

Turkish Supreme Court Rejects Pre-Emptive Claim Regarding Patent Infringement on Basis that Bolar Exemption Applies

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The Turkish Supreme Court recently published a decision in which it chose to uphold rejection of a non-infringement determination request. The request asked the court to give a pre-emptive determination that the plaintiff's acts and products do not infringe the defendant's patent rights. The Supreme Court upheld a lower court's decision to reject the request, on the basis that the plaintiff's acts are clearly permitted by the legislative Bolar exemption.

Obtaining a declaratory judgment in which a court determines that infringement has not occurred (**'non-infringement determination'**) is a key pre-emptive defensive measure for protecting intellectual property. Turkish law allows any interested party to ask the courts for a non-infringement determination against the registered owner of a trademark, patent, or industrial design (**"Right Owner"**). Prior to initiating proceedings, the requesting party will usually send a notice to the Right Owner through a notary public. The notice enables the Right Owner to comment on the requesting party's manufacturing activities, or manufacturing preparations.

According to the Turkish Patent Law, conducting the necessary studies or trials, then filing a marketing authorization request with regard to a generic drug is not considered to be an infringing act, despite the original drug still being protected by an active patent. These circumstances are commonly referred to as the Bolar exemption.

The plaintiff argued that its license application filed with the Ministry of Health is outside the scope of the defendant's patent. Accordingly, the plaintiff sought a determination from the court that its acts and products did not infringe the defendant's patent rights.

The defendant argued that he did not know the content of the plaintiff's license application and declared that he has not made any allegations about patent infringement. Accordingly, the defendant sought cancellation of the plaintiff's action.

The First Instance Court rejected the plaintiff's request for a non-infringement determination on the basis that:

- Neither party sent any cease and desist letters before the plaintiff filed the action.
- Filing the action achieves no legal benefit because the plaintiff's acts are clearly permitted by the legislative Bolar exception.

The defendant appealed to the Supreme Court, which upheld the First Instance Court's decision to reject the plaintiff's claim.

Case reference: Yarg. 11. HD. 23.06.2014, 2014/6103 E., 2014/11843 K

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