

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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MATTHEW A. PEQUIGNOT,)	
)	
Plaintiff,)	
v.)	Case No. 1:07cv897 (LMB/TCB)
)	
SOLO CUP COMPANY,)	
)	
Defendant.)	
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BRIEF OF *AMICI CURIAE* PUBLIC PATENT FOUNDATION, ELECTRONIC FRONTIER FOUNDATION, INITIATIVE FOR MEDICINES, ACCESS & KNOWLEDGE, PRESCRIPTION ACCESS LITIGATION, AND SOFTWARE FREEDOM LAW CENTER IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. THE PUBLIC INTEREST AMICI

The Public Patent Foundation (“PUBPAT”), Electronic Frontier Foundation (“EFF”), Initiative for Medicines, Access & Knowledge (“I-MAK”), Prescription Access Litigation (“PAL”) and Software Freedom Law Center (“SFLC”) (collectively “Public Interest Amici”) respectfully submit this brief in support of plaintiff Matthew A. Pequignot's motion for partial summary judgment.

The Public Interest Amici believe that the public interest is significantly harmed by false marking, and is well served by meaningful enforcement of the false marking statute as its literal language and legislative history mandate. The summary judgment motions filed by the parties in this case raise the important legal question of whether (i) a single decision to falsely mark a

batch of articles is one "offense" under 35 U.S.C. §292 (and hence subject to a maximum total fine of \$500, regardless of the number of falsely-marked articles) or (ii) an "offense" occurs with each falsely-marked article (thus subjecting the false marker to penalties of "not more than" \$500 per offense, as set by the Court). Compare Defendant Solo Cup Company's Memorandum in Support of Motion for Summary Judgment ("Def. Mem."), at 2 ("The language of Section 292, the applicable case law, and the legislative history are uniformly clear that an 'offense' is a decision to mark Because the 'offense' issue is a matter of law for the Court to decide, ... this Court should resolve this issue on summary judgment") with Plaintiff's Memorandum in Support of His Motion for Partial Summary Judgment ("Pl. Mem."), at 1 ("Mr. Pequignot seeks a partial summary judgment holding that: ... (ii) Solo Cup committed a separate 'offense' each time it falsely marked one of its lids ..."). Because the defendant's position offends the plain meaning of the statute, ignores its legislative history, and would effectively limit its maximum fine to \$500 in serious contravention of the public interest, the Public Interest Amici respectfully submit that this Court should side with the plaintiff on this key question of counting "offenses" under §292.

The Public Patent Foundation ("PUBPAT") is a not-for-profit legal services organization affiliated with Benjamin N. Cardozo School of Law. PUBPAT represents the public's interest in the patent system, and most particularly the public's interest in avoiding the harms caused by undeserved patents and unsound patent policy. PUBPAT has argued for sound patent policy before the Supreme Court, the U.S. Court of Appeals for the Federal Circuit, the United States House of Representatives, the U.S. Patent & Trademark Office ("USPTO"), and the European Union Parliament. PUBPAT has also requested that the USPTO reexamine certain undeserved

patents that cause significant harm to the public, and the USPTO has granted each such request. These accomplishments have established PUBPAT as a leading provider of public service patent legal services, and one of the loudest voices advocating for comprehensive patent reform.

The Electronic Frontier Foundation (EFF) is the nation's leading nonprofit civil liberties organization working to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 13,000 thousand dues-paying members have a strong interest in assisting the courts and policy-makers in striking the appropriate balance between intellectual property and the public interest.

The Initiative for Medicines, Access & Knowledge ("I-MAK") is a not-for-profit group that provides technical assistance on intellectual property and pharmaceutical products to governments, suppliers promoting access, public health organizations, and civil society groups. I-MAK challenges unsound patent systems globally, and works toward creating systemic change so that newer and more affordable drugs are made available for the public. I-MAK also offers tools and resources to the public, helping increase knowledge of the pharmaceutical patenting process.

Prescription Access Litigation LLC ("PAL") is a project of Community Catalyst, Inc., a nonprofit, nonpartisan organization that builds consumer and community participation in the shaping of the U.S. health system to ensure quality, affordable health care for all. PAL is a coalition of over 130 organizations in 35 states and the District of Columbia. The organizations in PAL's coalition have a combined membership of over 13 million people, and include state and local organizations representing consumers and seniors, statewide health care access coalitions,

and labor unions. PAL works to end illegal prescription drug price inflation by pharmaceutical manufacturers and others by facilitating the participation of consumers, advocacy organizations and third party payors (health plans, union benefit funds and others) in class action litigation challenging such price inflation practices. PAL joins this brief because PAL is concerned that abuse of the patent system – including through false patent marking and advertising – leads to higher prescription drug prices for consumers.

The Software Freedom Law Center (“SFLC”) is a not-for-profit legal services organization that provides legal representation and other law-related services to protect and advance Free and Open Source Software (“FOSS”), software distributed under terms that give recipients freedom to copy, modify, and redistribute the software. SFLC provides pro bono legal services to non-profit FOSS developers, and helps the general public better understand the legal aspects of FOSS. SFLC is concerned about the impact the patent system has on the development and distribution of FOSS.

The Public Interest Amici, despite having various missions and activities, are united in their belief that patent law and policy should be crafted to ensure that they benefit the public interest. In this case, the Public Interest Amici firmly believe that a failure to construe the false marking statute as it is written -- i.e., at least one "offense" for each falsely marked "article" -- would harm both the general public interest and the specific aspects of the public interest that they each separately exist to represent. Thus, the Public Interest Amici have united in this brief to express a single voice in support of the plaintiff's motion for partial summary judgment.

II. FALSE MARKING IS A SERIOUS VIOLATION OF THE PUBLIC INTEREST

Let's be honest, companies mark or advertise their products as patented for a reason; those markings and advertisements don't just appear out of thin air. The reason why companies mark and advertise their products as patented is because they expect doing so will provide them some benefit in the marketplace, such as by winning over consumers, building a superior brand associated with innovativeness, implying that their product has been reviewed and approved by the federal government, or implicitly threatening actual or potential competitors with allegations of patent infringement. Thus, when products are falsely marked or advertised as "patented" or with the numbers of expired, invalid, or inapplicable patents, such false marking provides these potential benefits to the false marker/advertiser without any commensurate justification and, as such, creates the potential to negatively impact the marketplace, the public interests, and the integrity of the patent system.

The Court of Appeals for the Federal Circuit has recognized this, too, saying,

the act of false marking misleads the public into believing that a patentee controls the article in question (as well as like articles), externalizes the risk of error in the determination, placing it on the public rather than the manufacturer or seller of the article, and increases the cost to the public of ascertaining whether a patentee in fact controls the intellectual property embodied in an article.

Clontech Labs., Inc. v. Invitrogen Corp., 406 F.3d 1347, 1356-1357 (Fed. Cir. 2005) (footnote omitted). The false marking statute aims to protect consumers from this risk of being misled by false patent markings, which not only can create incorrect conclusions about whether a particular product is controlled by a single party, but can also lead consumers to erroneously attribute innovative, quality, or performance characteristics to the falsely marked products. For these

reasons, the false marking statute protects the interest of consumers in not being misled into thinking a certain product – falsely marked as patented – is controlled by a single party, or is better or more innovative than other products available to them in the marketplace.

A. False Marking Harms Legitimate Patentees and Risks Decreasing the Incentive to Innovate Provided by the Patent Grant

In addition to the harm caused to consumers, perhaps one of the largest – and most overlooked – harms caused by false marking is to legitimate patentees. Imagine two competitors in a marketplace, one has a patent on her product, while the other does not. Both mark their products as patented, the first being justified in doing so, because she earned that privilege by having a currently valid patent, but the second not being justified in doing so, either because he never had a patent that covers the product, or any patent he did have has since expired. The marking of both products leads consumers to believe that both products are comparably innovative and, thus, of similar value. This deprives the legitimate patentee of the consumer respect and resulting commercial value that she deserves, because due to her competitor's false marking, her product doesn't stand out in the mind of the consumer as being more innovative. By depriving patentees of one of the important benefits of earning a patent, false marking actually runs the risk of decreasing the incentive to innovate offered by the exclusive patent grant. Thus, one of the most important functions of the false marking statute is to protect the interests of legitimate patentees in receiving the marketplace distinction they deserve.

B. False Marking Harms Honest Competitors

False marking also harms law-abiding competitors with unpatented articles. Such competitors who do not also falsely mark their products face the prospect that consumers will be

misled into thinking their competitor's falsely marked product is more innovative or modern. For example, acetaminophen is a well known pharmaceutical product for pain and fever relief that has been around for over fifty years. The drug is not patented, and there are many competing versions of acetaminophen available to consumers in the marketplace. Recently, however, one supplier of acetaminophen began marking and advertising its versions of the drug as "patented." See "There's nothing generic about TYLENOL", available at <http://tylenol.com/different/index.jhtml> (last visited June 9, 2009). This supplier is even so bold as to state that its brand of acetaminophen, "has patented technology ... no store brand can match." Id.

But the truth is that there is no patent on acetaminophen (or any of the "technology" embodied in TYLENOL), and the implication that TYLENOL products are patented when the generic or "store brand" versions of the drug are not is false and seriously misleading.¹ This false marking allows TYLENOL's supplier to trick consumers into paying a higher price for its version of the drug based on false and misleading assertions that its version of acetaminophen is patented. Such conduct harms both consumers and law-abiding competitors.

In addition, false marking also harms legitimate competitors by exerting a chilling effect on their willingness to enter the market for, or improve upon, the falsely marked product. For example, a competitor that has a cheaper method of manufacturing a product might be discouraged from entering the market if the product were adorned with a false patent declaration. Similarly, if an innovator had discovered an improvement to the product, that innovator might be

¹ One of the Public Interest Amici, the Public Patent Foundation, recently brought an action regarding this matter in the Southern District of New York. See Public Patent Foundation v. McNEIL-PPC, 1:09-cv-05471-RJH (SDNY).

discouraged from introducing the improvement for fear that the false marking might represent a blocking patent on the improvement. At a minimum, such false designations force legitimate competitors and innovators to spend scarce resources to investigate and disprove these false assertions.

C. False Marking Injures the Public Interest Regardless of Whether Actual Harm is Caused in Any Particular Case

It is also important to recognize that false marking is a serious violation of the public interest even if no harm is caused in any particular case. Stepping back for a moment, one cannot dispute that there exist countless laws in our country that serve to protect societal interests against certain behavior, even when that behavior might not actually cause any particular harm. For example, the entire category of crimes for attempting to commit another crime is justified not because any specific harm was caused by the attempt to commit crime, but because the act of even attempting to commit a crime is conduct we as citizens have decided to prohibit and meaningfully penalize. Further, many fraud based violations of the law are actionable and serious threats to the public interest even if no harm results from the fraud. For one, lying in court under oath is an act that merits significant punishment even if the lie has no effect whatsoever on the outcome of the case.

For similar reasons, even if the circumstances in any particular case of false marking are such that no actual harm can be proven to have occurred, that does not mean such conduct should be condoned by society. To the contrary, to condone such behavior with a “no harm no foul” attitude would in fact *encourage* such behavior when - as in the case of false marking - it offers such a substantial potential benefit to the actor. Put simply, if there were no law against it, false

marking would be rampant in the marketplace because it is an activity of insubstantial cost to perform, relative to its potential benefit. Can you imagine #2 pencils, aspirin, and even milk being labeled and advertised as patented? Surely such would cause significant consumer confusion, while also creating a mockery of legitimate patentees when they honestly tout their products' innovativeness as proven by their honestly earned patents. Respect for all patents would decline, and the efficiency of the marketplace would be perverted by false and misleading information for comparing products. This is why it is important to prohibit and meaningfully punish false marking, regardless of whether actual harm is caused by a specific act of false marking in any particular case.

Lastly, the location of the anti-false marking statute within the Patent Act confirms its importance to society. The false marking statute is contained in the same chapter of the Patent Act that contains the statutes pertaining to damages, injunctions, attorney fees, and many of the other statutes that are the most important to ensuring patents are adequately respected and infringement of patents is fairly remedied. Thus, to argue that 35 U.S.C. § 292 is somehow an obscure statute, or one that landed in the Patent Act by happenstance or mistake is simply unsupportable. Truth be told, the prohibition against false marking lies right in the heart of the Patent Act because it, too, is a serious violation of the law that Congress intended to sanction.

III. TO PROTECT THE PUBLIC INTEREST, THE FALSE MARKING STATUTE PROVIDES SUFFICIENT JUDICIAL DISCRETION TO SET APPROPRIATE FINES FOR FALSE MARKING

As discussed above, the lack of a false marking statute would cause substantial public harm. Similarly, under-enforcement of the false marking statute would – as a practical matter –

cause the same types and severity of public harm. Thus, any interpretation of the statute that effectively nullifies its ability to reign in false marking must be avoided in order to protect these vital public interests. A Court interpretation that has a sweeping impact on the statute's pragmatic viability would also be improper as a purely legal matter because it would have the practical effect of vetoing the policy decision made by Congress in the statute. While its origins may be centuries old, the fact that Congress has not recently revisited its predecessors' policy decision regarding false marking and instead actually re-invigorated the patents statute's qui-tam and false marking provisions with the introduction of the modern §292 in the 1952 Patent Act means that the prohibition against false marking deserves to be maintained as a vibrant and living statute with practical meaning and real-world effect. If prohibiting false marking is bad policy, Congress can – and is in fact the only branch of government that should – consider amending or repealing the statute.

Having said that, the false marking statute nonetheless contains language that gives broad latitude to judges ruling in such cases to implement what they see as fair and adequate punishment. Importantly, however, this broad latitude exists in the statutory language “not more than” with respect to the amount of fine to be imposed. The statute's flexibility does not reside in the term “offense,” which under any plain reading must be defined to mean each time the false marking is impressed upon the public, either by being seen or, in the case of advertising, heard. It would pervert the plain language of the statute and effectively nullify the intended effect of qui-tam enforcement provisions to define an “offense” in such a way as to severely limit the amount recoverable in any particular case. An “offense” should not be limited to the number of

times a decision was made to falsely mark, because that could very well be less than a handful of times, which would then limit the maximum penalty allowed for such false marking to no more than a few thousand dollars. Such minimal penalties would result in gross under-enforcement of the statute – thus completely undermining the public and competitive interests that §292 seeks to protect.

Although a legislatively faithful application of §292 may, at first blush, give rise to what appears to be an inequitable number of “offenses,” the “not more than \$500” language in the statute permits a judge to implement whatever she thinks is an appropriate fine for the offender's overall campaign of false marking, including as little as a fraction of a penny per “offense.” Surely, while there would be substantial public harm from under-enforcement of the false marking statute, there also exists the possibility of public harm caused by over-enforcement of the false marking statute. Thus, the issue of how much of a fine to impose is left to the sound discretion of the judge in any particular case. So, even if there are a million “offenses” in a particular case, that would not prohibit a judge from awarding any amount she sees fit, so long as it is no more than the maximum allowed for under the statute; in this hypothetical, \$500 million.

A. An "Offense" Under §292 Occurs with Each Falsely-Marked "Article"

The Public Interest Amici believe that the plain language and legislative history of §292 clearly support a finding of at least one offense per falsely-marked article. In this regard, Public Interest Amici agree with, and join in, the arguments advanced by the plaintiff. See Pl. Mem., at 15-20. The Public Interest Amici also disagree with the defendant's arguments (see Def. Mem., at 25-29), which essentially seek to perpetuate the questionable 1910 London decision, even though

its basis was completely eviscerated by amendments in the 1952 Patent Act. Below are remarks addressing the plain meaning and legislative history of §292, followed by an explanation of why the defendant's arguments are flawed.

As all parties agree, statutes must be interpreted, if possible, to give effect to every word. See, e.g., Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (quoting United States v. Menasche, 348 U.S. 528, 538-539 (1955)); Market Co. v. Hoffman, 101 U.S. 112, 115-116 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times.").

The language of §292 is unambiguous: "Whoever marks upon ... any unpatented article ... for the purpose of deceiving the public; ... - Shall be fined not more than \$500 for every such offense." Id. (emphasis added). To construe §292 as defendants suggest would give no effect to the words "any" and "every." Courts that have considered identical language have rejected such interpretations. See Pantuso Motors v. CoreStates Bank, N.A., 745 A.2d 614, 618-19 (Pa. Super. Ct. 1999) ("According to § 682, the fine for neglecting to satisfy a mortgage applies 'for every such offense,' ... we agree with the trial court's finding that ... the penalty may be applied to each occasion on which the bank refuses to perform."), rev'd on other grounds, 568 Pa. 601, 798 A.2d 1277 (2002).

This "plain meaning" rule of statutory construction applies even in situations where the result might appear unduly punitive.² In St. Louis, I. M. & S. R. Co. v. Williams, 251 U.S. 63,

² See Sutherland on Statutory Construction, p. 314 ("Even when a court is convinced that the Legislature really

63-4 (1919), for example, the Supreme Court rejected a challenge to an Arkansas statute that mandated "for every such offense," a penalty of "not less than fifty dollars, nor more than three hundred dollars and costs of suit, including a reasonable attorney's fee" against any railroad that demanded or collected greater than the prescribed fare. Affirming judgments of \$75 plus costs to each of two sisters overcharged \$0.66 each on the same trip, the Supreme Court commented:

When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.

Id., 251 U.S. 63, 67.

Here, where §292 contains express language ("not more than \$500") that avoids any possibility of an inequitable result for a defendant who falsely marks thousands or millions of low-cost articles, there is simply no basis to ignore the plain language of the statute.

B. Legislative History Further Supports the View that Each Falsely-Marked "Article" Constitutes at Least One "Offense"

The Public Interest Amici concede that defendant's argument would have at least some merit if applied to the Patent Act of 1842, where the first penalties for false marking appeared. Though the 1842 Act -- like the modern statute -- applied to the false marking of "any unpatented article," it went on to state that "he, she, or they, *so offending, shall be liable for such offense*, to a penalty of not less than one hundred dollars, with costs." Patent Act of 1842, ch. 263, §5, 5

meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity.").

Stat. 543, 544 (1842) (emphasis added). Thus, unlike the modern statute, the 1842 Act linked the "penalty" to the collective act of "offending." It also, of course, did not contain the "every such offense" language so prominent in the current statute, §292.

In 1870, Congress made a key amendment to the false marking statute. Gone was the "he, she, or they, so offending" language, and in its place was a provision directing that "he shall be liable for every such offense." Patent Act of 1870, 16 Stat. 198, 2003 (1870). The next amendment, and the codification as §292, appeared in the Patent Act of 1952. The 1952 Act left the "for every such offense" language unchanged, but eliminated the mandatory \$100 per offense penalty of the 1870 Act. Section 292 was amended once more in 1994, but the amendment to the pertinent language is cosmetic. Below, for the convenience of the Court, is a chart highlighting changes to the relevant language of §292 and its predecessors from 1842 to the present.

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<p>1842 (5 Stat. 544)</p> <p>if any person or persons ... shall affix the same or any word, stamp, or device, of like import, on any unpatented article, for the purpose of deceiving the public, he, she, or they, so offending, shall be liable for such offense, to a penalty of not less than one hundred dollars, with costs,</p>	<p>1870 (16 Stat. 203)</p> <p>if any person or persons ... shall <u>in any manner mark upon or affix to</u> the same or any word, stamp, or device, of like import, on any unpatented article <u>the word "patent," or any word importing that the same is patented,</u> for the purpose of deceiving the public, he, she, or they, so offending, shall be liable for <u>every</u> such offense; to a penalty of not less than one hundred dollars, with costs;</p>	<p>1952 (66 Stat. 814)</p> <p>if any person shall in any manner <u>Whoever</u> marks upon, or affixes <u>to, or uses in advertising in connection with</u> any unpatented article, the word "patent;" or any word <u>or number</u> importing that the same is patented, for the purpose of deceiving the public; ... shall be liable <u>finned not more than \$500</u> for every such offense to a penalty of not less than one hundred dollars, with costs,</p>	<p>1994 (35 U.S.C. 292)</p> <p>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; ... Shall be fined not more than \$500 for every such offense.</p>
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The 1870 amendment, providing that one who falsely marks "shall be liable *for every such offense* to a penalty of *not less than one hundred dollars, with costs,*" proved troubling to some courts. As one early case comments, "[t]his statute is a highly penal one. In this case, the sum of \$4,500 is claimed for affixing the stamp in question upon articles whose retail price is less than \$100." French v. Foley, 11 F. 801 (S.D.N.Y. 1882). While the French court endeavored to enforce the 1870 statute as written, others sought ways to narrowly (mis-)construe it, thus avoiding its harsh, mandatory penalties.

In London v. Everett H. Dunbar Corp., 179 F. 506 (1st Cir. 1910), the First Circuit expressed its concern that:

Patented articles are so varied in kind and in value that, if we construe the statute to make each distinct article the unit for imposing the penalty, the result may follow that the false marking of small or cheap articles in great quantities will result in the accumulation of an enormous sum of penalties, entirely out of proportion to the value of the articles, while the marking of expensive machines used in limited numbers may result in the infliction of penalties which are comparatively slight in relation to the pecuniary value of the articles.

Id., 179 F. 506, 508. As a result, the London court held that

a plaintiff, in order to recover more than a single penalty [under the 1870 Act], must go further than to prove the marking of a number of unpatented articles. The proof must be sufficiently specific as to time and circumstances to show a number of distinct offenses, and to negative the possibility that the marking of the different articles was in the course of a single and continuous act.

Id., 179 F. 506, 508.

Though clearly at odds with both the statutory language and the legislative history that created it, the London decision was widely followed at the time. So much so that the drafters of the 1952 Patent Act commented on the newly-codified §292 as follows:

This is a criminal provision. The first two paragraphs of the corresponding section of existing statute are consolidated, a new paragraph relating to false marking of 'patent applied for' is added, and false advertising is included in all the offenses. *The minimum fine, which has been interpreted by the courts as a maximum, is replaced by a higher maximum.* The informer action is included as additional to an ordinary criminal action.

Senate Report No. 82-1979 (June 27, 1952) (emphasis added). While not a model of clarity, the Public Interest Amici respectfully submit that the Report's reference to courts "interpreting" the 1870 Act's minimum fine "as a maximum" only makes sense if viewed as a reference to the London decision and its progeny. Through its results-oriented construction of "offense," the

London court effectively interpreted the 1870 Act's minimum \$100 fine as a maximum -- by making it very difficult to prove anything more than one "offense."

Noting that the courts had misinterpreted the 1870 Act to render its fines largely ineffective, Congress sought to cure the problem in the 1952 Act. The solution it reached was a sensible one: Change the minimum per-offense fine to a maximum per-offense fine, thereby completely undermining the basis for the problematic London decision and all the other cases that follow it.

Regrettably, Congress' amendment in the 1952 Act was perhaps too subtle to immediately produce its intended effect. To this day, some courts still continue to follow the London decision,³ despite the fact that Congress intentionally eliminated the specific language upon which the London decision rests. The Public Interest Amici respectfully suggest that the Court not continue this unfortunate trend, because the London decision, which applied to the 1870 Act, was legislatively rendered moot and no longer applicable by the passage of the 1952 Act. To be sure, the Supreme Court has never addressed § 292 and any implication to the contrary, such as that the issue of what constitutes an "offense" is controlled by the London case, is completely incorrect.

C. Defendant's "Offense" Arguments are Not Well-Taken

The overwhelming thrust of defendant's argument is directed to the idea that London is widely followed.⁴ Defendant, however, offers no explanation of how London can still be viable

³ See, e.g., Vanguard Prods. Group v. Merch. Techs. Inc., 2009 U.S. Dist. LEXIS 7306 (D. Or., Jan. 16, 2009); A.G. Design & Assocs., LLC v. Trainman Lantern Co., 2009 U.S. Dist. LEXIS 8320 (W.D. Wash., Jan. 23, 2009).

⁴ Defendant's assertion that "[t]he Federal Circuit has followed the London decision" (Def. Mem., at 26, n. 12) is completely misplaced, as the cited Federal Circuit decision deals with the "intent to deceive," not the "every such offense," language of §292.

following Congress' amendments in the 1952 Patent Act. Instead, defendant baldly asserts that "Congress has never altered the language of the false marking statute to overrule the accepted, common law view of an 'offense' as the decision to mark, rather than each product manufactured with a mark." (Def. Mem., at 29.)

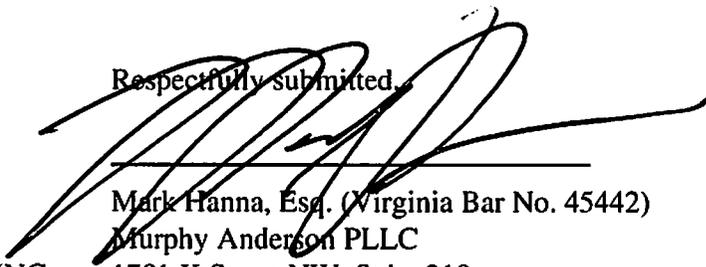
This is wrong for at least two reasons. First, interpretation of the term "offense" in the false marking statute is a question of statutory interpretation, not a question of "common law." Second, Congress clearly did alter the language of the false marking statute with the intent that its amendment would render the London line of cases moot. Thus, the defendant's arguments simply have no merit.

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IV. CONCLUSION

For the reasons set forth above, the Public Interest Amici respectfully submit that the Court should rule in favor of the plaintiff on the important "offense" counting question.

Respectfully submitted,



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Dated: June 17, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 2009, I caused a copy of the foregoing BRIEF FOR *AMICI CURIAE* PUBLIC PATENT FOUNDATION, ELECTRONIC FRONTIER FOUNDATION, INITIATIVE FOR MEDICINES, ACCESS & KNOWLEDGE, PRESCRIPTION ACCESS LITIGATION AND SOFTWARE FREEDOM LAW CENTER IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT to be filed with the Clerk of the Court by hand and to be served on the following counsel via first class mail, postage prepaid:

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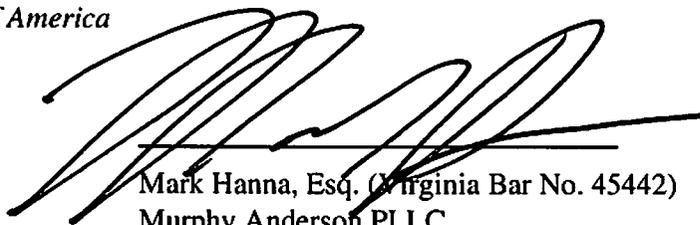
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A handwritten signature in black ink, appearing to read 'Mark Hanna', is written over a horizontal line. The signature is stylized and cursive.

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