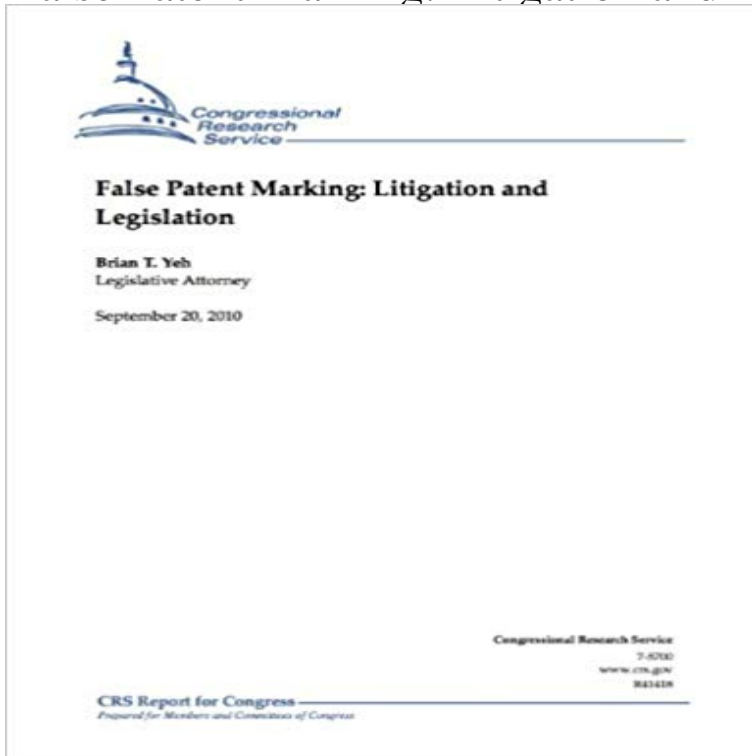


# False Patent Marking: Litigation and Legislation



A patent holder that manufactures or sells a patented product will usually mark it with the patent number or other words that provide notice to the public that the article is patented. Such marking also permits the patent holder to recover an increased amount of damages in patent infringement lawsuits. However, marking a product with an expired patent number or inapplicable patent number is a violation of the false marking statute, Section 292 of the Patent Act. Section 292 provides that anyone who falsely marks an unpatented product with either a patent number, the words patent, patent pending, or any other words or numbers implying that the product is protected by a current or pending patent when, in fact, it is not, and does so with the intent of deceiving the public, shall be fined not more than \$500 for every such offense. Until late 2009, false marking lawsuits were relatively rare, and federal courts often assessed one \$500 fine for the decision to falsely mark, without regard to the number of articles that had been mismarked by the defendant. Yet in December 2009, the U.S. Court of Appeals for the Federal Circuit issued *Forest Group, Inc. v. Bon Tool Company*, which interpreted 292 to require a penalty of up to \$500 for every article that is falsely marked. The Federal Circuit explained that this calculation is mandated by the plain language of the statute. Furthermore, the Federal Circuit identified policy considerations that support its interpretation of 292, noting that false marking deters innovation and stifles competition in the marketplace because a falsely marked article may dissuade potential competitors from entering the same market. The Patent Acts false marking provision expressly allows qui tam civil actions any member of the public may sue a false marking offender on behalf of the federal government, in which event the fine is shared evenly between the person

bringing the suit and the United States. The Forest Group decision helped fuel a surge of false patent marking lawsuits nationwide, filed by so-called whistleblower plaintiffs who targeted defendants that sold thousands of products marked with expired patent numbers, such as plastic cups, dental floss, and mouse traps. Such product manufacturers could face considerable financial liability for false patent marking. Two decisions by the Federal Circuit in 2010 have addressed several questions that have arisen during the false patent marking litigation. *Pequignot v. Solo Cup Co.* held that a product covered with an expired patent is unpatented for purposes of the false marking statute. *Solo Cup* also explained that a defendant can escape liability if, despite knowing that a marking is false, it can prove that it did not consciously desire to deceive the public. In addition, a defendant's good faith reliance on advice of counsel is sufficient evidence that it lacked intent to deceive the public. *Stauffer v. Brooks Brothers, Inc.* determined that although a qui tam plaintiff in a false marking complaint may not have suffered an injury to himself, the United States has suffered an injury from the false marking violation and because the false marking statute operates as a statutory assignment of the United States interests and rights, a private plaintiff (acting as the government's assignee) has standing to enforce 292. In the 111th Congress, legislation has been introduced to amend the false marking statute in an effort to curb the proliferation of false patent marking suits. H.R. 4954 would require that the person bringing a false marking suit must have suffered a competitive injury as a result of the violation, thus eliminating 292's qui tam provision. If enacted, the new standing requirement would apply to all cases pending on or after the date of the bill's enactment. The bipartisan managers amendment to the Senate version of the Patent Reform Act, S. 515, released on March 4, 2010, contains a similar amendment to 292.

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