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Patent Marking – Overview

What is "patent marking?"

Patent marking is placing on your product the word "patent" or the abbreviation "pat.," together with the patent number(s) that cover a product.

Why mark your products with patent numbers?

The patent statute requires notice - either actual or constructive notice that an article is patented - or no damages for patent infringement can be recovered by the patentee. Marking products with the patent numbers that cover the product provides "constructive notice" to third parties. Constructive notice can allow the patent owner to recover damages for patent infringement that occurs prior to the commencement of a lawsuit.

Alternative to marking - Actual notice.

Actual notice (contacting a potential infringer directly to inform them of your patent protection) is another way to recover damages for patent infringement that occurs prior to commencement of a lawsuit. This practice includes a risk that the potential infringer could bring a declaratory judgment action against you in their home court; therefore, it is highly recommended that you consult your attorney before contacting a potential infringer.

Alternative to marking – The new law of virtual marking.

Under the America Invents Act, an alternative form of "virtual marking" is now permissible. Under this practice, a product can be marked with "pat." or "patent" and a free-to-access web address that associates the product with the appropriate patent number(s). The webpage at that web address must identify a covered product by one or more patent numbers, and it must be free (you cannot charge money to access the information) and easily accessible to the public.

Patent Pending.

The marking of an article as "patented" when it is not in fact patented is against the law and subjects the offender to a penalty.

Some persons mark articles with the phrases "Patent Applied For" or Patent Pending." These phrases have no legal effect, but they do give third parties information that a patent application has been filed with the USPTO. The protection afforded by a patent does not begin until a patent has been granted by the USPTO. False use of any of these phrases or their equivalent is prohibited.

This area is codified in 35 United States Code, Section 287. Below is an excerpt of the provisions that relate to marking and damages:

35 U.S. Code § 287 - Limitation on damages and other remedies; marking and notice

(a) Patentees, and persons making, offering for sale, or selling within the United States any patented article for or under them, or importing any patented article into the United States, may give notice to the public that the same is patented, either by fixing thereon the word “patent” or the abbreviation “pat.”, together with the number of the patent, or by fixing thereon the word “patent” or the abbreviation “pat.” together with an address of a posting on the Internet, accessible to the public without charge for accessing the address, that associates the patented article with the number of the patent, or when, from the character of the article, this can not be done, by fixing to it, or to the package wherein one or more of them is contained, a label containing a like notice. In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice.

Additional resources

- USPTO website at www.uspto.gov/patents/resources
- USPTO Inventors Resources http://www.uspto.gov/inventors/

**This general information is provided for informational purposes only and is not, nor is it intended to be, legal advice. You should consult an attorney for advice regarding your individual situation. I invite you to contact me, and I welcome your calls, letters, and electronic mail. Nothing in these materials shall be construed to create an attorney-client relationship.