Intellectual Property - Mexico

Influenza Outbreak Sparks Compulsory Patent Licensing Debate

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The influenza epidemic that struck Mexico in late April 2009 prompted the government to use the compulsory licensing provisions of the Industrial Property Law for the first time.

In Mexico, a compulsory licence for a patent may be granted for lack of exploitation - that is, where there is no proof of use of the patented product or process - or where it is in the interests of the state to do so, such as for state security reasons or in a national emergency. These licences are called 'public utility licences'.

Articles 70 to 76 of the law specify the provisions that must be considered when granting a compulsory licence. Article 77 specifies the conditions and requirements for granting a public utility licence.

On January 26 2004 Article 77 was revised to include a mechanism for the partial implementation of the principles of the Doha Declaration on public utility licensing. The modified legislation allows for the granting of a compulsory licence for medicines in a national emergency or in the interests of national security, provided that the government declares that an outbreak of disease requires priority attention and that the patent jeopardizes access to drugs needed to treat the disease.

Following its measures to control the influenza epidemic, the government came under pressure from manufacturers of generic pharmaceuticals to declare the outbreak to be a 'priority attention disease' within the meaning of the law. On May 2 2009 the government made the declaration, but patent owners followed an aggressive strategy in seeking to demonstrate that access to the necessary drugs was not compromised and that public utility licences were unnecessary to cope with the epidemic. On May 19 2009 the government issued a second declaration that closed the door on compulsory licensing.

The debate between patent owners and generics manufacturers coincides with further uncertainty about the future form of the patent system. On March 26 2008 the Institutional Revolutionary Party proposed a bill for review by the Senate. The main aim of the proposal was to amend the law to establish a procedure for opposing the granting of patents and penalizing abusive practices when enforcing invalid patents.

Although the proposal would affect the entire IP system, some commentators have seen it as a step taken against the pharmaceutical research and development industry. The preliminary recitals of the proposal incorporate an argument that Mexican generics manufacturers have used in the past: patent holders extend the life of patents without undermining their IP rights, which in turn prevents the entry of generic products into the pharmaceuticals market.

On May 2008 the Senate issued a resolution which did not accept the proposed procedure. It argued that there was a real possibility of delaying patent applications, since under the proposal it would be necessary to interrupt this procedure in order to resolve the opposition.

Therefore, the Senate proposed an alternative opposition procedure, which is being reviewed by Congress. The revised procedure would not interrupt the patent application process, but would require the Patent Office to issue a resolution at the same time that it grants or rejects the patent application.

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