

EIP

UPC Orders Provisional Injunction on Mushroom Strain

Amycel LLC v Szymon Spyra (UPC_CFI_195/2024)

Order of 31 July 2024 (ORD_44133/2024) [1]

Amycel LLC is the proprietor of EP 1993350, which is directed towards a specific mushroom strain, defined by reference to an organism deposited at the ATCC[2] repository, under the “Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure”[3]. This is a system to facilitate meeting the disclosure and enablement requirement of a patent concerning microorganisms that would otherwise not be possible solely by the description of the patent. The sole claim reads:

A hybrid *Agaricus bisporus* mushroom strain BR06, wherein a representative culture of BR06 is available from ATCC under Accession No. PTA-6876.

The patent was opposed at the EPO by two opponents not including the defendant, in which the patent was maintained in amended form with this claim. The decision of the EPO opposition division was not appealed.

Amycel sells the mushroom strain BR06 under the name “Heirloom”, and it is the number one selling brown mushroom strain in the world. The defendant is a Polish farmer who has been selling since 2017 in Poland a brown mushroom strain “Cayene”, which Amycel alleged was the BR06 strain. Failing to reach a negotiated settlement, Amycel began an infringement action in Poland in July 2023, which is ongoing. Amycel stated that it became aware of sales of Cayene in UPC territory late July 2023, and it filed an application for a provisional injunction to restrain infringement at the UPC (Local

Division of The Hague) on 14 May 2024.

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Amycel commissioned a report from NakTuinbouw, a Dutch autonomous public body regulated by the Ministry of Agriculture, Nature and Food Quality, making a genetic comparison of fourteen mushroom strains, including the deposited BR06 strain, which is the subject of the patent, Amycel's Heirloom and Defendant's Cayene, using Amplified Fragment Length Polymorphism ("AFLP") and Whole Genome Sequencing ("WGS") analysis. The report concluded that the strains 'Cayene' and 'BR06' are genetically identical. This was contested in an expert report submitted by the defendant.

The defendant argued that a provisional injunction should not be granted because of Amycel's delay. However, the court accepted Amycel's argument that the genetic testing needed to prove its case was time consuming, and that this accounted for the delay. Therefore, Amycel had acted diligently in preparing and bringing its action once it was aware of the defendant's activities in UPC territory. That Amycel had been aware of infringement in Poland for longer was not considered relevant.

Concerning the validity of the patent, the defendant alleged that the strain BR06 was the same as an earlier Hungarian strain Barnakalapu BKU-100, but the court dismissed this argument in the absence of any concrete evidence of the identity. The defendant also argued that the BR06 strain was the same as the AA-0096 strain based on information in the patent showing no marker differences between AA-0096 and BR06, but this argument was held to be incorrect – the patent showed areas of similarity between the two strains but that did not mean that differences did not exist.

The defendant also suggested that the patent contravenes Art. 53(b) EPC, which excludes from patentability "plant or animal varieties". However, this argument was rejected since fungi are neither plants nor animals, but lie in a different taxonomic kingdom.

The Court accepted Amycel's expert evidence of the identity of the strains, and considered that the differences alleged by the defendant's expert related to the variations that would be expected between identical organisms due to sequencing errors rather than to actual genetic sequence differences. Accordingly, the Court held that infringement had been shown to the necessary standard for provisional proceedings.

In a previously reported order, the court allowed the defendant simultaneous interpretation for the oral hearing only at his own cost[4].

Having found the patent likely valid and infringed to the evidential standard required in provisional proceedings, the court ordered an injunction to restrain direct infringement of the patent by the Cayene strain, backed by a penalty payment of up to €50,000 for each

day that the injunction is not complied with. This order is to be enforceable only once Amycel provides a security of €200,000, as requested by the defendant, against the outcome that the provisional injunction is enforced but found to have been wrongly granted in a proceeding on the merits.

The Court ordered the defendant to pay the costs of the court fee for the proceedings immediately as an interim payment. The other costs, including representation and the expert reports, were also relevant to the proceedings on the merits, and the court held that these costs should be decided in a separate costs procedure following those proceedings. However, it determined that the claimant's representation costs should be subject to the cap based on a value in dispute of €200,000. This was lower than the value urged by the claimant of €500,000, but was the same as the security requested by the defendant.

This dispute looks to continue as the defendant began an invalidity action before the Milan Central Division on the eve of the hearing.

[1] <https://www.unified-patent-court.org/en/node/966>

[2] <https://www.atcc.org/>

[3] <https://www.wipo.int/treaties/en/registration/budapest/>

[4] https://eip.com//knowledge_hub/article/double_twofold_appropriateness_test/