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The Political Dimension of Tomatoes, Broccoli and Peppers

Miquel Montañá (Clifford Chance) · Monday, December 10th, 2018

As already reported by Kluwer Patent Blog, on 5 December 2018 (case T 1063/18) the EPO's Technical Board of Appeal 3304 found that Rule 28 (2) is contrary to article 53 of the European Patent Convention ("EPC") and that, therefore, it does not prevent the patentability of new pepper plants and fruits with improved nutritional value (patent EP 2753168). As a result, the Board referred the case to the Examining Division.

According to paragraph b) of article 53 "European patents shall not be granted in respect of (…) 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". On the other hand, Rule 28(2) states that "Under Article 53(b), European patents shall not be granted in respect of plants or animals exclusively obtained by means of an essentially biological process".

Readers will recall that Rule 28(2) was – rather surprisingly – approved by the EPO Administrative Council following the publication of a Communication dated 8 November 2006, where the EU Commission expressed the opinion that plants should not be patentable. Here we saw a body (i.e. the Commission) of an international organisation (the EU) telling a quasi-judicial body of a different international organisation (i.e. the EPO's Board of Appeal) how they should go about interpreting article 53 of the EPC, proving too much to handle for the latter.

Against this background, it should not come as a complete surprise that a Technical Board of Appeal of the EPO, as one would expect from a presumably independent quasi-judicial body, has taken the article 164(2) EPC route to bypass Rule 28(2). According to this recent decision, Rule 28(2) may not be applied as it contradicts article 53 EPC, as interpreted by the case law of the Boards of Appeal.

All in all, despite the Commission's attempts to sabotage patents on tomatoes, broccoli and peppers, this Board of Appeal did precisely what one would have expected an independent judicial body to have done. If the parties to the EPC feel that plants and/or their fruits should not be patentable, they are free to convene at an international conference and amend the provisions of the EPC. Although the EPO has never exactly been the paradigm of a democracy driven by the separation of powers, putting pressure on the Boards of Appeal in order to try to avoid such conference from having to take place does a disservice to their independence.

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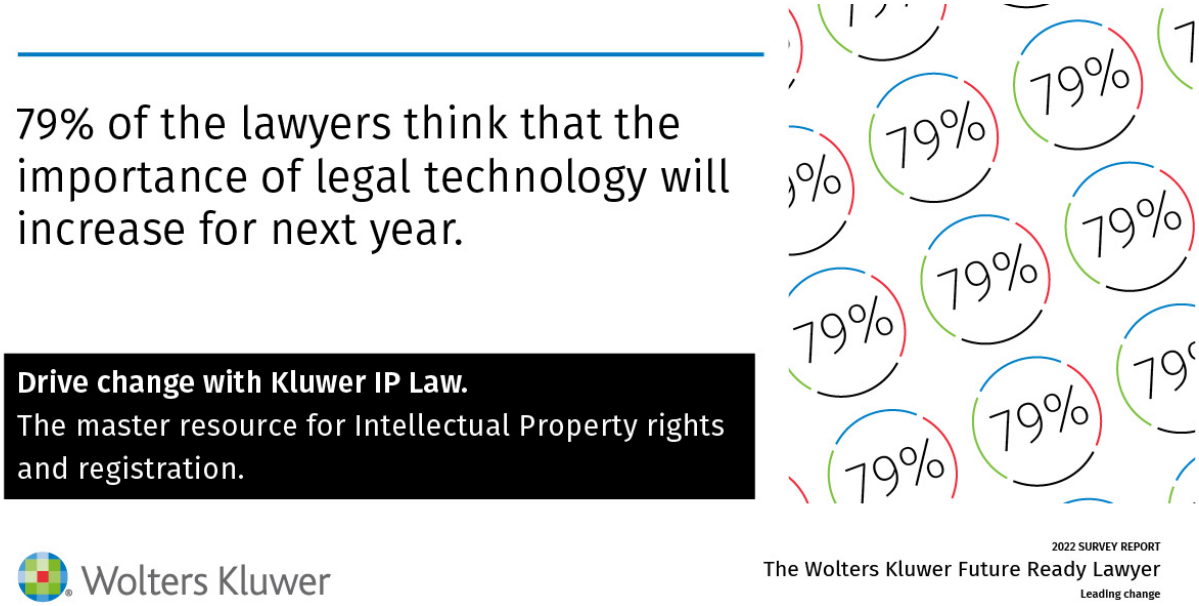

This entry was posted on Monday, December 10th, 2018 at 6:00 pm and is filed under Patents
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