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“Tip of the Month”

False Patent Marking? You Could be Fined up to \$500 Per Article

Savvy patent owners know that it is important to mark their patented articles as being covered by one or more patents. This is done by imprinting the articles or the packaging containing the patented articles with the words “Patent” or “Pat.” followed by the patent number. Patent marking puts the public on notice that the articles are protected by the patent. Notice of the patent is a requirement for collecting any damages in a patent infringement suit.

It is equally important to avoid patent marking any articles that are *not* covered by the patent. Anyone who falsely marks an article as patented – or even “patent pending” – with the intent to deceive the public may be fined up to \$500 “per offense.” Until recently, some courts have interpreted the words “per offense” to mean each decision to falsely mark. Other courts have interpreted “per offense” to mean “per article.”

The Court of Appeals for the Federal Circuit recently ruled that the false marking statute must be interpreted to allow a fine of up to \$500 *per article*, not per decision to falsely mark. *The Forest Group, Inc. v. Bon Tool Company, Fed. Cir., No. 2009-1044, 12/28/09*. Therefore, a high volume manufacturer could possibly incur enormous liability for violating the false marking statute. The \$500 per article is a maximum, however, and a court has the authority to make the fine as low as a fraction of a cent per article if appropriate.

Patent owners should also beware that third parties may also sue for false marking. If successful, half the award goes to the plaintiff and half goes to the U.S. government. This is called a *qui tam* statute. People who sue false markers under this statute are known as “marking trolls.”

At Mesmer & Deleault, we understand that manufactured product designs can change over time, and it is important to correctly determine whether a product is covered by a particular patent. Contact the attorneys at Mesmer & Deleault to help you make the correct marking decisions. For more information, please give us a call at 668-1971 or contact us by e-mail at *mailbox @ biz-patlaw.com*.

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