epi Information

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Institut der beim Europäischen Patentamt zugelassenen Vertreter

Institute of Professional Representatives before the European Patent Office

Institut des mandataires agréés près l'Office européen des brevets

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Editorial

T. Johnson (GB)
Editorial Committee

By the time this editorial is read, the Big Freeze that as it is being written grips a good deal of the area covered by the Member States, will have melted away. Nevertheless we on the Editorial Committee hope that none of our readers has been adversely affected by the cold spell. Also, as we write this, there seems to be another kind of freeze, namely on the lack of agreement on the EU Patent and Unitary Patent Court. Our Institute is in favour of both in principle, but those who have responsibility for bringing the systems into force need to be sure that they will both work efficiently for the benefit of industry. Perhaps the thaw will come under the current Danish Presidency of the EU; our Institute will be watching, and commenting as appropriate.

It has also come to our attention that the EPO has launched a new web-based consultation platform for proposed changes to European Patent Law and Practice; see: *http://www.epo.org/news-issues/news/2011/20111215a.html*

It seems that the purpose behind this is to facilitate the early involvement of users in the law-making process of the European Patent Organisation. We are in favour of user-participation if it results in a transparent system which will bring about useful changes in EP Law and Practice, some of which could be major, e.g. examination procedures and quality control criteria. However, as our Institute is part of the European Patent Organisation by virtue of the Founding Regulation, we hope that this new platform will not circumscribe our ability to respond to proposed changes in law and practice by the EPO. After all we are the users best-placed to respond, based on our experience of the EP system since its very inception.

Finally, congratulations to Mr Wim van der Eijk (NL). He has recently taken over from Peter Messerli as Vice-President, Directorate General, Appeals. We wish him well in his important new post.

Nächster Redaktionsschluss für epi Information

Informieren Sie bitte den Redaktionsausschuss so früh wie möglich über das Thema, das Sie veröffentlichen möchten. Redaktionsschluss für die nächste Ausgabe der epi Information ist der **11. Mai 2012**. Die Dokumente, die veröffentlicht werden sollen, müssen bis zu diesem Datum im Sekretariat eingegangen sein.

Next deadline for epi Information

Please inform the Editorial Committee as soon as possible about the subject you want to publish. Deadline for the next issue of epi Information is **11th May 2012**. Documents for publication should have reached the Secretariat by this date.

Prochaine date limite pour epi Information

Veuillez informer la Commission de Rédaction le plus tôt possible du sujet que vous souhaitez publier. La date limite de remise des documents pour le prochain numéro de epi Information est le **11 mai 2012**. Les textes destinés à la publication devront être reçus par le Secrétariat avant cette date.

Report of the Committee on Biotechnological Inventions

A. De Clercq (BE), Chair, S. Wright (GB), Secretary

This report mainly summarizes the last yearly *epi* Biotech Committee Meeting held on 9 November 2011 in Munich.

The following issues were discussed:

New EPO Rules

There was a discussion of new Rules 62 and 63, one of the members pointing out that they had received a Communication from the EPO saying that they could not conduct a search because the subject matter of the divisional application added matter. This was challenged and a result is awaited.

It was noted that the 2 year deadline for filing a divisional could be dynamic, and can change, (for example if an Office Action issues on a parent case later than on a divisional application). Although theoretical, this has in fact now happened in practice. Members discussed their experiences on disunity, and often frantic activity just before the 2 year deadline. It was agreed that the 2 year time limit was too short, and some members had contacted Examiners to clarify objections, so that a decision could be made on whether or not to file a divisional before the 2 year deadline.

ECJ Monsanto Decision

This mainly concerned infringement, and indeed the scope of downstream product claims. It was not well reasoned and so there remains a question mark over whether this decision will exclude from infringement all situations where the gene is inactive.

Brüstle and Stem Cells

It was discussed at the meeting that there had been recently before the meeting date of 9 November 2011 an announcement from President Battistelli that he wants to immediately implement the Brüstle decision. The *epi* needs to resist the EPO implementing the policy without getting guidance from the Appeal Board first. Rather worryingly, President Battistelli seems to be rather proud of the low grant rate in biotech. This matter will be discussed at the meeting with the EPO, and we should raise the matter with the *epi* Board and EPPC, as and where possible. An epi position paper was suggested to be prepared.

HGS v Eli Lilly

This is a UK Supreme Court decision, and it was notable because this is the first time that UK courts had decided on industrial applicability. It was welcomed because the decision was positive and confirms the earlier TBA decision, and states that if there is a credible or plausible function of a gene then this satisfies the industrial applicability test, admitting that it was a relatively low threshold. One member questioned whether such a low standard would additionally apply to pharmaceuticals, as we are concerned that there would be different standards for genes/proteins on the one hand, and chemicals on the other.

Novel Genes

T1644/08 concerned the inventive step of paralogs that had 90 % identity to the identified gene. Inventive step here was accepted, but not for variants that had a lesser (75 %) homology.

It was thought that the EPO seems to be moving towards narrower claims, and often objecting inventive step under Article 56 and sufficiency under Article 83. Often Examiners will speculate that a person skilled in the art cannot perform the invention over the whole scope, but with little substantive evidence of this. Post filing data seems to be acceptable for Article 83 objections, but less persuasive for those under Article 56. This was relevant in oppositions, where opponents would need to provide evidence of non-performance to succeed on an attack under Article 83. We have also seen more objections concerning the "result to be achieved" for functional features.

Medical Use Claims

The EPO has now settled on a particular format for EPC 2000 claims, and will object to any claims not in this specific format. Note that a change in category (say from method claims, or Swiss-style claims) is usually acceptable before grant, but not after grant. Note that, post-grant in T1635/09, a change from use category to second medical use was not allowed.

Sequence Listings

Note that new Rules have been introduced, without prior consultation with the *epi*. There is now new software, BISSAP. This can allow importation/amendment of .txt files. The new software can allow download of sequences, and it was agreed that we would ask the EPO in future to provide .txt files online.

One member had been able to secure a refund of the late sequence listing fee, when the case had entered the European Regional Phase about 18 months before the EPC 2000 came into force. On another case the EPO had asked to provide a listing during the middle of examin-

ation. It was noted that the EPO still insists on sequence listings, even if the invention is an entirely different field (for example, computing).

It was also agreed that, from lack of novelty objections where Examiners refer to sequence alignments, we would ask the Examiners to provide alignments wherever possible. For example, in an objection where there is 95 % identity over a certain length, and yet the claim requires a minimum of 90 %, we should ask the EPO to provide their alignment.

We also continue to find it unjust that the EPO demands the filing of sequence listings on divisional cases when they had already received one on the parent application.

Note also that the EPO online software currently does not allow the filing of subsequent documents on PCT applications, for example sequence listings.

Surgical Methods

One member reported that a reference in a claim to "obtaining" a sample was still regarded by the EPO as a surgical method. The attorney objected, but was nevertheless able to overcome the objection by referring to a sample obtained from a patient passively, and in the past tense.

Essentially biological processes G2/07, G1/08

The hearing on the broccoli case, scheduled for 26 October 2011, had been cancelled. On the wrinkly tomato case, a hearing took place on 8 November 2011, and is now the subject of a further referral to the Enlarged Board of Appeal (the second referral to the Enlarged Board in the same case). Once the referral becomes known as well as the time to file amicus curiae briefs, the *epi* Biotech Committee may wish to prepare observations for *epi* if EPPC can agree.

Dosage Regimes

Note that the new law on EPC 2000 claims took effect on 29 January 2011 (for cases with priority dates after this date, the traditional Swiss claims are no longer available). Note that the French courts in the *Actavis vs. Merck* decision decided that a dosage regime was not patentable, contrary to the EPO practice.

Microorganism Deposits

The question arose as to whether it was possible to refer to someone else's (namely a third party's) deposit, if it is publically available, and even if an expert solution had been requested. It was noted that deposit problems often arise where the deposit is filed in the name of the inventors, rather than the applicants, especially for US originating cases. See EPO Notice dated 7 July 2010 published in OJ 10/2012 p. 498-513 for a comprehensive review.

Disunity

This continues to be a problem, especially *a posteriori* objections where there are dubious lack of novelty objections at the search stage, resulting in an unexpected splitting of the subject matter. The EPO still thinks that, on average, each sequence is a different invention. It is noted that Examination issues are too frequently creeping into searches.

A Novozymes case was mentioned where there were allegedly 66 inventions in a PCT application, with demand from the EPO for a very large sum of Euros for further searches. In a divisional therefrom, with the PCT claim set, 8246 inventions were identified. In a second divisional, also with the PCT claims however, a Rule 63 Communication was sent, arguing that no meaningful search could be made.

Note that PCT applicants from some countries (e.g. Sweden and Finland) have a choice between using their national PCT authority or the EPO as ISA, whereas this is not the case for most other applicants.Using another ISA could be a viable option for those applicants, in light of the problematic disunity determinations from the EPO as ISA.

One member noted that he had filed a divisional application to the second invention, and then the EPO had further split up the subject matter, so the client did not have his second invention searched.

Some Examiners detail in great length their justification of disunity, sometimes over several pages, and we question whether it would have been quicker for the Examiner to have conducted a further search rather than detail, at great length, all the reasons for not being able to perform the search.

Quite often we pay an additional fee, and receive the same citations. So how do we try and prevent this happening? It was thought that the best way of proceedings would be to try and get the EPO to amend the Guidelines.

It was noted that on one EP Regional Phase case the EPO had simply cut and pasted the search from the International Phase, inappropriately so since the claims had been significantly amended on EP phase entry.

Another member had cases where there were 115 and even 184 inventions. This seems inappropriate and unfair (especially for SMEs). Examiners seem less willing to give applicants the benefit of any doubt.

The EPO's internal production system is not helping us here, where the Examiners get a point for the search. Examiners are therefore encouraged to raise disunity objections, forcing the applicant into filing divisionals, and then they can perform effectively the same search with minimum additional effort.

Membership

It was agreed to admit, as Associate members, Bo Hammer Jensen (DK) and Stefan Murnaghan (IE). We at present do not have a member from ES, but tempor-

arily have agreed to admit Mr Francisco Bernardo Noriega as associate member.

Other Matters

One member interestingly commented that her Italian cases seemed to be going quite often to Italian Examiners. It was also noted that if you first file a national Italian Patent application then you could get a free EPO search and opinion by the EPO.

Report of the European Patent Practice Committee (EPPC)

F. Leyder (BE), Chair

This report completed on 10.02.2012 covers the period since my previous report dated 08.11.2011.

The EPPC is the largest committee of the *epi*, but also the one with the broadest remit: it has to consider and discuss all questions pertaining to, or connected with, practice under (1) the EPC, (2) the PCT, and (3) the future EU Patent Regulation, including any revision thereof, except all questions in the fields of other committees: Biotech, OCC, PDC, LitCom, and EPO Finances.

The EPPC is presently organised with seven permanent sub-committees (EPC, Guidelines, MSBA, EPO-*epi* Liaison, PCT, Trilateral & IP5, and Unitary Patent). Additionally, *ad hoc* working groups are set up when the need arises.

The committee met on 18-19.01.2012.

EPC

1. SACEPO/WPR6 – Evaluation of the recent rule changes

During its meeting, the EPPC has prepared its own evaluation of the recent rule changes ("raising the bar"), then discussed the EPO paper on that subject.

At the meeting of the Working Party on Rules that took place on 06.02.2012, this was the first and most important substantive agenda item, discussed at length. It was not the purpose of that discussion to discuss possible further rule changes.

Proposed amendments to Articles 9(1) and 11(b) RFees, which had been submitted to written consultation, were also discussed. The *epi* delegation proposed that the refund system be retained, with the refunds being granted until the work product is sent, in order to keep an incentive for applicants to actively withdraw their application if they lost interest.

The proposed amendment to Rule 53(3) EPC, which had been the subject of a web-based consultation, was then discussed. During its meeting, the EPPC had concluded that the proposed system was not optimal, and agreed to propose a two-step procedure to better account for Article 113(1) EPC. The *epi* delegation filed a written proposal, which did not appear to have convinced the EPO.

A proposal to amend Rule 103 EPC will be considered later.

GUIDELINES

2. GUIDELINES2DAY:

The Director of Education called a meeting for the preparation of a series of seminars provisionally called Guidelines2Day, at which the EPPC is to be represented by A. Hegner, vice-chair in charge of the Guidelines sub-committee, and the EPPC chair. In preparation of that meeting, the sub-committee met on 18.01.2012 in order to identify those of the amendments to the Guidelines that are most likely to influence the practice before the EPO. We trust that the members of the sub-committee will be associated to the seminars.

EPO-*epi* Liaison

3. Partnership for Quality

A meeting was held on 08.12.2011. It was essentially devoted to information from the EPO:

– Quality Roadmap: presentation and status report;
– EPO metrics: presentation;
– Trilateral collaborative metrics study on International Search Reports: report and discussion;
– Patent Prosecution Highway: status report;
– ISO 9001 implementation: status report;
– Manual: no final decision on the title, but publication is still expected in Q1 of 2012.

The next meeting has been scheduled on 10.05.2012.

4. Meeting with EPO directors

Following the example of the Biotechnology committee, which sends a delegation to meet the directors of the Biotechnology Cluster, the EPPC has initiated contacts to set up meetings in further technical areas. An ad hoc group has already been set up for computer-implemented inventions (CII); it met after the last EPPC meeting, and started preparing a list of topics. Further technical areas under consideration are audio-video-media (AVM) and pure and applied organic chemistry (PAOC).

UNITARY PATENT

5. European patent with unitary effect in the participating Member States

On the website of the Council (http://register.consilium.europa.eu/), the title of the latest draft clearly indicates that it is not the version upon which the Council claims agreement was reached on 06.12.2011: "Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection – *Proposed additional technical changes to be introduced in the Regulation for a Unitary Patent* (document 18030/11 dated 02.12.2011; original emphasis)."

On the Council website, there is also available a document (CM 1068/12) dated 09.01.2012 calling for a meeting of the Jurists/Linguists Group on 26.01.2012 to "to finalize the [Regulation on the unitary patent] from a legal and linguistic point of view".

On the website of the Parliament (http://www.europarl.europa.eu/), it is reported that the JURI committee voted on amendments to both draft regulations on 20.12.2011. The reports by the rapporteurs have been posted respectively on 11.01.2012 (unitary patent) and 09.01.2012 (translation arrangements). Both are flagged "Awaiting Parliament 1st reading/single reading/budget 1st stage", with an indicative date that recently changed from 14.02.2012 to 12.03.2012.

The EPPC is also monitoring the Draft agreement on a Unified Patent Court; whilst the draft mainly relates to the court, it contains some patent law, and as such is relevant to the work of the EPPC. I am not aware of any recent changes impacting the EPPC.

Report of the Harmonisation Committee

F. Leyder (BE), Secretary

The Harmonisation Committee deals with all questions concerning the worldwide harmonization of Patent Law, and in particular within the framework of WIPO. This report was completed on 12 February 2012.

1. America Invents Act (AIA)

President Obama signed the AIA on 16 September 2011. Section 3(p) reads:

SENSE OF CONGRESS. – It is the sense of the Congress that converting the United States patent system from "first to invent" to a system of "first inventor to file" will improve the United States patent system and promote harmonization of the United States patent system with the patent systems commonly used in nearly all other countries throughout the world with whom the United States conducts trade and thereby promote greater international uniformity and certainty in the procedures used for securing the exclusive rights of inventors to their discoveries.

Thus, the implementation of the AIA is relevant to the world-wide harmonisation process and of interest to the EPO as major cooperation partner of the USPTO. Whilst the AIA was enacted on 16 September 2011, the system of "first inventor to file" will be effective 18 months from enactment, i.e. from 16 March 2013.

2. Committee on Patent Law (CPL)

The 40th meeting of the CPL on 27 November 2011 was mainly devoted to harmonisation.

The EPO presented a report on the recent procedural developments regarding the prospective resumption of discussions and work on substantive patent law harmonisation (SPLH). Upon the initiative and invitation of the EPO, representatives from DE, DK, FR, GB, JP, US and EP met in July 2010 ("The Tegernsee Meeting") to consider a new process for the potential resumption of discussions on selected substantive issues.

As a first contribution to a wider discussion with relevant parties and stakeholders, participating offices had agreed to mandate a group of technical and legal experts (the "Tegernsee Experts' Group") to carry out a fact finding exercise, i.e. compile a comparative table ("matrix") of the relevant substantive patent law provisions existing in the respective systems of Europe, Japan and the US; their report was discussed.

Finally, the EPO presented a summary overview of recent changes in US and JP patent law, along with a brief comparative analysis within the context of harmonisation.

3. Committee meeting – Hearing at the EPO

Mr Lutz, Vice-President DG5, issued an invitation to a "Hearing of European Users on the Implementation of the 'America Invents Act' 2011 in Light of Harmonization Issues" to be held on 16 February 2012.

The *epi* delegation will comprise our President and both Vice-Presidents, four committee members, and a former committee member. The delegation will meet in the morning to prepare for the afternoon hearing.

4. Standing Committee on the Law of Patents (SCP)

The 17th Session of the SCP was held in the week of 5th to 9th December 2011. John Brown represented the *epi*. In a nutshell, "[t]he non-exhaustive list of issues will remain open for further elaboration and discussion at the next session of the SCP" (quoted from the Summary of the Chair). The SCP/17 working documents and the Summary by the Chair are available from the WIPO website:
http://www.wipo.int/meetings/en/details.jsp?meeting_id=22209

The 18th Session of the SCP is now scheduled for the week of 21st to 25th May 2012. John Brown and Francis Leyder will represent the *epi*. The SCP/18 working documents will timely be available from the WIPO website.

Notice from the Disciplinary Committee

P. Rosenich (LI), Chair

1) Disciplinary Case CD 5/10 (San Marino)

At the last Council the Chairman of *epi* Disciplinary Committee was asked about a Complaint which was filed with and decided by a Chamber of the Disciplinary Committee regarding the surprising high number of Grandfathers entering the *epi*-Member-List when San Marion acceded he EPC.

Without going into details it can be stated that the Chamber Westerholm decided in their decision CD 5/10 to hand over this case to the Disciplinary Board which has more powerful sanctions at hand. The case is hence pending before the Disciplinary Board (the second half of the first instance in disciplinary matters).

2) Procedure when matters are sent to the Disciplinary Committee „just for information" by an *epi* Member

The Chairman of the Disciplinary Committee decided not to hand over a letter with some possible relevance to disciplinary questions to a Chamber unless said *epi* Member sends a more elaborated complaint.

The situation was:

A first European Patent Attorney filed a claim "Strafanzeige" against another European Patent Attorney with a local executive body.

The first European Attorney sent a plain copy of said claim to the *epi* Disciplinary Committee.

No request regarding disciplinary proceedings was attached and no reasoning with regard to *epi*'s Code of Conduct was provided.

The Chairman of the Disciplinary Committee decided not to hand over the letter with the copy to a Disciplinary Chamber but to ask in writing if said first Attorney requests disciplinary proceedings.

The reasons for this decision was:

a) Local executive bodies like Police or Courts have better investigative powers that the Disciplinary Committee. From this follows that said bodies may easier investigate what really happened. When the facts of the case are then available, the Disciplinary Committee can eventually use these facts in later disciplinary procedures. For that reason it does not make much sense to keep disciplinary proceedings running in parallel to Police or Court actions/proceedings.

b) Said claim did not contain a reference to the Code of Conduct and to a concrete disciplinary misbehavior of the Defendant. For that reason it was not prima facie obvious in which way the defending Attorney acted against the *epi* Code of Conduct.

c) If an *epi* Member (European Patent Attorney) files a request for disciplinary proceedings against another *epi* Member it is expected that the complaining Member provides an elaborated and substantiated request based on the provisions of the *epi* Code of Conduct.

Report of the Litigation Committee

A. Casalonga, Chair

1. Update on the UPC draft until end of 2011

The Polish Presidency was very anxious to reach an agreement on the creation of a Unified Patent Court before end of 2011. This was part of a package aimed at establishing a patent system with unitary effect including the Unitary Patent system with corresponding translation arrangements.

In the middle of December 2011, the Ministers in charge of Intellectual Property held a policy debate on the basis of a compromise package drawn up by the Presidency. The compromise was broadly accepted in substance however no final decision could be obtained before the end of 2011.

The essential elements of the compromise were the following:

a The site of the Central Division of the Court of the first Instance, the Court of Appeal and the Patent Arbitration Center.

Several proposals were made by member states interested in hosting those sites. Paris was proposed for the site of the Central Division. However this proposal was not accepted and Munich respectively London were suggested as alternatives.

No compromise could be reached before the end of 2011 on this point.

b The financial contribution of the member states hosting a local division, a regional division, the Central Division of the Court of Appeal.

It was agreed that the host member states would provide for the necessary facilities equipment and for the initial period the management of the administration staff.

c Other financial contributions of the member states

The general objective is that the Unified Patent Court would become self financing over time. However it was clear that financial contributions would be required in the setting up phase.

On all those points no final decision could be reached before the end of 2011.

2. Last status of the UPC draft at the end of 2011

The EU Commission reacted to the *epi* position paper prepared by the Litigation Committee and agreed upon by the *epi* Council.

Most of the last proposed amendments were in fact in line with the *epi* position paper:

– In the last status of the draft, the patent proprietor should be able to bring an infringement action to the Central Division if a revocation action is already pending before the Central Division

– The parties should have the option to bring an infringement action before the Central Division if the defendant is domiciled outside the European Union.

– If the defendant is domiciled within the European Union and the alleged infringement has occurred in the territory of three or more regional or local divisions, the defendant should be able to request a transfer of the case to the Central Division.

– The transitional period duration is set to 7 years with a possibility of prolongation for a maximum of up to further 7 years.

– The opting out would not only be available for patents granted or applications filed before the entry into force of the agreement but also for patents granted or applications filed during the transitional period.

Concerning the administrative procedures *b*efore the EPO, it is provided that the party affected by a decision of the EPO should be entitled to initiate an administrative proceedings without the need to be represented in such proceedings.

Concerning the compositions of the panels of the court of the first instance, the last draft provides that any panel of the Central Division shall be composed of judges of different nationalities.

3. Follow up of the UPC since beginning of 2012

In view of the absence of decision during the Polish presidency until the end of 2011, the draft is now in the hands of the Danish presidency.

The EU Commission continues to work on the draft of Rules of procedure. An amended draft has been issued.

The Litigation Committee is presently studying this draft and will prepare a position paper which will be submitted in due time to the Board and to the *epi* Council.

Information from the Disciplinary Committee

P. Rosenich (LI), Chair

A Chamber of the Disciplinary Committee ruled on a conflict of interest issue (CD 3/07) related to activities of a person in the past who was then not an *epi* member in relation to activities of the same person challenging the earlier activities after the person became an *epi* member.

SUMMARY

It is not a question of the former relation to the EPO/*epi* (being a member on the *epi* list of representatives or not) but whether the person worked under the umbrella of trust inside a firm or not. According to this case and the persons own admittances said person worked closely with the inventors at a time when she was not admitted on said *epi*-list and transformed the inventors' ideas at least into the bases of an patent application which was filed later and which was – after said person entered said *epi*-list – opposed later by said person.

The defence of said person claiming that the former activities are unrelated to the Code of Professional Conduct was not accepted by the Chamber Norgaardof the *epi* Disciplinary Committee.

OUT OF THE REASONS FOR THE DECISION

The Chamber has carefully analysed the argumentations from the Complainant and the Defendant, however the Chamber found, that the defending European Patent Attorney had direct and extremely close contact to the inventors of the later opposed Patent. This contact was under the provision that said Attorney, as a Candidate was a member/employee of the patentee and hence a fully trustworthy contact ("umbrella of trust") occured. It is very much likely that if the inventors would have known that the Candidate would have been at a later date a representative of an opposing party, the inventors would not have communicated with the Candidate in the same way as the communication happened in the past. This implies to the Disciplinary Committee, that it is likely that secret information was at least offered to the Candidate and – as the defending Attorney explained-said Attorney processed this information as a Candidate in a preparatory work for later filing.

It is a main target of Disciplinary Regulations to protect inventors and applicants in their relation to representatives. This must also be binding for assistants of representatives. And it must be binding also for former assistants of representatives (Candidates), as soon as they become a member of the *epi*.

The activities performed by an Attorney as Candidate are typical activities, which take away the right of said-Attorney to work thereafter for an opposing party on the same matter. "Inside" knowledge remains equally harmful when used against a client. The Disciplinary Committee weighs the protection of clients' trust against the right of third parties to employ highly specialized Attorneys. However in this case it is obvious, that the opponent may employ many other specialized European Patent Attorneys and the opponent cannot rely on a wish or argument that only the respective Attorney should or could do that representation of that particular opposition.

The fact, that a person (candidate) assisted in preparatory work for filing Patent applications on an particular invention during which said person worked under the "umbrella of trust" as an employee of the patentee, forbids that person to work on the same matter on the opponents side as an *epi* member.

epi Position Paper on Patentability of Human Embryonic Stem Cells (hESCs) following CJEU Decision C-34/10 (Oliver Brüstle vs. Greenpeace)

Background

This paper sets out the comments of the *epi* on the policy that the EPO should follow concerning the patentability of human embryonic stem cells (hESCs). It takes account of the paper CA/PL 6/11 (put forward in November to the Committee on Patent Law, CPL) and the SACEPO Working Party Rules paper SACEPO/WPR 3/12, which is due to be considered at the meeting on Friday 3 February 2012.

Legal Basis

The European Patent Organisation decided to incorporate some (but not all) of the provisions of the EU Biotechnology Directive 98/44/EC dated 6 July 1998 into the EPC. In particular, these were Articles 5 and 6 and Recital 42. They were introduced, inter alia, into new Rule 28(c) EPC.

Article 6 says that inventions shall be considered unpatentable "where the commercial exploitation would be contrary to ordre public or morality", which is further clarified (in paragraph 2c) which states that "uses of human embryos for industrial and commercial purposes" shall be considered unpatentable.

Impact on EPO practice

The EPO's policy following this CJEU ruling can only be decided by the Board of Appeal (BoA). Thus the EPO needs a decision from the Technical Board of Appeal (or the Enlarged Board of Appeal) before it can change its existing practice. The Board of Appeal is the highest decision making organ within the EPO on substantive patent law, and thus legally speaking only the Board can decide the impact of this CJEU decision.

Thus only the Board of Appeal can therefore first decide whether (or not, as the case may be) the EPO is bound by this CJEU ruling (and if it is, in what way), or secondly how this decision should be interpreted by the EPO. Thus there should be no rush to immediately follow C-34/10 and change the EPO's practice (assuming that this would be the correct approach).

The question therefore arises as to what the EPO's policy should be in the meantime, before and until a decision by the Board of Appeal is given. This needs to be carefully considered, because the EPO must not refuse European patent applications on grounds that might be criticised or overturned by the Board of Appeal. At the current point in time, therefore, the EPO can therefore only guess as to what the Board will eventually decide regarding C-34/10.

The EPO does, though, need to consider how to deal with this Brüstle decision, even though as yet it has no guidance from the Boards of Appeal. A cautious approach therefore needs to be taken, otherwise the EPO could end up refusing patent applications on grounds which might later be considered by a Board of Appeal to be unfounded. Examining Divisions should not raise objections under Rule 28 that could later be ruled wrong by a BoA.

The EPO is, in effect, entering a new era here. This is the first time that a CJEU decision arguably affects the EPO's policy on what subject matter is patentable (or not). It is therefore an unusual situation legally. Furthermore, the issue of patentability of hESCs is controversial, especially as it includes moral and ethical aspects, and needs to be treated cautiously.

Legal Issues concerning C-34/10

The EPO, and in particular the Boards of Appeal, will first need to decide whether or not the CJEU decision is binding on the EPO. It is indeed true that the EPC now contains certain provisions of the EU Biotechnology Directive. However, it must be remembered that the EPO is not an EU organisation, as the EPC contains several non-EU states. Legal opinions, including those from EU lawyers, confirm this view, namely that the EPO is, in the strictest sense, not legally bound by the CJEU. Note also that in G2/06 the EPO decided that it did not have power to refer a question concerning interpretation of the Biotech Directive to the CJEU.

If a BoA decides that it is in fact bound by CJEU decisions, then arguably this will apply to all CJEU decisions, and not just C-34/10.

The EPO's view that it should not grant patents that will clearly be invalid in EU states is sensible (even though this may be contrary to the EPC). However, that raises the question of what precisely is in fact patentable in various EU member states in view of C-34/10. This has yet to be determined. Indeed, the German court will now have to decide, as a result of C-34/10, how that impacts on the patentability of the invention by Oliver Brüstle, and it has not yet made a decision. The *epi* thinks it would be sensible for the EPO not to "jump the gun", and implement a policy on patentability of hESCs without at least first seeing the decision from the German courts and waiting for a decision from a BoA.

It has to be remembered that, legally, national courts of the EU member states are only constrained to follow CJEU decisions if the issue under consideration by that court is "acteclair". In other words, if the facts of a case are sufficiently different from a CJEU decision, then the national court may reach a different conclusion. Indeed, in that case a further referral to the CJEU may even be necessary. For example, the Brustle patent has a relatively early priority date, of 19 December 1997. Courts may take a different view regarding later EP patent applications relating to hESCs, especially if (at the priority date) the invention could be practiced using a publicly available human ES cell line, without destruction of an embryo.

Note that current EPO policy is that if the priority (or filing) date is later than May 2003, when stem cell lines were publicly available, then Rule 28(c) does not apply, and the invention is not considered to be immoral under Article 53(a) EPC.

A Board of Appeal will also need to decide whether or not C-34/10 is contrary to TRIPS, in which Article 27(1) states that "patents shall be available for any inventions, whether products or processes in all fields of technology".

Interpretation of C-34/10 and question 3

The relevant legal provision is that inventions are unpatentable if they relate to "uses of human embryos for industrial and commercial purposes". It was on this provision that the three questions were referred to CJEU. The answer to the third question is perhaps the most

important, where it is stated that an invention is not patentable where:

> "the technical teaching which is subject matter of a patent application requires the prior destruction of human embryos or their use as base material, whatever the stage at which that takes place and if the description of technical teaching claimed does not refer to the use of human embryos".

This quote is only one English translation of the answer to 3rd question, which was originally given in German. The CJEU initially issued a first English translation, which was later amended. There is therefore some doubt over the exact meaning of the answer to question 3 in the German language, let alone exactly what it means in English.

The answer to question 3 would, at first sight appear to go beyond decision G2/06. This is because the EPO's current practice is to allow cases filed after May 2003 and where reliance can be made on a publicly available stem cell line. The practice of the EPO concerning deposited stem cells lines flows from the G2/06 decision, and any policy by the EPO, prior to a decision of the Boards of Appeal, that goes beyond G2/06 is arguably ultra vires. Decision C-34/10 arguably goes beyond G 2/06, and indeed the EPO's current policy (with the May 2003 threshold) and so a further BoA decision is needed to see if this indeed so. Note that G 2/06 only dealt with the situation where the performance of the invention "necessarily" involved the destruction of a human embryo. This is not the case for many later, downstream, inventions.

The law says that what is unpatentable is the commercial exploitation of inventions, not the making of the invention itself.

This is confirmed by paragraph 49 of C-34/10, which states that an invention is regarded as "unpatentable … where the implementation of the invention requires destruction of human embryos". In other words, if the performance of the invention requires destroying human embryos, then it is unpatentable. That does not, however, mean that an invention is unpatentable if at some stage, far upstream and distant from making the invention, a human embryo was destroyed. In any event it may not be possible for the EPO (or indeed the applicant) to be absolutely sure that an embryo was in fact destroyed many years before the invention claimed, possibly by a third party and in a different country. Thus the EPO faces a real practical problem in that it will not be able to clearly check for embryo destruction, and so apply the law, when the invention claimed is so far removed and distant from any such destruction.

The answer to question 3 refers to the prior destruction of human embryos, or their use as base material, even if the technical teaching claimed does not refer to the use of human embryos. However, it is established and incontrovertible EPO law that the invention is defined by the claims, and supported by the description. So, as a practical matter, one cannot ignore the description, nor the scope of matter that is being claimed. Otherwise, every EP patent application, even ones that only in passing mention hESCs, become unpatentable.

The technical teaching of the patent application must therefore be considered, and cannot, as a practical matter, just be ignored. If, for example, a technical teaching refers to human ES cells, as well as other cell types, this must not be used to taint the entire application given that there may be non-ES cell aspects to the invention.

Thus, the *epi* considers that, when sensibly interpreted, the C-34/10 cannot render unpatentable an invention which clearly does not require the destruction of a human embryo. So, a method of producing pluripotent stem cells (iPS), for example by expressing an adult cell genes that are merely identified by screening human ES cells, should be patentable. In addition, new culture media or culture vessels should be patentable, as the invention will be applicable to ES as well as non-ES cells. In a similar vein, methods of culturing or preserving cells should not be excluded, even if the claims cover culturing hECSs (as well as other cell types).

None of these inventions require the destruction of human embryos for its exploitation or performance, and therefore they must all be patentable.

Commercial Implications

Stem cell research is an extremely important and growing area of science. It is capable of huge potential, and shows enormous promise. It may be able to treat patients for diseases which otherwise do not currently have a cure, such as neurodegenerative disorders such as ALS and Parkinson's disease. It should be remembered that the EU actually funds research in this area. The EPO's mandate is to grant patents, and to encourage innovation in EPC states. It should not therefore deny patent protection for inventions arising from scientific research in this area, at least not until a Board of Appeal has decided on the impact of C-34/10.

epi Mock EQEs and Training Seminars 2012

epi will organise a series of Mock EQEs and seminars (for patent attorneys and paralegals) in 2012.

For further information, please visit our website (*www.patentepi.com*) or contact the *epi* Secretariat (email: *education@patentepi.com*).

Tutors wanted

As *epi* is always looking to add new tutors to its current group we would like to know whether you are – in principle – interested in participating in this activity. In case you decide to volunteer your commitment is conditional: you will always be asked whether you are willing to tutor in a specific event.

Please volunteer by filling in the form available on the *epi* website (*www.patentepi.com* –> EQE and Training).

For any further queries, kindly contact the *epi* Secretariat (email: *education@patentepi.com*).

Summer and autumn tutorial

The epi tutorials are EQE training events that provide candidates with an opportunity to sit the A/B/C/D papers privately, to send the papers to an experienced epi tutor assigned to them and to have their individual papers reviewed and discussed.

The schedule is as follows:

1. Candidates enrol indicating the papers they want to sit. The enrolment is confirmed by the epi Secretariat and the candidates are informed about the assigned tutor(s). Two different tutors may be assigned for papers A/B and for papers C/D. A tutor will be assigned to a group of not more than 3 to 5 candidates to allow intensive discussions.

2. In a first round candidates write the papers privately (it is recommended to do so in the time the EQE allows for the particular paper).

3. Candidates send their paper(s) to the tutor they have been assigned to by the epi Secretariat. The tutor reviews the paper(s).
   Candidates who do not get an answer to their papers from their tutor by a due date are requested to contact the epi Secretariat immediately.

4. In a second round discussions are scheduled for papers A/B and C/D respectively. The papers are discussed in general, particular problems are addressed, individual solutions commented on and questions answered. The format is flexible: it is up to the tutor and the particular group candidates to decide upon a commonly agreeable form for the tutoring session. In case it is decided that a meeting should be held with all candidates, time and place is to be agreed upon by the tutor and the candidates. The candidates provide in this case their own travel expenses as well as the travel expenses of their tutor. Alternatively a telephone conference could be arranged, but as indicated it is up to the tutor/candidates to agree upon a suitable format.

5. Exam papers to be discussed
   a) Summer tutorial: 2009, 2010, 2011
   b) Autumn tutorial: 2010, 2011, 2012

6. Schedule
   As each year epi suggests a schedule to ensure a timely feedback and to avoid an overlap of summer and autumn tutorial. This schedule should be seen as a proposal. The final agreement on the date when papers should be returned and the date of the feedback session is to be decided between tutor and candidate(s).
   a) Summer tutorial:
      > Deadline for registration: May 25, 2012
      > Papers to be returned: June 22, 2012
      > Feedback to be given until: September 7, 2012

   b) Autumn tutorial:
      > Deadline for registration: September 14, 2012
      > Papers to be returned: October 19, 2012
      > Feedback to be given until: December 14, 2012

7. Fees for the tutorials: 180,– € for non epi students
   90,– € for epi students

For further information/enrolment form please visit our website (www.patentepi.com -> EQE and Training) or contact the epi Secretariat
(email: education@patentepi.com).

Praktika Extern Program

Information from *epi* President T. Tangena (NL)

Last year *epi* and EPO had a so-called Praktika Extern program which dealt with internships of examiners at patent attorney firms and industrial patent departments. In the 2011 program 36 examiners participated. The program lasted between 10 and 20 days and took place in the 3rd and 4th quarter of the year. The program was a great success and the comments from both examiners and hosting firms were very positive. So it has been decided to establish this as a yearly program that will also run in 2012.

If you, as a patent attorney firm or as an industrial patent department, are willing to host an examiner please send an e-mail to the *epi*-secretariat indicating your willingness and the particular technical area that your firm or departments covers. This in order to be able to match your interests with those of examiners.

epi Artists Exhibition 2012

T. Tangena (NL), *epi* President

On 6–17 February an exhibition of art made by *epi* members was held in the EPO-PschorrHoefe building. It was the ninth time the exhibition was held. This year the exhibition had as its theme a saying from Ernst Levy (1881-1968), a German lawyer: 'Man will begin to recover the moment he takes art as seriously as physics, chemistry or money'. Jacqueline Kalbe and Renate Schellenberg from the *epi* Secretariat, who organized the exhibition, stated: 'The *epi* artists are already following this philosophy and we ask visitors to the exhibition to contemplate, to be inspired and to enjoy the art'.

For the exhibition 18 *epi* members had sent in pieces of art. These members came from many EPC countries. Some artists had already participated several times before. The art pieces were divided over two floors of the EPO building: the entrance hall and the first floor, so that the art could be seen by many visitors. The art was very diverse with photographs, paintings, drawings, sculptures and ceramics. The art styles reflected the artists' European background with impressionistic, surrealistic, modern, abstract art and East-European icons.

On February 6th Tony Tangena, *epi* President and Raimund Lutz, Vice-President Directorate-General Legal/ International Affairs of the EPO opened the exhibition. Tony Tangena reminded us in his opening speech that creativity and diversity as shown in the exhibition is typical for the patent attorney profession. Nowadays diversity in Europe is often criticized, but it is good that this art exhibition shows that diversity can also be an asset. Creativity and diversity form part of Europe's strength and heritage.

The exhibition was a great success and the *epi* would like to thank all artists, organizers and the EPO for making this event possible.

List of Professional Representatives

by their place of business or employment in the Contracting states and their entry according to A134(2) (EQE) or A134(3) (Grandfathers)

17.02.2012	A134(2) – EQE	A134(3) – Grandfathers	All professional representatives
Contr. State	**Number**	**Number**	**Number**
AL	0	31	31
AT	97	30	127
BE	151	30	181
BG	0	67	67
CH	362	94	456
CY	0	12	12
CZ	1	98	99
DE	2966	573	3539
DK	160	49	209
EE	0	26	26
ES	62	111	173
FI	56	115	171
FR	788	161	949
GB	1685	294	1979
GR	2	22	24
HR	0	27	27
HU	3	86	89
IE	38	27	65
IS	0	20	20
IT	268	201	469

17.02.2012	A134(2) – EQE	A134(3) – Grandfathers	All professional representatives
Contr. State	**Number**	**Number**	**Number**
LI	15	3	18
LT	0	26	26
LU	15	3	18
LV	0	21	21
MC	1	2	3
MK	0	40	40
MT	0	7	7
NL	417	38	455
NO	3	97	100
PL	2	338	340
PT	1	41	42
RO	1	61	62
RS	0	56	56
SE	263	70	333
SI	2	29	31
SK	0	38	38
SM	2	24	26
TR	2	96	98
Total:	**7363**	**3064**	**10427**

Source: Legal Division/EPO

Next Board and Council Meetings

Board Meetings

86th Board meeting on 17th March 2012 in Brussels (BE)
87th Board meeting on 6th October 2012 in Istanbul (TR)
88th Board meeting on 23th March 2013 in Stockholm (SE)
89th Board meeting on 28th September 2013 in Riga (LV)

Council Meetings

72nd Council meeting on 21st April 2012 in Bucharest (RO)
73rd Council meeting on 10th November 2012 in Hamburg (DE)

The CEIPI Colloque 2012 pertaining to the new European Patent Court will take place on April 26/27, 2012 in the European Parliament in Strasbourg.

For further information/registration kindly consult the CEIPI website.

News concerning *epi* Council

Change of Practice

– Mr Nils Ekström who was elected Council member for Sweden for private practice has left private practice as from 17 February 2012. He therefore resigned from his position in Council. Mr Lennart Karlström will take over as full member for Sweden.

– Mr Sigmar Lampe laid down his membership as substitute Council member for Luxembourg from November 2011 since he left private practice. Ms Valérie Mellet took over as substitute member for Luxembourg.

Dear epi members,

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Issue	Deadline	Publication
2/2012	11 May 2012	30 June 2012
3/2012	10 August 2012	30 September 2012
4/2012	02 November 2012	30 December 2012

Plant patents an endangered species? – surprising new developments in the tomato case[1]

by O. Malek[2], C. Hames[3], H. Waterman[4] and G. Ehrlich[5,6]

The Technical Board in charge of the controversial tomato case[7] intends to again refer questions of law to the Enlarged Board of Appeal (EBA). Now, the patentability under Article 53(b) EPC of product claims on plants will be at issue. While probably more than 99 % of the European patent practitioners thought that this matter has been settled since G 1/98, there is obviously an interest in scrutinizing the issue in light of the recent EBA decision G 1/08[8]. We consider this an alarming development. Therefore, we would like to spur a public debate by writing this article.

A. Introduction

To summarize the last events in the tomato case: In its decision on the patentability of plant breeding methods, G 1/08, the EBA answered the referred questions of law as follows:

"1. A non-microbiological process for the production of plants which contains or consists of the steps of sexually crossing the whole genomes of plants and of subsequently selecting plants is in principle excluded from patentability as being "essentially biological" within the meaning of Article 53(b) EPC.
2. Such a process does not escape the exclusion of Article 53(b) EPC merely because it contains, as a further step or as part of any of the steps of crossing and selection, a step of a technical nature which serves to enable or assist the performance of the steps of sexually crossing the whole genomes of plants or of subsequently selecting plants.
3. If, however, such a process contains within the steps of sexually crossing and selecting an additional step of a technical nature, which step by itself introduces a trait into the genome or modifies a trait in the genome of the plant produced, so that the introduction or modification of that trait is not the result of the mixing of the genes of the plants chosen for sexual crossing, then the process is not excluded from patentability under Article 53(b) EPC.
4. In the context of examining whether such a process is excluded from patentability as being "essentially biological" within the meaning of Article 53(b) EPC, it is not relevant whether a step of a technical nature is a new or known measure, whether it is trivial or a fundamental alteration of a known process, whether it does or could occur in nature or whether the essence of the invention lies in it."

The tomato case was then remitted to Technical Board of Appeal (TBA) 3.3.04 for further examination. Taking into account the EBA decision, the Patentee adapted its claims to the new legal situation by deleting any claims directed to breeding methods. The remaining claims referred to tomato fruits defined by specific phenotypic features[9]. Oral proceedings took place on November 8, 2011, with the notorious anti-patent protesters demonstrating in front of the EPO and also composing the majority of the public audience.

The Opponent, Unilever, vigorously insisted on the point that compound claims directed to tomato fruit do not comply with Article 53(b) EPC because such claims would cover the products of a conventional breeding process and, thus, would bar breeders from carrying out a method that could not be patentable under G 1/08. In other words, such claims would allegedly run counter the gist of the EBA decision. Surprisingly, the Board took up these concerns and announced its sympathy for again referring this case to the EBA to resolve this point. The parties were invited to formulate corresponding questions of law to be referred to the EBA. Unilever submitted the following:

"1. Is a claim which is not directed to an essentially biological process per se as defined in Article 53(b) EPC and G 1/08 patentable, if such claim would render inoperative the exclusion from patentability as defined in G 1/08.
2. Is a claim patentable if such claim is directed to a plant, fruit, seed or any other part of an essentially biological process as defined in Article 53(b) and G 1/08, if such claim would render inoperative the exclusion from patentability as defined in G 1/08.

1 submitted for publication on February 10, 2012; the authors' view is their own personal view

2 Dr. rer. nat., Dipl. Biol., European Patent Attorney, Vossius & Partner, Munich, Germany; representative of Patentee in the so-called „tomato case" G 1/08 concerning EPB1 1 211 926

3 Dr. rer. nat., Dipl. Biol., Vossius & Partner, Munich, Germany

4 Ph.D. Mol. Biol. Biochem., Israeli Patent Attorney, Head of Biotech Dept., EHRLICH & FENSTER, G. E. Ehrlich (1995) Ltd., representative of the Patentee in the „tomato case"

5 Ph.D. Mol. Biol., LL.B., Israeli Patent Attorney, Managing Director, EHRLICH & FENSTER, G. E. Ehrlich (1995) Ltd., representative of the Patentee in the „tomato case".

6 We are grateful to Jennifer L. Enmon, Ph.D., J.D., Dr. Friederike Stolzenburg, Dr. Thure Schubert, and Dr. Georg Rauh, each from Vossius & Partner, for supporting us

7 Opposition appeal case with respect to EPB1 1 211 926 owned by the State of Israel, Ministry of Agriculture

8 The EBA dealt with this matter in two consolidated proceedings from which decisions G 2/07 (concerning EPB1 1 069 819; the so-called „broccoli case") and G 1/08 (the „tomato case") arose. For simplicity, we will only refer to G 1/08 since this is the one pertaining to the tomato case primarily at issue herein.

9 Claim 1 of the Main Request as filed on September 7, 2011 is as follows: „A tomato fruit of the species Lycopersicon esculentum which is naturally dehydrated, wherein natural dehydration is defined as wrinkling of skin of the tomato fruit when the fruit is allowed to remain on the plant after a normal ripe harvest stage, said natural dehydration being generally unaccompanied by microbial spoilage."

3. If such claim is patentable which other requirements are there to be met?
4. If such claim is unpatentable which other requirements need to be met to escape the exclusion from patentability as defined in G 1/08."

However, the TBA is not bound by the suggested questions. In essence, Unilever considers it necessary to determine whether product patents on plants (or fruit, seed or other parts of a plant), wherein the plant is obtained by using a breeding process, which is excluded from patentability according to G 1/08 (i.e. a non-microbiological process for the production of plants which contains or consists of the steps of sexually crossing the whole genomes of plants and of subsequently selecting plants), contravenes the EBA decision.

The TBA has not yet issued a referral decision. As is apparent from the minutes of the oral proceedings, the Board announced its intention to refer questions of law to the EBA and closed the debate in relation to Article 53(b) EPC. If the case is indeed referred to and taken up by the EBA, it would be the first time that the EBA would address one patent twice. As this case has already proven to be a "hot issue", the judicial, political and – not the least – economic implications of the surprising new developments in the tomato case cannot be overestimated. In the following, we address some important aspects of this case.

B. Surprise surprise

What was the surprise that most of the observers felt when they heard about the announced new referral? A problem was suddenly recognized to exist that seemed to have been resolved for a long time. In the 1990s, there had already been a debate about whether plants could be patentable subject-matter in view of the Article 53(b) provision that European patents shall not be granted for plant varieties. It terminated by the issuance of G 1/98 in which the EBA held:

"I. A claim wherein specific plant varieties are not individually claimed is not excluded from patentability under Article 53(b) EPC even though it may embrace plant varieties.

II. When a claim to a process for the production of a plant variety is examined, Article 64(2) EPC is not to be taken into consideration.

III. The exception to patentability in Article 53(b), first half-sentence, EPC applies to plant varieties irrespective of the way in which they were produced. Therefore, plant varieties containing genes introduced into an ancestral plant by recombinant gene technology are excluded from patentability."

(G 1/98; Headnotes)

Thus, following this decision, a product claim on a plant would be patentable as long as it does not refer to one or more individual plant varieties. This is clearly meant as a necessary and sufficient requirement for plant claims to be acceptable since the Article solely forbids the patenting of plant varieties (and this provision was exhaustively interpreted by the EBA). Significantly, according to Headnote III (and corresponding explanations in section 5 of the Reasons of G 1/98), the prohibition of patenting plant varieties applies *irrespective of the origin of the variety*. This finding was included in G 1/98 in order to clarify that the production by way of genetic engineering does not create an escape from the exclusion. The EBA justified this by emphasizing the purpose of the exclusion, formulated in a nutshell as follows:

"The exclusion in Article 53(b) EPC was made to serve the purpose of excluding from patentability subject-matter which is eligible for protection under the plant breeders' rights system."

(G 1/98; point 5.2 of the Reasons; the detailed reasoning being outlined in points 3.6 to 3.10 of said decision)

No other purpose was identified. Thus, with the same right, one could conclude that the exclusion also applies if the respective plant variety is generated by conventional breeding. As a logical consequence, the exclusion would not apply if the claim related to a more generically defined conventionally bred plant entity.

Therefore, each patent practitioner could expect that the EPO would consider a claim directed to a plant as not being excluded if it is not confined to one or more individual plant varieties. In this regard, it should be kept in mind that, at the time G 1/98 resolved the disputes on the patentability of plants (the decision issued in December 1999), it was clear that, under certain circumstances, plant breeding processes – though broadly applicable with the product not being confined to varieties – might not be patentable under Article 53(b) EPC (i.e. falling under the provision that a European patent shall not be granted in respect of essentially biological processes for the production of plants). The landmark decision T 320/87 (Lubrizol), handed down on November 10, 1988, formulated the corresponding criteria. Nonetheless, when the EBA was dealing with the G 1/98 case, the question that a plant could not be patentable because it was obtained by an excluded process did not arise, even though the legal background was thoroughly analysed. On the other hand, why should it have arisen, given that the law only requires "plant varieties" to be excluded? No other excluding provision is specified in this context.

After issuance of G 1/98, patents were granted on plants defined as the product of a breeding process, whereby the process as such was not patentable. This disparity might have appeared somewhat paradoxical. But the two provisions were applied independently and no one saw a need to change this practice. In particular, the EU law makers maintained the parallel provisions in their Biotech Directive 98/44/EC of July 6, 1998[10] (see therein Articles 2(2), (3) and 4). Last, but not least, in G 1/08, the EBA perpetuated this practice. When faced with a suggestion to overcome the disparity by interpreting the term "essentially biological processes for the

10 The Biotech Directive (see OJ EPO 2/1999, 101) was introduced by the EPO Administrative Council as Chapter VI into the Implementing Regulations with the decision of June 16, 1999, which entered into force on September 1, 1999.

production of plants" as only referring to processes that result in plant varieties, the EBA insisted that the difference in terms in Article 53(b) EPC (i.e. "plant" vs. "plant variety") must have some meaning so that the two plant-related exclusions have to be handled separately (see G 1/08, point 6.1.1 of the Reasons). Even the same TBA that is now intending to refer the tomato case to the EBA apparently had no objections in the parallel broccoli case, where the claimed broccoli plant is defined as the product of a breeding process that would not overcome the Article 53(b) hurdle.[11]

In view of all this, it should be understandable that many observers – like the authors of this article – were very surprised when the TBA gave Unilever's approach any credit and considered that G 1/08 created a new situation affecting the patentability of plants as such. This discussion could have arisen long ago; at least since G 1/98. Clearly, G 1/08 could not have caused it.

C. Plant patents are needed

What seems to be missing in the legal debates summarized above is that, objectively, there is a need for effective patent protection of plant-related inventions. There are those that say that plant variety protection (PVP) is the right instrument for covering this technical field, in particular, when products of "conventional" breeding are concerned. Such views are often supplemented by the concession that patents could still be possible for transgenic plants.

However, there are important reasons why this view should not be followed. In Europe, it is practically impossible to obtain approval for the growth of transgenic plants. And, if such approval is granted, producers are in fear of aggressive campaigners trying to destroy their crops. BASF's recent decision to shut down transgenic plant research facilities and activities in Europe and move them to the US highlights the dismal prospects of this technology in Europe. In view of this, the concession that patent protection for transgenic plants may be acceptable appears hollow.

Indeed, given the generally negative publicity surrounding genetic engineering, plant producers in Europe have more and more focused their efforts on research and development that does not require the introduction of recombinant DNA into plants. Such approaches might encompass traditional breeding on a scale that a farmer could do. At the other extreme, much more sophisticated technologies may be involved, utilizing biotechnological tools, such as molecular genetic markers. Innovations resulting from the latter approaches are very capital- and time-intensive. Investment in such innovations requires efficient protection, which clearly brings into question the relevance of PVP. While the final outcome in the form of the marketable plant variety may well be protected by PVP, the more basic innovation, that is, e.g., a new agronomically characteristic (a new trait), is not protectable in this way. Would one have one or more specific plant varieties PVP-protected, it would be easy for a third party to use such plants for further breeding and thereby gain possession of the trait and, at the same time, escaping the protected area, without being liable to the inventor. The unsatisfactory limitations of the PVP system as regards scope of protection and enforcement are well-documented in the literature.[12]

By the introduction of Article 14.5 to the UPOV Convention 1991 providing for protection of essentially derived varieties (EDV), an attempt was made to broaden the scope of PVP or, in other words, to introduce a "doctrine-of equivalents"-like concept to the PVP system. Article 14.5 allows for the introduction of varieties that are essentially derived from another protected (initial) variety. The regulation defines that if a breeder brings a new variety onto the market that is not significantly different from the initial variety, breeder's right is applicable. This means that for example a mutation may create a difference to an initial variety, but the developer of the mutant has to ask for permission from the owner of breeder's rights to the initial variety if he wants to sell his plant material. In general, the intention of Article 14.5 was to stipulate that mutation finders, who hardly do any breeding work, have to pay a kind of royalty to the breeder who has invested in breeding and selection programs. It seems, however, that it will hardly ever be in the interest of a breeder holding a PVP-protected initial variety to give permission to the developer of the EDV. Moreover, EDV protection has been found controversial because of its poor legal certainty. There is little consensus over the genetic conformity threshold required for the identification of an EDV as opposed to the corresponding initial variety. For instance, a recent case – Astee Flowers vs. Danziger "Dan" Flowers Farm concerning the Gypsophila cultivar "Blancanieves" – resulted in conflicting rulings in the Netherlands and Israel. In the Netherlands, the cultivar "Blancanieves", which is a polyploid variety of a Gypsophila cultivar named "Million Stars" originally cultivated by Danziger "Dan" Flowers Farm, was determined not to be an EDV, whereas an Israeli court reached the opposite decision. Thus, the attempt to introduce broader PVP protection via EDV can be regarded as problematic and less attractive.

In view of the above-outlined downsides of PVP, either patents or trade secrets would be the feasible alternatives for protecting plant-related innovation on a basic scale. However, what can one do when more than one entity is collaborating or academics develop the invention but require an industry partner for commercialization? In such cases of technology transfer, patent protection is the instrument of choice to ensure that third parties do not reap the benefits of an expensive investment without compensating the innovators. It seems illogical that the European patent system should pre-

11 The oral proceedings scheduled by the TBA in the broccoli case for October 26, 2011 were cancelled by the Board after the Patentee filed new claims in which the breeding process claims were deleted.

12 Kock et al., „The legal protection of plant-biotechnological inventions and plant varieties in light of the EC Biopatent Directive, IIC 2 (2006), 135"

clude patents to those who provide plant-related innovations; in particular, in circumstances like those just mentioned where appropriate alternatives are scarce and provide inadequate protection. Thus, it is expected that, for a considerable part of the plant industry, a prohibition of patenting plants that are produced by breeding processes, which are not patentable according to G 1/08, would cause severe economic damage.

This also raises the question of whether it would be good for society if patenting practice would be restricted in this way. There is an ongoing, if not increasing, need for plant improvements in view of the variety of challenges, such as global population growth, climate change and the focus on biofuels. Up to now, the global production of crops has been steadily rising. For instance, given the increasing desertification and salting of previously cultivatable land, more drought- and salt resistant crops will be needed. To keep pace with the ever more demanding properties that crop plants have to satisfy, the development of new traits will be crucial. As a rough estimate, the establishment of a new trait may take 10 years, with enormous capital input. Such investments require adequate protection, and if the trait is one that may be employed in various genetic backgrounds of a given crop species (i. e. a generic teaching above the level of plant variety), PVP is certainly not suitable to achieve broad protection, as is explained above.

The intention to refer questions of law to the EBA indicates a worrying trend of the EPO towards that practiced in emerging and developing countries, in which plant-related innovation can solely be protected by the *sui generis* system of PVP (see Table 1). However, with many leading biotechnological or agronomical companies domiciled in Europe, and thus forming a centre of research and development in the plant field, this region cannot afford restricting IP for this key technology to PVP.

Table 1: The legal status as regards protection of plants in representative jurisdictions.

	Utility Patent		sui generis plant variety protection (PVP)
	Non-transgenic Plants	Transgenic Plants	
China	–	–	+
India	–	–	+
Indonesia	–	–	+
Thailand	–	–	+
Brazil	–	–	+
Australia	+	+	+
USA	+	+	+
Israel	+	+	+
Europe	?	+	+

The above notions show that, under certain circumstances, it may well make sense to have the option of using patents for protecting plant-related innovations, in particular, in the field of the so-called conventional breeding.

D. Erosion of absolute compound protection – threat to legal certainty

Proponents of a restricted product protection with respect to plants like, in the tomato case, Unilever or the German Plant Breeders' Association appear to suggest that plant patents should still be possible, however, only for what they call "biotechnological" inventions, i. e. inventions where the plant is modified by techniques such as genetic engineering. If a plant is generated by a process that involves "sexually crossing the whole genomes of plants and … subsequently selecting plants" (Headnote I of G 1/08), this plant should be excluded from patent protection under Article 53(b) EPC. However, can one always know whether a plant is generated in this way? In some situations, it may be easy to determine whether a claimed plant is produced by an essentially biological process in the sense of G 1/08. Product-by-process claims will, in general, belong to this category. However, what is to be done when the plant is defined in a claim solely by the use of genotypic or phenotypic features? The patent might not even describe how the plants were obtained but might merely teach molecular markers, i. e. enabling the reproduction of the plant either by marker-assisted breeding or genetic engineering. How would such a case be handled? Would it be necessary to include a disclaimer such as "*with the proviso that said plant is not obtained by a process comprising sexually crossing the whole genomes of plants and subsequently selecting plants*"? This cannot be a realistic option since, for example, commercially available transgenic plants are not only produced by a step of transgenic engineering, but always require several steps of crossing, backcrossing and selection in order to introduce the transgenic event into elite lines ready for marketing.

The situation might even become more complicated due to new techniques of plant modification which are not "classic" genetic engineering, but certainly also not conventional breeding according to the EBA's definition. For instance, the company Cibus Global (formerly Valigen) has provided a technology by which plant genes can be modified in a targeted manner without having to transform the plants as is usual for transgenic plants[13]. The genome of so-produced plants is not distinguishable from the genome of wild-type plants because, unlike transgenic plants, this method does not leave traces of vector sequences, antibiotic resistance markers or other uncommon DNA sequences at untypical positions in the host's genome. Thus, whereas normal transgenic plants are distinguishable from other plants by structural features, how can one tell from a plant that has undergone site-directed mutagenesis whether it was produced by means of conventional breeding or by a novel molecular-biological technique? If a plant is defined in a patent only by phenotypic features (e.g. an extraordinarily advantageous composition of substances in the fruit juice) and the patent provides alternative teachings, such as con-

13 See e.g. EP-patent No. EP-B1 1 210 123

ventional breeding and targeted gene modification, both potentially leading to structurally identical organisms, it is no longer possible to make such a distinction. Certainly, a disclaimer would be entirely unfeasible in that context.

The above considerations show that legal uncertainty would be the inevitable consequence of a restriction of compound protection of plant inventions based on the method by which the plants are obtained.

E. Problems arising from G 1/08

However, the seed of legal uncertainty is already in G 1/08. Therein, the EBA held that plant production processes are excluded as soon as they comprise crossing and selection, and that processes like genetic engineering do not fall under the ban (see G 1/08, point 6.4.3.2, penultimate paragraph, of the Reasons). However, if steps of both technologies are combined in one method, the exclusion shall prevail. The EBA was of the opinion that additional steps upstream or downstream of crossing and selection cannot carry the plant production process outside the exclusion. Specifically, the EBA suggested that, e.g., a claimed genetic engineering process "should not, explicitly or implicitly, include the sexual crossing and selection process" (see G 1/08, point 6.4.3.2, penultimate paragraph, of the Reasons).

However, what about "comprising" language? Haven't we been educated to draft method claims by defining the method as "comprising" the steps rather than "consisting of" the steps in order to attain a reasonable scope of protection? Would a genetic engineering method drafted using comprising language not also cover embodiments in which the obtained transgenic plant is crossed with another line and further selected in order to yield commercially acceptable plants? Certainly, that is what a seed-producing company would normally do when it produces a marketable transgenic plant line.

This leads to two fact situations: (i) The claim defines a method for producing a plant as "consisting of" a step of transforming a plant with a certain transgene or (ii) the claim defines the method as "comprising" said plant transformation step.

In the first case, the claim should be acceptable under the ruling of G 1/08. However, one may ask whether it provides a reasonable scope of protection. The direct product of a so-defined method would hardly be something that a seed producer would sell on the market.

On the other hand, in the second case, one may wonder whether the use of the "comprising" language has the consequence that crossing and selection is implicitly included. By analogy, if a generically formulated diagnostic process claim covers acts performed on the human or animal body, even though not explicitly stated, such a claim is normally objected to by the EPO under Article 53(c) EPC for unduly relating to a method of treatment. Thus, it is difficult to imagine that a plant production process, theoretically embracing crossing and selection, should be handled any differently. However, if the EPO decides that plant production processes defined by using comprising language are allowable, as long as crossing and selection are not explicitly specified in the claim, then the term "comprising" would experience a difference in meaning, i.e. changing from "potentially containing anything in addition" to "potentially containing anything in addition *that is allowable*". Such a change can of course not be desirable since it would be against established practice of the EPO according to which a term in a claim has to have the meaning that a skilled person would understand based on common general knowledge and the patent's teaching. To impose an additional legal interpretation on the term "comprising" would not be commensurate with the principle of legal certainty. In particular, third parties would have difficulties in deciding whether they infringe the claim or not.

Potential consequences of G 1/08 as regards the scope of protection of claims on methods for producing transgenic plants can be visualized with the consideration of plant importation. Assume company A holds a European patent according to the above option (i), i.e. defining a method for producing transgenic plants utilizing "consisting of" language and only containing the step of transforming a plant. If a third party produces a transgenic plant according to this method in a patent-free country and imports it to Europe, it is questionable whether the imported good is covered by the patent as a direct product of the claimed method since normally it is not the plant resulting from the claimed transformation step that is marketed, but a plant that has gone through several subsequent breeding steps. Certainly, a patent claiming a corresponding method drafted using the "comprising" language would provide its proprietor with a much better position in this regard. Thus, it is clear that the EBA decision not only created legal uncertainty, but also led to potential disadvantages in patent protection, even in the field of transgenic plants.

To summarize, it is difficult to follow G 1/08 as regards the finding that a claimed genetic engineering process "should not, explicitly or implicitly, include the sexual crossing and selection process". In particular, confusion arises about the meaning of the term "comprising".

The above discussion shows that not only the potential referral that the TBA envisages in the tomato case, but also G 1/08 itself has created legal uncertainty, leading to grey areas with respect to the protection of both plant production processes and plant products. A consequence of this can already be seen in the Netherlands. On January 31, 2012, the Court of The Hague decided on the validity of claims to radish sprouts in the infringement case Taste of Nature vs. Cresco[14]. In claim 1 of the patent at issue, the radish plant was inter alia defined as being obtainable by a process involving screening, selfing and/or crossing steps. The Defendant pointed to the recent developments in the present tomato case and argued, in line with Unilever, that a plant obtainable by a

14 Court of The Hague case 408315 /KG ZA 11-1414; judgment of January 31, 2012; EPB1 1 290 938

process that would be excluded from patentability according to G 1/08 cannot be patentable either. Interestingly, the Judge followed this view and stated in the written decision that the former EBA decision G 1/98 is not applicable because it relates to transgenic plants, is dated before G 1/08 and is not relevant because the interpretation of the exclusion of essentially biological processes was not interpreted therein (point 4.10 of said judgment).

It appears as if the Judge has misinterpreted G 1/98 in several respects and one can contemplate whether this would have happened if G 1/08 had been drafted in a way to provide clear guidance and logical structure, and in particular, were consistent with the reasoning developed in G 1/98.

F. Impact of political pressure?

Greenpeace and affiliated non-governmental organizations such as No Patents on Seeds celebrated the announced intention to once again refer the tomato case to the EBA as a further partial victory on their crusade to the total abolishment of patents on living matter[15]. These groups are fighting on the legislative level, requesting amendments of the patent law, and also on the judicial level by mounting public pressure on institutions like the EPO. We can be grateful that the EPO has a good tradition of resisting any influence of such activities. The sentence "[t]he EPO has not been vested with the task of taking into account the economic effects of the grant of patents in specific areas and of restricting the field of patentable subject-matter accordingly" coined by the EBA in G 1/98 (see point 3.9 of the Reasons) has repeatedly been cited by the Technical Boards.

However, the surprising conduct of the TBA in the present tomato case might indicate a slight, but decisive change. Indeed, the pressure is currently becoming stronger. For instance, on September 24, 2010, the President of the EPO was visited by the German Federal Agriculture Minister, Ms. Aigner, who is a known opponent of patents on plants and animals. In a press release of the EPO reporting on this event[16], the President stated: "The EPO is very aware of its responsibilities to society in this field and it applies the most exacting standards to its examination of applications for biotechnology patents." He even proudly emphasized that "[t]his stringency means that only 28 % of all biotechnology applications received by the EPO are granted, compared with an average of 42 % in other technical fields" and that "[a]s a result of our strict examination procedure and associated legislation, the number of patents giving protection to plants and animals is declining." One may wonder how the Boards of Appeal should not be influenced when the highest representative of the EPO formulates such a position.[17]

It is getting even worse: On January 17, 2012, the German Bundestag informed about a motion for a resolution requested by a grand coalition of the conservative, social-democrat, green and liberal parties (representing 88 % of the seats) asking the government to take measures to amend the Biotech Directive so that

– patents may no longer be granted for conventional breeding methods, farm animals and agricultural crops obtained thereby, as well as offspring and products thereof; and that
– in case of farm animals and agricultural crops, the protection conferred by product-by-process patents shall be limited to the use of the process indicated in the patent.[18]

The subject as such, as well as the reasons for the motion, seem to be criticisable in several respects. For instance, the reasons for the motion have not been well substantiated. However, it would go beyond the scope of this article to discuss this in detail. Important in this context is that, certainly, there will be interested parties in politics and administrations trying to withstand the public and political pressure and to avoid any re-commencing of a debate on amendments of the Biotech Directive. The law making process that preceded the adoption of the Directive in 1998 was very lengthy and complicated, oscillating over years between the European Commission and the European Parliament. Understandably, the fear might exist that it would be like opening Pandora's box if the Directive were cracked at one end. Thus, it is tempting to speculate that the EPO and the EU would be motivated to avoid this happening. Resolving the issue of patenting living matter on the judicial, rather than on the legislative level could be one option to alleviate anti-patenting pressures. Of course, such a tendency would be very dangerous since it could undermine the principle of an objective application of law and, thereby, carries the risk of potentially damaging the attractiveness of the patent system as a whole.

G. Outlook

Will there be a new referral? Probably, but not necessarily. The TBA clearly signalled in the oral proceedings that it would do so, but did not fix this matter by giving corresponding statements in the verbally pronounced conclusion or the minutes of the oral proceedings. It just indicated an intention to refer questions of law to the EBA.

15 See e.g. p[ress release] „Patent on tomato becomes a landmark decision" available on the No Patents on Seeds homepage (http://www.no-patents-on-seeds.org/en/information/news/patent-tomato-becomes-landmark-decision)

16 EPO press release „President Battistelli: ‚Biotech patents subject to exacting standards'" of September 24, 2010 (see on http://www.epo.org/news-issues/press/releases/archive/2010/20100924.html)

17 On November 3, 2011 (i. e. five days before the oral proceedings before the TBA in the tomato case), the EPO President once more emphasized his position with regard to biotech patents in his personal blog („The EPO is now doing its best to implement this legislation [i. e. the Biotech Directive] in its daily work. It is well aware of the sensitivity of the issues involved, and although biotech accounted for under 5 % of all European patent applications received in 2010 has set up a dedicated specialist taskforce and applies the rules very strictly (the grant rate in biotech is 28 %, compared with 42 % overall)."; see on http://blog.epo.org/uncategorized/patents-and-biotechnology-%e2 %80 %93-latest-developments)

18 See Drucksache 17/8344 dated January 17, 2012 of the German Bundestag (see on http://dipbt.bundestag.de/dip21/btd/17/083/1708344.pdf)

However, if it comes to the referral, it is unclear if the EBA would take it up. Certainly, the EBA would have enough material to consider the questions of law as not sufficiently substantiated so that there would be no point of law of fundamental importance (according to Art. 112 EPC). The other possibility provided for by Article 112 EPC as a basis for EBA proceedings, which is ensuring uniform application of the law, does not seem to be accessible in the present case due to lack of diverging case law. In order to avoid uproar in the camp of the opponents to plant patents, the EBA would then have to provide a very well-reasoned substantiation of its rejection. From the software case, G 3/08, we know that it is very capable of doing so.

Any failure of a referral would probably lead to a continuation of the current practice enabling effective compound protection for plant-related inventions. However, if it comes to new EBA proceedings, the chance should be taken to consolidate this whole field in order to generate legal certainty for plant producers. In our view, this can only be achieved if the exclusion of patents on plants is made compatible in a reasonable way with the exclusion of plant breeding methods. Accordingly, the findings of G 1/08 would have to be revised and aligned with G 1/98. It would certainly be a generally acceptable legal assumption that exclusions under Article 53(b) EPC with respect to plant inventions aim at reflecting the ban on dual protection by patents and PVP. Following this, only those plant breeding processes should be excluded from patentability when the immediate product is one or more individual plant varieties. This would change the current legally chaotic and, in effect, innovation-unfriendly situation into a much more certain and predictable procedure and, in particular, would avoid a non-desirable gap in the patent protection available to plant-related inventions.

Die Crux mit der erfinderischen Tätigkeit und die schweizerische Chance ihrer operablen Bewertung

Dr. A. W. Kumm (DE)

I.

Die Münchener Diplomatische Konferenz zur Harmonisierung der europäischen Patentrechte (1973) verwarf ganz bewusst das objektivierbare Kriterium des „technischen Fortschrittes". Das seinerzeitige Kriterium der „Erfindungshöhe" (bzw. der inventive activity) – also die nachträglich konstruierte fiktive Handlungsweise, die zu dem Erfundenen geführt hätte - wurde beibehalten und in den nachfolgenden Gesetzen sogar als „erfinderische Tätigkeit" zur Norm erhoben.

Die schweizerische Regierungsdelegation hatte sich vergeblich gegen die gesetzliche Normierung gewandt. Abgelehnt wurde sogar ihr vermittelnde Antrag vom 28.5.1973 festzustellen, dass ein technischer Fortschritt eine erfinderische Tätigkeit bezeuge[1].

II.

Die negativen Folgen der Harmonisierung wurden jüngst analysiert[2]. Ergebnis: Die Norm des Art. 52 EPÜ ist überhaupt nicht operabel (nicht widerspruchsfrei nachweisbar). Der Art. 56 EPÜ, der diese Norm praktikabel machen soll, ist jedoch eine weitere Unklarheit, denn er ist ebenfalls nicht operabel. Die forschen Aussagen der Prüfer und der Nach-Richter, man wisse, was das immaterielle Konstrukt „der Fachmann" tun würde und getan hätte, sind bloße Zirkelschlüsse. Die vielen einschlägigen ad-hoc-Entscheidungen sind keine Präjudizien und sie entziehen sich prinzipiell einer induktiven Verallgemeinerung. Die Art. 52 und 56 EPÜ verlangen jedenfalls ontologisch Unmögliches, denn jedes derartige Urteil ist immer eine subjektive Festsetzung und keine objektive Feststellung.[3]

Das schweizerische Patentgesetz ist im Art. 1,A,2 auch harmonisiert. Allerdings fehlt eine Normierung, wer beurteilt, „was sich in nahe liegender Weise … ergibt".

Der schweizerische Prüfer (etc.) kann also entweder selbst (vermeintlich) als Sachverständiger urteilen oder er kann indirekt das irrationale Konstrukt „der Fachmann" vermeintlich „sprechen" lassen. In beiden Fällen ist sein Urteil subjektiv und nicht operabel.

Kein Gesetz hindert ihn jedoch, die bekannten Allgemeinen Erkenntnisse über technische geistige Leistungen und technisch-inventive Fortschritte heranzuziehen[4]

1 „Berichte der Münchener Diplomatischen Konferenz". Bundesanzeiger Verlag, 1977.

2 Kumm, A. W.: Die Crux mit der erfinderischen Tätigkeit. In: *epi* Information, 4/2011, 151.

3 Bundesgesetz über Erfindungspatente. Stand 1.Juli 2011.

4 Kumm, Alfred W.: Inventionsmanagement: Interdisziplinäre Grundlagen der Lenkung von industrielle Forschungen und Entwicklungen. 1995, ISBN 3-8248-0142-6. Besonders: E 3.2.6. E 3.2.7, Kap. 3.3 und dann 6.3 und 6.5, schließlich Kap. 4.4. Derselbe: Vom Spezialisten zum Generalisten der

und so zu einer operablen Bewertung einer Erfindung zu kommen. Dazu nur zur Orientierung das Folgende.

Die Gesamtheit der i realen Fachleute eines Faches sind durch Eignung, durch Befähigung oder durch Begabung qualifiziert. Sie bilden eine Standardnormalverteilung N(O,1). Ihre Z_i geistigen Leistungen lassen sich so klassifizieren: 15,9 % sind geeignet, relativ neue, applikative (anwendungsorientierte) Leistungen zu erbringen, 68,3 % sind befähigt, zu relativ oder absolut neuen, adaptiven (angepassten) Leistungen, 15,9 % sind sogar begabt zu absolut neuen, überdurchschnittlichen, talentierten bis genialen geistigen Leistungen.

Der inventive technische Fortschritt ist der Wachstumsschub, den ein relativ oder absolut neues Objekt O_n gegen das beste alte Objekt O_a hinsichtlich der technischen Gesamtwirkung wirkungsvoller auslöst. Beide Objekte dienen dem gleichen sozio-ökonomischen Zweck. O_n ist um die Zeitdifferenz T_n-T_a später erschienen, so dass die Objekte eine nicht gleichförmige „Treppe" bilden. Jeder Wachstumsschub ist prinzipiell quantifizierbar, denn eine (technische Gesamt-)Wirkung S ist physikalisch in Joulesekunden, in Ws^2 oder in einer gleichwertigen Messgröße messbar bzw. in der täglichen Praxis plausibel abschätzbar. Diese Fortschritte sind auch gaußisch-normalverteilt: 15,9 % der realen Fachleute sind unterdurchschnittlich und nur entwicklungsanregend tätig; 68,2 % sind entwicklungsfördernd tätig, 15,9 % sind entwicklungsraffend mit absolut neuen technischen Wirkungsprinzipien tätig.

Das Verhältnis $(S_n\text{-}S_a) / (T_n\text{-}T_a)$ ergibt eine Wertzahl mit folgender Bedeutung: Liegt sie zwischen > 0 und 0,16, dann ist O_n applikativ und entwicklungsanregend, zwischen > 0,16 und 0,68 ist O_n adaptiv und entwicklungsfördernd, zwischen > 0,68 und 1 ist O_n talentiert bis genial und somit entwicklungsraffend. Der Wert 0 bedeutet, dass O_n nicht fortschrittlich ist. Bei einem Wert von kleiner als 0 ist O_n schon bekannt oder es ist zwar neu aber sozio-ökonomischer Unsinn.

Was könnte also ein schweizerischer Prüfer (etc) tun? Er bräuchte von einer zu patentierenden Erfindung nur das Verhältnis $(S_n\text{-}S_a)/(T_n\text{-}T_a)$ zu ermitteln und festzustellen, dass sie, wie eben zahlenmäßig gezeigt, eine geistige Leistung und Ergebnis verkörpert, die nicht nahe liegend war, denn niemand hat sie bisher vorweg genommen. (Zudem hätte er die legale Genugtuung zum 28.5.1973)

Diese Arbeitsweise würde freilich ein technologisches Wissen und technisches Können voraussetzen, wohingegen das Urteil über ein irreales, fiktives, nicht operables „Erfinden" einer realen technischen Erfindung von fast Jedermann gefällt werden kann.

Technik- Ein Wegweiser zum technologischen Denken, Analysieren und Bewerten. 2003, ISBN 3-89846-264-1. Kap. 3.1, 3.2, 6.3, 6.5 und 4.4.

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