



CAN A PRIVATE PARTY ENFORCE A FEDERAL STATUTE?

Court gives formal answer in lawsuit over bow tie patents

By CHARLES F. O'BRIEN

Most of us are taught from an early age that you can't take the law into your own hands. But, in *Stauffer v. Brooks Bros. Inc.*, the U.S. Federal Circuit Court of Appeals considered whether a private party had the standing to enforce the false marking statute. And the court's finding may surprise you.

Brooks Brothers manufactures and sells bow ties with an "Adjustolox" mechanism that's manufactured by J.M.C. Bow Company. The ties are marked with numbers for two patents that expired in 1954 and 1955.

Raymond Stauffer is a patent attorney who purchased some of the marked bow ties. In December 2008, he brought a *qui tam* action against Brooks Brothers under the false marking statute, which prohibits marking an unpatented article, in a way

that indicates the article is patented, for purposes of deceiving the public.

In a *qui tam* action, a private citizen sues for a statutory penalty (up to \$500 for each case of false marking), with any penalties recovered to be split equally with the government. But the district court dismissed this particular action, finding that Stauffer lacked standing to bring the claim because he had failed to show that the government had suffered an injury.

The Federal Circuit explained that the *qui tam* provision in the false marking statute operates as a partial assignment, or transfer, of the government's rights to damages to a private party. For Stauffer to have standing, he must allege that the government has suffered an injury causally connected to the defendant's conduct.

The appellate court found that, by enacting the false marking statute, Congress

defined an injury to the government as "a violation of that statute [that] inherently constitutes an injury to the United States." The government would, therefore, have standing to enforce the statute, as would its assignee.

Interestingly, the Federal Circuit suggested that the *qui tam* provision in the false marking statute might not withstand a challenge to its constitutionality. But because the defense didn't raise constitutional issues on appeal, the court declined to determine the statute's constitutionality. Instead, it reversed the district court and sent the case back for consideration on the merits of the claim. ■



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