***The Rise of the End User in Patent Litigation***

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## *Abstract*

The patent system focuses on the actions of two players: the patentee and its competitor. It assumes that the competitor will represent the interests of the end user. But increasingly, end users are becoming significant players in the patent system, their interests sometimes diverging from those of competitors. End users were principal players in several cases before the Supreme Court this year. In *Bowman v. Monsanto*, farmers were sued for re-using Monsanto's patented self-replicating seeds. In *FTC v. Actavis*, the FTC challenged pay for delay agreements between patentee and competitors because they undermine patients' interests in access to generic drugs. And in *Association for Molecular Pathology* v. *Myriad Genetics*, patients and physicians sued to invalidate breast cancer gene patents. Finally, in the telecommunications and software industries, non-practicing entities, suing customers of the patentee's competitors, bring vast numbers of end users into the thick of patent litigation.

The drafters of the America Invents Act (the "AIA") intended the legislation to catch up with the changing patent landscape. Yet, the AIA did not predict and is largely ill equipped to address the growing role of end users. The AIA addresses needs of small entities, mainly, by adding procedures to challenge patents in the Patent Office, which provide a cheaper and faster forum for challenging validity. However, end users are different from small technological competitors. End users lack technological sophistication, they are often one time players and tend to become involved in the patent dispute relatively late in the life of the patent. The AIA's novel PTO procedures are largely unsuitable for end users because they permit expansive challenges mostly early in the life of the patent before end users are likely to be implicated.

Paradoxically, as end users play an increasingly larger role in patent law disputes, they have few legal tools to assert their interests. This Article argues for the need to equip end users with tools to defend their interests in this new litigation landscape. First, currently, end users do not have standing to sue for declaratory judgment relief. The Federal Circuit in *the Association of Molecular Pathology* construed a very narrow basis for standing in patent lawsuits. This Article argues that the change in litigation practices underscores the need to expand standing to end users. Second, since end users, who lack internal resources of technological sophistication, are particularly ill suited to fund the expense of patent litigation, expense shifting should apply in cases where the winner is an end user.