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CLIENT ALERT

Federal Circuit ruling may proliferate false marking cases

Recently, in a closely-watched case, the Federal Circuit ruled that any person has standing to bring a false marking suit pursuant to 35 U.S.C. § 292, regardless of whether the complaint alleges harm beyond a literal violation of the statute. *Stauffer v. Brooks Bros., Inc.*, No. 2009-1428 (Fed. Cir. Aug. 31, 2010). As a result, businesses are likely to face increased exposure to false marking suits brought by the general public or possibly even the government. Accordingly, companies that manufacture or outsource manufacturing should consider establishing a more rigorous patent marking program.

In *Stauffer*, the plaintiff, a lawyer, sued Brooks Brothers, Inc. for marking its “Adjustolox” bow ties with expired patent numbers. The district court dismissed the case because Stauffer failed to allege an injury to competition, the U.S. economy, or the public that could be assigned to Stauffer or vindicated through the litigation. Other district courts followed suit, staying false marking cases pending the *Stauffer* appeal.

The Federal Circuit reversed, ruling that Stauffer was only required to allege the act of false marking, which is, by operation of the statute, an injury sufficient to give Stauffer standing. In making this ruling, the Court relied on the language of § 292, which provides that “[a]ny person may sue for the penalty.” The Federal Circuit also analogized to cases under the False Claims Act, where even though a plaintiff may suffer no injury himself, the statute operates as an assignment of the United States’ rights, and the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The Court reasoned that the statute itself defines the injury in fact, and in creating the statute, Congress already decided that a violation, *i.e.*, false marking, is harmful.

The Federal Circuit also reversed the district court’s denial of a motion to intervene filed by the United States. The Court ruled that the government has an interest in enforcement of its laws and in one half of the fine that Stauffer claimed. The Court also noted that if Stauffer did not prevail, the United States would be precluded from seeking further relief in connection with the “particular markings at issue” under the doctrine of *res judicata*. This ruling suggests that the United States may become more actively involved in false marking suits.

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