Date	April 4, 2018	Court	Intellectual Property High Court, Fourth Division
Case number	2017(Ne)10090		
- A case in which the court did not affirm a right of prior use for Appellant with respect to the claims for injunction of the Appellant's product which was requested on the basis of a patent right relating to a pharmaceutical, since the technical idea embodied in a sample drug of the Appellant's product could not be an invention having the same content as the Invention of present case.			

References: Article 79 of the Patent Act

Number of related rights, etc.: Patent No. 5190159

Summary of the Judgment

1 The present case is one in which the Appellee having a patent right according to the invention titled "PHARMACEUTICAL" alleged that the Appellant's product manufactured by Appellant, etc. fell within a technical scope of the invention according to Claim 2 of the Patent (Invention 2) and sought for the injunction of the manufacture, etc. of the Appellant’s product, and the disposal of the same.

2 Appellant admitted that the Appellant's product fell within the technical scope of Invention 2 and alleged that Appellant had manufactured a sample drug of the Appellant's product and conducted a clinical trial by the filing date, and thus Appellant has a right of prior use with regard to the patent right according to Invention 2. The judgment in prior instance (Tokyo District Court, 2015(Wa)30872, judgment on September 29, 2017) affirmed the claims by the Appellee, stating that the Appellant did not have a right of prior use.

3 This court judgment dismissed the appeal by the Appellant, stating that the Appellant did not have a right of prior use, for the following reason:

"A person who is preparing a business for the working of the invention" as specified in Article 79 of the Patent Act should be at least a person who, without knowledge of the content of an invention claimed in a patent application, made an invention identical to the said invention, or a person who, without knowledge of the content of an invention claimed in a patent application, learned the invention from a person who made an invention identical to the said invention. Therefore, the technical idea embodied in a sample drug should be an invention having the same content as Invention 2 to find that the Appellant has a right of prior use.

It cannot be said, however, that the moisture content of any of the sample drugs manufactured by the Appellant and subjected to a clinical trial by the filing date fell within the range of Invention 2 (within a range of 1.5 to 2.9 mass%).

Even if a moisture content of a sample drug fell within a range of 1.5 to 2.9 mass%,

there would be no technical idea that, as the sample drug, the tablet should contain a moisture content in a range of 1.5 to 2.9 mass% or a range included in the aforesaid range. Further, there would be no technical idea to adjust the moisture content of a tablet to a certain numerical value within a range of 1.5 to 2.9 mass%.