

Do You Have to Put the Patent Number on Your Patented Products?

United States patent law requires that a product covered by a patent be marked with its respective patent number. If the product is not marked, the patent owner cannot collect infringement damages for the period before the accused infringer received actual notice of infringement.

The marking requirement applies to all products covered by a U.S. patent, but it does not apply to patents claiming only a method (because there is nothing to be marked). If a patent has both method and apparatus claims which cover a product, however, marking the product is required.

The marking should be fixed on the product, unless because of the nature or character of the product this cannot be done, in which case it is permissible to fix the marking to the product's packaging. Courts generally allow alternative marking when there is some reasonable consideration presented for not marking the product, for example physical constraints or other limitations.

The failure to mark a product can be cured. A delay between issuance of the patent and compliance with the marking provisions generally will not prevent recovery of damages after marking has begun. Once started, the marking must thereafter be consistent and continuous.

If there has been a failure to mark products covered by the patent, the patent owner can still recover damages from the time when the infringer received actual notice of infringement. At the latest, this is the service of the Complaint. However, it can be earlier, if the patentee sends a pre-filing notice of infringement. The infringer's awareness of the patent is not enough; in the absence of patent marking the infringer must be specifically accused on infringement.

Rather than mark the product directly, the law now permits "virtual" patent marking by marking the product with a URL which links to a page with information and the patents that apply to the product. This allows the patent owner to quickly add patents as they are issues or delete patents as they expire, without having to change the product of its packaging.

The marking should be fixed on the product, unless the nature or character of the product prevents this, in which case the marking should be applied to the product's container or packaging.

Follow these steps to ensure your patented products are properly marked.

- 1** Put the patent number on all products that are covered by product or method claims of a patent, or which could be used as part of a system covered by product or method claims. If marking is impractical, attach the patent number to the product or put it on its packaging, but realize that a court may second-guess your decision and restrict your ability to collect damages to the time the infringer had actual notice of infringement.
- 2** The law now allows for virtual patent marking, where the product (or the product package) can be marked with the word “patent” or the abbreviation “Pat.” and a website address that has current information about the patent coverage.
- 3** Finally, a patent owner can mark products that are the subject of a pending application “patent pending” or “pat. pend.” but there is no obligation to do so.