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Executive Director



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March 19, 2010

The Honorable Patrick J. Leahy, Chairman  
Committee on the Judiciary  
United States Senate  
433 Russell Senate Office Building  
Washington, D.C. 20510

The Honorable Jeff Sessions, Ranking Member  
Committee on the Judiciary  
United States Senate  
335 Russell Senate Office Building  
Washington, D.C. 20510

**Re: Senate Patent Reform Bill, Preserve False Marking Qui Tam Provision**

Dear Chairman Leahy and Ranking Member Sessions:

As Executive Director of the Public Patent Foundation at Benjamin N. Cardozo School of Law, a not-for-profit legal services organization that represents the public interest in the patent system, I write to express deep concern over the Senate's apparent intent to eliminate the *qui tam* provision for false patent marking suits as part of the Senate's Patent Reform Act of 2010, S. 515, § 2(k). If enacted, the new provision would eliminate an important method of protecting the public from false and deceitful statements. Therefore, that portion of the amendment should be abandoned.

Falsely marking an unpatented item as patented harms the public by misleading consumers, deterring competition, and depriving legitimate patentees of the marketplace distinction they deserve. The existing *qui tam* provision of 35 U.S.C. § 292(b) empowers the government to stop the harmful practice of false patent marking without having to bear the expense of prosecuting it. By offering citizens a share of recovery in suits they bring on behalf of the government against false markers, the statute provides an incentive for citizens to expend time and resources to keep manufacturers honest.

Arguments forecasting the rise of a "cottage industry" of false marking suits<sup>1</sup> are completely overblown. While there indeed has been a surge in such suits recently, this will undoubtedly lead to a virtual extinction of the practice. Once manufacturers get the message that attempting to deceive the public with false patent markings will be punished, they will stop doing so and the need to bring such suits will disappear. To be sure, false marking plaintiffs will work themselves out of a job very quickly. If, however, you change the statute to disarm citizens from policing the market for false patent markings, then the harmful practice will continue unabated, to the severe detriment of the public.

Claims of potential windfalls to citizen plaintiffs are pure nonsense. The existing false patent marking statute already protects manufacturers in two significant ways. First, it applies only to those who falsely mark "for the purpose of deceiving the public," so those who have not engaged in culpable conduct need not fear being fined. Second, Federal District Court judges have wide discretion to set appropriate fines in order to accomplish the goal of deterrence without overburdening defendants. And, half of any such fine goes directly to the Federal government for its own use. This is money that can pay for health care, homeland security and any other important public program.

In closing, I respectfully urge the Senate to preserve the *qui tam* provision of the false patent marking statute because it operates to prevent harmful, deceptive acts, without cost to the government, while also containing adequate protections for defendants. If helpful, I am available to discuss this matter further at your convenience.

Sincerely,

A handwritten signature in blue ink that reads "D. Ravicher". The signature is fluid and cursive.

Daniel B. Ravicher

cc: Senators Schumer, Hatch, Kyl and Kaufman

<sup>1</sup> Susan Decker, *Pfizer, P&G Sued as Part of New 'Cottage Industry,'* BLOOMBERG.COM, Feb. 26, 2010, [http://www.bloomberg.com/apps/news?pid=20601103&sid=aHPV8\\_zNHR.k](http://www.bloomberg.com/apps/news?pid=20601103&sid=aHPV8_zNHR.k).