



Europäisches
Patentamt
European
Patent Office
Office européen
des brevets

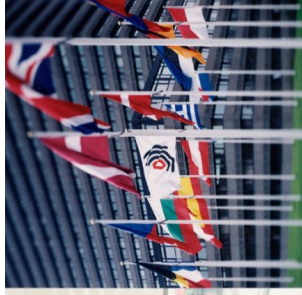
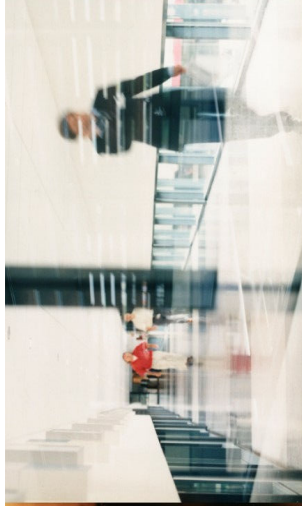
"Monsanto pig" and "Brassica"

or

The open question of what is an "essentially biological processes"

Dr. Jürg Bilang
Examiner, EPO Munich

NCCR Trade Regulation Workshop
Rights to Animal Genetic Resources
Bern, 27/28.11.2008



- 1. Legal Background**
- 2. Brassica**
- 3. Monsanto Pig**

European patents shall be granted for any inventions, in all fields of technology, which are susceptible of industrial application, which are new and which involve an inventive step

Article 52(1) EPC

European patents shall not be granted in respect of:

- (a) inventions the commercial exploitation of which would be contrary to "ordre public" or morality; such exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States;**
- (b) plant or animal varieties or essentially biological processes for the production of plants or animals; this provision shall not apply to microbiological processes or the products thereof;**
- (c) ... (medical use)**

Article 53 EPC

A process for the production of plants or animals is essentially biological if it consists entirely of natural phenomena such as crossing or selection.

Rule 26(5) EPC (Rule 23b(5) EPC 1973)

**"Essentially biological" has to be judged on the basis of
the essence of human intervention**

**Human intervention must contribute to the technical
effect; A merely trivial human intervention is not
sufficient to take a claim out of the exception**

T 320/87

EP 1 069 819:

Method for production of *Brassica oleracea*, comprising steps of crossing and selection, wherein molecular markers used to identify desired hybrids

- **Opposition division: not an essentially biological process of producing plants**

- Travaux Préparatoire for Article 53(b) suggest that**
- **Biological method as opposed to technical method**
 - **Term “essentially” introduced on purpose instead of the narrower term “purely”**
 - **Plant breeding processes based on selection and hybridisation fall under exclusion**

Rule 26(5):

- **Contradiction between term “entirely biological” and reference to crossing and selection**
- **Aims at very narrow exclusion**

T 83/05

EP 1 211 926

Method for breeding tomato plants that produce tomatoes with reduced fruit water content, containing steps of crossing, collecting, growing, pollinating and selecting.

- **The expression "process for the production of plants" implies at least some kind of human intervention.**
- **Purely natural processes do not qualify as an invention anyway due to the lack of technical character**

T 1242/06

Technical Board of Appeal (T 83/05 and T 1242/06) referred three questions to the Enlarged Board of Appeal, pending under G 2/07:

- 1. Does a non-microbiological process for the production of plants consisting of steps of crossing and selecting plants fall under the exclusion of Article 53(b) EPC only if these steps reflect and correspond to phenomena which could occur in nature without human intervention?**

- 2. Does a non-microbiological process for the production of plants which contains the steps of crossing and selecting plants 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, an additional feature of a technical nature?**

- 3. If question 1 is answered in the negative, what are the relevant criteria for distinguishing non-microbiological plant production processes excluded from patent protection under Article 53(b) EPC from non-excluded ones? In particular, is it relevant where the essence of the claimed invention lies and/or whether the additional feature of a technical nature contributes something to the claimed invention beyond a trivial level?**

Two positions:

- **epi:**
Method should be patentable as soon as there is a technical step
Analogy to computer-implemented inventions (T 258/03)
- **President of EPO:**
Additional technical (non-biological) feature should have technical effect on process or product. Not patentable if technical step can be omitted without losing the effect

EP 1 651 777

Association between a polymorphism in the leptin receptor gene (LEPR) with production- and quality-related traits in pigs

- **Claimed in application as filed:**
 - **Method of genotyping animal and tools therefore**
 - **Method of producing pigs**
 - **Pigs & herds of pigs**
 - **Method of altering meat production in swine**

- **Granted claims:**
 - **Method of genotyping animals**
 - **Method of altering meat production in swine**
 - **Method of identifying polymorphism**
- **➡ No claims to animals in granted patent**



Europäisches
Patentamt
European
Patent Office
Office européen
des brevets

Thank You

