Non-patentability of plants obtained by essentially biological processes

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The EPO treats plants and plant varieties obtained by essentially biological processes (crossing, hybridisation, selective breeding) as non-patentable in principle.

Some months ago, Sirris gave a presentation to a Brussels think tank at a day-conference on changes in intellectual property and the major challenges which have now arisen: how far are the existing intellectual property systems capable of responding to the new paradigms of innovation and creativity?

Among the many questions which impinge on intellectual property, the patentability of the live organism is an important issue which has both legal, economic and social implications.

Biotechnology is having an increasingly significant impact on economies. The monopolies conferred by intellectual property rights in this field may pose a danger: how far can private corporations or research institutions be allowed to claim exclusive rights of exploitation of flora, fauna, even humans? This raises difficult questions, though the related controversy should be viewed in context. This is not about ownership of the live organism, but about protecting a technical advance and allowing the proprietor to prevent third parties from making commercial use of his invention.

Before the introduction of plant variety rights (PVR) certificates in Europe, patents could be granted for plants. This possibility was excluded at the time of revision of the European Patent Convention (EPC) in 1973. But the development of biotechnology has opened up new prospects, which raise serious issues. Questions arise about the patentability of breeding processes which consist mainly of stages of crossing and selective breeding, and about the patentability of the products of such processes.

In Europe, the limits of patentability of biological matter are prescribed by Directive 98/44/EC and by the EPC, which postulate that essentially biological processes of plant or animal breeding are not patentable. This means biological processes which consist entirely (or make exclusive use) of natural phenomena such as crossing or selection.

Nevertheless the EPO has granted patents for vegetables which have not been genetically modified. For example Seminis Vegetable Seeds, a member-company of the Monsanto Group taken over by Bayer, was granted a patent (EP1597965) for a broccoli type adapted for ease of harvest by a conventional breeding technique. The patent covers the plants, seeds and even the head of the cut broccoli and multiple broccoli plants grown in a field.
This has been the source of ongoing disputes in Europe.

There is no need here to give a full account of the decisions made by various bodies, the ins and outs of the practices of the authorities concerned, the rules amended and applied retroactively, the procedures suspended, and so on.

For example, in its 'Tomatoes' and 'Broccoli' decisions of December 2010, the Enlarged Board of Appeal refused patent applications for essentially biological processes using selectable genetic markers. In March 2015, in the 'Tomatoes II' and 'Broccoli II' cases ((G2/12 and G2/13)), it found that a patent could be granted for plants/plant matter obtained from such processes (not for the processes themselves), provided that the basic conditions of patentability were met.

Responding to the positions of the Contracting States, most of which disagreed with these findings, to the concerns of the community of users, and to the sometimes violent outbursts from civil society, in 2019 the EPO referring the issue back to the Enlarged Board of Appeal with the request that it clarify the legal framework applicable to the patentability of plants obtained exclusively by essentially biological processes.

Nothing is set in stone. In a complete change of judicial attitude, on 14 May 2020 the Enlarged Chamber concluded, in its opinion G3/19 ('Pepper'), that plants and animals obtained by essentially biological processes are not patentable.

The EPO will conform to and apply this opinion, which should reduce the legal uncertainty which hitherto applied to the both complex and sensitive question of the patentability of plants obtained exclusively by an essentially biological process.

Note that plant varieties are normally protected by a Plant Variety Rights (PVR) certificate. This is designed to allow recompense for the work of the successful applicant, while leaving allowing free access to the resource for research by other interested parties, for the genetic improvement of the plant species and the creation of new varieties.

Source

- https://www.epo.org

See also

- Techniline 12.06.20 - Protection des savoirs traditionnels et expressions culturelles traditionnelles

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