

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

STRYKER CORPORATION,  
STRYKER PUERTO RICO, LTD., and  
STRYKER SALES CORPORATION,

Plaintiffs and Counter-Defendants,

CASE NO. 1:10-CV-1223

v.

HON. ROBERT J. JONKER

ZIMMER INC., and  
ZIMMER SURGICAL, INC.,

Defendants and Counter-Plaintiffs.

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**ORDER DENYING ZIMMER'S MOTION FOR SUMMARY JUDGMENT  
FOR THE LIMITATION OF DAMAGES UNDER 35 U.S.C. § 287(a)**

Plaintiff Stryker sued Defendant Zimmer on December 10, 2010, asserting infringement of three of its patents: U.S. Patent Nos. 6,022,329 (“the 329 patent”), 6,179,807 (“the 807 patent”), and 7,144,383 (“the 383 patent”). (Compl., doc. # 1.) In the Motion now before the Court (doc. # 139), Zimmer alleges that Stryker failed to provide it with legally adequate notice of the infringement asserted. The Court denies Zimmer’s Motion.

**I. BACKGROUND**

This is a case about pulsed lavage irrigation systems. A pulsed lavage irrigation system operates like a motorized squirt gun combined with a small suction tube. Medical professionals use pulsed lavage irrigation systems to clean wounds during surgery by spraying water onto the wound site and then vacuuming excess or dirty liquid out of the wound.

Stryker is one of America's top purveyors of pulsed lavage irrigation systems. It markets two lines of pulsed lavage irrigation systems: the InterPulse and the SurgiLav Plus. (Pl.'s Br. in Opp., doc. # 194, at 3.) The InterPulse line is the commercial embodiment of the 329, 807, and 383 patents. (*Id.* at 16-18.) The SurgiLav Plus line is the commercial embodiment of the 329 and 383 patents. (*Id.*)

Pulsed lavage irrigation systems must be kept sterile because they are routinely used in surgical operations and to help treat open wounds. (*Id.* at 3.) Since repeated use would greatly impair sterility, Stryker designed the InterPulse and SurgiLav Plus devices to be used once and then disposed of. (*Id.*) To further ensure that every Surgilav Plus and InterPulse device is sterile when used, Stryker packages each unit individually and then sterilizes each unit in its packaging. (*Id.*)

The packaging for InterPulse or SurgiLav Plus products includes a label identifying the patent information for that product. (*Id.* at 3-4.) Because all Surgilav Plus and InterPulse units are sold in their original packaging, and because the units are never re-used, anyone who uses a Surgilav Plus or InterPulse device necessarily comes in contact with the label containing the patent information.

Stryker's major competitor in the pulsed lavage irrigation system market is Zimmer. Zimmer markets its pulsed lavage irrigation systems under the names "Pulsavac Plus," "Pulsavac Plus LP," and "Pulsavac Plus AC" (collectively "Pulsavac Plus systems"). Stryker claims that the Pulsavac Plus systems infringe on the 329, 807, and 383 patents and seeks damages for infringement dating from December 10, 2004 to the present.

To recover damages for patent infringement, a patentee must establish that the alleged infringer had notice of the allegedly infringed patent during the period for which

damages are sought. *See* 35 U.S.C. § 287(a); *Amstead Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 186 (Fed. Cir. 1994). In its Motion (doc. # 139), Zimmer argues that Stryker did not provide it with legally adequate notice of its alleged infringements of the 383 and 807 patents until October 14, 2010, and that Stryker did not provide it with legally adequate notice of the alleged infringements of the 329 patent until August 14, 2006. Consequently, Zimmer says, it cannot be exposed to damages for infringing the 383 and 807 patents before October 14, 2010, or for infringing the 329 patent before August 14, 2006.

## II. ANALYSIS

35 U.S.C. § 287(a) (“the marking statute”) provides that:

Patentees, and persons making, offering for sale, or selling within the United States any patented article for or under them, or importing any patented article into the United States, may give notice to the public that the same is patented, either by fixing thereon the word “patent” or the abbreviation ‘pat.’, together with the number of the patent, or by fixing thereon the word ‘patent’ or the abbreviation ‘pat.’ together with an address of a posting on the Internet, accessible to the public without charge for accessing the address, that associates the patented article with the number of the patent, or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is contained, a label containing a like notice. In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice. Filing of an action for infringement shall constitute such notice.

Notice under this marking statute can be either actual or constructive. *Sentry Prot. Prods., Inc. v. Eagle Mfg. Co.*, 400 F.3d 910, 918 (Fed. Cir. 2005). “Actual notice requires the affirmative communication of a specific charge of infringement by a specific product or device.” *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994). The parties agree that Stryker did not provide Zimmer with actual notice of the alleged infringement until December 10, 2010, when it filed this lawsuit. (*See* Pl.’s Resp. to

Def.'s Interrog. No. 17.) Therefore, Zimmer is only liable for infringements before that date if Stryker provided it with constructive notice. To establish constructive notice from an earlier date, Stryker must show "that substantially all [Surgilav Plus and InterPulse products] being distributed [at that earlier date] were marked, and that once marking was begun, the marking was substantially consistent and continuous." *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1446 (Fed. Cir. 1998).

Compliance with the marking statute is a question of fact. *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1111 (Fed. Cir. 1996). Thus, a patentee's compliance with the marking statute is properly decided upon summary judgment only when no reasonable jury could find that the patentee either has or has not provided notice to the particular defendants by informing them of its patent and their infringement on it. *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1339 (Fed. Cir. 2001).

Zimmer argues that Stryker failed to comply with the marking statute in at least two ways. First, Zimmer asserts that constructive notice under the marking statute requires that the commercial embodiments themselves—and not just their packaging—be marked, except where marking the actual commercial embodiments is effectively impossible. (*See* Br. in Supp. of Mot. for Summary J., doc. # 140, at 13-14.) Zimmer points out that Stryker labeled the InterPulse and Surgilav Plus products with a variety of commercial markings, so that it could just as easily have marked them with the requisite patent information. (*Id.*) Because Stryker failed to mark the physical embodiments directly prior to October of 2010 in the case of the 383 and 807 patents, and August of 2006 in the case of the 329 patent, Zimmer claims that it cannot be liable to Stryker for infringing on those patents before those specific dates. (*Id.*)

A handful of district courts from around the country have adopted Zimmer's highly literal reading of the marking statute's requirements. *See, e.g., Belden Techs., Inc. v. Superior Essex Commc 'ns LP*, 733 F. Supp. 2d 517, 534 (D. Del. 2010) ("If, however, the patented article has markings or printing on it, other than the appropriate patent marking, then the alternate form of patent marking on the package is not sufficient compliance with the marking statute."); *see also Rutherford v. Trim-Tex, Inc.*, 803 F. Supp. 158, 163 (N.D.Ill. 1992) (same). However, this Court declines to follow their example and, instead, adopts the practical approach taken by a majority of the district courts to have considered this issue. *See, e.g., Ethicon Endo-Surgery, Inc. v. Hologic, Inc.*, 689 F. Supp. 2d 929, 945-46 (S.D. Ohio 2010) (noting, among other things, "the [Supreme] Court's long-standing focus on the notice effected by the method of marking the patented article rather than on the precise mechanistic compliance with the statute."); *Bowling v. Hasbro, Inc.*, 490 F. Supp. 2d 262, 276-77 (D.R.I. 2007) (listing cases allowing patentee discretion in manner of marking product); *see also Sessions v. Romadka*, 145 U.S. 29, 50 (1892) (allowing marking on packaging where it was "impracticable" to mark the device, itself); *Chicago Pneumatic Tool Co. v. Hughes Tool Co.*, 192 F.2d 620, 625 (10th Cir. 1951) (holding that marking containers for drill bits complied with marking statute) *Rutherford*, 803 F. Supp. at 162 ("Here, the emphasis is in providing notice to the public. Marking the package is a sufficient alternative so long as the patentee, the licensees or distributors act so that the package marking is actually seen by the consuming public."). Those courts have all emphasized the marking statute's notice-serving purpose over the precise mechanics of compliance. *See, e.g., Bergstrom v. Sears, Roebuck and Co.*, 496 F. Supp. 476, 494 n.9 (D.Minn. 1980) (tag hung from fireplace grate complied with marking statute because reasonably calculated to affect

notice). Thus, they have found non-compliance with the marking statute only where the decision not to mark the actual product is unreasonable in light of factors like: (1) the size of the product, *see, e.g., Sessions*, 145 U.S. at 50; (2) other practical considerations, like the cost of marking the product, itself, rather than marking the packaging, *see, e.g., Wayne-Gossard Corp. v. Sondra Mfg. Co.*, 434 F. Supp. 1340, 1364 (E.D.Pa. 1977); (3) industry norms for marking similar products, *see, e.g., Wayne-Gossard Corp. v. Sondra Mfg. Co.*, 579 F.2d 41, 43 (3d Cir. 1978); and (4) whether an alternative form of marking would provide users with adequate notice of the patent, *see, e.g., Rutherford*, 803 F. Supp. at 162.

Analyzed under these criteria, a jury could reasonably conclude that Stryker's marking of the packaging for the InterPulse and Surgilav Plus devices satisfies the marking statute's requirements. Even though InterPulse and SurgiLav Plus devices are large enough that Stryker could conceivably mark them directly, it is also true that each of Stryker's commercial competitors—including Zimmer—marks the packaging of its pulsed lavage irrigation systems, rather than the device itself. (*See, e.g., Pulsavac Plus Label*, doc. # 195-3, at 2). There are at least two plausible reasons for this that have record support: (1) marking the product itself can be prohibitively expensive, and (2) affixing a sticker or some other sort of label directly to the product runs the risk that the label will come off during use, which can have potentially serious consequences. (Pl.'s Br. in Opp., doc. # 194, at 12-14.) There is no evidence, moreover, that Stryker's practice of marking the packaging fails to effectively provide notice of the relevant patent information. Since all InterPulse and Surgilav Plus devices are sold in their packaging and are not taken out of their packaging until use, marking the packaging guarantees that the user will come in contact with the patent information just as surely as would marking the product. At a minimum, then, whether

Stryker's method of marking the packages for its InterPulse and Surgilav Plus products complies with the marking statute is a question about which reasonable factfinders can differ. The Court, therefore, must deny summary judgment on this theory.

Zimmer also argues that Stryker failed to comply with the marking statute because it did not mark a high enough percentage of the commercial embodiments of the 329, 807, and 383 patents. (Def.'s Br. in Supp. of Mot., doc. # 140, at 11-12.) The marking statute does not say so expressly, but the Federal Circuit has said that full compliance with the marking statute is not achieved—and, so, constructive notice is not achieved—until the patentee “consistently [marks] substantially all of its patented products and [is] no longer distributing unmarked products.” *Am. Med. Sys., Inc. v. Med. Eng'g Corp.*, 6 F.3d 1523, 1538 (Fed. Cir. 1993). The parties agree that Stryker properly marked at least 99.68% of the embodiments of the 807 patent, 98.58% of the embodiments of the 329 patent, and 83.37% of the embodiments of the 383 patent. (Pl.'s Br. in Opp., doc. # 194, at 16-22.) Zimmer argues that, as a matter of law, none of these percentages is high enough to satisfy the marking statute. (Def.'s Br. in Supp. of Mot., doc. # 140, at 11-12.) Instead, Zimmer argues that Stryker had the obligation to mark all but “a few articles in the hundreds of thousands made and sold.” (Def.'s Br. in Supp. of Mot., doc. # 140, at 10 (quoting *Maxwell v. J. Baker, Inc.*, 805 F. Supp. 728, 733 (D.Minn. 1992))).

The Court does not believe the marking statute or the relevant case law requires such a restrictive, bright-line rule as Zimmer proposes. Indeed, most courts that have considered the question have rejected Zimmer's suggested approach in favor of one allowing patentees greater flexibility according to the facts of the case. *See, e.g., Imagexpo, L.L.C. v. Microsoft Corp.*, 299 F. Supp. 2d 550, 554 (E.D.Va. 2003) (“Whether [a patentee] consistently marked

‘substantially all’ of the patented products and whether the evidence is credible and reliable, appear to be classic issues for resolution by the trier of fact.”). The raw percentages of marked products is certainly an important consideration, but it is not necessarily dispositive at any particular bright line. Congress itself has certainly not provided such a bright line, and neither has any court. The Federal Circuit, for example, recently affirmed a finding that substantial evidence supported a jury’s determination that marking 88-91% of all the commercial embodiments of a patent was sufficient to satisfy the marking statute. *Funai Elec. Co., Ltd. v. Daewoo Electronics Corp.*, 616 F.3d 1357, 1374-75 (Fed. Cir. 2010). True, one of the factors in *Daewoo*—the presence of third-party licenses—is not present here. But other factors in this case may be significant to the jury, including whether some portion of the Stryker products not marked with the 383 patent nevertheless were marked with other patent protection notices. At a minimum, there is a question of material fact as to whether Stryker’s marking 99.68%, 98.58%, and 83.37% of the commercial embodiments of its patents satisfies the marking statute’s “substantially all” requirement on the particular facts of this case.

**ACCORDINGLY, IT IS ORDERED** that Zimmer’s Motion for Summary Judgment for the Limitation of Damages under 35 U.S.C. § 287(a) is **DENIED**.

Dated: November 29, 2012

/s/ Robert J. Jonker  
ROBERT J. JONKER  
UNITED STATES DISTRICT JUDGE