



ILLINOIS STATE
BAR ASSOCIATION®

Intellectual Property

The newsletter of the ISBA's Section on Intellectual Property Law

September 2026 • Volume 66 • Number 1 •

Copy Editing Is Not a Remedy Available in Court

By *David C. Brezina*

Assertion that issued patent description is misleading

The Court of Appeals for the Federal Circuit addressed a claim for a positive injunction essentially requiring copy editing. Specifically, *US Inventor, Inc. v. Squires* sought to order the Commissioner of Patents and Trademarks to more completely qualify the statement published on issued patents that the patent “grants to the person(s) having title to this patent the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States of America or importing the invention into the United States of America”

US Inventor claimed the statement was misleading because, while it tracks the Constitutional power of Congress to enact laws to issue patents, Supreme Court precedent requires that a permanent injunction to enjoin infringement meet the requirements of *eBay, Inc. v. MercExchange, L.L.C.*, that “courts use the ‘four-factor test historically employed by courts of equity’ to determine if a patent-holder is entitled to a permanent injunction. 547 U.S. at 390. That test requires a plaintiff to demonstrate ‘(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.’ *Id.* at 391.”

Essentially, US Inventor wanted the “exclusive right” language qualified to something like the “right to *ask a court to* exclude others ...”

Standing was the basis for the decision

A plaintiff must suffer injury from the conduct complained of for there to be a case or controversy. A membership organization must have a member show suffers injury.

While the issue of whether US Inventor had standing to sue—whether it had a member who suffered a tangible injury—the court’s introduction is worth summarizing.

Protecting inventors’ rights is a Constitutional power

The Constitution provides:

The Congress shall have power * * * to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. U.S. Constitution, Art. I, Section 8, Clause 8.

The concept that a patent right (the useful Arts) belonged to the Inventor differed from the early English practice of grants by the King or Queen. Statute of Monopolies, (21 Jas. 1. c. 3) 1624 (patents); see also Statute of Anne, 8 Anne, c. 19 (1710) (copyright). Personal rights of inventors and authors remained a concern a century and half later. The right of the inventor was recognized in The Federalist Papers, this Constitutional provision as virtually beyond debate:

“The utility of this power will scarcely be questioned. The copy right of authors has been solemnly adjudged in Great Britain, to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases, with the claims of individuals. The states cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passes at the instance of Congress.”

Thus, inventors have rights to their own inventions, and Congress has the power to decide how to effectuate those rights to promote progress of the useful arts. Essentially the text printed on the patent describes the authority under which the patent is granted.

Is the text sufficiently misleading that it should be edited?

The power to grant exclusive rights is subject to execution of requirements for invention by Congress. It has refined its power over the years. One example is the requirement that patents have “claims.” *Markman v. Westview Instruments, Inc.* (“The claim ‘define[s] the scope of a patent grant.’”). The claims must define something new and non-obvious. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* (“Even if a particular combination of elements is ‘novel’ in the literal sense of the term, it will not qualify for federal patent protection if its contours are so traced by the existing technology in the field that the ‘improvement is the work of the skillful mechanic, not that of the inventor.’ *Hotchkiss v. Greenwood*, 11 How. 248, 267 (1851). In 1952, Congress codified this judicially developed requirement in 35 U.S.C. § 103, which refuses protection to new developments where ‘the differences between the subject matter sought to be

patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person of ordinary skill in the art to which said subject matter pertains.”).

Just as the enforcement of exclusivity is subject to case law such as *eBay*, the reverse is also true. Despite earlier terminology, for example the fact that there is a patent does not mean there is a “monopoly” for economic purposes. *Illinois Tool Works, Inc. v. Independent Ink, Inc.*¹

Further copy editing could, indeed, require something like:

“grants to the person(s) having title to this patent the right to *ask a Court* to exclude others from making, using, offering for sale, or selling the invention *as defined by the claims* throughout the United States of America or importing the invention *so defined* into the United States of America”

While we can evaluate what editing could make the repetition of the basis of Congressional power more precise to comport with the regulation Congress chose to create as interpreted by courts interpreting the law, the “standing” argument provides an answer to the case at issue—what is the harm from the failure to edit?

Failure to adequately plead injury negated standing

Plaintiffs were inventors’ organizations complaining the information on the face of a patent certificate was misleading. The Court stated on standing:

“When a plaintiff seeks injunctive relief, he ‘must show that he is under threat of suffering “injury in fact” that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.’ *Summers*, 555 U.S. at 493 (citing *Friends of Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, **528 U.S. 167**, 180–181 (2000)).”

The lead plaintiffs were organizations² claiming they suffered injury because they were misled:

For an organization, “the standing requirements of Article III can be satisfied in two ways.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, **600 U.S. 181**, 199 (2023). First, “the organization can claim that it suffered an injury in its own right.” *Ibid.* Second, even if the organization itself suffered no injury, it can nonetheless “assert standing solely as the representative of its members.” *Ibid.* (internal quotation marks and citation omitted). This second avenue is known as associational standing. When assessing associational standing, the question is “whether an association has standing to invoke the court’s remedial powers on behalf of its members.” *Warth v. Seldin*, **422 U.S. 490**, 515 (1975). The answer is yes where (a) the association’s “members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Advert. Comm’n*, **432 U.S. 333**, 343 (1977); accord *Students for Fair Admissions*, 600 U.S. at 199.

The organizations, of course, know the parameters of patent grant and enforcement. They are not directly injured.³ A

speculative indirect injury, that they will need to educate inventors, is insufficient. Consider, for example, a typical tort case—perhaps a consumer suing an advertiser for false advertising, because the consumer spent money and bought something thinking it would function one way, when it could not. The consumer spent money and didn't get the value it expected, because there was a false statement. That example is a tort—probably a statutory tort like Consumer Fraud—although there could be extreme cases of false statements of fact arising to common law fraud, such as by loss of members.

"Tied to this, appellants have not alleged an injury that resembles a traditional tort like the one in *Havens*. See *Alliance*, 602 U.S. at 395. Appellants are not similar to 'a retailer who sues a manufacturer for selling defective goods to the retailer,' *ibid.*, because in such a case, the manufacturer is providing the retailer with a defective good that the retailer would foreseeably pass on to consumers, harming the retailer's business and reputation. Appellants have not suggested that they would pass on the alleged misinformation on patent covers to others; to the contrary, they suggest that they provide advice to disabuse inventors of the information on the covers. Compl. ¶¶ 7, 10, 11."

A need to explain the meaning of the limitations of the grant of exclusive rights is not injury.

"Finally, appellants have not plausibly claimed the information appellees provide on patent covers impedes their 'core business activities,' *Alliance*, 602 U.S. at 395. Appellants assert the patent covers have diverted them from their core activities, by causing them to take on advice-giving responsibilities they would not otherwise perform. Compl. ¶ 7" ("Providing business advice for each independent.").

Conclusion

The preceding section explaining the nature of patent rights and the authority of Congress to set forth its requirements to exercise that power to effectuate "securing for limited Times to ... Inventors the exclusive Right to their ... Discoveries" highlights the purported inaccuracies may not really be the message of the legend on the face of a patent. However, the Court did not need to evaluate the message conveyed, because whatever plaintiffs plead did not show they were injured. The case was dismissed for lack of standing.

Cases

Bonito Boats, Inc. v. Thunder Craft Boats, Inc., **489 U.S. 141**, 150, **109 S.Ct. 971**, **103 L.Ed.2d 118** (1989)

eBay, Inc. v. MercExchange, L.L.C., **547 U.S. 388**, **126 S. Ct. 1843**, **164 L. Ed. 2d 625** (2006)

Havens Realty Corp. v. Coleman, **455 U.S. 363**, **102 S.Ct. 1114**, **71 L.Ed.2d 214** (1982)

Illinois Tool Works, Inc. v. Independent Ink, Inc., **126 S.Ct. 1281**, **164 L.Ed.2d 26**, **547 U.S. 28** (2006)

Markman v. Westview Instruments, Inc., **517 U.S. 370**, 373, **116 S.Ct. 1384**, **134 L.Ed.2d 577**, 38 USPQ2d 1461 (U.S. 1996)

Parker-Smith v. Sto Corp., **262 Va. 432, 551 S.E.2d 615** (2001)

Other Authorities

Statute of Anne, 8 Anne, c. 19 (1710)

Statute of Monopolies, (21 Jas. 1. c. 3) 1624

Treatises

The Federalist Papers, No. 43 Rossiter Ed. New American Library, 271 – 272

David C Brezina is Of Counsel with Ladas & Parry, LLP and has served as an Adjunct Professor at UIC School of Law. The content hereof does not express views of either institution or their clients. © 2026 David C. Brezina.

1. Apart from the difficulty in explaining how injury was caused, for at least five years the legend on the patent cover included the same words, the 2026 copies adding only 250th Year words and logo and the Commissioner's signature being different. "[A] cause of action for false advertising is an action for which no limitation period is prescribed. Therefore, Code § 8.01-248 is applicable, and the circuit court correctly determined that Parker-Smith's claims for false advertising were barred under either the former one-year or the current two-year limitation period in that statutory provision." *Parker-Smith v. Sto Corp.*
 2. US Inventor, Inc., Inventor's Association of South Central Kansas, Inventors Network of Minnesota, San Diego Inventors Forum, Inc., Mercexchange, L.L.C., and an individual, Paul Morinville.
 3. Plaintiff Paul Morinville is not discussed in the opinion.
-