



PATENT INFRINGEMENT: WHAT BIOFUEL PRODUCERS, BLENDERS AND DISTRIBUTORS SHOULD KNOW

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Let us consider the following scenario: A biofuel producer has its facilities in Québec from which it ships out its fuel to a blender. The blender mixes the biofuel with gasoline or petrodiesel to generate various concentrations. A distributor then completes the chain by delivering the blended fuel to pumps throughout Canada and the United States.

Now let us introduce another variable into the equation. It turns out that there is a Canadian patent that relates to the biofuel in question. This patent provides a monopoly in Canada on the subject matter defined in a number of claims (described below). The claims may cover a biofuel product, a process for making a particular biofuel or a fuel additive.

To determine exactly what it covers, the patent must be analyzed in detail. Depending on the claims of the patent, our producer, blender and distributor may be liable for infringement.

In most cases, the producer stands to be directly affected by patent infringement issues, as the majority of biofuel patents cover production processes. As the producer's facilities are located in Québec, its use of the patented technology in Canada will likely constitute infringement. The patent holder may sue for infringement, which may result in an injunction and damages. An injunction would prohibit the producer from using or selling the patented technology in Canada. Damages are generally calculated as a reasonable royalty or lost profits. The infringing product may also be seized under certain circumstances.

The blender should also be wary of certain types of patents, especially those pertaining to biofuel compositions and additives. If the blending is performed in Canada and results in a composition that falls within the definition of the patent claim, the blender may be liable for infringement. Even if the blender's operations

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^{*} Of LEGER ROBIC RICHARD, LLP, a multidisciplinary firm of lawyers, and patent and trade-marks agents. Published in the February/March 2008 issue of Biofuels Canada Magazine. Publication 063.002.

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are located in the U.S., it may be prohibited from selling its blended product in Canada.

Though the distributor does not alter the blended product en route to filling stations or other repositories, the sale of a patented biofuel in Canada would technically make the distributor liable for infringement. Ignorance is not an excuse. If only a Canadian patent exists, non-infringing distribution would be limited to the U.S.

Given this simple scenario, it is clear that producers, blenders and distributors should be aware of the patented technologies related to their biofuels. In reality, however, the situation is far more complex. Here are just some of the factors that may come into play:

- › Patent applications are not enforceable until the patent is granted, but there is a post-grant right to “reasonable compensation” for infringing acts committed after its publication but before it is granted.
- › Many companies hold extensive patent portfolios covering different aspects of a single technology in various countries.
- › Patent litigation in the U.S. is jaw-droppingly costly and can spell disaster for small and medium sized companies.
- › Genetically modified feedstocks may be patented or protected by plant breeders’ rights.
- › Canada and the United States have regulations prohibiting importation of a product that was produced abroad by a process that is patented domestically.

Subtleties abound when considering what constitutes infringement. Given the financial considerations involved, infringement is also a matter of continual and heated debate. In an evolving industry such as biofuels, it is never too early to find out about the potential risks and strategies regarding patent infringement.



