BANNER WITCOFF

Patent Marking and Advertising: Best Practices and Recent Updates

Thursday, November 14, 2024

Topics

- Patent Marking in the United States
  - Benefits of Marking
  - What is it? Requirements for Proper Marking
    - Proper Mark Format
    - Virtual Marking – Additional Requirements
    - Proper Mark Location
- False Marking Under the Patent Act
  - Permissible Error in Marking System
- "Patented" False Advertising Under the Lanham Act
- Marking of Design Patents and Trade Dress
  - Design Patents
  - Trademarks
  - Trade Dress

PATENT MARKING

Benefits of Patent Marking

- Patents are often referenced in advertising to highlight unique and innovative qualities of a product.
  - "This product is innovative"
  - "XYZ Corp. is innovative"
  - "I am innovative"
  - "No one else can do this"
- The product is somehow better because it has a patent.
- Consider perception of USPTO as an "expert endorser."
  - The patent grant indicates that the invention is new and non-obvious, and meets utility requirements (!).
- Consumers are unlikely to pull claims of a patent.

Helpful discussion of these issues is found in an article by Bonnie Grant, "Deficiencies and Proposed Recommendations to the False Marking Statute: Controlling Use of the Term 'Patent Pending'," University of Georgia Law, Journal of Intellectual Property Law, Volume 12, Issue 1 (October 2004).


PATENTED SYSTEM
NO SCOOPING
SAVE MONEY
ECO-FRIENDLY
MADE IN USA
CitiKitty®
Cat Toilet Training Kit
PATENTED
1 START
Every CitiKitty Includes:
Training Seat
Training Insert
Training Guide
and more!
2 TRAIN
BONUS
Catnip Included!
3 NO LITTER BOX!
Turn Over & SEE HOW IT WORKS!
U.S. PATENT No. 8,051,804

LEGAL

PATENTS ARCHIVE

In accordance with Section 287(a) of Title 35 of the United States Code, the reader is hereby placed on notice of [redacted] Golf Company's rights in the United States Patents listed on this site and associated with the following products.

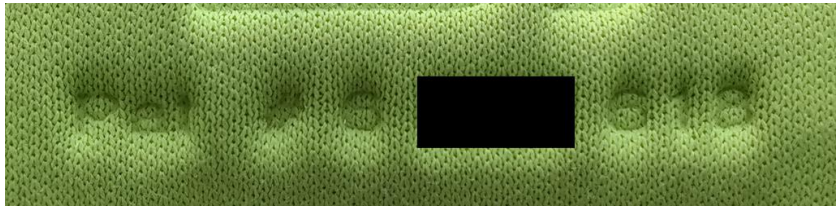
Woods:

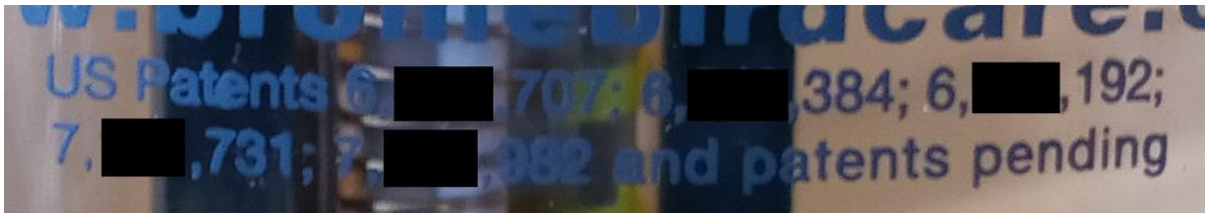
[redacted] 815 Driver

- 8[redacted]534
- 8,[redacted]911
- 8[redacted]294
- D[redacted],156
- D[redacted]388

[redacted] 816 Driver

- D[redacted]997



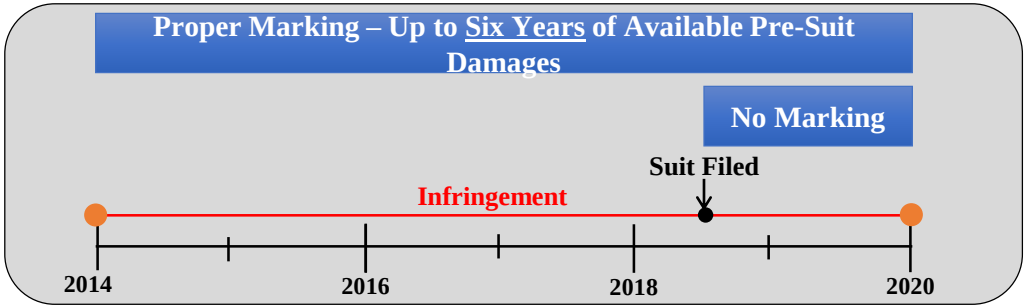


What is Patent Marking?

- Patent marking is a form of **constructive notice** to the public that the marked article is patented.

Why Mark? Additional Damages Available

- Damages may be recovered only for infringement occurring **after notice**.
  - **Notice** requires either:
    - **(1)** Actual notice
    - [i] filing infringement action; *[only post-filing damages available]*
    - [ii] actual notice of infringement; *[often difficult to prove]*
    - **(2)** Constructive notice, i.e., **proper marking.**
  - **Burden** is on **plaintiff** to prove compliance with the notice requirement



E.g., Versata Software v. SAP America (E.D. Tex. 2011) (patentee's damages award reduced $16 million for failure to sufficiently mark)

Why Mark? Other Benefits

- Marking may act as a **deterrent** to others from copying a patented product
- Marking may aid assertions of **willful infringement**, which may result in treble damages and/or attorney's fees awards
- Marking may aid in establishing assertions of **induced infringement**
- Marking may provide marketing benefits, identifying the product as **unique and innovative** to the consuming public.

Marking Statute – 35 U.S.C. § 287

Who Must Mark What & When

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,

How to Mark & Where

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,

Where Marked Alternative

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.

Effect of Failure

In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement,

Actual Notice Alternative

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.

Marking Statute – 35 U.S.C. § 287

- **35 U.S.C. § 287** - Patentees may **give notice to the public** that the patented article is patented by:

(1) "fixing thereon the word 'patent' or the abbreviation 'pat.', together with **the number of the patent**," — **Traditional Marking**

or

(2) "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." — **Virtual Marking** **[NEW]** *Added by the America Invents Act*

Note: *35 U.S.C. § 287 applies equally to design and utility patents. *Nike v. Wal-Mart Stores Inc.*, 138 F.3d 1437, 1443 (Fed. Cir. 1998).

Proper Mark Format

- **Traditional Marking**

Patent 7,254,576	Pat. 7,254,576
U.S. Patent No. 7,254,576	U.S. Pat. 7,254,576
U.S. Patent 7,254,576	U.S. Pat. No. 7,254,576

Covered by the following patents: 7,254,576; 8,602,915; D685,044; D689575

- *Unclear Whether Sufficient:*

May be covered by the following patents: 7,254,576; 8,602,915; D685,044; D689575

- **Virtual Marking**

Patented: http://www.company.com/patents

Pat.: http://www.companuy.com/patents

This product is covered by one or more patents: http://www.company.com/patents

- *Unclear Whether Sufficient:*

May be covered by patents at http://www.company.com/patents

A to Z Machining Serv. LLC v. Nat'l Storm Shelter (W.D. Okla 2011)
(virtual mark must include the word 'patent' or 'pat' with website address)

Virtual Marking - Additional Requirements

- Marking website must be "**accessible** to the public without charge for accessing the address."
- Marking website must "**associate**[] the patented article with the number of the patent." - 35 U.S.C. § 287(a)

Financial Product A: Covered by one or more of the following patents: US 1,234,567, …

Software Product B: Covered by one or more of the following patents: US 1,234,567, …

Proper Mark Location

(1) **Directly -** "fixed" directly to the patented article;

(2) **Label** – "fixed" as a label to the patented article; or

(3) **Packaging** – "fixed" directly or as a label to the packaging wherein one or more article is contained

Always permissible, generally preferred

Permissible <u>ONLY</u> when ***"from the character of the article,"*** direct marking "cannot be done."

Method Patents – The patent marking statute generally does **<u>not apply</u>** if only method claims have been asserted against the defendant. (*Crown Packaging v. Rexam Beverage* (Fed. Cir. 2009)

- **BUT - Apparatus and Method Claims Asserted** - If patentee asserts **<u>both</u>** apparatus and method claims of the same patent, courts may require method patent markings for patentee to recover damages under its **method** claims prior to actual notice. *American Medical System v. Medical Engineering* (Fed. Cir. 1993)

Proper Mark Location

When does the "**character of the article**" render direct marking not possible?

Rule: Courts take a "practical common sense approach," balancing at least five factors:

(1) The **physical difficulty** of affixing a mark directly to an article;
(2) The **cost of marking** an article directly rather than a separate label;
(3) Whether an **additional manufacturing step** is required to affix the mark directly (other markings on a product suggest not)
(4) The **industry custom**
(5) Impairment of **product aesthetics** by fixing a mark directly to the article

NOTE: Generally, courts base their decision on satisfaction of the statutory notice function: "§ 287 is to be realistically applied . . . Marking the package is a sufficient alternative so long as the patentee, the licensees or distributors act so that the package marking is actually seen by the consuming public."

Rutherford v. Trim-Tex, Inc., 803 F. Supp. 158, 161 (N.D. Ill. 1992)

Summary of Virtual Marking

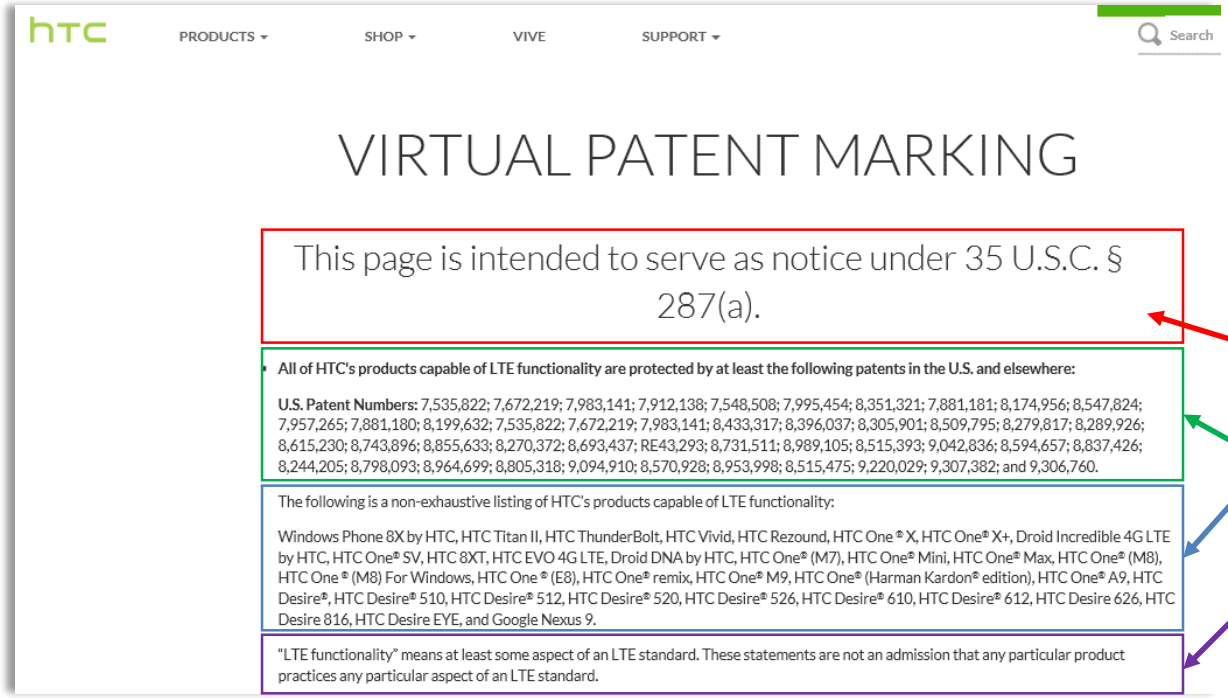
Question: How can software be virtually marked?

- Covered **software/inventions** can include notice on 1) Apps, 2) product implementing software, 3) web page accessing invention, 4) manuals:
  1) 'Patent' or 'pat.'; and
  2) Webpage address
- And, **webpage** must:
  1) Be publicly accessible
  2) Associate software with all patents covering it

Common elements of virtual patent marking pages:

- Statute (notice intent)
- Product categories
- Patent lists

Virtual marking – example #1 (htc)

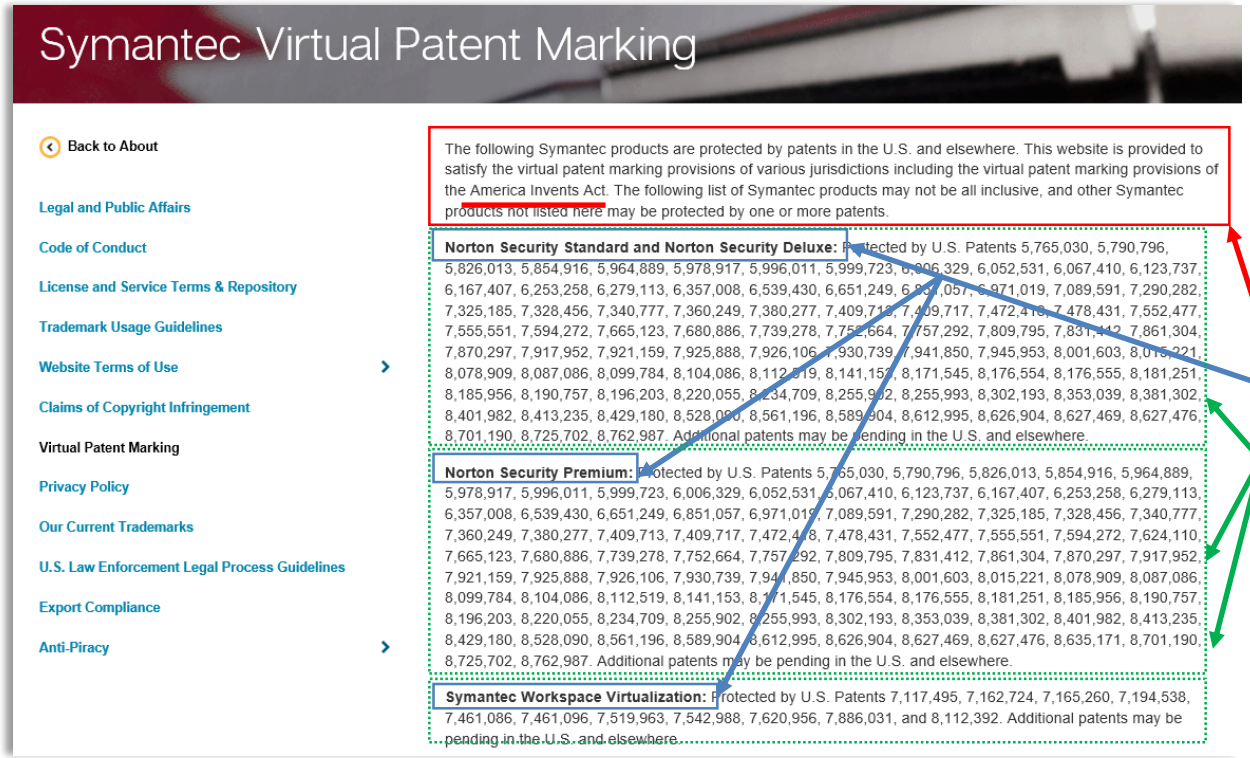


Elements:

- Statute (notice intent)
- Product categories
- Patent lists
- Standard essentiality

http://www.htc.com/us/virtual-patent-marking/

Virtual marking – example #2 (Symantec)

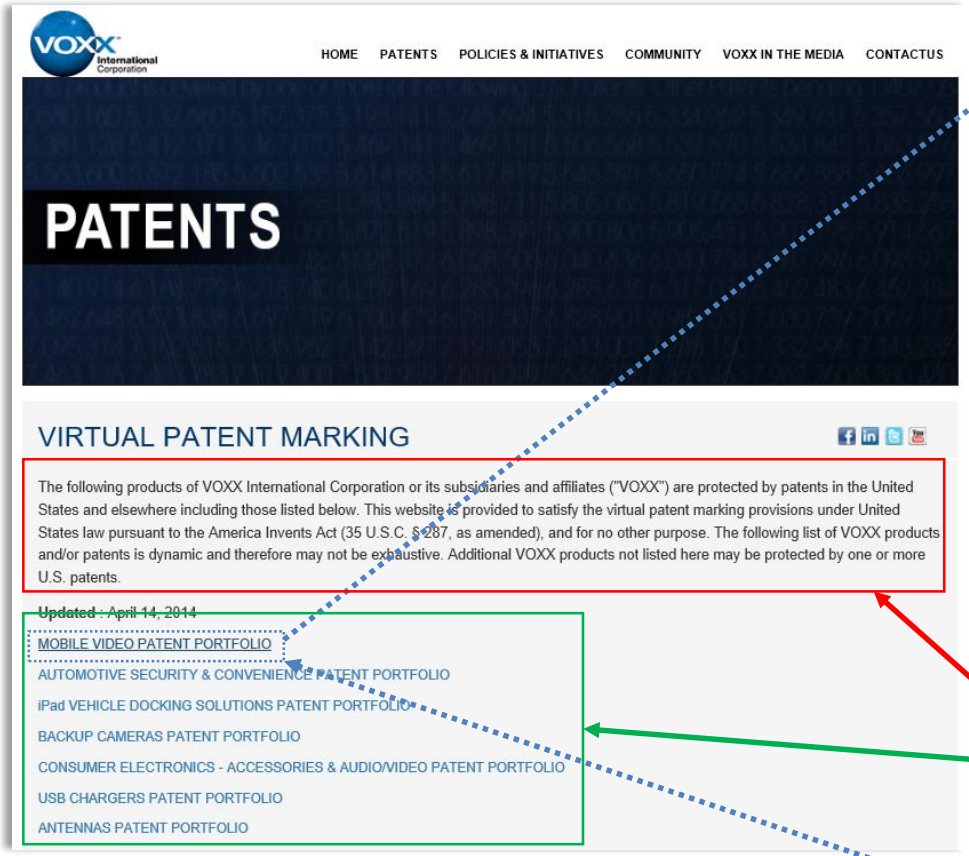


Elements:

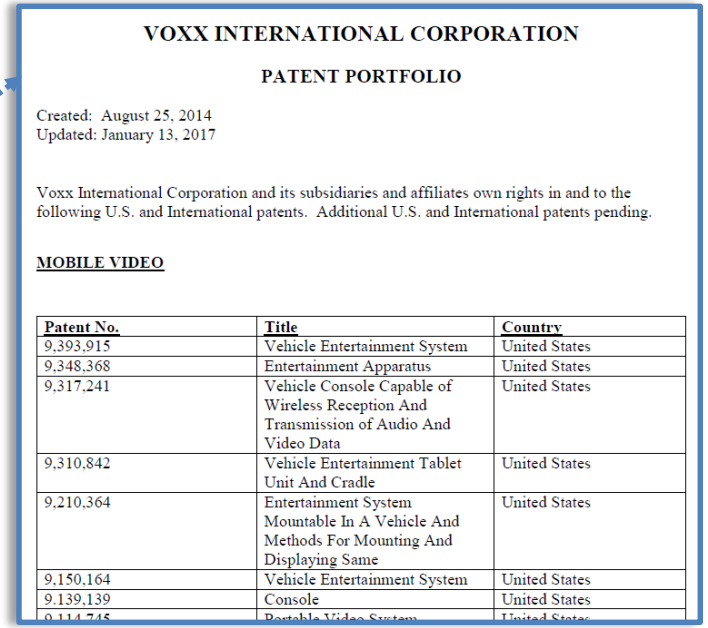
- Notice intent ("AIA")
- Product categories
- Patent lists

https://www.symantec.com/about/legal/virtual-patent

Virtual marking – example #3 (VOXX)



http://www.voxxintl.com/patents/



VOXX INTERNATIONAL CORPORATION

PATENT PORTFOLIO

Created: August 25, 2014
Updated: January 13, 2017

Voxx International Corporation and its subsidiaries and affiliates own rights in and to the following U.S. and International patents. Additional U.S. and International patents pending.

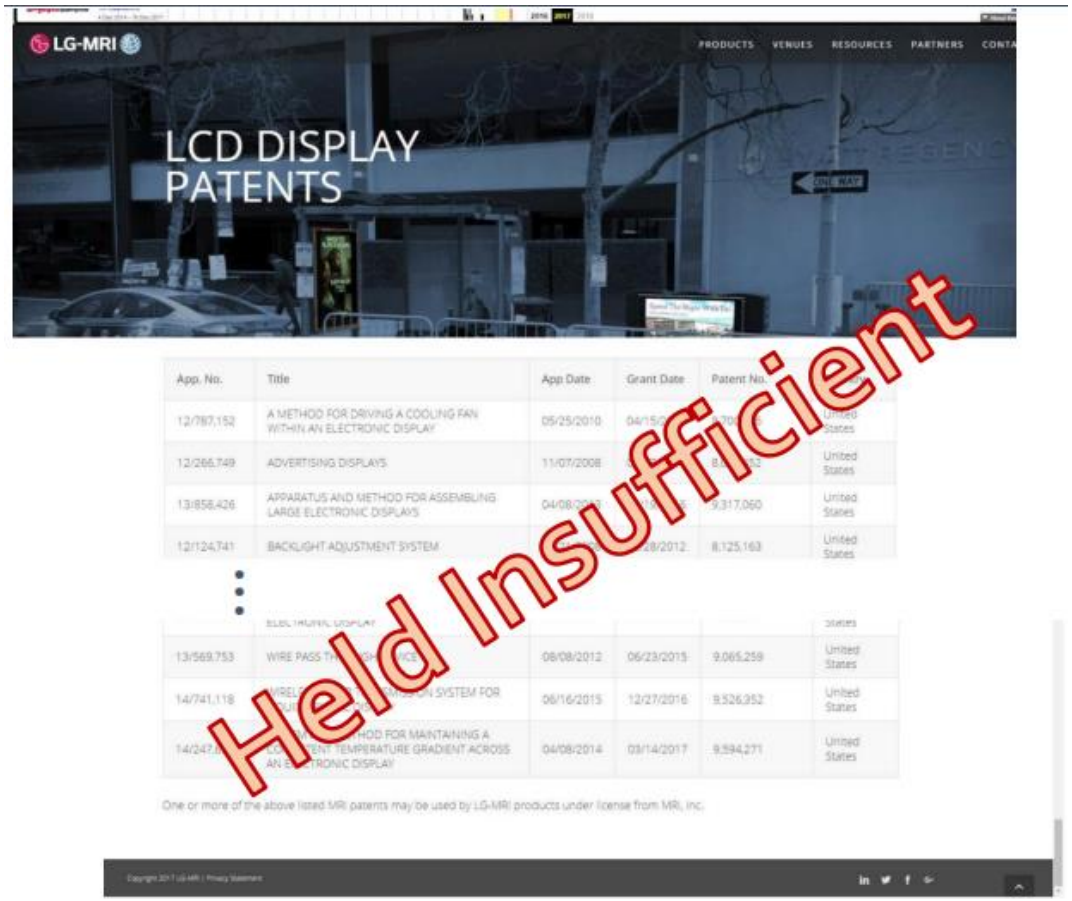
MOBILE VIDEO

Patent No.	Title	Country
9,393,915	Vehicle Entertainment System	United States
9,348,368	Entertainment Apparatus	United States
9,317,241	Vehicle Console Capable of Wireless Reception And Transmission of Audio And Video Data	United States
9,310,842	Vehicle Entertainment Tablet Unit And Cradle	United States
9,210,364	Entertainment System Mountable In A Vehicle And Methods For Mounting And Displaying Same	United States
9,150,164	Vehicle Entertainment System	United States
9,139,139	Console	United States
9,114,745	Portable Video System	United States

Elements:

- Statute (notice intent)
- Portfolio categories: association of products with patents may be lacking by reference to "portfolio" and not "products"
- Patent lists: linked pdf documents

Virtual marking – INSUFFICIENT



- "Simply listing all patents that could possibly apply to a product or all patents owned by the patentee on the patentee's marking website does not give the public notice. It merely creates a research project for the public."
- Must reference specific product/product name
  - **Mfg. Res. Int'l, Inc. v. Civiq Smartscapes, LLC, 397 F. Supp 3d 560, 577-78 (D. Del. 2019)**

Discussion on Patent Marking

FALSE MARKING

False Marking – 35 U.S.C. § 292

- A party may be found liable for false marking in three ways: [35 U.S.C. § 292(a)]

  (1) Mismarking a product with the number of a **patent issued to another** for the purpose of deceiving the public;

  (2) Marking **unpatented articles** for the purpose of deceiving the public;

  (3) Marking "**patent pending**" or similar language on an article for which **no patent application has been filed** for the purpose of deceiving the public

  - *§ 292(a) remains unchanged post-AIA*

***America Invents Act* Significantly Reduces Risk of False Marking Liability**

Pre-AIA	Post-AIA
Any person, without individualized injury or harm, has standing to sue and seek $500 per offending article	[NEW] § 292(b) - Private citizen must suffer "**competitive injury**" as a result of false marking [although U.S. may still sue for statutory penalty]
Marking product with **expired patent *may*** constitute false marking	[NEW] § 292(c) - Marking product with **expired patent is not** false marking

False Marking – 35 U.S.C. § 292

35 U.S.C. § 292 (a)

- …
- Whoever marks upon, or affixes to, **or uses in advertising in connection with any unpatented article,** the word "patent" or any word or number importing that the same is patented, for the purpose of deceiving the public; or
- Whoever marks upon, or affixes to, or uses in advertising in connection with any article, the words "patent applied for," "patent pending," or any word importing that an application for patent has been made, when no application for patent has been made, or if made, is not pending, for the purpose of deceiving the public—
- Shall be fined not more than $500 for every such offense. Only the United States may sue for the penalty authorized by this subsection.

False Marking – 35 U.S.C. § 292 (PRE AIA)

Pequignot v. Solo Cup (Fed. Cir. 2010)

- **"Unpatented Article" under § 292(a)** - Solo's patent had expired, which, pre-AIA, rendered Solo's product an "unpatented article," satisfying first prong of § 292(a).
- **Presumption of Intent to Deceive** - Solo's label stating "this product may be covered by one or more pending or issued patents" was a false statement. A knowing false statement raises a presumption of intent to deceive the public.
- **Solo Rebutted Presumption –** Solo, however, rebutted that presumption showing by a preponderance of the evidence that "the language was added to all packaging because the alternative was inconvenient from a logistical and financial perspective."
- **Held - §** 292(a) requires "purpose of deceit, rather than simply knowledge that a statement is false." There is a "high bar that is set for proving deceptive intent . . . [and] Solo's burden of proof is to show by a preponderance of the evidence that it did not have the requisite purpose to deceive."
- *Note: this case arguably kicked off the false marking troll industry, which was subsequently killed by the AIA.*
  - *Pre-AIA – qui tam provision allowed any person to bring suit on behalf of US*
  - *$500 statutory damages per article -> EACH solo cup = $10.8 trillion potential damages.*

Permissible Error in Marking Practices

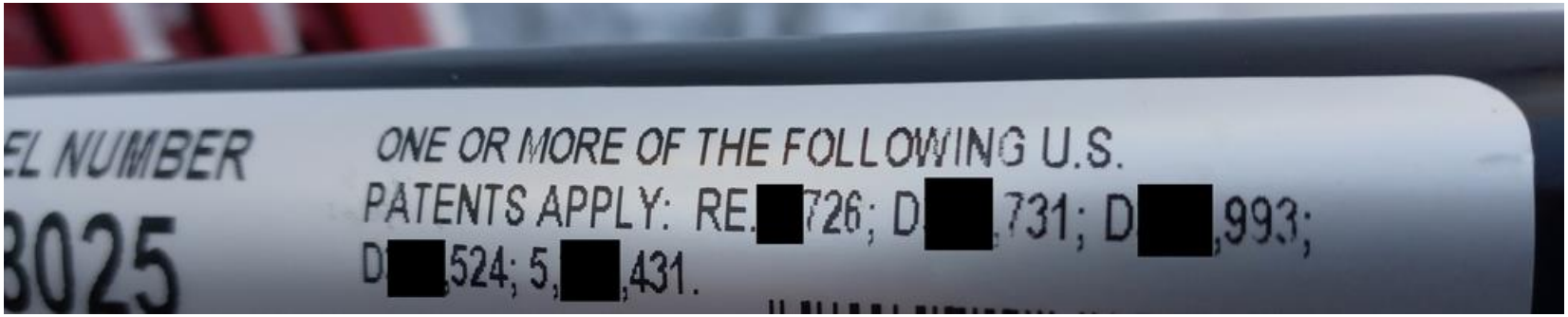
- Marking must be "substantially consistent and continuous"
  - *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1446 (Fed. Cir. 1998) (patentee required to show "that *substantially* all of the [patentee's] shoes being distributed were marked, and that once marking was begun, the marking was substantially consistent and continuous")
  - *American Medical Sys. v. Medical Eng'g* (Fed. Cir. 1993) (patentee must be in "full compliance" with constructive notice provisions to avail itself to benefits of marking statute, which requires that marking is "substantially consistent and continuous")
- Minor errors OK – courts apply a "rule of reason" analysis
  - *Allen Eng'g Corp. v. Bartell Indus.* (Fed. Cir. 1993) (sticker provided effective notice despite obvious typographical error regarding patent number)
  - *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1111 (Fed. Cir. 1996) (patentee satisfied marking statute even though third-party licensee only marked 95% of the patented shoes, patentee reasonably ensured licensee was meeting its marking duties)
- **NOTE:** Some commentators expect courts to require a higher degree of precision in virtual patent marking, given relative ease of maintaining a web page

Licensees must mark

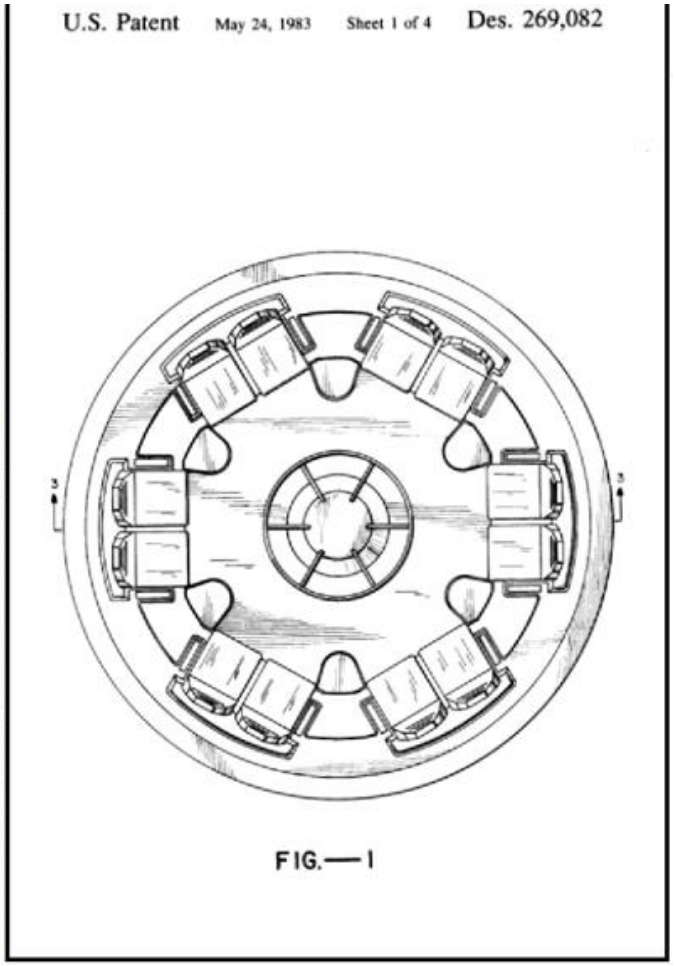
- "Patentees, and ***persons making, offering for sale, or selling*** within the United States ***any patented article*** for or under them, ***or importing*** any patented article into the United States, may give notice to the public that the same is patented …" 35 U.S.C. § 287(a)

Conditional Patent Marking? BE CAREFUL

- Could constitute false marking if any of the listed patents do not have a claim that covers the product and the notice is used with intent to deceive the public




XV
U.S. PATENT
NO. 269082


U.S. Patent May 24, 1983 Sheet 1 of 4 Des. 269,082
FIG.—1

“PATENTED” LANHAM ACT ISSUES

FALSE ADVERTISING: 15 U.S.C. § 1125(A)(1)(B)

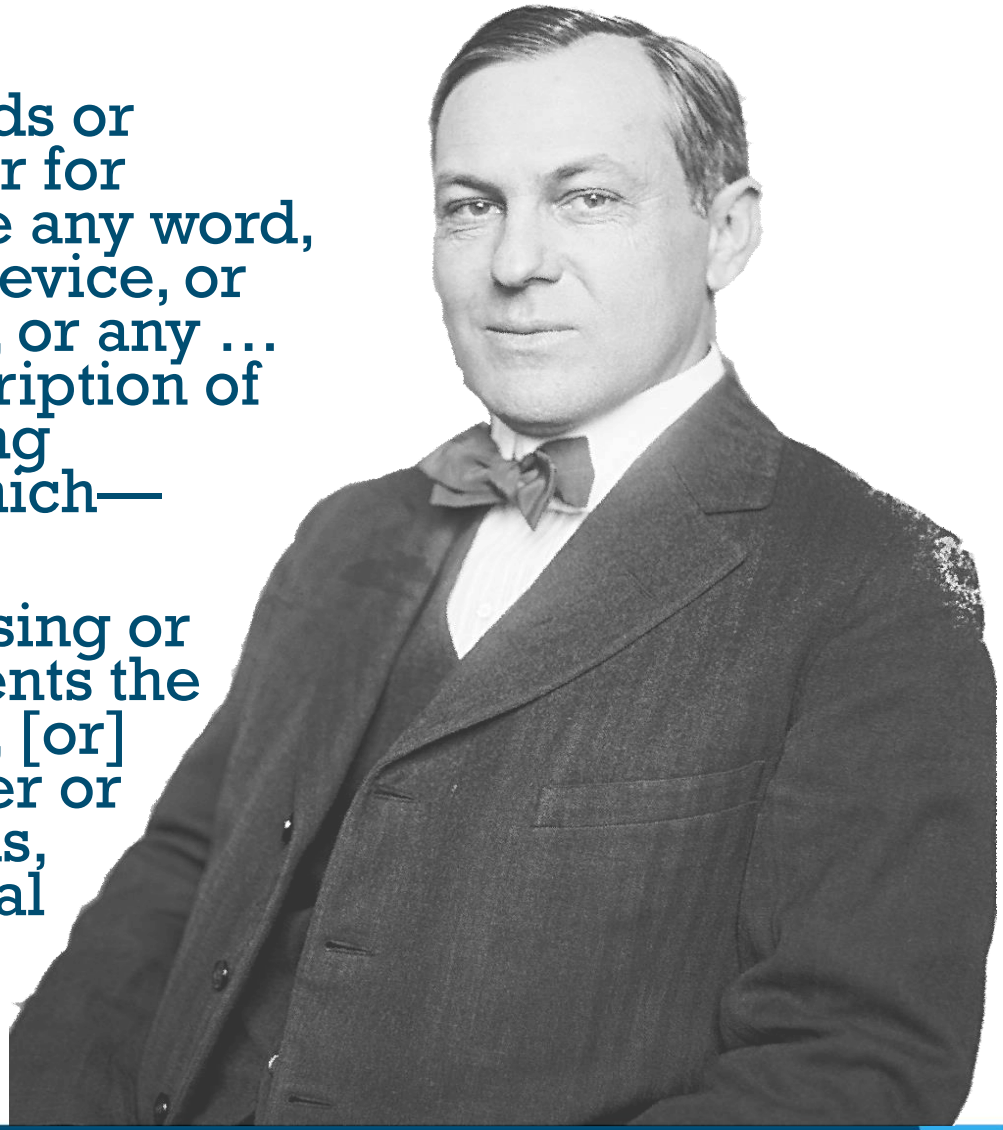
(A) Civil Action

1. Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any … false or misleading description of fact, or false or misleading representation of fact, which—

   A. …

   B. in commercial advertising or promotion, misrepresents the nature, characteristics, [or] qualities … of his or her or another person's goods, services, or commercial activities,

   shall be liable in a civil action … .



FALSE ADVERTISING: REQUIRED ELEMENTS

1. The Defendant made a false/misleading statement about a product
2. The false statement entered interstate commerce
3. The statement actually deceived (or has a tendency to deceive) a substantial segment of its audience
4. The deception is material, *i.e.*, likely to influence the purchasing decision
5. A likelihood of injury to plaintiff (not actual injury)

Skydive Arizona, Inc. v. Quattrocchi, 673 F.3d 1105, 1110 (9th Cir. 2012)

FALSE ADVERTISING VS. FALSE MARKING

1. The Defendant made a false/misleading statement about a product
   The Defendant falsely marked an object as patented
2. The false statement entered interstate commerce
   The marking was affixed to an unpatented article
3. The statement actually deceived (or has a tendency to deceive) a substantial segment of its audience
   The Defendant intended to deceive the public
4. The deception is material, *i.e.*, likely to influence the purchasing decision
5. Economic/reputational injury from the deception
   The Plaintiff suffered a competitive injury

Skydive Arizona, Inc. v. Quattrocchi, 673 F.3d 1105, 1110 (9th Cir. 2012); *Mayview Corp. v. Rodstein*, 320 F.3d 1347, 1359 (9th Cir.1980)
#5: Lexmark Int'l Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014); 35 U.S.C. 292(b) (amended 2011)

EXEMPLARY CASE DISCUSSION

- *Gravelle v. Kaba Ilco Corp.*, 684 F. App'x 974 (Fed. Cir. 2017)
- *Healthport Corp. v. Tanita Corp. of Am.*, 563 F. Supp. 2d 1169 (D. Or. 2008), aff'd, 324 F. App'x 921 (Fed. Cir. 2009)

Gravelle v. Kaba Ilco Corp., 684 Fed. App'x 974 (Fed. Cir. 2017)

- Kaba advertised "automatic blade detection" and "automatic calibration" as "patent pending" features of locksmith machines
- Federal Circuit affirmed summary judgment of no false marking and no false advertising against *pro se* litigant Gravelle
- only evidence of #5:
  - Gravelle Affidavit:
    mismarked features are "highly desirable within the small locksmith community, at large, to the extent that same could readily influence a buyer[']s purchasing decision."
  - Gravelle Deposition:
    G: "probably" $30k in advertising spent to undo the damage
    K: But does anything indicate that the money was spent to undo false marking?
    G: "No. But I—they did say specifically—or in generally—or specifically that, you know, false marketing is very hard to overcome."

Healthport Corp. v. Tanita Corp. of Am.,

563 F. Supp. 2d 1169 (D. Or. 2008), aff'd *per curiam*, 324 F. App'x 921 (Fed. Cir. 2009)

- Healthport advertised metabolic analyzer as "the only metabolic analyzer patented in the United States and abroad for unequaled accuracy and validity in the prediction of human body composition"
- #1, two inferences (both false)
  - Per testimony, not the only patented metabolic analyzer
  - No indications (or substantiation) of patents granted for "unequaled accuracy and validity"
- #3 and #4: presumed based on uncontroverted testimony from healthcare professionals (*i.e.*, surveys not required)

Marking and a *Raison d'Ětre* of Design Patents

- "Whoever …
  (1) applies the patented design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or (2) sells or exposes for sale any article of manufacture to which such design or colorable imitation has been applied
  shall be liable to the owner to the extent of his total profit … ." *35 USC 289*
- False marking applies to design patents *35 USC 171(b)*
- 289 requires marking *NIKE, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437 (Fed. Cir. 1998)

Discussion of Risk Management re Patent Marking and False Advertising

APPROACH TO PATENT MARKING

PATENTS

YETI Coolers, LLC has received patents for many of our innovations. These patents protect YETI Coolers, LLC's inventions and the extensive resources YETI Coolers, LLC devotes to research, development and design. In accordance with 35 USC 287(a), YETI Coolers, LLC provides notice that the YETI® products listed below are protected by the associated patents listed below. The following list of YETI products and patents is not all-inclusive. The YETI products listed below and additional YETI products may be protected by one or more additional patents and pending patents in the U.S. and elsewhere.

ROADIE® 20 COOLERS

U.S. Patent Nos. D712720, D712721, D712722, D712723, D714125, 8910819, 9187232, 9834342, 10046900

ROADIE® 24, 48, AND 60 COOLERS

U.S. Patent Nos. D899866, D899867, D899868, D899869, D922176, D925295, D925296, D925297, D925298, D942219, D942220, D959918, D965409, D997650, 9694521, 9919459, 9919460, 10766672, 11180291, 11623796

ROADIE® 24, 48, AND 60 WHEELED COOLERS

U.S. Patent Nos. D1040617, 11970313

TUNDRA® COOLERS

U.S. Patent Nos. D712720, D712721, D712722, D712723, D714125, 8910819, 9187232, 9694521, 9834342, 9919459, 9919460, 10046900

TUNDRA HAUL® WHEELED COOLERS

U.S. Patent Nos. D712720, D712721, D712722, D712723, D714125, D863892, D863893, D869244, D889208, D904128, D927939, D964110, D1039915, 8910819,

Implementing a Marking Program

- Commit
  - Decide you want to mark a product
- Establish Program
  - Set guidelines and procedures
  - Assign responsibilities
  - Establish ongoing recordkeeping
- Determine Marking Requirements
  - Interpret claims
  - Identify patented articles
- Mark Products
  - Put marking notices on products, virtual marking, verify compliance with OC
- Maintain
  - Patents and applications as granted/invalidated/abandoned, etc.
  - Product changes?

Marking – Best Practices and Managing Risk

- (1) Maintain a unique virtual marking landing page ("http://www.company.com/patents")
- (2) Use an introductory paragraph, specifying intent to comply with marking statute:
  - "Pursuant to Section 287(a) of Title 35 of the United States Code, the reader is hereby placed on notice of COMPANY's rights in the United States Patents listed on this site and associated with the following products"
- (3) Use independent listings for each unique product and model
- (4) Include issued patents and published patent applications
  - May serve as stating point for royalties under provisional patent rights
- **(5)** Advise website visitors to return frequently as patent status for each product is subject to change.

Marking – Best Practices and Managing Risk

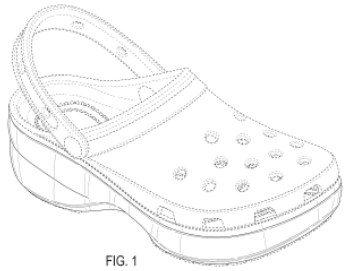
- (6) Consider maintaining records to show all or some of the following:
  - (a) Substantiation / reasonable basis / lack of intent to deceive
    - Claim charts demonstrating coverage of each patent on the product it allegedly covers
    - Written record of legal review (email)
  - (b) "Continuous and consistent" updates to marking website:
    - (i) Regularly updated as patents issue or expire;
    - (ii) Regularly updated as patents are found invalid or limited by judicial interpretation
    - (iii) Updated as new products are introduced and product configurations change
  - (c) Website is constantly available online
  - (d) Security measures implemented on the site
  - (e) Records of access (not required, but may be useful to show willfulness)

RECENT CASE LAW:

Crocs, Inc. v. Effervescent, Inc. (Fed. Cir. Oct. 3, 2024)

Crocs, Inc. v. Effervescent, Inc.

No. 2022-2160, 2024 U.S. App. LEXIS 25001(Fed. Cir. Oct. 3, 2024)



- Crocs sued several competitor shoe distributors (collectively "Dawgs") for patent infringement.
- Dawgs counterclaimed, alleged that Crocs misleadingly marketed the foam material of its shoes, branded "Croslite," by advertising it as "patented," "proprietary," and "exclusive," despite the fact that Croslite had never been patented.
- Dawgs claimed that this misrepresentation was a "campaign to mislead customers" and gave consumers the impression that Crocs' shoes were made from a material that was distinct from other footwear brands' and, in doing so, implied that competitors' products were "made of inferior material."

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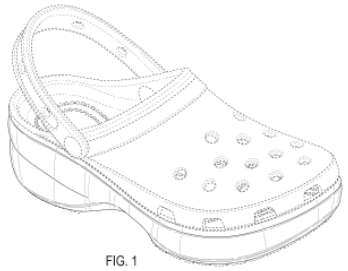

- The primary issue before the **District Court** was whether Crocs' representations that Croslite was "patented," "proprietary," and "exclusive" went to the inventorship of the material (which would be insufficient to give rise to a Lanham Act claim) *or* if the language they used would support a false advertising claim – allegedly influencing consumers' perception of the nature, characteristics, qualities, or origin of the product.
- The **District Court** held that while Crocs misrepresented that it was the exclusive source of the Croslite material, this was not a misrepresentation of the nature, characteristics, or qualities of Crocs-brand shoes. Ultimately, the District Court decided that Dawgs did not assert a Lanham Act claim, and Dawgs appealed to the CAFC.

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- The **Federal Circuit** held that Crocs saying that their Croslite technology was patented actually went to the nature and qualities of Croslite (which Crocs themselves advertised as exclusive/proprietary/patented) – thereby ultimately leading consumers to believe that the material was better or different than that used in other footwear, thereby leading to an actionable case under the Lanham Act.

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- If a company misleads consumers about the nature of a product by making false patent marking claims, *it can be held liable under the Lanham Act*.
- False marking claims made through the Lanham Act have different elements and a greater variety of damages for the same claims asserted under the Patent Act.
- The Federal Circuit noted that *Crocs' false patent claim was combined with promotional materials advertising Croslite's tangible benefits*.
  - This false advertising falsely suggested that Croslite had proprietary qualities that made Crocs' products better than other brands'.
  - In combining misleading advertisements with the false claim of having patented Croslite, consumers could be misled that a patent exists in the first place AND about the actual attributes of Crocs' shoes.

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- Takeaways from Crocs:
  - Marketing and legal teams should work together to evaluate advertising campaigns for compliance with the law.
  - Something that is allowed under one area of the law may not be allowed under another area of the law.
    - Example: Marking a product with an expired patent does not constitute false marking under patent law; BUT continuing to advertise that product as patented, along with saying that the product is proprietary/unique/special could result in a false advertising claim under the Lanham Act.

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