



# Patent Marking Guidelines

Kristen J. Hansen

June 26, 2025

This presentation is for information purposes only and does not constitute legal advice.



# Overview

- Intro to Patent Marking
- Legal Requirements
- Benefits/Best Practices
- Real Life Case Cautionary Tale
- Worldwide Marking

# Patent Marking Definition

## Definition of patent marking

Patent marking refers to the practice of labeling a product with its patent number to inform the public of its protected status.

Under 35 U.S.C. § 287(a), American patent law operates on a simple principle: mark your products with patent numbers, or watch your damages disappear

# Patent Marking Law and Timing

- **U.S. patent law:** According to U.S. patent law, patent holders are obliged to mark their patented products with the corresponding patent number. This legal requirement aims to provide public notice and can also impact the ability to recover damages for infringement.

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

# Physically Mark or Virtually Mark?

- Since 2011, the AIA allows patentees to virtually mark their products instead of physically marking their products
- If marking a product is not feasible due to size constraints:
  - a package or label may be marked instead
  - if words are printed on the product itself, the patent number or web address should also be included on the product
- Virtual marking allows a company to update its product(s) without having to re-label or re-produce a line of products when a new patent issues covering the product(s)

# Physical Patent Marking Basics

Marking is accomplished by marking the patented product with the word "Patent" or "Pat.", followed by the patent number or a web address where the patent number is listed.

---

Pat. US 4,444,416

---

Pats. US 4,444,416, US  
4,444,421, 4,444,444

---

Pat. US D555,555 (for  
design patents)

---

Pat. [http://exampleurl.com/  
patents](http://exampleurl.com/patents)

Constructive Notice vs. Actual Notice

# Patent Marking Basics

## Importance of patent marking

Proper patent marking is critical not only for legal enforcement of patent rights but also for maximizing the monetary value of inventions. It ensures that the patent holder can recover damages in patent infringement cases and diminishes the risk of infringement by informing potential infringers of the patent's existence.

- **Consequences of improper marking:** Failure to properly mark a product can lead to devastating legal consequences, including the potential inability to claim damages in infringement lawsuits, the erosion of market value, and legal liabilities for misrepresentation.

**A patent owner may obtain damages dating back to a date on which the patent owner provided an infringer with notice of the infringement. Marking is a way to provide this notice.**

# Benefits of Proper Patent Marking

## Enhanced legal protection

Properly marked products underline the legal protections afforded by patents, reinforcing the patent holder's position in litigation. It provides clarity regarding patent rights and may expedite legal processes when infringement occurs.

## Increased market value

Marking products with their patent numbers enhances perceived value in the marketplace, as it conveys innovation and professionalism. Such marking can also contribute to more robust investment opportunities, enticing stakeholders with a clear understanding of the intellectual property landscape.

# Best Practices for Physically Marking Products

## Clear and visible markings

Ensuring patent numbers are clearly visible and legible on products is paramount. This facilitates easy recognition and encourages compliance, informing consumers, competitors, and potential infringers of the patent's existence.

## Use of patent numbers

The use of specific patent numbers associated with each product not only highlights the legal protection but also serves as a precise point of reference for stakeholders seeking information about those patents.

## Best Practices for Physically Marking Products (CONT)

If a family of products is covered by one or more patents, the mark can say "covered by one or more of Patents:" followed by a list of applicable patent numbers or the web address where they can be found. Not every patent listed must cover every member of the product family.

## Best Practices for Marking Products (CONT)

### Obligation to Licensees:

A patent owner who is licensing the patent must make reasonable efforts to ensure that a licensee is following a marking program, such as by notifying the licensee that marking is required or by including a requirement to mark in the license agreement.

# Virtual Marking Best Practices

To virtually mark a product, a patent owner must mark the product itself or to the packaging for the product with the word "patent" or "pat." followed by an Internet website address. At the listed Internet website address, the patent numbers are listed that apply to the product. Therefore, when a consumer buys the patented product, they can go to the website shown on the product or its packaging and see all of the patents that are associated with that product.

For example, a company could mark their patented product with one of the following markings; "Patent [www.company.com/patents](http://www.company.com/patents)" or "pat. [www.company.com/patents](http://www.company.com/patents)".

**The patent number or web address where the patent number can be found is required. It is not enough to merely state "Patented" on the article/product.**

## Virtual Marking Best Practices (CONT)

If virtual marking is used, the web address must be "accessible to the public without charge for accessing the address."

- If marking a product is not feasible due to size constraints:
  - a package or label may be marked instead
  - if words are printed on the product itself, the patent number or web address should also be included on the product

# Example website content for Virtual Marking

## VIRTUAL PATENT MARKING

The following articles are protected by patents in the U.S. and elsewhere. This page is intended to satisfy applicable virtual patent marking requirements of various jurisdictions including those of the America Invents Act and to provide notice under 35 U.S.C. § 287(a). The following list of products and patents may not be all inclusive.

**PRODUCT NAME:**

Product 1

Product 2™

Product 3®

**PATENT:**

US 9,xxx,xxx; US 8,xxx,xxx; US 7,xxx,xxx; Patent Pending

US 9,xxx,xxx; US 8,xxx,xxx; US D6xx,xxx

CN xxxxxxxxx; AU xxxxxxxxx; Patent Pending

# Virtual Marking Best Practices for Software

- Virtually mark patented software on a web page specifically generated for virtual markings in the same fashion as virtually marking physical products
- Map the product to the patent(s) on the web page
- It has been found appropriate in some cases to mark patented software on a UI, but it is not best practice
- Ambiguity on the marking webpage may render markings improper
  - Update timely and often (e.g., expiration, new continuations/family members issued, etc.)

# Virtual Marking Best Practices for Software (CONT)

- Courts have held that method claims create no marking obligation because it is not possible to mark a step or action performed in accordance with a patented method\*
- If software is covered by apparatus or system claims, the software should be marked, to the extent there is a tangible item to mark\*\*
- If software is covered by computer-readable medium claims, then it is likely (according to case law\*\*\*) best to mark

**Interesting note:** for patents containing both apparatus and method claims, a patentee can still avoid marking requirements by asserting only method claims in litigation

\**Crown Packaging Technology, Inc. v. Rexam Beverage Can Co.*, 559 F.3d 1308, 1317 (Fed. Cir. 2009)

\*\**Am. Med. Sys., Inc. v. Med. Eng'g Corp.*, 6 F.3d 1523, 1538-39 (Fed. Cir. 1993)

\*\*\* *Finjan v. Secure Computing Corp.*, 626 F.3d 1197, 1203-1204 (Fed. Cir. 2010)

## Virtually Marking Partially Covered - Software

Q: What if a product only is covered by some portion of a patent claim?

A: Use “For use under U.S. X,XXX,XXX” language in your marking strategy

TIP: consider the downstream intended uses of products. If the patent owner **anticipates that those products will be combined with other components, and the resulting combination would meet all elements of the patent owner's claim**, then the patent owner should 1) mark the product "for use under" the patent or 2) contractually require its customers to mark the product with the patent number.

# False Patent Marking

- False marking is a significant risk and includes:
  - Using patent numbers without authorization
  - Marking products not actually covered by the patents listed
  - Stating “Patent Pending” when no application is pending
  - any intent to deceive can still expose the company to fines and civil claims

# Arctic Cat v. Bombardier Marking Case

In **Arctic Cat v. Bombardier**, the Fed Circuit clarified the impact of failure to mark products on the recovery of pre-suit damages under **35 U.S.C. § 287(a)** – the court held:

- if the patent holder fails to mark its own products, it cannot recover damages for infringement that occurred before the filing of the lawsuit, unless the alleged infringer had actual notice of the infringement

**Note:** Recent court decisions demand marking "substantially all" products, with courts playing a numbers game where 95% compliance passes but 77% fails

# Arctic Cat v. Bombardier Marking Case

- Although the case did not directly address a scenario where the license agreement explicitly exempts the licensee from marking obligations, it underscores the importance of complying with marking requirements to secure the ability to claim past damages
- **The court's logic?** Patent owners must "police" their licensees' marking compliance, turning every licensor into an unpaid compliance officer

## For Patent Prosecutors:

- Draft US licenses with explicit licensee marking duties post-*Arctic Cat*
- Consider virtual marking strategies for complex product lines
- Advise clients on jurisdiction-specific enforcement strategies

## For In-House Counsel:

- Budget enough to meet US marking compliance programs
- Develop licensee monitoring systems to avoid Arctic Cat disasters
- Consider foreign filing strategies that bypass US marking complications

## Other Countries

- Europe: no marking requirements
- Germany: no marking requirements – damages calculate from the infringement date regardless of marking; *marking can be done to avoid unfair competition or reduced damages in infringement cases*
- U.K: recognizes virtual marking, but limited practicality; exception of “innocence defense” when someone uses a patented invention without knowing about existence of the patent (*infringer must prove their lack of knowledge*)
- France/Netherlands: no marking requirements, but similar to Germany, you can mark
- Unified Patent Court: no marking requirements yet
- China: marking is optional
- Japan: marking is optional
- Canada: no marking requirements and vehemently rejects US policy



**Thank you for listening today!**

**What questions do you have?**