

April 13, 2011

The Honorable Lamar S. Smith  
Chairman  
House Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, DC 20515

Dear Chairman Smith:

The undersigned companies and organizations oppose amendments to change the effective date and delay complete implementation of the false marking reforms contained in H.R. 1249.

Products are often marked “patent pending” or “patented” with the appropriate patent number by manufacturers. It is an offense to deliberately deceive the public by falsely marking a product as patented. Under a longstanding law, any person, including persons who have suffered no demonstrable harm, can sue manufacturers for false marking. A 2009 court decision effectively raised the maximum false marking penalty from \$500 per instance of false marking to \$500 per mismarked item. As a result, manufacturers of mass-produced articles from plastic cups to Boy Scout belts can be sued for hundreds of millions of dollars for mismarking one product or product line. Not surprisingly, the number of false marking lawsuits has since skyrocketed, growing from one suit per year in 2004-2006 to 674 suits in 2010. Nearly half (49%) of the 2010 suits were filed by just seven individuals or firms. Fighting these lawsuits has become a huge unproductive drain on manufacturers’ resources.

The language in H.R. 1249 revises false marking law. It expressly preserves the currently existing right of the United States to bring an action against those who deliberately deceive the public through false patent marking. It also allows such suits to be brought by members of the public to recover damages for actual, competitive injury. Like any change in law, H.R. 1249 could affect lawsuits that have been filed but not resolved. H.R. 1249 would not, however, terminate the lawsuits of plaintiffs alleging actual competitive injury.

The provisions in the pending legislation would apply immediately and there are several reasons why the effective date provision should not be changed:

1. **Immediate action is needed to address current false marking cases.** Companies that are defendants in pending false marking cases face huge liability for mass produced products because of a court’s misinterpretation of the current statute. For example, a single infraction on one kind of golf ball could expose the manufacturer to a billion dollars in penalties. Letting these cases run their course under this erroneous judicial interpretation serves no public purpose.
2. **Because the false marking statute is a criminal statute, Congress is the appropriate body to determine the conduct that constitutes a crime.** Court decisions have effectively criminalized false marking in a way that Congress never intended. Therefore, it is perfectly reasonable for Congress to pass a law that corrects this error and clearly outlines what constitutes a crime – and to make that change effective immediately. Continuing to use court resources to try cases for action no longer deemed criminal makes no sense.

3. **False Marking suits have increased dramatically in the last year, from 22 in 2009 to 674 in 2010.** Setting a future effective date will only result in a rush to the courthouse by those already filing suits at a rate of nearly 100 per month. Three firms are responsible for nearly 1/3<sup>rd</sup> of all the suits filed in 2010 – they are well organized to file suits as long as permitted.

We urge you to oppose any effort that would delay full false marking reform.

Sincerely,

ADVAMED

BIO

BIOCOM

California Healthcare Institute (CHI)

CONNECT

Consumer Electronics Association

Intellectual Property Owners Association

Medical Device Manufacturers Association

National Association of Manufacturers

Sporting Goods Manufacturers Association

Toy Industry Association

U.S. Chamber Institute for Legal Reform

U.S. Chamber of Commerce

3M

Abbott Laboratories

Agilent Technologies, Inc.

American Medical Systems, Inc.

Bausch + Lomb

Beckman Coulter

Boston Scientific

CaridianBCT, Inc.

Cook Medical

Corning Incorporated

DuPont

Fortune Brands

General Electric

Gen-Probe, Inc.

GlaxoSmithKline

Illinois Tool Works

Integrated DNA Technologies, Inc.

Iowa State University

Johnson & Johnson

Life Technologies

Mattel, Inc.

Novartis

Pfizer

Procter & Gamble

Roche Diagnostics

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Syngenta

Thermo Fisher Scientific

Zimmer, Inc.