

## Patent Marking Basics

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After investing time and resources to obtain patent protection, consumer product companies should maximize their return through a well-executed patent marking plan. The details of an effective marking program must be considered carefully, but here are some of the basic considerations.

### Who Should Mark?

Patentees who make, offer for sale, sell, or import any article covered by the patent should mark the patented article. Patentees should also require their licensees to do the same. Patentees should monitor licensee products to ensure the licensee complies with the marking requirements.

### Why Should you Mark?

Under the patent marking statute, 35 U.S.C. § 287, patentees may obtain damages from an infringer dating back to when the infringer had “notice” of the infringement and continued to infringe. Proper marking gives the infringer constructive notice. Absent marking, a patentee may only collect damages from the time the infringer received actual notice, such as, a warning letter or the filing of an infringement suit.

### How Should you Mark your Product?

Generally, products should be marked with “Patent [Number]” or “Pat. [Number]” where the applicable patent number or numbers are included. Patent notice must be “fixed” on the patented article. If the character of the article itself prevents fixing notice to the patented article, the patentee should mark the article’s packaging or container. Although courts generally give patentees wide discretion for satisfying the statutory notice provision, patentees should carefully consider the best option for marking, especially when “fixed” marking on the article is not available.

### How Extensive Should you mark?

Marking must be “consistent and continuous.” Although a de minimis number of unmarked products may not trigger noncompliance in most circumstances, patentees should ensure that “substantially

all” of the patented articles are marked. Courts have recently addressed whether the patent marking statute should be considered on a claim-by-claim or patent-by-patent basis, and patentees should carefully consider whether a particular product is covered by a patent such that marking is necessary. For example, patentees should consider whether a component to their patented system should be marked in compliance with the statute.

### **What about Virtual Marking?**

The patent marking statute permits “virtual marking,” which can provide patent owners flexibility to add or remove patents associated with a particular product. A patentee employing “virtual marking” may mark the patented article with “Patent [Website]” or “Pat. [Website]” where [Website] is an Internet address that is accessible to the public without charge (i.e., the web address cannot be behind a pay wall). The website should associate the patented article with the number of the patent(s) covering the article.

### **When Should you Start Marking?**

Articles may be marked with “Patent Pending” once a U.S. Patent Application, including a provisional patent application, covering the article is filed. Once granted, subsequently produced articles should be marked in compliance with the patent marking statute.

### **What about False Marking?**

False marking under 35 U.S.C. § 292 allows only the United States and persons who have suffered a “competitive injury” to bring a claim for false marking. A claimant must show (1) that the patent does not cover the marked article, and (2) that the article was marked with the intent of counterfeiting or deceiving the public. The marking of a product relating to a patent that covered that product but has expired is not a violation of this statute.

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