

### **Marking Requirement For Patented System Not Met When Operating Software Was Marked, But Not The System Itself (Robinson, J.)**

In *McKesson Automation, Inc. v. Swisslog Italia S.P.A.*, 2010 U.S. Dist. Lexis 48742 (D. Del. May 18, 2010), the Court adopted the report and recommendation of Magistrate Judge Stark and granted the Defendant's motion to limit damages. The Defendant, Swisslog, argued that Plaintiff, McKesson Automation, failed to mark the physical system Robot-Rx or any of its packaging with the numbers of the patents-in-suit. McKesson responded by arguing that their Connect-Rx software, which was associated with the Robot-Rx system, displayed the markings of the patents-in-suit on the log-in screen each time a user accessed the Robot-Rx system.

The Court determined that the Connect-Rx software is "...neither an embodiment of the patents-in-suit, nor exclusive to the Robot-Rx system." *Id.* at 24. The Court adopted Magistrate Judge Stark's report and recommendation finding that "...a user has no way of knowing which patents listed on the log-in screen cover which of the multiple products controlled by the Connect-Rx software, or whether the patents cover the Connect-Rx software itself." The Court concluded that the marking displayed on the Connect-Rx software did not adequately apprise the public that the Robot-Rx is covered by the patents-in-suit and accordingly limited damages to accruing only after the date when Swisslog received McKesson's cease and desist letter.