

North Carolina Law Life

This is Patent Pending? Really?

By: Donna Ray Berkelhammer. Monday, July 30th, 2012

I succumbed to a chip-and-dip bowl shaped like a flip-flop on sale at the grocery store check-out line. As I was washing it, I noticed “Made in China” and “Patent Pending” stamped on the bottom. What in the world is patentable about a novelty chip bowl?



Something is **patentable** when it is a new, nonobvious and useful invention (typically a process, machine, article of manufacture, composition of matter, or, as the patent law calls it, an ornamental design of an article of manufacture (a “design patent”).

To my mind (and I’ve been wrong before) nothing seems patentable about this flip-flop bowl.

What is the benefit of claiming something is “patent-pending” and what is the penalty for falsely claiming patent-pending?

A US patent gives the inventor the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States during the term of the patent. Marking a product as patent pending gives notices that the owner is seeking patent protection, and exact copying may be patent infringement.

If someone ignores the notice, and manufactures a similar product that is found to be infringing, the infringer may be guilty of “willful infringement” which carries much stiffer penalties. The patent-pending designation also allows an infringement suit before the patent actually issues.

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Under current U.S. Patent law, it is considered false marketing to use “patent pending” when there is no patent application filed, or the application is no longer active (abandoned or rejected). Under 35 USC Section 292, the public can sue the product manufacturer on behalf of the government for the sum of not more than \$500 per each offense (ie, each item manufactured). This is referred to as a qui tam action, where the government seeks the help of the public to control false marking.

I still think the “patent pending” notice was false marketing on this particular product, but I don’t intend to dip my toe into a qui-tam action.

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