

Method of treatment excluded from patentability

A European Patent Office (EPO) Board of Appeal provided further guidance of which methods practised on a human body are excluded from patentability in decision T 1213/10.

Background

Methods of treatment by surgery or therapy are excluded from patentability by the European Patent Convention (EPC) for policy reasons; so that medical professionals are free to carry out surgical interventions without the possibility of patent infringement.

The EPO Enlarged Board of Appeal (EBA) provided guidance of which methods fall within this exclusion in the leading case G 1/07. In that case, the EBA stated "neither the legal history nor the object and purpose of the exclusion from patentability... justify a limitation of the term 'treatment by surgery' to curative surgery".

In other words, the EPC exclusion from patentability includes investigative and diagnostic surgery, along with curative surgery.

T 1213/10

European patent application number 08157038.4 was refused by an examining division as relating to an excluded "method of surgery". The applicant appealed the refusal.

The claims of the application considered by the board included the feature "method of measuring an enzymatic activity comprising measuring the quantity of a substrate by an enzyme... (wherein) the substrate is caused by a penetration device to penetrate to a site where said enzyme is present..." The "penetration device" could be an endoscope.

The applicant argued that the method was not directed to "treatment" but to measuring enzymatic activity in general which could be used for scientific or analytical purposes. The method did not produce an immediate health benefit to the patient.

The board concluded that use of an endoscope equated to a substantial physical intervention which was excluded from patentability

What physical interventions are not excluded from patentability?

The EPO Guidelines state invasive techniques of a routine character which are performed on uncritical body parts and are generally carried out in a non-medical commercial environment are not excluded from patentability. Examples include tattooing, piercing, hair removal by optical radiation and micro-abrasion of the skin.