Plant variety: ‘blatant attempt to change the law in an illegal and improper manner’

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The Chartered Institute of Patent Attorneys (CIPA) in the UK has harshly criticized the European Patent Office for its handling of the issue of patentability of plants. Last month it published a position paper in which it said measures proposed by the EPO to create clarity undermine legal certainty or are even unlawful. Kluwer IP Law interviewed Simon Wright, Chair of the CIPA Life Sciences Committee and partner at J.A. Kemp about what’s going on. Wright stressed these are his personal comments.
Could you give an impression of the magnitude of this issue? How many cases are pending, how much money is involved?

“The new Rule 28(2) EPC [which was introduced in 2017 to make sure plants obtained by essentially biological processes are not patentable, ed.] will affect a few hundred cases at the EPO. However, the legal issue is actually much wider than that, because we have the situation whereby some parts of the EPO (namely the examining and opposition divisions) seem to be ignoring the decision from the Board of Appeal (which decided that Rule 28(2) EPC was *ultra vires*).

The magnitude of this decision and the legal situation is significant, and cuts across all technologies, because it concerns a fundamental legal principle. My concern here is that the EPO is not respecting its highest legal organ, namely the Boards of Appeal. As for how much money is involved, that is anyone’s guess, but considering it could potentially cover all technologies, we are talking hundreds of millions of euros.”

Earlier this month, EPO President António Campinos referred decision T 1063/18 related to plant patentability to the Enlarged Board of Appeal. The CIPA and many others questioned the legal basis for this move. What do you expect the EBA to do with the referral?

“The EBA is likely to invite parties to file comments, and both CIPA and epi are likely to file amicus briefs. My personal view is that the EBA should deem the referral inadmissible.”

Do you agree with criticism that the EPO President, just like his predecessor Battistelli, has disdain for the separation of powers and the same will to marginalize the boards?
“The worry that I have (as do many attorneys, and indeed many EPO applicants) is that a clear decision from the Board of Appeal that a particular Rule is *ultra vires* is being ignored (and even overturned).”

As was reported by Juve-Patent, Campinos announced a stay of plant patent proceedings on 9 April 2019. Two years ago, the CIPA criticized a similar decision by the EPO to stay proceedings in which the decision depends entirely on the patentability of a plant or animal obtained by an essentially biological process. It said the measure was unjustified and without legal basis. Did this EPO decision ever give rise to claims (in accordance with Article 9(2) EPC) against the EPO for non-contractual liability? Do you expect such claims now?

“As far as I am aware, there have been no claims against the EPO for non-contractual liability. However, I know that several legal and industry associations (as well as applicants) are looking very closely at that issue, and are deciding whether to take legal action. If they do, then I would expect there to be litigation in Germany.”

Why hasn’t it been possible in the last few year to give clarity about this issue? Is the EPO to blame? The European Commission? Or action groups propagating that plants and seeds cannot be patentable?

“There was clarity on this issue for many years. The problem is that the European Commission now wants to change the law, and is trying to persuade the EPO to do the same. The proper legal process would either be to amend the EPC, amend the EU Biotech Directive, or refer the matter to the CJEU.

The lack of clarity has been brought about by certain national EPC member states unilaterally changing their law so that they are deliberately out of step with the EPC. They did this even before Rule 28(2) was amended. These countries, with seats on the Administrative Council (AC), are now trying to persuade the EPO to change the law, and they tried (unsuccessfully) to do that by changing Rule 28(2) which has since been declared *ultra vires*. So, the legal uncertainty is being created entirely by the European Commission, these member states, and their actions within the AC.”

What should happen? Are you optimistic a solution will be found soon?

“Unfortunately, I am very pessimistic that a solution will be found because this seems to be an entirely political process, being driven by a few vocal plant breeders. In my opinion the president of the EPO should not have referred the matter to the Enlarged Board of Appeal, because the law is clear: there is no conflict between the decisions.

Unfortunately some minority interests are driving this process, and the EPO has now got itself into a mess by trying to amend Rule 28(2) EPC (and it was clearly warned in advance that this could be illegal). We can only have legal certainty if the EPO respects the most recent board of appeal decision.”

Is there anything else you’d like to mention?

“The next stage in the procedure is likely for the EBA to invite comments from interested parties. That will see a considerable number of amicus curiae briefs, not only likely from legal representative bodies (likely CIPA and epi) but also industry bodies too.

No doubt the plant breeders will be continuing to push for a change in the law. They argue that it is just *‘a clarification’*. This, however, is incorrect. Products of essentially biological processes have always been patentable, ever since the EPC was written in 1977, and indeed that was the intention when the EU Biotech Directive was drafted too (because it uses exactly the same wording as the EPC). In short, both the EPC and the Directive clearly state that while essentially biological processes are unpatentable, the products thereof are not excluded.

What we have here, though, is a blatant attempt by certain parts of the agricultural industry (via the European Commission, and now via the EPO) to change the law in an illegal, and improper manner, and to try and persuade law makers that they need to change the law (although I cannot see the logic for this) ‘by the back door’.”