



Patent Marking

- Proper patent marking is required to retain all patent rights
- Patent marking can only be on packaging rather than product itself if placing on product itself “cannot be done”

Patent Marking Requirements and Strategies

Patent marking, or the act of displaying the patent number on the product sold containing patented claims, is crucial for maintaining rights and allowing for full recovery against infringers. This is because “[a patentee] is entitled to damages from the time when it either began marking its product in compliance with section 287(a) [i.e. providing constructive notice], or when it actually notified [the accused infringer] of its infringement, whichever [is] earlier.” [American Medical Sys., Inc. v. Medical Eng’g Corp., 6 F.3d 1523, 1537, 28 USPQ2d 1321, 1331 (Fed.Cir.1993)] While “actual notice” is self-explanatory in this case, “constructive notice” will be found when there is proper patent marking. That is why knowing how and what to mark with your patent number is crucial to maintaining your patent rights.

1) Basics

The relevant statutes state that ““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.’” le: “Patent No. 8,000,000” or “Pat. 8,000,000” This patent must be fixed to the product it is associated with. However, if fixing the patent number on the product “cannot be done” it may be affixed to the packaging.

A key point to recognize is that affixing patent marking to the packaging of a product will only be seen as proper marking if affixing it to the product itself “cannot be done”. This means that the shape or composition of the product makes it impossible, or impractical in light of the disadvantages of doing so, to affix markings to the product itself. If markings are affixed to packaging when it “could be” affixed to the product, proper marking will not be found.

2) Virtual Marking

The America Invents Act (AIA) allows patented products to be marked “virtually” by using a notice directing consumers to visit a site on the Internet. As noted above, the same requirement of affixing the marking to the product, or the packaging if it “cannot be done” on the product.

One of the benefits of virtual marking is if patent protection changes or updates, the patent owner does not need to re-update physical patent markings on all products. This could be a costly and labor-intensive process. Instead, the patent owner can simply mark products directing them to a website, and then update the list of patents on said website if they change at any point.

3) Marking for All Types of Patents?

For patents that only contain method claims, there is no marking required. If patent owners want to give notice of the method claims, products can be marked with “Made Under US Pat. ##” or “For Use under Pat. ##”.

Design patents require the same type of basic marking as noted above for utility patents.

Software patents, if there is a way a product can be marked, should be marked. Simply displaying the patent marking at a startup or loading screen of the software will not count as appropriate marking. If there is a physical component to the software, it should be marked.



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