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Legal presumption of infringement or reversal of the burden of proof: Who cares?

Miquel Montañá (Clifford Chance) · Monday, July 5th, 2010

According to Article 61.2 of the Spanish Patent Act "*where a patent concerns a process for the manufacture of new products or substances, unless there is proof to the contrary, it shall be presumed that any product or substance with the same characteristics has been obtained by using the patented process*". Over the last few years, Spanish courts have debated whether this article enshrines a "legal presumption of infringement" or, on the contrary, a special rule reversing the burden of proof. In its judgment of 14 June 2010, the Supreme Court handed down a landmark judgment that has clarified that Article 61.2 contains a "special criterion on the burden of proof" and not a "legal presumption". The Court reached this conclusion after carefully considering Protocol number 8 of Spain's Treaty of Accession to the European Communities (as they were known as then), Article 75 of the stillborn Community Patent Convention (1975), and Article 34 of TRIPS (1995).

After listing the technical differences between a "legal presumption" and a rule reversing the burden of proof, the Court pointed out that "the practical consequences of the process are virtually irrelevant." This is because the complainant must prove that it owns a process to obtain a new product or substance, and that the defendant's product or substance has the same characteristics. On the other hand, the defendant must prove that its product has been obtained through a different process.

All in all, the response to the academic debate that has kept our Courts busy over the last few years (Legal presumption of infringement or reversal of the burden of proof?) is: Who cares?

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