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A preliminary injunction can be based on a patent application

Matthieu Dhenne (Ipsilon) · Tuesday, June 28th, 2022

In a decision of 3 June 2022, opposing NOVARTIS and BIOGARAN, the President of the Paris High Court accepted the admissibility of a request for a preliminary injunction based on a patent application.

This decision was rendered in a case relating to the GILENYA product, which includes fingolimod hydrochloride as active ingredient and is indicated as monotherapy for the treatment of very active forms of relapsing-remitting multiple sclerosis (MS). The European patent application EP 2 959 894, that covers the said speciality, was invoked by its proprietor (NOVARTIS AG) as the basis for a request for a preliminary injunction, immediately after the EPO Board of Appeal had ordered the Examining Division to grant the patent on the basis of one of the claims submitted by the applicant. While the request for a preliminary injunction was rejected, the Judge accepted its admissibility on the basis of the patent application.

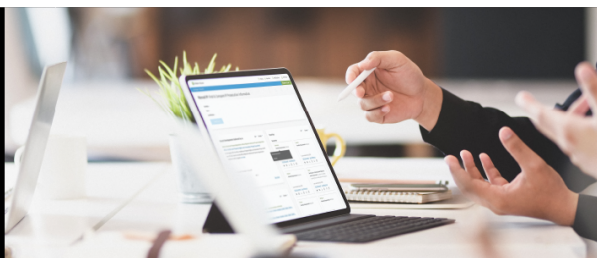
Such a position may seem surprising if one looks at the letter of Article L. 615-3 of the French Intellectual Property Code (“IPC”). Indeed, this text requires the existence of a “title”, therefore a patent, and not only an application. This is all the more surprising as Article L. 614-9 of the same Code, which lists the rights arising from the application, does not mention Article L. 615-3.

However, the fact remains that, from a fundamental point of view, the patent right arises from the filing of the application and not from the grant, so that in this sense the decision rendered merely rectifies an imperfect text. This seems also justified as the action for preliminary injunction tends to be similar to the action for infringement, both in terms of its effects and the conditions governing its eligibility. The urgency also argues in favour of the possibility of invoking a patent application. The impossibility to request the revocation of a title or to file an opposition until the granting of the patent could nevertheless create difficulties. Let us hope that the Judges will be able to separate the wheat from the chaff among the preliminary injunctions that will be submitted to them.

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