

B.5 Patent Damages

5.10 DATE OF COMMENCEMENT OF DAMAGES—PRODUCTS

In determining the amount of damages, you must determine when the damages began. Damages commence on the date that [alleged infringer] has both infringed and been notified of the alleged infringement of the [] patent [choose those that apply]:

Alternative A:

[Patent holder] and [alleged infringer] agree that date was [insert date].

Alternative B:

If you find that a product has been sold or licensed, by [patent holder] or a third party, that includes the claimed invention, you must determine whether that product has been “marked” with the patent number. “Marking” is placing either the word “patent” or the abbreviation “pat.” with the patent’s number on substantially all of the products that include the patented invention. The marking requirement may also be satisfied by including with the product an internet address to a posting that associates the patented articles with the number of the applicable patents. [Patent holder] has the burden of establishing that it substantially complied with the marking requirement. This means [patent holder] must show that substantially all of the products made, offered for sale, or sold under the [] patent have been marked [and that reasonable efforts were made to ensure that licensees who made, offered for sale, or sold products under the [] patent marked the products].

[If [patent holder] [its licensees,] [or any prior owner of the patent] has not marked practicing products with the patent number, or if any licensees were not required to mark practicing products, you must determine the date that [alleged infringer] received actual notice of the [] patent and of the specific product alleged to infringe.] [Actual notice means that [patent holder] communicated to [alleged infringer] a specific charge of infringement of the [] patent by a specific accused product or device. The filing of the complaint in this case qualified as actual notice, so the damages period begins no later than the date the complaint was filed.] [However, [patent holder] claims to have provided actual notice prior to filing of the complaint, on [date], when it [sent a letter to [alleged infringer]]. [Patent holder] has the burden of establishing that it is more probable than not [alleged infringer] received notice of infringement on [date].]

[If you find that [choice A] a product has not been sold under the [] patent[or choice B] that products sold under the [] patent have been properly marked with the patent number, then the marking and notice requirements do not affect the damages period. If you find that the [] patent was granted before the infringing activity began, damages should be calculated as of the date you determine that the infringement began. If you find that the [] patent was granted after the infringing activity began, damages should be calculated as of [date patent issued].]

Committee Comments and Authorities

35 U.S.C. § 287; *Crystal Semiconductor Corp. v. Tritech Microelectronics Int’l, Inc.*, 246 F.3d 1336 (Fed. Cir. 2001); *Nike Inc. v. Wal-Mart Stores*, 138 F.3d 1437, 1443-44 (Fed. Cir. 1998); *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1108-09 (Fed. Cir. 1996); *Am. Med. Sys. v. Med. Eng’g Corp.*, 6 F.3d 1523, 1534 (Fed. Cir. 1993); *Devices for Med., Inc. v. Boehl*, 822 F.2d 1062, 1066

(Fed. Cir. 1987). Notice through marking is constructive notice. *See Maxwell*, 86 F.3d at 1111-12 (holding that when 95% of patented product offered for sale was marked by licensee retailer with “patent pending,” even after the patent had been granted and remaining 5% of product remained unmarked, constructive notice had been made under 35 U.S.C. § 287(a) where patentee demonstrated efforts to correct licensee’s mistakes).

In determining when damages begin with regard to method claims, there is no notice requirement. 35 U.S.C. § 287(c)(2)(F); *see Am. Med. Sys.*, 6 F.3d at 1538 (“The law is clear that the notice provisions of section 287 do not apply where the patent is directed to a process or method.”). Accordingly, the calculation of damages for infringement of method claims should begin as of the date the patent issued or the date the infringement began, whichever was first. *Crystal Semiconductor*, 246 F.3d at 1353.