ESA
EUROPEAN SEED ASSOCIATION

Registry of the Enlarged Board of Appeal

European Patent Office
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Brussels, 25.11.2009

ESA_09.0853

Case number: G 2/07 and G 1/08

Dear Madam, Sir,

By the present letter ESA European Seed Association would like to address the question of „essentially biological processes". In cases G 2/07 (Broccoli case) and G 1/08 (Tomato case) the Technical Board of Appeal referred important questions of law to the Enlarged Board of Appeal on the exclusion from patentability of a non-microbiological process for the production of plants containing the steps of crossing and selection. In both abovementioned cases ESA submitted its views to the Enlarged Board of Appeal in two *amicus curiae* briefs dated December 13, 2007 and October 20, 2008 respectively[1], which we strongly confirm by the present letter.

ESA is aware that in the meantime there have been an increasing number of patent applications filed in relation to inventions raising the questions at stake in cases G 2/07 and G 1/08 which are currently suspended by EPO awaiting the decision of the Enlarged Board of Appeal. ESA is of the opinion that a decision in the two aforementioned cases would be urgent since the current circumstances are putting the whole seed industry in a legally uncertain situation. Therefore, ESA would like to kindly ask the Enlarged Board of Appeal to take a position and continue with the procedure in the cases mentioned above as soon as possible.

Thank you for your consideration.

Sincerely yours,

Szonja Csörgő

Manager Intellectual Property and Legal Affairs

[1] For your convenience the two letters are attached to the present letter as annexes.

Registry of the Enlarged Board of Appeal
European Patent Office

ESA reference: ESA_08.0715
Re.: Case G 1/08

Brussels, October 20, 2008

Dear Madams, Sirs,

The European Seed Association (ESA) appreciates the opportunity that is offered to third parties to file a written statement in accordance with Article 112(1)(a) EPC regarding the questions of law that the Technical Board of Appeal has referred to the Enlarged Board of Appeal with interlocutory decision of 4 April 2008 in case T 1242/06.

With reference to the letter of the President of the European patent Office of 7 August 2008 stating that the issues raised in the referring decision T 1242/06 are all extensively discussed in the comments submitted to the Enlarged Board in respect of case G 2/07, ESA also refers to the comments it has submitted to the Enlarged Board on 13 December 2007 in respect of case G 2/07. For your convenience, we attached our letter of 13 December 2007 in an annex to this letter.

On behalf of the ESA we would like to thank you again for the given opportunity to contribute to the discussion on this important topic.

Yours sincerely,

Bert Scholte

Technical Director

Registry of the Enlarged Board of Appeal
European Patent Office

ESA reference: ESA_07.0597.2
Re.: Case number G 2/07

Brussels, 13.12.2007

Dear Sirs,

The European Seed Association (ESA) appreciates the opportunity that is offered to third parties to file a written statement in accordance with Article 11b of the Rules of Procedure of the Enlarged Board of Appeal (EBA) regarding the questions of law that the Technical Board of Appeal has referred to the enlarged Board of Appeal with interlocutory decision of 22 May 2007 in case T 83/05.

ESA is the voice of the European seed industry, representing the interests of those active in research, breeding, production and marketing of seeds of agricultural, horticultural and ornamental plant varieties. Protection of intellectual property is a matter of high importance for the European seed industry. In this respect reference is made to document ESA_04.0056.2, the ESA position paper on Access to Plant Genetic Resources and Intellectual Property in the European Union, which is attached to this letter.

For ESA the UPOV 1991 Convention is the most suitable existing sui general intellectual property system for the protection of plant varieties per se. UPOV 1991 is a balanced system providing for the effective protection of plant varieties of all species on the one hand and access to genetic variability by the free use of protected commercialized plant varieties for further breeding (the so-called "breeders' exception") on the other hand. At the same time ESA is of the opinion that the patent system is the most appropriate system for the protection of biotechnological inventions in general.

As a consequence of this position the first question of law should be answered by: No, a non-microbiological process for the production of plants which contains the steps of crossing and selecting plants does not escape the exclusion of Article 53(b) 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, but this answer should only be viewed in the light of the answer to the second question.

As to the second question of law, ESA would like to answer according to its majority position that the relevant criterion for distinguishing non-microbiological plant production processes excluded from patent protection under Article 53(b) EPC from non-excluded ones is whether a process contains as a further step or as part of any of the steps of crossing and selection, an additional feature that has a substantially significant impact on the process.
The use of a molecular marker for example could be a technical feature that has no substantially significant impact on the process. In principle there is no difference between selecting certain plants on the basis of visible (phenotypical) characteristics

(size, color, etc.) or invisible (physiological) characteristics (such as for example the level of certain compounds) that can be detected by using biochemical (including molecular) methods. However, when a technical feature has such a substantially significant impact that the whole process cannot be considered to be essentially biological, the process does not fall under the exception of Article 53(b).
As to the technical features themselves used in essentially biological processes, ESA is of the opinion that they of course are patentable provided all patent requirements are met.

In general ESA would like to express its concern about the assessment of plant-related inventions in view of the general patent requirements as patents seem to be granted for processes that could be considered as conventional breeding processes. In this respect ESA pleads for a stringent application of the general patent requirements taking into account the latest state of the art in plant breeding.

On behalf of the ESA we would like to thank you again for the given opportunity to contribute to the discussion on this important topic.

Yours sincerely,

Bert Scholte

Technical Director