang & Massand, PLLC] | 46 | Cates Law Firm | 13 |
| Eugene M. Cumming PC | 45 | Hinshaw & Culbertson | 12 |
| Vanek Vickers & Masini | 44 | Owens Tarabichi LLP | 10 |

Individuals also filed suits, such as Tom Simonian who filed forty-five cases, mostly in the Northern District of Illinois. Some of the individual plaintiffs were patent lawyers themselves or learned about these cases from patent lawyers they knew.[77]

How exactly the plaintiffs and lawyers learned of this opportunity is hard to pin down. Most likely, lawyers who followed Federal Circuit decisions were the first to notice. One lawyer interviewed for this project reported that it was the earlier Solo Cup case, rather than *Forest Group*, that tipped them off,[78] and, of course, the lawyers in the Solo Cup case got there another way.[79] But almost all of the lawyers interviewed—and the data—point to *Forest Group* as the "green light."[80] One lawyer said that he got into these cases because he "randomly learned about the Federal Circuit decision" from another lawyer in a hallway conversation.[81] The *Forest Group* decision was publicized in sources that target lawyers, in general, or patent lawyers, in particular, so this could have contributed as well (Crouch 2010; W. Olson 2010).

The geographic distribution of cases suggests that the decision garnered more attention in certain districts, especially those with large patent practices. It seems likely that an obscure Federal Circuit decision about patent law might resonate more in legal communities with a larger concentration of patent lawyers, such as the Eastern District of Texas. It is also possible that there was a network effect. Lawyers in the Eastern District of Texas might be more aware of one another so that, when one lawyer found a new business, others followed. In any event, however they learned about the opportunity, plaintiffs and lawyers seized upon it in droves. Interviews suggested that lawyers and their friends and family members would "scour the shelves" of stores looking for products with expired patent numbers.[82] A lawyer recalled a step-child sending a photo of a shampoo bottle to ask if the patent marking was false.[83] One firm offered bonuses to firm employees (lawyers and non-lawyers) who found offending products, and the firm even recruited local high-school students to work part-time checking patent numbers on consumer goods in stores.[84] Some firms focused on what they considered egregious cases, while others were less discerning.[85]

Defendants, of course, did not sit on their hands. Defendants raised constitutional challenges to the statute under the Take Care Clause, arguing that it impermissibly transferred executive power to private parties. Most courts rejected this argument.[86] Judge Dan Polster in the Northern District of Ohio briefly held that the statute was unconstitutional.[87] Then the US government intervened to argue the statute's

[77] Anonymous, interview with author, June 28, 2022.
[78] Anonymous, interview with author, June 23, 2022.
[79] Anonymous, interview with author, June 28, 2022.
[80] Anonymous, interview with author, June 28, 2022.
[81] Anonymous, interview with author, June 22, 2022.
[82] Anonymous, interview with author, June 22, 2022.
[83] Anonymous, interview with author, June 14, 2022.
[84] Anonymous, interview with author, June 23, 2022.
[85] Anonymous, interview with author, June 22, 2022.
[86] *Ford v. Hubbell Inc.*, No. 10–513, 2011 WL 1259707, *3 (S.D. Ill. March 31, 2011); *Luka v. Procter & Gamble Co.*, 785 F.Supp.2d 712, 720–21, 2011 WL 1118689, *7 (N.D., Ill. March 28, 2011); *Public Patent Found., Inc. v. GlaxoSmithKline Consumer Healthcare*, L.P., No. 09–5881, 2011 WL 1142917, *4 (S.D.N.Y. March 22, 2011); *Hy Cite Corp. v. Regal Ware, Inc.*, No. 10–168, 2011 WL 1206768, *4 (W.D. Wis. March 15, 2011).
[87] *Unique Product Solutions, Ltd. v. Hy-Grade Valve, Inc.*, 765 F.Supp.2d 997 (N.D. Ohio 2011).

constitutionality, and Judge Polster vacated his prior opinion in favor of a new decision upholding the statute.[88] Courts also exercised their discretion to impose fines of less than five hundred dollars per item.[89] But the cases kept rolling in. The solution would have to come from elsewhere.

### *The America Invents Act*

Congress was fairly quick to take notice of the boom in false marking suits. As early as March 2010, less than three months after *Forest Group*, Representative Darrell Issa introduced legislation to limit the false marking provision to parties who suffered a competitive injury.[90] The big move happened in the Senate when the false marking issue was included as a small part of a much larger patent reform bill that had been percolating for years (Anderson 2014). False marking joined this legislation in progress when Senator Patrick Leahy of Vermont introduced the Patent Reform Act of 2011, later renamed the America Invents Act.[91] With respect to false marking, the bill limited enforcement of the penalty provision to the US government and created a cause of action for private parties only based on a competitive injury.[92] These changes would apply to all pending and future cases.[93]

Leahy's bill would pass ninety-five for and five against in the Senate.[94] With respect to the false marking provision, some senators took the opportunity to inveigh against "frivolous and vexatious litigation,"[95] "abusive litigation,"[96] and "litigat[ion] . . . that is far out of proportion."[97] The only pushback on the false marking provision came with respect to the question of retroactivity. Senator Claire McCaskill thought it should apply to new cases only.[98] Soon after the Senate passed the bill, Representative Lamar Smith introduced the House's version of the Act. Smith's bill treated false marking much like the Senate did, except it also provided that there would be no liability based on an expired patent for three years after expiration.[99]

The legislative history in the House related to false marking is relatively scant, though it included Representative Bob Goodlatte connecting the bill to the broader litigation reform agenda: "The bill also ensures that abusive false markings litigation is put to an end."[100] A late arriving amendment from Representative Lamar Smith extended the "expired patent" defense indefinitely, providing that false marking with

[88] *Unique Product Solutions, Ltd. v. Hy-Grade Valve, Inc.*, 813 F.Supp.2d 854 (N.D. Ohio 2011).

[89] See, for example, *Presidio Components Inc. v. American Tech. Ceramics Corp.*, 723 F.Supp.2d 1284 (S.D. Cal. 2010); *King Tuna, Inc. v. Anova Food, Inc.*, 2011 WL 839378 (C.D. Cal.). For a proposal on calculating damages, see Cotter 2010.

[90] H.R. 4954 (2010).

[91] Patent Reform Act, 2011, s. 23.

[92] Patent Reform Act, s. 2.

[93] Patent Reform Act, s. 2.

[94] 157 Cong. Rec. 1381 (March 8, 2011).

[95] 157 Cong. Rec. S1368 (March 8, 2011) (Senator Grassley).

[96] 157 Cong. Rec. S951 (February 28, 2011) (Senator Grassley).

[97] 157 Cong. Rec. S1372 (March 8, 2011) (Senator Kyl).

[98] 157 Cong. Rec. S1545 (March 10, 2011) (Senator McCaskill).

[99] H.R. 1249 (2011).

[100] 157 Cong. Rec. H4426 (June 22, 2011).

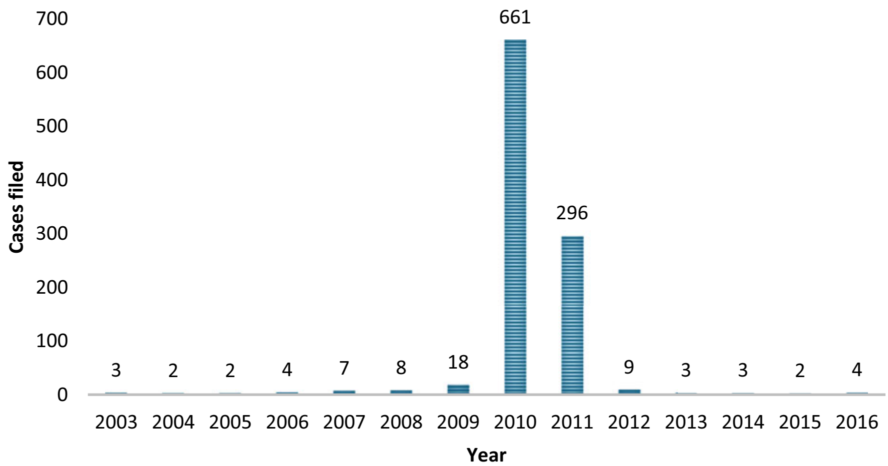


**Figure 2.** False Marking Cases By Year 2003–2016.

an expired patent "is not a violation of this section."[101] The House passed the amended bill 304 for and 117 against.[102] The Senate then passed the House bill on September 8 by a vote of eighty-nine for and nine against,[103] and President Barack Obama signed it on September 16, 2011.[104]

The effects of the Act were sudden. Because the law applied to pending cases, more than two hundred pending false marking actions disappeared with the stroke of a pen. The new limits on false marking suits also dramatically shrunk the pool of potential plaintiffs and the scope of potential recovery. The data are stark: four false marking cases were filed in the remainder of 2011, nine in 2012, and four or fewer for each of the next four years.[105] The boom had ended (see Figure 2).

## Analysis

The story of the false making qui tam is not just a curio, but it is also a case study in how litigation and legislation work. This section of the article teases out some of its lessons, starting with what this experience tells us about the markets for litigation and legislation. This section then uses this episode to demonstrate the unpredictability inherent in private enforcement laws.

[101] H. Rep. to accompany H. Res. 316 at 15 (June 21, 2011), adopted 157 Cong. Rec. H4480 (June 23, 2011).

[102] 157 Cong. Rec. H4505 (June 23, 2011).

[103] 157 Cong. Rec. S5442 (September 8, 2011).

[104] This episode is an example of dialogue between Congress and the courts. Using Matthew Christiansen and William Eskridge's (2014, 1374–75) taxonomy of congressional overrides of Supreme Court decisions, this legislation combines a restorative override (returning the law to the status quo before a court's intervention) and a policy updating override (reaching a new policy judgment contrary to the court's).

[105] "Patent Litigation Docket Reports Data."

### The Market for Litigation

Private enforcement and qui tam rely on the private provision of enforcement resources. Unsurprisingly, the private provision of these resources is subject to market forces. When the expected recovery is increased, the supply of enforcement should increase too. This is consistent with the classic law-and-economics models of litigation—here, with an emphasis on policy makers managing the market (Landes and Posner 1987). Policy makers can manage litigation markets through subsidies. In private enforcement, extra-compensatory damages and attorney fee shifting are subsidies for private enforcers, subsidies that come out of defendants' pockets (Burbank and Farhang 2017, 2021). In his study of the Civil Rights Act of 1991, for example, Sean Farhang (2009) found that Congress's decision to increase the potential recovery for certain civil rights claims increased the number of claims brought by private enforcers.

For false marking, the qui tam penalty subsidized private enforcement. When the size of that subsidy increased, it was followed by an avalanche of new cases—a thirty-six-fold increase over the previous year and more than one hundred times as many cases than the average over the prior seven years. The market worked. Indeed, the dramatic increase of the subsidy seemed to lead attorneys (and non-attorneys) to enter the market who had not been there before. Most of the firms had not filed false marking cases, and many had not filed patent cases at all. One attorney interviewed suggested that this episode helped make a primarily defense-side firm more open to plaintiff-side work.[106] At least one law firm, it seems, was established with the proceeds of false marking cases in order to prosecute more of them.[107]

Here, too, this experience builds on the existing theoretical and empirical literature on the way in which private enforcement incentives can affect the supply of private enforcers. In addition to Farhang's evidence on the 1991 Civil Rights Act, the enactment of Title VII of the Civil Rights Act of 1964 is credited with the development of an employment-discrimination bar (Epp 1998). A similar phenomenon has been noted in national security law following a turn toward private enforcement in that area (Jamshidi 2023). False marking is another entry on this list.

### The Market for Legislation

The market for legislation is also on display in this story. When the damages were capped at one hundred dollars or five hundred dollars, there was little interest in the law. The legislative history of the relevant statutes spent little if any time on this provision. There was virtually no news coverage. The late nineteenth-century review article suggested that false marking cases "will continue to be a rarity," and they were (Roberts 1896–97). But things changed when we started talking about real money. Congress got interested quickly. One lawyer remarked that because false marking was so widespread that every member of Congress probably had a company in their district that could be sued.[108] In Congress, there was testimony from Chief Intellectual Property Counsel of General Electric on behalf of an industry group, the Coalition for

[106] Anonymous, interview with author, June 23, 2022.
[107] Anonymous, interview with author, June 22, 2022.
[108] Anonymous, interview with author, June 28, 2022.

Twenty-first Century Patent Reform,[109] and from a partner at Mayer Brown, a law firm that represented many potential defendants in false marking cases.[110] The General Electric lawyer, for example, called these cases "the worst recent example of truly wasteful litigation."[111]

This experience is consistent with the classic story of political economy, in which concentrated interests are well positioned to lobby for legislation (M. Olson 1971). Also consistent with this story is the fact that more diffuse interests are less effective. The masses of consumers do not lobby. Even the plaintiffs' bar, which presumably benefited directly from the old law, was unable to mount resistance. One attorney who brought false marking cases remarked that they wanted to lobby Congress but lacked the resources of their concentrated opposition.[112] Another said that they tried a little lobbying, but "you can't stand up very well to the Chamber of Commerce."[113] The asymmetry was exacerbated by the fact that these cases were not brought by the organized plaintiffs' patent bar but, rather, by disparate and seemingly unconnected attorneys, who took up these cases. If anything, the organized bar stayed away.

Not only did concentrated interests get this issue on Congress's agenda, but they also got results quickly, at least by Congress's standards. The false marking law was changed in under two years, which is well below the four-year median found by a leading study of congressional overrides of judicial decisions (Christiansen and Eskridge Jr. 2014, 1355–56). But recall that litigation began almost immediately after *Forest Group*. More than eighty cases were filed before the first bill was proposed in Congress. More than eight hundred cases were filed before the law was changed. And this situation was perhaps the best-case scenario for swift legislative reform: a simple and intuitive argument for the particular change; concentrated interests supporting reform; no serious opposition; related legislation already in progress; and more than 150 years of experience before the recent change in law. Yet it still took close to two years to make it happen.

### *Congress and the Courts*

Finally, the false marking statute highlights the variable roles of institutions in private enforcement. Farhang's (2010) book on private enforcement focused on situations in which Congress sought to encourage private enforcement. Burbank and Farhang's (2017) book focused on situations in which the courts sought to push back on Congress's efforts. In the false marking story, the roles are reversed. The courts were the primary drivers of the enforcement boom. The legislative history suggests that Congress created and reauthorized an enforcement scheme that, it seems, was expected to play a minor role in the patent world. It was a one-hundred-dollar or five-hundred-dollar fine that might be tacked on a larger infringement suit or that could

109 "Crossing the Finish Line on Patent Reform: What Can and Should Be Done," Hearing before the Subcommittee on the Courts, the Internet, and Intellectual Property of the House Judiciary Committee, February 11, 2011.

110 "Review of Recent Decisions on Patent Law," Hearing before the Subcommittee on Intellectual Property, Competition, and the Internet of the House Judiciary Committee, March 10, 2011.

111 "Crossing the Finish Line on Patent Reform."

112 Anonymous, interview with author, June 23, 2022.

113 Anonymous, interview with author, June 28, 2022.

serve as a modest penalty in a small number of cases. Once the statute was adopted, however, it was out of Congress's hands. Private enforcement necessarily involves judges. Judges may or may not enforce the law exactly as Congress intended. Burbank and Farhang (2017) observed how procedural decisions can cut back on private enforcement. Here, a remedial decision dramatically increased the incentives for private enforcement, and the market followed. Congress then played the role of Burbank and Farhang's courts, cutting back on a booming market for litigation.

The false marking episode reveals that Congress and the courts may not always play the same roles. Burbank and Farhang (2021), in other work, have observed that the partisan alignment of private enforcement may have flipped recently. False marking is less likely a partisan story and more likely about what happens when diffuse and unsupervised agents (courts) may diverge from their principals (Congress). This experience also complicates some narratives about the occasionally mentioned democratic legitimacy of private enforcement regimes (Norris 2022). It is true that a democratically elected Congress may seek to democratize enforcement—by supplementing executive enforcement with the option for public participation—but it must be acknowledged that the unelected courts remain as integral parts, with their own (potentially undemocratic) policy preferences.

## References

Anderson, Jonas. 2014. "Congress as a Catalyst of Patent Reform at the Federal Circuit." *American University Law Review* 63: 961–1018.

Brinn, Hope. 2019. "Improving Employer Accountability in a World of Private Dispute Resolution." *Michigan Law Review* 118: 285–314.

Burbank, Stephen B., and Sean Farhang. 2017. *Rights and Retrenchment: The Counterrevolution against Federal Litigation*. Cambridge, UK: Cambridge University Press.

——. 2021. "A New (Republican) Litigation State?" *University of California Irvine Law Review* 11: 657–92.

Burbank, Stephen B., Sean Farhang, and Herbert M. Kritzer. 2013. "Private Enforcement." *Lewis & Clark Law Review* 17: 637–722.

Chisum, Donald S. (1944) 1978. *Chisum on Patents: A Treatise on the Law of Patentability, Validity, and Infringement*. New York: Lexis Publisher.

Christiansen, Matthew R., and William N. Eskridge Jr. 2014. "Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011." *Texas Law Review* 92: 1317–1542.

Clopton, Zachary D. 2016. "Redundant Public-Private Enforcement." *Vanderbilt Law Review* 69: 285–332.

Copeland, Trevor K., and Laura A. Lydigsen. 2009. "Qui-Tam-Osaurus, The Statutory Dinosaur: Evolution or Extinction for the Qui Tam Patent False Marking Statute?" *Engage* 10: 86–93.

Cotter, Thomas F. 2010. "Optimal Fines for False Patent Marking." *Michigan Telecommunications and Technology Law Review* 17: 181–200.

Crouch, Dennis. 2010. "False Marking: Calculating Damages Part I." *Patently-O: Patent Law Blog*, January 4. https://patentlyo.com/patent/2010/01/false-marking-calculating-damages-part-i.html.

Eisenberg, Ann M. 2016. "Land Shark at the Door: Why and How States Should Regulate Landmen." *Fordham Environmental Law Review* 27: 157–206.

Engstrom, David F. 2013. "Agencies as Litigation Gatekeepers." *Yale Law Journal* 123: 616–713.

—— 2014. "Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design." *Theoretical Inquiries in Law* 15: 605–33.

Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.

Farhang, Sean. 2009. "Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991." *Journal of Empirical Legal Studies* 6: 1–34.

——. 2010. *The Litigation State: Public Regulation and Private Lawsuits in the US*. Princeton, NJ: Princeton University Press.

——. 2011. "The Litigation State: Public Regulation and Private Lawsuits in the U.S." *Journal of Politics* 73: 1284–86.

Glover, Maria J. 2012. "The Structural Role of Private Enforcement Mechanism in Public Law." *William and Mary Law Review* 53: 1137–1218.

Golden, John M. 2013. "Patent Privateers: Private Enforcement's Historical Survivors." *Harvard Journal of Law & Technology* 26: 545–618.

Hertel, Franziska. 2013. "Qui Tam for Tax: Lessons from the States." *Columbia Law Review* 113: 1897–1938.

Huq, Aziz Z. 2023. "The Private Suppression of Constitutional Rights." *Texas Law Review* 101: 1259–1339.

Jamshidi, Maryam. 2023. "The Private Enforcement of National Security." *Cornell Law Review* 108: 739–838.

Klerman, Daniel, and Greg Reilly. 2016. "Forum Selling." *Southern California Law Review* 89: 241–316.

Krent, Harold J. 1989. "Executive Control over Criminal Law Enforcement: Some Lessons from History." *American University Law Review* 38: 275–312.

Krent, Harold J., and Ethan G. Shenkman. 1993. "Of Citizen Suits and Citizen Sunstein." *Michigan Law Review* 91: 1793–1823.

Landes, William M., and Richard A. Posner. 1987. *The Economic Structure of Tort Law*. Cambridge, MA: Harvard University Press.

Leitner, Sarah. Forthcoming. "The Private Rights Model of Qui Tam." *Florida Law Review* 76.

Michaels, Jon D., and David L. Noll. 2023. "Vigilante Federalism." *Cornell Law Review* 108: 1187–1264.

*New York Times*. 1934. "Odin Roberts Dies; Patent Attorney." *New York Times*, July 25.

Norris, Luke P. 2022. "The Promise and Perils of Private Enforcement." *Virginia Law Review* 108: 1483–1546.

Olson, Mancur. 1971. *The Logic of Collective Action*. 2nd ed. Cambridge, MA: Harvard University Press.

Olson, Walter. 2010. "Open Season for "False Marking" Bounty-hunters?" *Overlawyered*, January 7. https://www.overlawyered.com/2010/01/open-season-for-false-marking-bounty-hunters/.

Ormerod, Peter. 2022. "Privacy Qui Tam." *Notre Dame Law Review* 98: 267–336.

Poplin, A. Justin. 2009. "Avoiding False Patent Marking Claims." *LAW 360*, October 9. http://www.law360.com/articles/116798.

Rapp, Geoffrey C. 2007. "Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers." *Boston University Law Review* 87: 91–156.

Resnik, Judith. 2000. "Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation." *University of Pennsylvania Law Review* 148: 2119–96.

Roberts, Odin B. 1896–97. "Actions Qui Tam under the Patent Statutes of the United States." *Harvard Law Review* 10: 265–74.

Rupert, Donald W. 2009. "Trolling for Dollars: A New Threat to Patent Owners." *Intellectual Property and Technology Law Journal* 21: 1–5.

Schwab, Stewart J., and Theodore Eisenberg. 1987–88. "Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant." *Cornell Law Review* 73: 719–84.

Stephenson, Matthew C. 2005. "Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies." *Virginia Law Review* 91: 93–174.

Van Houweling, Molly Shaffer. 2009. "Private-Law Attorneys General." *Minnesota Law Review* 108: 201–29.

Winston, Elizabeth I. 2009. "The Flawed Nature of the False Marking Statute." *Tennessee Law Review* 77: 111–50.

Zambrano, Diego A., Neel Guha, Austin Peters, and Jeffrey Xia. 2023. "Private Enforcement in the States." *University of Pennsylvania Law Review* 172: 61–150.

**Cite this article:** Clopton, Z. D. (2024). 'The False Marking Gold Rush: A Case Study of the Private Enforcement of Public Laws'. *Law & Social Inquiry* **49**, 2380–2397. https://doi.org/10.1017/lsi.2024.30