

# PATENT INFRINGEMENTS AT INTERNATIONAL FAIRS

## CROSS-BORDER ENFORCEMENT THROUGH BELGIAN SUMMARY PROCEEDINGS

IN HER RULING OF 25 MARCH 2005, THE PRESIDENT OF THE BRUSSELS DISTRICT COURT ISSUED A CROSS-BORDER INTERIM INJUNCTION AGAINST TWO COMPANIES, ONE BRAZILIAN AND THE OTHER SOUTH KOREAN, WHICH HAD INFRINGED THE PATENT RIGHTS OF THE GERMAN PHARMACEUTICAL COMPANY ALTANA PHARMA AT AN INTERNATIONAL FAIR HELD IN BRUSSELS.

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### LEGAL CONTEXT

Belgium has often unfairly developed a reputation for the tardy resolution of complex technological disputes involving patents. The length of time taken in resolving issues such as alleged patent infringement does not, however, depend solely on the relevant substantive and procedural rules: it also depends on the use to which those rules are put. In this case the patent owner, Altana Pharma, successfully invoked a summary procedure against the display of infringing pharmaceutical products at an international trade fair, where there was a risk of repetition in subsequent international trade fairs in other countries. This approach was aided by the fact that the Brussels Court of Appeal had previously ruled that the presumed infringement of a European patent created a 'situation of urgency'.

### FACTS

Altana Pharma is the proprietor of a European patent (and supplementary protection certificates) for the chemical substance Pantoprazole (dialkoxypyridine) and its salts. Pantoprazole is used in the treatment of gastro-intestinal pathologies and is one of the most successful molecules ever developed by the German pharmaceutical industry.

At the international fair CPhI Worldwide 2004 held in Brussels from 7 to 9 December 2004, Altana discovered that a large number of participating companies were offering Pantoprazole in brochures and on posters at their respective

booths. These companies were apparently all manufacturing and/or distributing Pantoprazole in their home countries, where Altana Pharma's patent rights did not apply.

After carrying out a *saisie contrefaçon* (an *ex parte* discovery measure under Belgian law) on the first day of the fair, Altana Pharma decided to initiate summary proceedings against those companies that refused to sign a cease and desist declaration that was handed to them with the service of the *saisie* order. The writ was served on these companies on the last day of the fair.

## ANALYSIS

### The issue of infringement

In considering the claim, the court found that all the requirements for a claim in summary proceedings had been met, namely, urgency, a presumption as to the validity of the patent, and a presumption of infringement.

Considering these factors in turn, the requirement of urgency was deemed to have been established because of (i) the gravity and the increasing scope of the (threatened) damage to Altana Pharma, (ii) the risk of repetition of the infringements at the various annual international fairs, and (iii) the fact that proceedings on the merits would not have provided an effective solution to the given situation in Europe.

Furthermore, Altana Pharma's patent rights were presumed to be *prima facie* valid. Quite apart from the fact that the validity was not contested by the defendants, established Belgian case law starts from the premise that a European patent is valid given its thorough examination by the European Patent Office prior to its grant (see Antwerp Court of Appeal, 25 June 1990, *Remington v Improver* [1991] *Revue de droit intellectuel-l'Ingenieur-Conseil* 249).

Finally, the court also found that the presumption of infringement was established. Sufficient documentation and evidence, including an official bailiff's report witnessing the offering of the patented substance at the fair, had been submitted to safely conclude that Altana Pharma's European patent rights had *prima facie* been infringed.

The court confirmed the earlier case law of the Brussels Court of Appeal of 15 June 2004, which had held that the presumed infringement of a European patent in itself created a situation of urgency (Brussels Court of Appeal, *Synthon and Eurogenerics v SmithKlineBeecham* [2005] *Intellectuele Rechten Droits Intellectuels* 67).

Against this backdrop, the court issued a preliminary injunction preventing the defendants from any further offering of any product covered by the European patent as well as any product that was the direct result of any process covered by that patent.

Furthermore, the defendants were enjoined from any further manufacturing, printing, publishing, and distributing of any advertising material, such as leaflets and brochures, containing any reference to the patented substance.

In doing so, the court disregarded the defendants' contentions that merely referring to a patented pharmaceutical substance in a brochure did not amount to "offering" of the substance within the meaning of the Belgian Patent Act. Even though the defendants' activities in relation to the patented substance may not have amounted to an infringement in their home countries, the court found that in the present case it could not be reasonably contested that a substance covered by Altana Pharma's patent rights had been offered in Belgium.

The court's approach thus endorsed the broad interpretation given to the notion of "offering" in the preparatory material for the Belgian Patent Act. "Offering" does not necessarily involve the actual offering for sale of the physical product but includes any type of commercial offer regardless of the conditions under which the offer is being made. Therefore, the fact that the defendants argued a lack of intention to actually sell the products in the EPC member states where Altana Pharma's patent applied (including Belgium) was irrelevant.

### **Cross-border measures**

Having assessed all the facts of the case, the court then decided that it would be appropriate to make the interim injunction apply not only to Belgium but to all EPC member states designated in the European patent.

Given the nature of the infringement – the offering for sale of a patented product at international fairs, which often last for only a couple of days – and the difficulty in tackling such infringements, the court held as follows : “the risk of new infringements is clearly linked to the international fairs which are alternately held in the various member states where the European patent is applicable. It is logical and reasonable to say that an order in this case will only be effective if it is issued with cross-border effect. Taking into account that in this case Belgium is the most connecting link to the dispute (the last fair took place in Brussels), Article 31 of Regulation 44/2001 confers on this court jurisdiction to do so”.

Provided that there is a sufficient connection between the claim and the Belgian territory, Article 31 of the Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (‘the Brussels-I Regulation’) gives the courts of the EC member states jurisdiction to issue preliminary measures even if, under the regulation, the courts of another member state have jurisdiction over the main proceedings.

The court thus confirmed its earlier summary ruling in the *Colgate v Unilever* case of 14 September 2001 ([2002] *Intellectuele Rechten Droits Intellectuels* 264). In this case, the court granted a claim for cross-border interim relief but specified that the order would cease to be enforceable when a court of any one of the states designated in the European patent in dispute declared its national part of the patent invalid (see also *Antwerp Court of Appeal*, 18 October 1999, *Resilux v Schmalbach-Lubeca* [2002] *Intellectuele Rechten Droits Intellectuels* 292; for a dissenting judgment, see *President of the Brussels District Court*, 7 April 2003, *Steps v D.B. and Franzoni* [2003] *I.R.D.I.* 282).

An important difference between the two cases, however, is that in this case the defendants were domiciled in non-EC member states, Brazil and South Korea. The court held that since patent law was not a subject matter excluded from the Brussels-I Regulation, the domicile of the defendants was irrelevant for the purpose of considering jurisdiction under Article 31 of the regulation (see also *Case C-391/95, Van Uden Maritime v Kommanditgesellschaft in Firma Deco-Line* [1998] *Eur Court Rep* I-7091). Therefore, referring to its earlier ruling in the *Medtronic v Therex* case of 23 June 2000 ([2002] *Intellectuele Rechten Droits Intellectuels* 328), the court held that the domicile of the defendants in a non-EC member state did not prevent Article 31 from applying since this was an autonomous ground of jurisdiction which existed independently of Article 4(1) of the regulation.

### **Practical significance**

This case can be seen as good news for patent holders. It shows that Belgian courts, which were – often unfairly – renowned for their alleged tardiness in dealing with patent cases and were sometimes reluctant to get into the technical complexity of (bio-)pharmaceuticals and medical devices, seem more aware of the international impact that patent infringements can have on a patentee’s business and appear willing to offer swift interim relief. It is worthwhile noting that the present case took little more than three months from start to finish.

Although the outcome of each case will of course depend on its facts, and although other courts may prefer a different approach (see P de JONG, ‘The Belgian Torpedo: From Self-Propelled Armament to Jaded Sandwich’ [2005] *Eur Intellectual Property Rev* 75), this ruling could have a positive impact on patent litigation in summary proceedings. It is, in particular, likely to make it easier for patentees to take legal action against companies who believe that their non-European status will deter patent holders from enforcing their patent rights, in particular at international fairs. Article 31 of the Brussels-I Regulation or, alternatively, the relevant provisions of the new Belgian Code on Private International Law seem to be useful tools in keeping such companies in check in Europe.

## About the Author



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Note : the author's firm acted as counsel for the patent holder