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Patently Enabled January 2026 – New Year, New Inventions: The Meaning of 'Patent Pending'

Key Takeaways

- "Patent pending" gives notice of a filed application but provides no enforceable rights before issuance.
- The designation may deter competitors, however, and in some instances support provisional royalty rights after publication.
- An inaccurate "patent pending" marking could create liability for the applicant and should be promptly corrected.
- Obtaining a U.S. patent can take years. It is prudent for applicants to understand their rights before issuance.

'Patent Pending' Meaning:

The phrase "patent pending" on a product indicates a pending patent application has been filed with the U.S. Patent and Trademark Office (USPTO) having one or more claims reading on the product. Variations of this indicator, including "Pat. Pend.," "Patent Applied For" and "U.S. Patent Pending," may also be seen on products or packaging. The designation "patent pending" puts consumers and, importantly, competitors on notice of the application and the applicant's potential future enforcement rights; however, a pending patent application does not confer any present protections from infringement or the copying of one's product. The pivotal moment for applicants considering their exclusionary enforcement rights is the patent issuance date. No claim for patent infringement can be made before the issuance of the patent.

Provisional Rights:

An applicant's inability to enforce patent rights during the pendency of an application does not mean the indicator "patent pending" has no value. The warning may serve as a useful deterrent against those who would have to incur substantial costs to tool up, for example, only to have to stop infringing abruptly when the patent is issued. Further, a patent applicant may rely on provisional rights, pursuant to 35 U.S.C. § 154, and obtain a reasonable royalty from one who makes, uses, offers for sale, or sells in the United States the claimed invention in the time between publication (in the case of applications first filed in the United States) and issuance. This option becomes available provided certain conditions are met. First, actual notice of the published patent application is required. Actual notice may be accomplished, for example, by the simple maneuver of an applicant sending a letter to would-be competitors identifying the published patent application. Second, the invention claimed in the issued patent and the invention claimed in the published patent application must be substantially identical.

Implications of Misuse:

Falsely marking an item as "patent pending" (or other variations) can give rise to liability and penalties. 35 U.S.C. § 292(a) ("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…[s]hall be fined."). A plaintiff who brings a false-marking claim must show there was an intent to deceive the public by falsely marking an item with "patent pending."

Bottom Line:

Those with a pending patent application on record with the USPTO are permitted to mark their products within the scope of the application's claims "patent pending" and should consider doing so. While enforcement rights are not immediately available to applicants, the "patent pending" indicator may deter would-be competitors, and actual notice to competitors may give rise to provisional rights. It is important, however, to ensure that any such marking remains accurate and that the marking is removed if the application is denied or its claims change so that no claim still reads on the marked product.

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