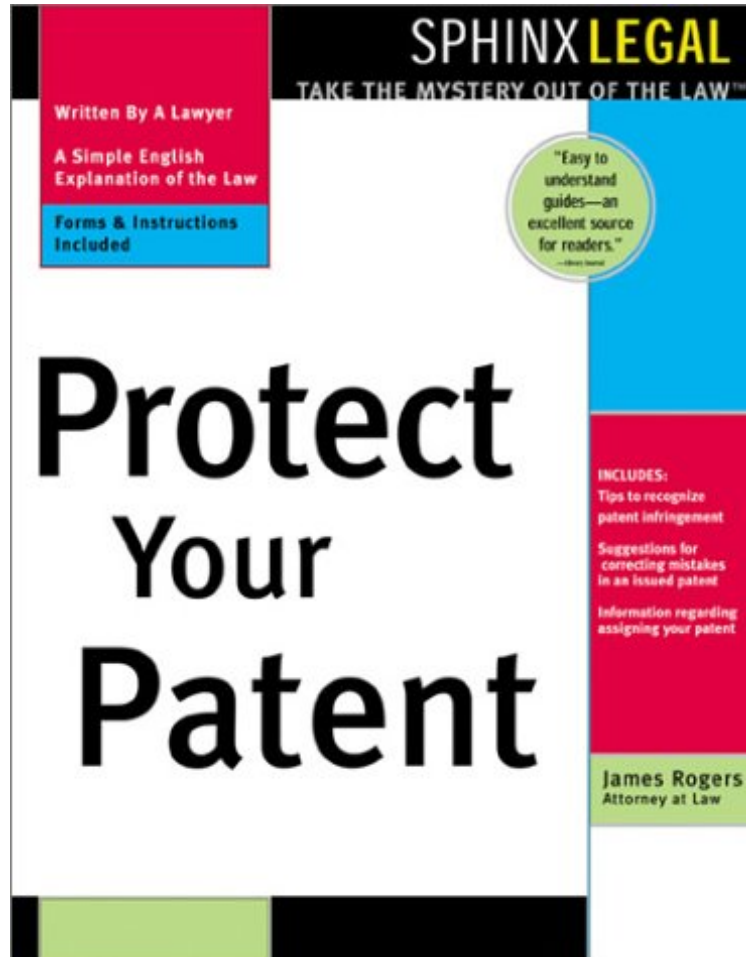


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## Protect Your Patent

James Rogers

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About the Author James L. Rogers received his J.D. from Suffolk University. He is a member of the New York and Massachusetts bars, as well as the United States District Court for the Eastern, Northern, and Southern Districts of

New York. He is also registered before the United States Patent and Trademark Office and has written extensively on a wide range of legal subjects. Rogers has worked for several law firms and a biotechnology company concerning patent and related intellectual law property matters. Excerpt. Reprinted by permission. All rights reserved.

### How to Use Your Patent

Excerpted from *Protect Your Patent* by James L. Rogers 2003

If you have a patent and are wondering what to do next, let me first say "CONGRATULATIONS." Patents are probably the most potent form of intellectual property (IP) protection. This chapter is going to look at what you have obtained, what you still need to do, and where to find the law regarding patents and their protection.

### Right to Exclude

A U.S. patent will give you the right to exclude others from making, using, selling, and offering for sale or importing within the United States, its territories and possessions, that which is covered by the claims of your patent. A special statute also provides that a product imported into the U.S. will infringe a process patent for making the product if the patented process was implemented abroad. (United States Code (U.S.C), Title 35, Section (Sec.) 271(g).)

The right to exclude others can be a formidable right. By having a patent on your invention, it is going to be worth considerably more than if you do not have a patent. The reasons for this are simple. Any person interested in your invention will not only have to pay money to purchase your invention, but also will need to finance a means to get your invention to the market place. If such a purchaser has spent a couple hundred thousand dollars to do this, such a purchaser is going to be much more interested in a market place that is not already infiltrated with your invention. You can charge a lot more and also sell a lot more copies of a product that is not already out in the market place. If your purchaser has bought your invention with a patent attached to it, such a purchaser will also have the right to exclude any other persons from making, using, selling, offering for sale or importing within the U.S. its territories and possessions your invention as described by the claims of the patent.

The question we still have not answered is now what? Too many individuals and even corporations seem to go into hibernation mode after obtaining a patent. It is not the time for that, but instead time to do everything you can to exploit and use that patent.

### Use Your Patent

Whether you decide to start your own business and sell your patented invention, or whether you decide to license your patented invention to others—one of the most important things to do is to use what your patent protects. Too many individuals and even corporations are not pro-active enough in making use of their patents. Perhaps this is a result of a lack of understanding of how to best do this, a fear that others will steal their inventive idea, or a combination of both.

Your patent has a limited term, and expires twenty (20) years from your patent's effective filing date. Since it can take up to three (3) years or longer to obtain a patent, you effectively have only about seventeen (17) years or less to actively exploit your patented invention. After this period of time, your claimed invention can be used by anyone in the public. The potential power of market exclusivity will no longer be in effect, and your invention will be worth less.

Market conditions may change the need for your invention if you wait to exploit your patent. This can happen even while the patent is in force. Do not delay in making full use of your patent.

### Patenting Improvements

It has been said more than once that the second time around is always easier. If you have come up with one patented invention, you are probably capable of coming up with more. So keep inventing. Some of your inventions will be worth more than others. Hopefully you will come upon that one invention that hits the jackpot. Sometimes your new inventions will be improvements upon your old invention. You can patent improvements upon an existing patented invention if there are enough differences to make the improvements patentably distinct. Patenting improvement of an existing invention can also lead to additional patents. Sometimes these improvement patents are even more successful than the earlier base technology patents. Moreover, by improving on your earlier existing patent, you will be helping to keep competitors from making these improvements. By creating an exclusive technology niche for yourself, you will have the chance to become the leader in your niche. However, to do so, you must continually make patented improvements.

If you have another patent on an improvement of your patented invention, then you have an additional twenty (20) year period of patented protection from the effective filing date of that improvement patent. This is a great strategy to get more out of your initially patented invention.

### Keeping Good Records

You should keep good records of your inventive process. Unlike abroad, the U.S. is still a first to invent country. This means that you are entitled to a patent on your invention before a third party who was later than you in respect to the inventive process. This is true whether or not that third party got to the patent office quicker than you for the invention. However, you must be able to document that you were the first inventor.

The best way to record your invention is to keep a laboratory notebook. Include everything from test results to your theories or conclusions. There are two very important reasons to do this. The first reason is that such information can become vital towards proving your date of invention in a patent dispute. Secondly, good records will keep you organized. Few have the capacity to recall what was done years earlier. As you prepare your notebook, it is a good idea to follow these points: date each page; use a bound notebook; do not erase any entries or tear any pages out of your note book; start your subsequent days' work on a new page; and, have each page of your notebook read and then signed by two witnesses. This is always a good idea and it is best to have people who do not have a close relationship to you such as a mother or sibling. Your witnesses should be over the age of 21 and should have the necessary technical expertise to understand what you wrote to substantiate the facts and nature of your work if called into court.

### Labeling Patented Products

It is very important that all products covered by your patent be labeled with the word "Patent" or the abbreviation "Pat," together with the number of your patent. If you cannot directly label your product because of the character of your

product, then label the packaging of the product in that way. The reason that such labeling is so important is that there is a special statute (U.S.C., Ch. 35, Sec. 287) that specifically says that you can only recover damages from the time that you give an infringer notice of infringement. This will be very difficult if your goods are not labeled as specified. Example: You fail to label goods covered by your patent claims. Several years later you discover that Infringer X is selling your product. Since you have not labeled your product, you have forgone any chance to obtain damages from Infringer X until you now actually give notice to Infringer X about the infringement. NOTE: If you sell a component that is not specifically covered by your patent claims, but which is used in combination with other components to form a device covered by your patent, you should similarly mark that component. In this case, you can say "For Use Under U.S. XXXX." You should not specifically state that such component is covered by your patent when it is not because the United States Code prohibits the marking of a product with a patent number when it is actually not patented. (U.S.C., Ch. 35, Sec. 292.)

#### Where to Find More Information

Patent law is filled with many laws and rules at every level of government. There are laws enacted by Congress, as well as rules and regulations developed by the United States Patent and Trademark Office (PTO). The PTO is the government agency in charge of allowing or denying the thousands of patent applications filed each year. Patent law is also governed by the thousands of court cases that have been litigated. Since patent law involves federal laws, the courts that decide patent cases will be federal courts. You may be able to find some of these cases online. There are various websites that are devoted to finding legal reference material. One such example is [www.findlaw.com](http://www.findlaw.com). You may also be able to find these cases in some public libraries. Most public libraries, however, do not have a large enough legal reference section to find the books (often referred to as "Reporters") that contain patent law cases. In such instances, you should visit a court or law school library, which have more extensive legal sections. As for the laws enacted by Congress and the rules of the PTO, you will need to look at the references listed below. A description of these references and where you can obtain them are specified. These laws and rules can all now be obtained online.

Title 35 of the United States Code. These are the broad based laws enacted by Congress which guide the PTO in enacting more detailed laws which govern patent prosecution. They are sometimes referred to as the Patent Laws. You can find the patent laws on the PTO website at: [www.uspto.gov/web/offices/pac/mpep/patlaws1214.pdf](http://www.uspto.gov/web/offices/pac/mpep/patlaws1214.pdf).

Title 37 of the Code of Federal Regulations. These are often referred to as the Patent Rules and are somewhat more detailed than the patent laws. These rules can be found on the PTO website at: [www.uspto.gov/web/offices/pac/mpep/patrules03222001.pdf](http://www.uspto.gov/web/offices/pac/mpep/patrules03222001.pdf).

Manual of Examination Procedure. This is referred to as the MPEP for short and is a detailed rule book put out by the PTO. The MPEP can be found online at: [www.uspto.gov/web/offices/pac/mpep/mpep.htm](http://www.uspto.gov/web/offices/pac/mpep/mpep.htm)

These rules of the PTO have the force and effect of law unless they are inconsistent with statutory provisions enacted by Congress.