



Institute For Policy Innovation

ISSUE BRIEF

OUT OF BALANCE:

THE FALSE PATENT MARKING LANDSCAPE POST-*BON TOOL* AND *SOLO CUP*

by Marla Grossman and Adam Lerner

Synopsis

The December 2009 court ruling in *Bon Tool* results in costly and unnecessary false marking litigation that frustrates the constitutional goal of promoting “the progress of . . . useful arts.” Indeed, the court’s June 2010 decision in *Solo Cup* demonstrates that unless a sound legislative solution is enacted, it is likely that we will continue to witness narrow judicial interpretation of the false patent marking statute in order to avoid what a court deems to be an inequitable outcome.

Qui tam pro domino rege quam pro se ipso in hac parte sequitur. (Latin for [he] who sues in this matter for the king as [well as] for himself.)

“The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Rights to their respective Writings and Discoveries.”¹

Introduction

Public perception of the patent system has varied widely over the years, from highs, such as those in the late nineteenth century when Mark Twain wrote “a country without a patent office and good patent laws was just a crab and couldn’t travel anyway but sideways or backwards”² to lows in the mid-twentieth century when it was written “the only patent that is valid is one which . . . [the Supreme] Court has not yet been able to get its hands on.”³ Thus, not only the value and philosophical basis underpinning the patent system, but the proper level of protection that should be accorded a patent has been a matter for debate over the years.⁴ This paper adds to that debate with a specific focus on patent marking law and judicial interpretation. Specifically, this paper argues that the December 2009 ruling by the Court of Appeals for the Federal Circuit (hereafter “CAFC”) in *Forest Group v. Bon Tool*,⁵ results in costly and unnecessary false patent marking litigation that frustrates the goal of promoting “the progress of . . . useful arts.” Legislative attempts to restore appropriate balance to our patent marking laws—such as those articulated in the 111th Congress’ H.R. 4954 and the false marking provisions of S. 515, the Patent Reform Act of 2009—are a sound solution to remedy the current inequity in the false patent marking protection landscape. Indeed, we argue that the CAFC’s June 2010 decision

in *Pequignot vs. Solo Cup*⁶ demonstrates that unless such a legislative solution is enacted, it is likely that we will continue to witness narrow judicial interpretation of the substantive provision of the statute in order to avoid the possibility of large damage awards against defendants who have committed what a court deems to be a minor violation.

Brief History of the *Qui Tam* Action

Qui tam is an action by an informer on behalf of the government to penalize illegal behavior. If the action is successful, the informer and the government usually share the penalty award. In a *qui tam* action, the informer is a private citizen and has standing to bring a civil action even in the absence of personal injury.⁷

The genesis of *qui tam* provisions has been traced back to medieval England when no organized police force existed to enforce laws. English common law adopted various *qui tam* provisions in an attempt to provide for the enforcement of the law, thereby encouraging private parties to act as policemen. The government paid a reward or bounty to the private party to make the effort worthwhile and to give incentives to other individuals to bring similar suits.⁸

The *qui tam* action in American jurisprudence dates back to colonial times. Such actions were embraced by the first U.S. Congress as a way to enforce the laws when the new federal government had virtually no law enforcement officers.⁹ Over the last two centuries, most *qui tam* provisions have been repealed, and, presently, only a few laws such as the False Claims Act,¹⁰ Indian Protection Laws,¹¹ a law prohibiting the arming of vessels against friendly nations,¹² a law prohibiting the removal of undersea treasure,¹³ and the Patent Act¹⁴ contain such provisions. Specifically, the Patent Act provides a *qui tam* action for false patent marking.

Qui-Tam Action for False Patent Marking

Explanation of 35 U.S.C. § 292

The false marking provision of the Patent Act is located at 35 U.S.C. § 292¹⁵ and contains two subsections. The first subsection, 292(a), delineates 3 categories of false marking: (1) marking an article or advertisement for the article with “the name of the patentee, the patent number, or the words ‘patent,’ ‘patentee,’ or the like”¹⁶ without the consent of the patentee; (2) marking an unpatented article with “the word ‘patent’ or any word or number importing that the same is patented;”¹⁷ and (3) marking an article with “the words ‘patent applied for,’ or ‘patent pending,’ or any word importing that an application for patent has been made, when no application for patent has been made, or if made, is not pending.”¹⁸ In each case, the prohibited conduct must have been committed with the intent to deceive the public.¹⁹ Subsection 292(a) limits the fine to \$500 per false marking offense.²⁰

The second subsection, 292(b), establishes the *qui tam* cause of action: “Any person may sue for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States.”²¹ The informer does not have to show harm, and the government may intervene in the informer’s suit under FRCP 24(a)(2) or FRCP 24(b).²²

The Century-Old Interpretation of the Term “Offense”

The last sentence of 35 U.S.C. § 292 states that a violator “[s]hall be fined not more than \$500 for every such offense.”²³ The word “offense” was interpreted by the First Circuit in *London v. Dunbar*,²⁴ in 1910. In that case, the court held that an “offense” under U.S. Rev. Stat. § 4901, the predecessor statute to § 292, is a decision to falsely mark with the intent to deceive. The court determined that Dunbar’s false marking of 100 articles with the intent to deceive constituted only one decision to falsely mark

and therefore only one “offense.”²⁵ The court’s rationale was that Dunbar only possessed the intent to deceive once, and that the false marking of the articles was merely “publicizing” that intent 100 fold.²⁶ For the next century, the London decision was followed, and courts assessed penalties for false marking on a per-decision-to-mark basis.

On December 28, 2009, the CAFC decided *Bon Tool* and set forth a new interpretation of “offense.” *Bon Tool* brought a § 292 *qui tam* action against Forest Group for falsely marking construction stilts. The District Court found that Forest Group was guilty of one offense based on the then-existing decision-to-mark standard.²⁷ On appeal, *Bon Tool* argued *inter alia* that Forest Group should be instead penalized for each falsely marked article. The CAFC agreed with *Bon Tool* and set forth its per-article-marked basis for assessing penalties under § 292.²⁸ The CAFC reasoned that the plain language of the statute²⁹ and policy considerations³⁰ dictated that “offense” should be based on the number of falsely marked articles. Furthermore, the CAFC determined that assessing damages on a per-decision-to-mark basis would be insufficient to deter violators from engaging in false marking and would not provide “sufficient financial motivation” for persons to bring *qui tam* actions.³¹

The CAFC’s New Interpretation of the Term “Offense”

The Effect of *Bon Tool*

The change to a per-article-marked standard for assessing false marking has had an immediate and dramatic effect. In the three months following the CAFC’s decision in *Bon Tool*, more than 150 *qui tam* lawsuits for false marking were filed.³² That equals approximately the number of § 292 suits filed in the ten years preceding the *Bon Tool* decision.³³ In the modern era of mass-production, a company’s single decision to mark often results in thousands, if not millions, of marked articles. The CAFC’s decision remedies the problem of inadequate incentive for the bringing of *qui tam* actions: an informer may now recover for each falsely marked article.³⁴ But in creating greater incentives for enforcers, the Court’s decision subjects defendants to the risk of very large damage awards.

Does the Court’s Decision Result in Good Public Policy?

As indicated above, the Court’s decision in *Bon Tool* has resulted in a significant increase in individuals and companies that are researching expired or invalid patent markings and bringing such markings to light in a court of law. At first blush, such a result might seem desirable. After all, allowing expired and/or invalid patent markings in the marketplace could potentially confuse consumers and stifle innovation. Consumers could think that a product is of more significance than is truly warranted because its patent mark connotes that the product has been deemed “new and useful” by the U.S. Patent and Trademark Office. Although such confusion is, indeed, possible, that risk may be more theoretical than real. There is little evidence that such potential consumer confusion has a significant economic impact.

A more significant risk of harm caused by a false marking seems to be its anti-competitive effect. Since a patent provides the right to exclude others from making, using, selling, offering for sale, or importing the patented invention for the term of the patent,³⁵ a patent mark is a warning sign to potential competitors; essentially, a patent mark serves as a “No Trespass” warning. When such marking is a false one, according to the *Bon Tool* court, it can dissuade potential competitors from creating similar products, deter scientific research, and cause unnecessary investment to analyze issues of validity, enforceability, or design-around.³⁶ It is also possible that the public at large could be harmed by a stifling of innovation that could have potentially otherwise occurred if the competitor had not been unduly kept away from innovating a particular product or process.

Harm Caused by the Anti-Competitive Effects

Harm Caused by the Increase in Litigation

In determining the public policy impact of the *Bon Tool* case, it is reasonable to attempt to weigh the harm caused by false marking with the harm caused by increased litigation as a result of the ruling. There is little doubt that false marking *qui tam* lawsuits can be costly to the defendant companies and individuals. Defendants must spend time and money—often significant time and money—to fend off the lawsuits. Moreover, in many jurisdictions, false marking plaintiffs do not have all of the obligations of either a typical patent plaintiff or defendant, while the false marking defendant has most of its obligations. For instance, in the Northern District of Illinois—where many of the recent false patent marking claims have been brought—the plaintiff will not have to produce his reduction to practice documents or prosecution histories, whereas the defendant likely will have to at least produce the prosecution histories. The defendant will also have the obligations of a typical defendant—producing documents sufficient to show how each accused product or process works. So, the defendant has initial discovery burdens that are not shared by the plaintiff, and the plaintiff is very likely to enjoy early document production. Additionally, the defendant will likely be obligated to produce initial infringement contentions, after which the plaintiff would have to respond with non-infringement contentions. So, the plaintiff not only avoids initial production requirements, but also has the benefit of filing its initial claim charts last. These are significant costs for the defendant, while the plaintiff has few up-front costs.³⁷ This litigation-cost asymmetry gives the false marking plaintiff extra leverage to induce settlements from defendants irrespective of the merits of the false marking complaint.

In addition to the direct time and cost of litigation expenditures, defendants in false marking suits might have to divert resources that could otherwise be used for useful product or process development. It is possible that consumers could be harmed by increased litigation as well: Defendants in false marking lawsuits could well pass the added litigation expense on to the consumer in the form of higher prices.

Increased litigation also clogs the court system and costs consumers money in the form of tax revenue used for judicial purposes.

The hard question posed by the *Bon Tool* case and the immediate flood of false marking cases that it engendered is whether enhancing the incentives for *qui tam* false marking suits is likely to produce public benefits that exceed the harm to the public caused by frivolous lawsuits and costly litigation. If the answer is not clear, is there some alternative that will give us most of the public benefits from preventing false marking without the excessive costs that may result from *qui tam* false marking actions? Some recent legislative proposals provide better alternatives.

Legislation to Amend 35 U.S.C. § 292

H.R.4954 and S.515 In response to the *Bon Tool* decision and the subsequent *qui tam* lawsuits, two bills have been introduced to amend 35 U.S.C. § 292. These bills are H.R. 4954,³⁸ which was introduced in the House of Representatives by Rep. Darrell Issa (R-CA), and a section in a draft Manager's Amendment to S. 515, the Patent Reform Act of 2009 (which is not yet publicly available) introduced in the Senate by Sen. Patrick Leahy (D-VT). Specifically, the bills amend subsection § 292(b) to read as follows:

A person who has suffered a competitive injury as a result of a violation of this section may file a civil action in a district court of the United States for recovery of damages adequate to compensate for the injury.³⁹

The bills alter § 292 in three ways: the *qui tam* provision is eliminated; only competitors have standing to sue for false marking; and damages are now compensatory rather than punitive. Under the amended language, persons not suffering competitive injury may no longer sue and receive compensation for vindicating the public interest

against false marking. Instead, standing to sue for false marking is only conferred on “a person who has suffered a competitive injury as a result of a violation of this section.”⁴⁰ Thus, a plaintiff must demonstrate that it has suffered competitive harm.⁴¹

We believe that the proposed legislation strikes a better public interest balance than either the prior law or current law after the *Bon Tool* decision. The historical basis for *qui tam* actions, i.e., the absence of a public enforcement mechanism, no longer exists. The public interest in many other areas of law and public policy seems to be adequately served by a combination of public enforcement and private standing for those actually injured by the prohibited conduct.⁴² There is no reason to think that the public interest in false patent marking could not be similarly secured. Moreover, the decline in the reliance on *qui tam* actions over the past two centuries is not without reason. Historically, *qui tam* lawsuits have been subject to abuse by persons looking to make a quick profit,⁴³ and thus have been traditionally looked upon with judicial disfavor. For example, informers were sometimes required to pay costs and even fines if they did not prevail, and legislatures imposed short statutes of limitations or venue restrictions to curb abuses.⁴⁴ Another means of curbing vexatious informer actions was to require that the government be involved as a party and assume primary control in prosecuting the action.⁴⁵

By choosing to rely on injured competitors and public agencies, we think that the proposed legislation focuses in a salutary manner on the most important harm caused by false patent marking: harm to competition. Such injury can impede the process of innovation, which the patent laws are designed to promote. While not all lawsuits brought by competitors will have merit, the history of abusive *qui tam* actions leads us to conclude that there would be a lower incidence of non-meritorious actions under the proposed legislation. In view of the general adequacy of a combination of public and injured-party private enforcement in other public interest areas, we believe that the proposed legislation reflects a sensible balance of the public interest consideration. *Qui tam* actions have proven to be sufficiently problematic that they should be allowed only where there is clear evidence that more traditional modern remedies are not likely to achieve the public’s enforcement interest. We are unaware of such clear evidence with respect to false patent marking and believe that the proposed legislation is more likely to promote the “useful arts”—our founding fathers’ intent for providing patent protection in the first place.

CAFC’s Interpretation of the Intent Requirement in *Solo Cup*

On June 10, 2010, the CAFC ruled in *Solo Cup* that the manufacturer Solo Cup was not liable for its false labeling of products as patented. Solo Cup marked billions of plastic cold and hot drink cup lids with expired patent numbers. It also marked some with a phrase indicating that one or more U.S. or foreign pending or issued patents might cover the product.⁴⁶ Pequignot asserted that, in selling products with expired (yet previously accurate) patent numbers, Solo Cup had committed more than 21 billion separate offenses under § 292.⁴⁷ Given the statutory award maximum of \$500 per offense, the potential cost to Solo Cup would be an astounding \$10.8 trillion.

Instead of focusing on the meaning of the word “offense,” the CAFC took a different tack. It upheld the lower court’s finding that the plaintiff “cannot show that Solo Cup . . . had the requisite intent to falsely mark its products.”⁴⁸ Solo Cup relied on the advice of lawyers for its policy to replace the manufacturing molds that stamped the patent numbers on the products when they wore out or became damaged.⁴⁹ The Court held, by unanimous panel, that Solo Cup “has raised more than blind assertions of good faith.”⁵⁰ “Instead, Solo [Cup] has cited the specific advice of its counsel, along with evidence as to its true intent, to reduce costs and business disruption.”⁵¹ The Court found that “[r]ather than continuing to manufacture mold cavities with the expired patent markings, Solo [Cup] took the good faith step of replacing worn out molds with unmarked molds.”⁵²

The CAFC’s reasoning is potentially troubling. It is not intuitively clear that the decision to phase out, rather than immediately cease, a knowing violation of the law should

negate a finding of “intent to deceive the public.” It is just as easy, if not more so, to conclude that such a decision reflects a willingness to continue deceiving the public in order to minimize the cost of compliance with the law. Moreover, the statement on Solo Cup’s packing material that the product “may be covered by one or more U.S. or foreign pending or issued patents”⁵³ smacks more of legal sophistry than a genuine desire not to deceive the public. While we cannot know for sure that the *Solo Cup* court was influenced by the potential for a very large damage award, in this case, under the *Bon Tool* decision, it is certainly possible that the Court narrowed its substantive reading of the statute to avoid what it deemed might be an excessively large—though still within a district court’s wide discretion—damage award on remand.

Conclusion

We do not think that the consumer and competitive goals of the false patent marking statute are best advanced by relying on a cramped construction of its substantive provisions in order to limit possible excesses in damage awards.⁵⁴ Thus, we do not believe that the CAFC’s *Solo Cup* decision obviates the benefits of a legislative remedy. Rather, we believe the legislative approach and balance embodied in H.R. 4954 and S. 515, which focus on competitive harm and compensatory damage, more efficiently and effectively promote “the progress of ... useful arts,” and hence, the public interest.

Endnotes

1. U.S. CONST. art. I, § 8, cl. 8.
2. Mark Twain, *A Connecticut Yankee in King Arthur’s Court* 68 (Harper & Brothers 1917).
3. *Jungerson v. Ostby & Barton Co.*, 335 U.S. 560, 572 (1949) (Jackson, J., dissenting).
4. See Ladas & Perry LLP, A Brief History of the Patent Law of the United States, <http://www.ladas.com/Patents/USPatentHistory.html> (last visited May 18, 2010).
5. *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295 (Fed. Cir. 2009).
6. *Pequignot v. Solo Cup*, No. 2009-1547, 2010 WL 2346649 (Fed. Cir. 2010).
7. The courts have identified six characteristics of a *qui tam* provision: “(1) The statute defines an offense against the sovereign or proscribes conduct contrary to the interests of the public; (2) A penalty or forfeiture is imposed for violation of the statute; (3) The statute permits a civil or criminal enforcement action pursued by a private party; (4) The private informer need not be aggrieved and may initiate the action in the absence of any distinct, personal injury arising from the challenged conduct; (5) A successful informer is entitled to a private benefit consisting of part or all of the penalty exacted from the defendant; and (6) The outcome of the private informer’s enforcement action is binding on the government.” *Pequignot v. Solo Cup Co.*, 640 F. Supp. 2d 714, 720-21 (2009).
8. Whistleblower *Qui Tam* Center, <http://www.whistleblower-qui-tam.com/index.html> (last visited May 3, 2010).
9. See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 776 (2000). See also The False Claims Act Legal Center, What is the False Claims Act & Why is it Important?, <http://www.taf.org/whyfca.htm> (last visited May 18, 2010).
10. The False Claims Act is codified at 31 U.S.C. §§ 3729-3733 (2009).
11. The *qui tam* action for the Indian Protection Laws is codified at 25 U.S.C. § 201 (1834).
12. This law is codified at 46 U.S.C. § 80103 (2006).
13. This law is codified at 46 U.S.C. § 723 (1983).
14. The Patent Act is codified at 35 U.S.C. §§ 1-376 (1952).
15. Section 292 reads as follows:

“(a) Whoever, without the consent of the patentee, marks upon, or affixes to, or uses in advertising in connection with anything made, used, offered for sale, or sold by such person within the United States, or imported by the person into the United States, the name or any imitation of the name of the patentee, the patent number, or the words “patent,” “patentee,” or the like, with the intent of counterfeiting or imitating the mark of the patentee, or of deceiving the public and inducing them to believe that the thing was made, offered for sale, sold, or imported into the United States by or with the consent of the patentee; or Whoever marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word “patent” or any word or number importing that the same is patented, for the purpose of deceiving the public; or Whoever marks upon, or affixes to, or uses in advertising in connection with any article, the words “patent applied for,” “patent pending,” or any word importing that an application for patent has been made, when no application for patent has been made, or if made, is not pending, for the purpose of deceiving the public—Shall be fined not more than \$500 for every such offense.

(b) Any person may sue for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States.” 35 U.S.C. § 292 (1994).
16. *Id.*
17. *Id.*
18. *Id.*

19. “Intent to deceive” has been defined as the “state of mind arising when a party acts with sufficient knowledge that what it is saying is not so and consequently that the recipient of its saying will be misled into thinking that the statement is true.” *Clontech Labs., Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1352 (Fed. Cir. 2005). The plaintiff has the burden of showing by a preponderance of the evidence that the defendant “did not have a reasonable belief that the articles were properly marked.” *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295, 1300 (Fed. Cir. 2009).
20. 35 U.S.C. § 292 (1994).
21. *Id.*
22. FED. R. CIV. P. 24(a)(2) allows for mandatory intervention for a party who “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” FED. R. CIV. P. 24(b) allows for permissive intervention.
23. 35 U.S.C. § 292(a) (1994) (emphasis added).
24. *London v. Everett H. Dunbar Corp.*, 179 F. 506 (1st Cir. 1910).
25. *Id.* at 508-09.
26. *Id.*
27. *Forest Group, Inc. v. Bon Tool Co.*, 2008 U.S. Dist. LEXIS 57134 (2008).
28. The CAFC remanded the case to the District Court to recalculate fines based on the new per-article-marked standard.
29. “Instead, the statute’s plain language requires the penalty to be imposed on a per article basis.” *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295, 1301 (Fed. Cir. 2009).
30. “Acts of false marking deter innovation and stifle competition in the marketplace” and “can also cause unnecessary investment in design around or costs incurred to analyze the validity of enforceability of a patent whose number has been marked upon a product with which a competitor would like to compete.” *Id.* at 1302-03.
31. “Penalizing false marking on a per decision basis would not provide sufficient financial motivation for plaintiffs ...” and “would render the statute completely ineffective.” *Id.* at 1304.
32. Donald Zuhn, False Patent Marking Bill Introduced in the House, <http://www.patentdocs.org/2010/03/false-patent-marking-bill-introduced-in-the-house.html> (last visited May 18, 2010).
33. LexisNexis, <http://www.lexisnexis.com> (search “Federal Court Cases, Combined” for “35 U.S.C. 292”).
34. *Bon Tool*, 590 F.3d at 1304.
35. 35 U.S.C. § 154(a) (2002).
36. *Bon Tool*, 590 F.3d at 1302-03.
37. R. David Donoghue, Northern District of Illinois: False Patent Marking Capitol of the World, <http://www.chicagoip litigation.com/2010/03/articles/local-rules/northern-district-of-illinois-false-patent-marking-capitol-of-the-world/> (last visited May 18, 2010).
38. H.R. 4954, 111th Cong. (2010).
39. *Id.*
40. *Id.*
41. It is not clear whether this change would preclude a buyer of a falsely marked product from claiming standing on the grounds that it has been harmed by the false marking.
42. For example, the public interest in enforcement of the federal antitrust laws and securities laws is deemed by Congress to be adequately served by the combination of public and injured-party private enforcement. *See* 15 U.S.C. 15(a) (1982); 15 U.S.C. 15(b) (1982); 15 U.S.C. 26 (1995); and Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence* (2009) (available at <http://ssrn.com/abstract=1000086>).
43. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775 (2000).
44. *Id.* at 775-76.
45. For example, the False Claims Actions in the California Code. *See* Cal. Gov. Code §§ 12650-12656 (2009).
46. *Pequignot v. Solo Cup*, No. 2009-1547, 2010 WL 2346649 (Fed. Cir. 2010).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. To be sure, the *Bon Tool* decision specifically reserves to the district court the discretion to reduce the per offense award from the statutory maximum of \$500. However, in a case such as with *Solo Cup*, which allegedly involved over 21 billion violations, even reducing the damage award to one cent per violation would produce an award of \$210 million. Thus, the district court could have acted in a manner that would not have been reversible on appeal to award very large damages relevant to the harm actually inflicted under the *Bon Tool* decision.

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