

## Changes in Patent Marking Provisions

### Intellectual Property News

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*This article is the second in a series of mini-articles considering a section of the new patent statute and how it may affect your business.*

Among the earliest provisions of the recently signed Leahy-Smith Patent Reform Act to go into effect are changes related to patent marking, including a new "virtual marking" provision and changes to the false marking statute. In both cases, the changes apply to all cases pending on or after the date of enactment.

Virtual marking permits patentees to give notice of patent coverage of their products by listing patents on a website instead of marking products with specific patent numbers. To be effective, the product must be marked with the website's address; the website must be freely accessible to the public and must associate the product to the appropriate patent numbers. Companies can now avoid potentially costly updates to molds, name plates, and other materials commonly marked with patent numbers when a change occurs that might affect the number or applicability of one or more patents with respect to a particular product.

Instead, the company can establish a single website and simply mark the product with that site's web address. Unlike patent numbers which can change, the web address can remain the same as long as the website is maintained. When changes must be made, the website can be easily and inexpensively updated from time to time with a listing of products and the patent numbers that apply to those products, without changing any marking on the product itself.

The other important change the Act makes to patent marking involves the false marking statute. Under the Act, private parties may only bring an action for false marking to recover damages to compensate for a competitive injury. The \$500 per article civil penalty under prior law can now be sought only in an action brought by the United States. The new false marking statute also includes a safe harbor for items marked with expired patents, provided the expired patent was applicable to the product. These changes are expected to eliminate most of the hundreds of pending false marking actions filed over the past few years and which have affected scores of companies across the country.

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