

The unbearable complications of patenting agro food products

Sven J.R. Bostyn

Patenting plant material has always been a rather controversial business, and surprisingly enough even more controversial than patenting human DNA related inventions.

It is difficult to grasp the sources of this controversy, and especially of the extent of it. One possible clarification is that plant related innovations are politically very sensitive, and again surprisingly, this has been so for many years before human DNA related innovations came into the spotlight.

One possible explanation of the controversy is the plethora of interests which are at stake when it comes to patenting plant material. There is not only the dichotomy industry – farmer (if there is a real dichotomy in the first place). There are also issues relating to food security in both the developed and developing world. Furthermore, there are also issues of protecting biodiversity, and fears that such biodiversity would be at risk due to patent practices. Serious questions can also be asked as to whether benefit sharing systems which tend to link to the patent system provide any kind of practical solution. The debate around this issue is equally conundrumously complicated.

One can ask oneself whether it is the technology in itself or certain applications of it that feed the controversy. The answer to the question is very relevant as it should determine which solutions to seek.

Recent developments in patent case law have unfortunately not helped in calming down the controversy. The decisions of the EPO Enlarged Board of Appeal in the broccoli and tomato cases (G 2/07 and G 1/08) leave us in the dark as to what is now exactly a non-patentable essentially biological process and how it distinguishes itself from a patentable non-essentially biological one. Apart from clarifying the decision, one can also ask oneself whether such an exclusionary provision serves a purpose.

The decision of the ECJ in the Monsanto case (C-428/08) has probably caused more problems than it resolved, as the part of the judgement confirming that meal produced from Roundup Ready® soya (which is patent protected in large parts of the world) does not fall within the scope of protection of the patent concerned was not very surprising. The case does however not give us a lot of clues as to what is now protectable and what not, and it raises worrying issues in areas which were strictly speaking not at issue in that very case.

If one would decide that patent protection still provides an adequate and necessary reward for stimulating plant innovation, one should perhaps ask questions whether the current patent system is entirely adequate. We are not only talking about statutory definitions which seem to be entirely incomprehensible (see G 2/07 and G 1/08), but we are obviously also talking about scope of protection of patents for such products, a very loaded word indeed in patent law. Furthermore, for medicinal products, patent holders obtain a de facto extension of patent term by the grant of a supplementary protection certificate (SPC) which is there to compensate the loss of effective patent protection during the regulatory process. Also the plant technology sector faces very burdensome regulatory procedures before a product can enter the market, hence the question whether anything ought to be put in place in this regard, an at first glance maybe counterintuitive idea in the light of scope of protection concerns.

That leads to the more fundamental question whether we should have patent protection for plant material in the first place. The discussion around this issue is fed by the rather contradictory developments in practice that on the one hand the cost for technological development in the plant area becomes higher and higher, and on the other hand the tendency to seek patent protection for techniques which are at least akin to biological processes. Is the alternative of plant variety protection, often lauded in anti-patent literature, a much better alternative?

These are the issues I would like to discuss during my keynote speech at the Conference.