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EU Commission tries to sabotage Tomatito's guitar

Miquel Montaña (Clifford Chance) · Monday, November 28th, 2016

Tomatito (“little tomato”) is the nickname of a very popular Spanish flamenco guitar player, who began his career with mythical singers of flamenco such as *Camarón de la Isla* (“prawn from the island”) and who has played around the world accompanying other singers with more mundane names such as Frank Sinatra or Elton John. Having been born in Almeria, which produces more than 1,000 million (yes, one thousand million) kilograms of tomatoes every year, it is not difficult to guess the source of inspiration for his nickname.

The sound of *Tomatito*'s guitar might start to fade after the publication of the “Commission Notice on certain articles of Directive 98/44/EC of the European Parliament and of the Council on the Legal Protection of Biological Inventions” (OJ of 8 November 2016, C 411/3), whereby the EU Commission has tried to sabotage the case law of the EPO's Boards of Appeal accepting the patentability of products derived from using essentially biological processes, even if the process used to obtain the product (i.e. selecting and crossing the plants) is essentially biological and, therefore, not patentable. This case law stems from the Decisions handed down by the EPO's Enlarged Board of Appeal on 25 March 2015 in cases G 2/12 and G2/13, which are nicknamed, respectively, “Tomatoes-II” and “Broccoli-II,” to distinguish them from “Tomatoes-I” (G 1/08) and “Broccoli-I” (G 2/07). These were handed down on 9 December 2010, and the patentability of the “processes” was denied for being contrary to Article 53(b) of the EPC.

In the Notice published on 8 November 2016, the Commission refers to the alleged “legal uncertainty” caused by the EPO's Enlarged Board of Appeal and, for the purpose of shedding some light onto this allegedly dark landscape, it advances its own views: “The Commission takes the view that the EU legislator's intention when adopting Directive 98/44/EC was to exclude from patentability products (plants/animals and plan/animal parts) that are obtained by means of essentially biological processes.”

But far from bringing legal certainty, this Notice appears to have caused exactly the opposite effect, as it has muddied the clear waters of the competent bodies of the EPO (i.e. the Enlarged Board of Appeal). Clearly, a “Notice” from the Commission, which does not even bind the Commission – as the Notice itself alerts – does not seem to be the right instrument to enlighten the examining divisions of a different international organization (i.e. the European Patent Organization) on how they must interpret the provisions of the EPC. For, although *Tomatito*, who is extremely courteous, has always tried to accommodate the musical scores suggested by the EU (for example, by incorporating the provisions of Directive 98/44/EC into the EPC's Implementing Regulations in 1999), at the end of the day he is bound to play the musical scores dictated by the

EPC. And, as matters stand, the current wording of the EPC, which of course trumps the provisions of the Implementing Regulations, does not appear to allow the EPO's bodies to cause the sound of *Tomatito's* guitar to fade.

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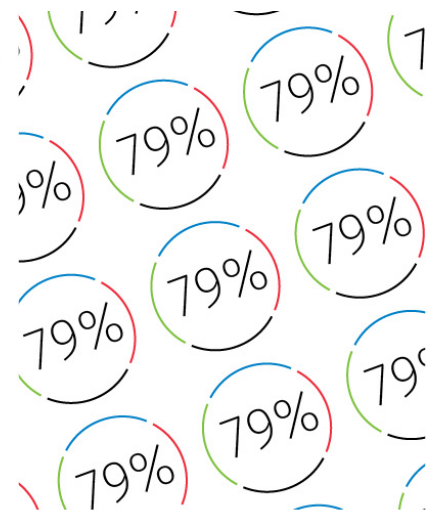
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