

Belgium: Online Offer for Sale Constitutes Patent Infringement

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In a global patent battle between Ajinomoto and Global Biochem Technology (GBT), a Belgian front was opened on March 25, 2008 when Ajinomoto seized more than 4 million kilos of infringing L-Lysine (a compound feed additive) produced by GBT. After unsuccessful third party opposition proceedings by GBT and its European distributors, patent litigation on the merits was initiated on February 11, 2009 and pleaded before the Commercial Court of Antwerp on May 7, 11 and 14, 2010.

Ajinomoto claimed injunction orders to enjoin the further infringement of its patent rights on genetically modified E.coli, the misappropriation of its confidential know-how and the violation of the applicable regulatory framework. Ajinomoto also initiated a claim for damages. The defendants raised several inadmissibility arguments (lack of international competence, unlawful combination of multiple claims, etc.), argued that the patent invoked by Ajinomoto was invalid and that in any event no infringement whatsoever had been committed and that therefore no damages have to be paid.

In a 40-page ruling of June 11, 2010, the Commercial Court of Antwerp rejected the inadmissibility arguments and declared Ajinomoto's claims based on its patent rights and the violation of the applicable regulatory framework well-founded. The Court however found that there was insufficient proof that the confidential know-how of Ajinomoto was being misappropriated in Belgium. Of particular importance is the decision of the Court that the simple fact that the main distributor of GBT had a website on which it promoted its capability to swiftly supply the whole Benelux market from its centralised warehouse in Belgium and which enabled potential customers to order or ask additional information about L-Lysine, qualified as an "offer to sell" and thus infringement of Ajinomoto's patent in the sense of article 27 of the Belgian patent act. The fact that the defendants argued that purchasing L-lysine via the website was in reality not possible, was deemed irrelevant by the Court. The Court ruled that the fact that the website created the impression with potential customers that such a purchase was possible was sufficient to qualify as an offer to sell, even if an actual purchase via the website was not possible.

After concluding that the rights of Ajinomoto were being infringed, the Court ordered several measures, including an injunction order, the appointment of an independent expert-accountant to examine the extent of the infringements and the damage caused by them. GBT and other defendants have announced to appeal the judgment.