

European Court of Justice (ECJ) to Decide on the Patentability of Human Embryonic Stem Cell Research

The German Federal Court of Justice (BGH) recently asked the European Court of Justice (ECJ) to decide whether or not embryonic stem cell research methods are patentable. This arises from a lengthy patent dispute on this issue. The dispute centres around the interpretation of the terms “human embryo” and “commercial purposes”.

Background

German patent law states that patents should not be granted for industrial or commercial uses of human embryos, because those are contrary to “ordre public” or morality. This corresponds to European and UK patent law.

The German patent in question includes methods of cultivating of human embryonic stem cells. Greenpeace objected that, because the patent covers neural precursor cells derived from human embryonic stem cells, it is an industrial or commercial use of human embryos, contrary to “ordre public” and morality. The German Federal Patent Court agreed with Greenpeace and declared the patent to be invalid.

The Appeal and Referred Questions

The patentees appealed this above decision to the BGH. The BGH referred the legal points to the ECJ, and has stayed the appeal proceedings until the ECJ decides the issues.

The BGH made this referral because it believes that the law on the use of human embryos is ambiguous. In particular, the BGH asked for guidance on whether the methods of the patent “use” a human embryo.

The first question for the ECJ is how to interpret the term “human embryos”. In particular, is a stem cell, obtained from a blastocyst (which is a particular development stage of the fertilized egg), is an embryo, despite the fact that it cannot develop into a human?

If the answer is no, a further question is whether a blastocyst itself is an embryo.

The final question is whether any non-private use, in particular use for scientific or therapeutic purposes, corresponds to “commercial” use.

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It could be some time for the ECJ to issue their decision. When it does finally issue, it will be binding on EU national courts and patent offices, which will amend their practice accordingly. While the EPO will not be obliged to amend their practice in line with the decision, but it is highly likely that they will. It is also very likely that examination of relevant patent applications will be stayed while the decision is pending.