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Wham-O Lawyer: Actually, Not all Qui Tam Laws Have Been So Pretty

Plaintiffs' attorneys have been increasingly clever in racking up defendants for false patent marking suits. (Click [here](#), [here](#) and [here](#) for earlier blog posts.)

Sweeps through the aisles of retail stores have netted allegedly expired patents on products such as [no-slip suspender clips](#), a line of hair removal cream and the [Quick Response Extra Large Orifice Concealed Pendant Sprinkler](#). The banking industry also has taken a false marking hit.

But defendants have a few tricks up their sleeves too. The latest challenge comes from Wham-O Inc., the makers of Frisbees.

Wham-O's attorney, Berkeley-based Andrew Dhuey, has [filed an appeal of the false marking statute](#) before the Federal Circuit challenging its constitutionality based on the "[Take Care Clause](#)," essentially saying the law gives too much power to private entities. (Last week U.S. District Judge Dan Aaron Polster in Ohio ruled the law was unconstitutional on those same grounds.)



The false marking law is a qui tam statute, meaning plaintiffs split the proceeds with the U.S. government. In past filings, the government has defended the statute based on "the long history and use of the qui tam mechanism in England and the United States."

In his argument Dhuey counters that point with some some, well, embarrassing qui tam statutes once on the books. One allowed a plaintiff to carry out a larceny prosecution and take half the proceeds, but as Dhuey points out:

"It is unclear from the statute if the relator was entitled to administer half of the blows when a convict was 'publicly whipped, not exceeding 39 stripes.'"

Another early qui tam statute allowed a person to prosecute on the government's behalf anyone who was not a "free white person" in the postal service.

"Relators could pocket \$25 for every non-white or non-free postal carrier they spotted, sued and convicted," Dhuey wrote.

The Frisbee maker has some allies in its appeal. The Cato Institute [has filed an amicus](#) on Wham-O's behalf. Late Tuesday, the U.S. Chamber of Commerce [added its own](#).

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