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Pharmaceutical big data as a valuable asset: the IMS Health case

Patricia Mariscal (Elzaburu) · Monday, September 17th, 2018

The Spanish Supreme Court dismissed the cassation appeal filed by the Spanish affiliate of the American group IMS HEALTH against the judgment of the Provincial Appellate Court of Madrid ordering them to pay damages of 5 million euros for misappropriating and selling part of the content of a database developed by the claimant company.

INFONIS, SL and IMS HEALTH, SA are both companies operating in the computing and technology sector in the medical field. As a result of a commercial relationship, IMS had access to a database developed by INFONIS between 2004 and 2006 (ZBSales) which contained valuable information on the territorial distribution of medical centres in Spain. According to the account of the facts, after ending the commercial and contractual relationship in 2007, IMS continued to use the database created by INFONIS to develop its own product (Sanibricks), which it sold to third parties.

In 2010, INFONIS instituted proceedings against IMS based on infringement of the sui generis database right and acts of unfair competition. Mercantile Court No. 2 in Madrid accepted the claimant's arguments, ordering IMS to withdraw the Sanibricks product from the market and to pay damages amounting to over 5 million euros to INFONIS, representing 65% of the income from the sale of the infringing product. IMS lodged an appeal, but the Provincial Appellate Court of Madrid once again dismissed the arguments put forward by IMS, except with regard to the obligation imposed in the lower court's judgment to uninstall the product even when it had been acquired by third parties in good faith.

IMS lodged a cassation appeal with the Supreme Court, however the Supreme Court deemed the

appeal inadmissible due to lack of justification and absence of compelling interest. Nonetheless, of particular interest in this case are the findings of the Provincial Appellate Court of Madrid, subsequently confirmed by the Supreme Court, which dealt with matters such as the concepts of "**substantial investment**" and "**data extraction/dumping**", which are both of considerable importance in the area of *sui generis* database rights.

With regard to the concept of "**substantial investment**", the Court found that it should be not so much in respect of the development of the database itself but rather in respect of obtaining the data making up the content of the same. In this regard, it held that an investment of 2,700,000 euros by way of remuneration to the people who worked on the data search and compilation, as demonstrated by the claimant at first instance, must be regarded as substantial.

With respect to the criteria for determining whether or not there was an **infringement**, aside from the high degree of similarity between the databases (rated by the claimant at 86%), the Court held that a decisive factor was the presence in the defendant's database of a multitude of spelling errors and mistakes that were also present in the original database.

A full summary of this case has been published on Kluwer IP Law.

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