

Essentially Biological Processes – Plant Pollination

In our Spring 2011 update, we reported a decision of the EPO Enlarged Board of Appeal, in which it considered what is an “essentially biological” process for the production of plant. The European Patent Convention excludes “essentially biological” processes, for the production of plants or animals, from patentability.

The Enlarged Board did not define what was meant by an “essentially biological process for production of plants”. Instead it decided, on the facts of two cases before it, that a classical crossing process to produce a new plant was not patentable unless there was human technical involvement in the crossing process itself. A classical crossing process was not patentable if technical means merely facilitated the process.

The EPO now only allows patents to the production of plants where there is a technical addition to the crossing process. Generally this involves technical interference with the genome of one or both of the plants involved.

The Board of Appeal decision T1729/06 recently refined this approach. This related to a patent application for the production of seedless watermelons. These watermelons are produced by pollinating sterile female flowers of triploid watermelon plants with pollen from diploid plants. The invention was the use of particularly advantageous diploid plants for this pollination.

The Board concluded that the exclusion of “essentially biological processes for the production of plants” should be interpreted narrowly, as all exclusions at the EPO. The Board held that the case under consideration did not relate to the production of plants but, rather, seedless fruit. Because the fruit was seedless it could not grow into a plant.

As a result, EPO exclusion of “essentially biological processes for producing plants” will focus on classical crossing processes for producing plants, and should not extend to processes for producing ancillary vegetative material, such as fruit.