NIH sues BMS over missing drug royalties

The US National Institutes of Health (NIH) has become embroiled in a court battle with pharmaceutical giant, Bristol-Myers Squibb (BMS), over royalty payments for an AIDS drug that it helped to develop. The government agency is demanding $9.1 million royalties from the overseas sale of didanosine, an antiviral drug used in a potent anti-AIDS drug cocktail. However, BMS lawyers have a different interpretation of the agreement.

It is almost 20 years since Congress passed the Bayh-Dole Act encouraging federal agencies to seek commercial partners to manufacture and market drugs and other products based on government research. Thus, NIH is under pressure to ensure that it reaps the appropriate dividends when a private company develops a successful drug using NIH research. Indeed, its licensing of the cancer drug Taxol to BMS is often cited as an example of a government research give-away.

But with the increased awareness of technology transfer within more academic institutions, and an increased willingness to take disputes to court, BMS versus the United States of America promises to offer a glimpse into how well the government agency holds its own in the industry's game of intellectual-property hardball.

According to court documents, the suit involves a 1991 licensing agreement between BMS and NIH to develop didanosine, which is sold under the brand name Videx. As NIH's preliminary tests indicated, the drug proved to be effective, especially when combined with other antiviral drugs. Thousands of AIDS patients now take Videx as part of the drug combination credited with dramatically extending their life expectancy. By 1998, annual Videx sales reached nearly $200 million worldwide.

Since 1991, the company has paid $24.5 million to NIH in royalties. But a 1999 NIH audit concluded that BMS owed an additional $9.1 million. BMS contends that it is not required to pay royalties on sales in countries where the US did not have a patent or the patent was pending. This includes countries such as Jamaica, Estonia and Panama, where the company sold very little of the drug, but also includes Spain where $13 million of Videx was sold—more than in any other country outside the US and France.

Meetings between the drug company and NIH's Office of Technology Transfer failed to resolve the issue, and NIH agreed to ask the Department of Commerce—which wrote the original licensing agreement—to review the case. Commerce department lawyers backed NIH, which then informed BMS that it would be in violation of the agreement unless NIH received the money within 30 days. The company paid but filed a lawsuit, stating, "BMS considered that it had no reasonable alternative" except to pay the money in protest.

Does this case signal the NIH's intention to take all such disputes to court in future? That question is up for debate. Kathleen Mullinix, now the CEO of biotechnology company Synaptic Pharmaceutical, helped Columbia University to set up its successful technology transfer office. She says that neither side wants to resort to legal action because litigation can potentially shut down drug production. Moreover, threats of litigation at the university level are usually settled out of court.

During her time at Columbia, Mullinix says she knew of at least one drug company that openly violated a university patent because they knew the school was not equipped to force the issue, but she thinks universities are now becoming more aggressive. Janice Reichert, a senior research fellow at Tufts University Center for the Study of Drug Development said, "I have the impression that NIH has been rather lax in this area in the past, so companies may think they are a pushover… certainly you can see the strategy of making [BMS] an example."

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Company disputes scientist's right to publication

When scientists at the California-based pharmaceutical company, Immune Response, proposed changes to James Kahn's article on the failure of the company's experimental AIDS treatment, Kahn refused. The University of California at San Francisco (UCSF) researcher perceived the company's post-hoc analysis to be "spin." The company described it as good science. When Kahn submitted the study to the *Journal of the American Medical Association*, they immediately agreed to publish it, accompanied by separate articles on the perils of industry-sponsored research. The story quickly became front-page news.

Even before the journal was printed, Immune Response sought arbitration and was asking for $7 to $10 million in damages. UCSF responded with a counter claim, asking for release of all data collected as part of the $30 million study. And the already hot issue of industry influence on campus moved even higher on the research policy agenda. The 1 November article concluded that patients taking IRC's therapeutic AIDS vaccine, Remmune, didn't fare any better than patients on standard therapy.

"We went forward because we felt that our patients and colleagues had the right to know," says Kahn. The company did not try to block the study's publication, as reported, but simply wanted to make sure it included all the data, insists IRC vice president Ronald Moss. Missing from the article was a subgroup analysis conducted by the company concluding that the drug has some effect on immune response, he said. "The data is there," says Moss. "Why not let people see it and come to their own conclusion?" Kahn says he had no problem with the data, but felt the company's analysis was flawed.

Disagreements between industry sponsors and academic researchers are not uncommon, but they rarely reach this stage, says John Bartlett, the director of the clinical research at the Duke University Center for AIDS Research in Durham, North Carolina. His program has at least six industry sponsored AIDS studies running at any given time. The best way to avoid court proceedings is to spell out all the details from the start, including who gets to approve publications, says Bartlett.

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