

CPVO Workshop

**Protection for Plants and
Essentially Biological Processes
under German Patent Law**

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Tomato II



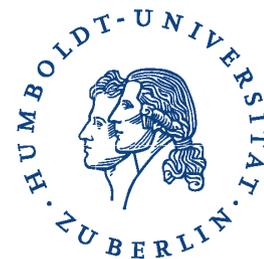
Source: Wikimedia

**Enlarged Board of Appeal, 25.3.2015, G2/12 and G 2/13,
– Tomato/Broccoli II**

24.06.2015

Metzger

EP 1 211 926 (Tomato): Claims in their last version



„1. A tomato fruit of the species *Lycopersicon esculentum* which is naturally dehydrated, wherein natural dehydration is defined as wrinkling of skin of the tomato fruit when the fruit is allowed to remain on the plant after a normal ripe harvest stage, said dehydration being generally unaccompanied by microbial spoilage.

2. A tomato fruit of the species *Lycopersicon esculentum* characterized by an untreated skin, dehydration of the fruit and wrinkling of the skin, said dehydration being generally unaccompanied by microbial spoilage.“

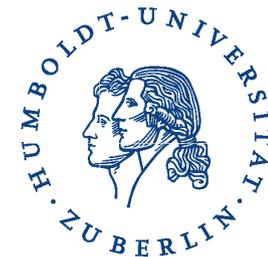


Quelle: Peter Knebel, AFP

Public Demonstration in front of EPO, Munich

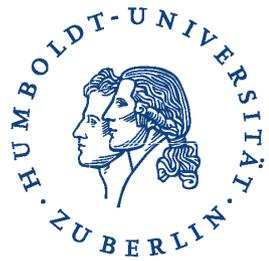
24.06.2015

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Section 2a(1)1 German Patent Act

Patents shall not be granted for plant or animal varieties or for essentially biological processes for breeding plants or animals.



Section 2a(1)1 German Patent Act (after the amendment of 19 October 2013):

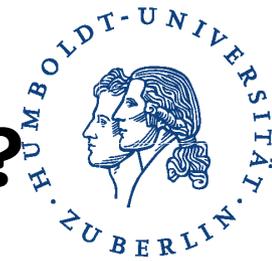
Patents shall not be granted for plant or animal varieties or for essentially biological processes for breeding plants or animals or for plants and animals resulting entirely from such processes.

Legislative History

- * **Revision of Patent Act started in 2012**
 - Proposal of the German Federal Ministry of Justice of 24 January 2012
 - * Issues: Procedure before the German Patent Office
 - * No word on plants or animals
 - Proposal of the German government of 9 May 2012
 - European Parliament Resolution of 10 May 2012
 - Amendment to the Proposal by the Parliaments Committee of Legal Affairs of 26 June 2013
 - Final vote in German Parliament on 19 October 2013

- * **Tomatoe/Broccoli-Cases at EPO**
 - Tomatoe/Broccoli I: 9 December 2010
 - Referral of Tomatoe II to the Enlarged Board of Appeal on 31 May 2012
 - Decision of Tomatoe/Broccoli II on 25 March 2015: Board took note of the amendment to the German act (similar in NL, but in not UK, F, AUS, CH)

Compatible with D 98/44/EC?



* Art. 4 Directive 98/44/EC

1. The following shall not be patentable:

(a) plant and animal varieties;

(b) essentially biological processes for the production of plants or animals.

2. Inventions which concern plants or animals shall be patentable if the technical feasibility of the invention is not confined to a particular plant or animal variety.

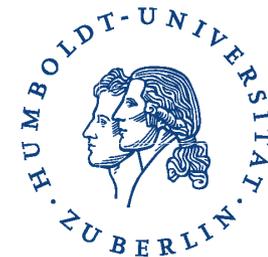
* Directive 98/44/EC: Full harmonisation?

- CJEU, C-428/08 – Monsanto/Cefetra, para. 51-63:

Art. 9 is exhaustive

- CJEU will most likely not accept exemptions from patentability not covered by Art. 4 → Crucial question is interpretation of Art. 4

- Sect. 2a(1)1 German Patent Act may violate Directive



Symbolic legislation

- * Sect. 2a(1)1 German Patent is applicable to patent applications filed at the German Office
 - * Plant breeder may file patent application to the EPO and choose Germany as designation state
 - * German courts are under an obligation to enforce plant patents
 - Art. 64 EPC: „the same rights as would be conferred by a national patent granted in that State“
 - Sect. 2a(1)1 German Patent Act is irrelevant for infringement procedure
 - Courts in revocation proceedings must apply EPC
- Plant breeder will get full patent protection in Germany

Last resort: Scope of protection

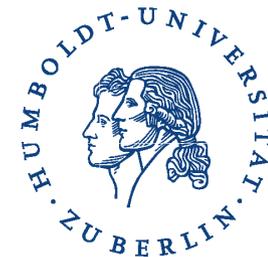
* Art. 8 para. 1 D 98/44/EC

1. The protection conferred by a patent on a biological material possessing specific characteristics as a result of the invention shall extend to any biological material derived from that biological material through propagation or multiplication in an identical or divergent form and possessing those same characteristics.

* Do new varieties with the same characteristics but not derived from the initial biological material violate the patent?

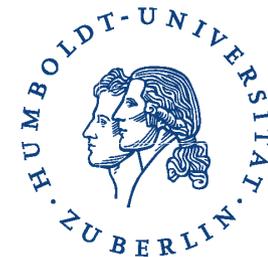
* Product by process-claims → Art. 8 para. 2

„shall extend to biological material directly obtained through that process“



Some conclusions

- * Main areas of plant breeder's activities are (potentially) covered by patents
- * International agrosience companies threaten the SME industry structure of European plant breeders
- * Traditional innovation model of plant breeders is under pressure
- * Only a revision of Art. 4 D 98/44/EC and the EPC Implementing Regulation may cure the problem



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