more than six years prior to the filing of the complaint or counterclaim for infringement in the action.

In the case of claims against the United States Government for use of a patented invention, the period before bringing suit, up to six years, between the date of receipt of a written claim for compensation by the department or agency of the Government having authority to settle such claim, and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as part of the period referred to in the preceding paragraph.

(July 19, 1952, ch. 950, 66 Stat. 813.)

HISTORICAL AND REVISION NOTES

Based on Title 35, U.S.C., 1946 ed., § 70, part (R.S. 4921, amended (1) Mar. 3, 1897, ch. 391, § 6, 29 Stat. 694, (2) Feb. 18, 1922, ch. 58, § 8, 42 Stat. 392, (3) Aug. 1, 1946, ch. 726, § 1, 60 Stat. 778).

The first paragraph is the same as the provision in R.S. 4921 with minor changes in language, with the added provision relating to the date for counterclaims for infringement.

The second paragraph is new and relates to extending the period of limitations with respect to suits in the Court of Claims in certain instances when administrative consideration is pending.

### § 287. Limitation on damages and other remedies; marking and notice

(a) 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 can not 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.

(b)(1) An infringer under section 271(g) shall be subject to all the provisions of this title relating to damages and injunctions except to the extent those remedies are modified by this subsection or section 9006 of the Process Patent Amendments Act of 1988. The modifications of remedies provided in this subsection shall not be available to any person who—

(A) practiced the patented process;

(B) owns or controls, or is owned or controlled by, the person who practiced the patented process; or

(C) had knowledge before the infringement that a patented process was used to make the product the importation, use, offer for sale, or sale of which constitutes the infringement.

(2) No remedies for infringement under section 271(g) shall be available with respect to any product in the possession of, or in transit to, the person subject to liability under such section before that person had notice of infringement with respect to that product. The person subject to liability shall bear the burden of proving any such possession or transit.

(3)(A) In making a determination with respect to the remedy in an action brought for infringement under section 271(g), the court shall consider—

(i) the good faith demonstrated by the defendant with respect to a request for disclosure,

(ii) the good faith demonstrated by the plaintiff with respect to a request for disclosure, and

(iii) the need to restore the exclusive rights secured by the patent.

(B) For purposes of subparagraph (A), the following are evidence of good faith:

(i) a request for disclosure made by the defendant;

(ii) a response within a reasonable time by the person receiving the request for disclosure; and

(iii) the submission of the response by the defendant to the manufacturer, or if the manufacturer is not known, to the supplier, of the product to be purchased by the defendant, together with a request for a written statement that the process claimed in any patent disclosed in the response is not used to produce such product.

The failure to perform any acts described in the preceding sentence is evidence of absence of good faith unless there are mitigating circumstances. Mitigating circumstances include the case in which, due to the nature of the product, the number of sources for the product, or like commercial circumstances, a request for disclosure is not necessary or practicable to avoid infringement.

(4)(A) For purposes of this subsection, a ''request for disclosure'' means a written request made to a person then engaged in the manufacture of a product to identify all process patents owned by or licensed to that person, as of the time of the request, that the person then reasonably believes could be asserted to be infringed under section 271(g) if that product were imported into, or sold, offered for sale, or used in, the United States by an unauthorized person. A request for disclosure is further limited to a request—

(i) which is made by a person regularly engaged in the United States in the sale of the same type of products as those manufactured by the person to whom the request is directed, or which includes facts showing that the person making the request plans to engage in the sale of such products in the United States;

(ii) which is made by such person before the person's first importation, use, offer for sale, or sale of units of the product produced by an infringing process and before the person had notice of infringement with respect to the product; and

(iii) which includes a representation by the person making the request that such person

will promptly submit the patents identified pursuant to the request to the manufacturer, or if the manufacturer is not known, to the supplier, of the product to be purchased by the person making the request, and will request from that manufacturer or supplier a written statement that none of the processes claimed in those patents is used in the manufacture of the product.

(B) In the case of a request for disclosure received by a person to whom a patent is licensed, that person shall either identify the patent or promptly notify the licensor of the request for disclosure.

(C) A person who has marked, in the manner prescribed by subsection (a), the number of the process patent on all products made by the patented process which have been offered for sale or sold by that person in the United States, or imported by the person into the United States, before a request for disclosure is received is not required to respond to the request for disclosure. For purposes of the preceding sentence, the term ''all products'' does not include products made before the effective date of the Process Patent Amendments Act of 1988.

(5)(A) For purposes of this subsection, notice of infringement means actual knowledge, or receipt by a person of a written notification, or a combination thereof, of information sufficient to persuade a reasonable person that it is likely that a product was made by a process patented in the United States.

(B) A written notification from the patent holder charging a person with infringement shall specify the patented process alleged to have been used and the reasons for a good faith belief that such process was used. The patent holder shall include in the notification such information as is reasonably necessary to explain fairly the patent holder's belief, except that the patent holder is not required to disclose any trade secret information.

(C) A person who receives a written notification described in subparagraph (B) or a written response to a request for disclosure described in paragraph (4) shall be deemed to have notice of infringement with respect to any patent referred to in such written notification or response unless that person, absent mitigating circumstances—

(i) promptly transmits the written notification or response to the manufacturer or, if the manufacturer is not known, to the supplier, of the product purchased or to be purchased by that person; and

(ii) receives a written statement from the manufacturer or supplier which on its face sets forth a well grounded factual basis for a belief that the identified patents are not infringed.

(D) For purposes of this subsection, a person who obtains a product made by a process patented in the United States in a quantity which is abnormally large in relation to the volume of business of such person or an efficient inventory level shall be rebuttably presumed to have actual knowledge that the product was made by such patented process.

(6) A person who receives a response to a request for disclosure under this subsection shall pay to the person to whom the request was made a reasonable fee to cover actual costs incurred in complying with the request, which may not exceed the cost of a commercially available automated patent search of the matter involved, but in no case more than $500.

(c)(1) With respect to a medical practitioner's performance of a medical activity that constitutes an infringement under section 271(a) or (b), the provisions of sections 281, 283, 284, and 285 shall not apply against the medical practitioner or against a related health care entity with respect to such medical activity.

(2) For the purposes of this subsection:

(A) the term ''medical activity'' means the performance of a medical or surgical procedure on a body, but shall not include (i) the use of a patented machine, manufacture, or composition of matter in violation of such patent, (ii) the practice of a patented use of a composition of matter in violation of such patent, or (iii) the practice of a process in violation of a biotechnology patent.

(B) the term ''medical practitioner'' means any natural person who is licensed by a State to provide the medical activity described in subsection (c)(1) or who is acting under the direction of such person in the performance of the medical activity.

(C) the term ''related health care entity'' shall mean an entity with which a medical practitioner has a professional affiliation under which the medical practitioner performs the medical activity, including but not limited to a nursing home, hospital, university, medical school, health maintenance organization, group medical practice, or a medical clinic.

(D) the term ''professional affiliation'' shall mean staff privileges, medical staff membership, employment or contractual relationship, partnership or ownership interest, academic appointment, or other affiliation under which a medical practitioner provides the medical activity on behalf of, or in association with, the health care entity.

(E) the term ''body'' shall mean a human body, organ or cadaver, or a nonhuman animal used in medical research or instruction directly relating to the treatment of humans.

(F) the term ''patented use of a composition of matter'' does not include a claim for a method of performing a medical or surgical procedure on a body that recites the use of a composition of matter where the use of that composition of matter does not directly contribute to achievement of the objective of the claimed method.

(G) the term ''State'' shall mean any State or territory of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(3) This subsection does not apply to the activities of any person, or employee or agent of such person (regardless of whether such person is a tax exempt organization under section 501(c) of the Internal Revenue Code), who is engaged in the commercial development, manufacture, sale, importation, or distribution of a machine, manufacture, or composition of matter or the provision of pharmacy or clinical laboratory services (other than clinical laboratory services provided

in a physician's office), where such activities are:

(A) directly related to the commercial development, manufacture, sale, importation, or distribution of a machine, manufacture, or composition of matter or the provision of pharmacy or clinical laboratory services (other than clinical laboratory services provided in a physician's office), and

(B) regulated under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, or the Clinical Laboratories Improvement Act.

(4) This subsection shall not apply to any patent issued based on an application which has an effective filing date before September 30, 1996.

(July 19, 1952, ch. 950, 66 Stat. 813; Pub. L. 100–418, title IX, § 9004(a), Aug. 23, 1988, 102 Stat. 1564; Pub. L. 103–465, title V, § 533(b)(5), Dec. 8, 1994, 108 Stat. 4989; Pub. L. 104–208, div. A, title I, § 101(a) [title VI, § 616], Sept. 30, 1996, 110 Stat. 3009, 3009–67; Pub. L. 106–113, div. B, § 1000(a)(9) [title IV, § 4803], Nov. 29, 1999, 113 Stat. 1536, 1501A–589; Pub. L. 112–29, §§ 3(g)(2), 16(a)(1), 20(i)(4), (j), Sept. 16, 2011, 125 Stat. 288, 328, 335.)

HISTORICAL AND REVISION NOTES

Based on Title 35, U.S.C., 1946 ed., § 49 (R.S. 4900, amended Feb. 7, 1927, ch. 67, 44 Stat. 1058).

Language is changed. The proviso in the corresponding section of existing statute is omitted as being temporary in character and now obsolete.

REFERENCES IN TEXT

Section 9006 of the Process Patent Amendments Act of 1988, referred to in subsec. (b)(1), is section 9006 of title IX of Pub. L. 100–418, which is set out as a note under section 271 of this title.

The effective date of the Process Patent Amendments Act of 1988, referred to in subsec. (b)(4)(C), is the effective date of title IX of Pub. L. 100–418. See section 9006 of Pub. L. 100–418, set out as a note under section 271 of this title.

Section 501(c) of the Internal Revenue Code, referred to in subsec. (c)(3), is classified to section 501(c) of Title 26, Internal Revenue Code.

The Federal Food, Drug, and Cosmetic Act, referred to in subsec. (c)(3)(B), is act June 25, 1938, ch. 675, 52 Stat. 1040, as amended, which is classified generally to chapter 9 (§ 301 et seq.) of Title 21, Food and Drugs. For complete classification of this Act to the Code, see section 301 of Title 21 and Tables.

The Public Health Service Act, referred to in subsec. (c)(3)(B), is act July 1, 1944, ch. 373, 58 Stat. 682, as amended, which is classified generally to chapter 6A (§ 201 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 201 of Title 42 and Tables.

The Clinical Laboratories Improvement Act, referred to in subsec. (c)(3)(B), probably means the Clinical Laboratories Improvement Act of 1967, section 5 of Pub. L. 90–174, Dec. 5, 1967, 81 Stat. 536, which enacted section 263a of Title 42 and enacted provisions set out as notes under section 263a of Title 42. For complete classification of this Act to the Code, see Short Title note set out under section 263a of Title 42 and Tables.

AMENDMENTS

2011—Subsec. (a). Pub. L. 112–29, § 16(a)(1), substituted ''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,'' for ''or when,''.

Subsec. (b)(2). Pub. L. 112–29, § 20(j), struck out ''of this title'' after ''271(g)''.

Subsec. (c)(1). Pub. L. 112–29, § 20(j), struck out ''of this title'' after ''271(a) or (b)'' and after ''285''.

Subsec. (c)(2)(G). Pub. L. 112–29, § 20(i)(4), substituted ''any State'' for ''any state''.

Subsec. (c)(4). Pub. L. 112–29, § 3(g)(2), substituted ''which has an effective filing date before'' for ''the earliest effective filing date of which is prior to''.

1999—Subsec. (c)(4). Pub. L. 106–113 substituted ''based on an application the earliest effective filing date of which is prior to September 30, 1996'' for ''before the date of enactment of this subsection''.

1996—Subsec. (c). Pub. L. 104–208 added subsec. (c).

1994—Subsec. (a). Pub. L. 103–465, § 533(b)(5)(A), substituted ''making, offering for sale, or selling within the United States'' for ''making or selling'' and inserted ''or importing any patented article into the United States,'' after ''under them,''.

Subsec. (b)(1)(C). Pub. L. 103–465, § 533(b)(5)(B)(i), substituted ''use, offer for sale, or sale'' for ''use, or sale''.

Subsec. (b)(4)(A). Pub. L. 103–465, § 533(b)(5)(B)(ii), substituted ''sold, offered for sale, or'' for ''sold or'' in introductory provisions.

Subsec. (b)(4)(A)(ii). Pub. L. 103–465, § 533(b)(5)(B)(iii), substituted ''use, offer for sale, or sale'' for ''use, or sale''.

Subsec. (b)(4)(C). Pub. L. 103–465, § 533(b)(5)(B)(iv), (v), substituted ''have been offered for sale or sold'' for ''have been sold'' and ''United States, or imported by the person into the United States, before'' for ''United States before''.

1988—Pub. L. 100–418 inserted ''and other remedies'' in section catchline, designated existing provisions as subsec. (a), and added subsec. (b).

EFFECTIVE DATE OF 2011 AMENDMENT

Amendment by section 3(g)(2) of Pub. L. 112–29 effective upon the expiration of the 18-month period beginning on Sept. 16, 2011, and applicable to certain applications for patent and any patents issuing thereon, see section 3(n) of Pub. L. 112–29, set out as an Effective Date of 2011 Amendment; Savings Provisions note under section 100 of this title.

Pub. L. 112–29, § 16(a)(2), Sept. 16, 2011, 125 Stat. 328, provided that: ''The amendment made by this subsection [amending this section] shall apply to any case that is pending on, or commenced on or after, the date of the enactment of this Act [Sept. 16, 2011].''

Amendment by section 20(i)(4), (j) of Pub. L. 112–29 effective upon the expiration of the 1-year period beginning on Sept. 16, 2011, and applicable to proceedings commenced on or after that effective date, see section 20(*l*) of Pub. L. 112–29, set out as a note under section 2 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103–465 effective on date that is one year after date on which the WTO Agreement enters into force with respect to the United States [Jan. 1, 1995], with provisions relating to earliest filed patent application, see section 534(a), (b)(3) of Pub. L. 103–465, set out as a note under section 154 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–418 effective 6 months after Aug. 23, 1988, and, subject to enumerated exceptions, applicable only with respect to products made or imported after such effective date, see section 9006 of Pub. L. 100–418, set out as a note under section 271 of this title.

### § 288. Action for infringement of a patent containing an invalid claim

Whenever a claim of a patent is invalid, an action may be maintained for the infringement of a claim of the patent which may be valid. The patentee shall recover no costs unless a dis-