

# Future of European patent law will be decided in Munich

Greenpeace background paper on the EPC Diplomatic Conference, November 2000

**The European Patent Office (EPO), which is the body responsible for the granting of patents in Europe, faces mounting criticism on the eve of the Ministerial Conference of its 20 member states<sup>1</sup> due to take place in Munich on 20-29 November. The Conference comes at a time when the EPO's policy on bio-patents has been intensively criticised by member states and civil society.**

The EPO, which is the main administrative body of the European Patent Convention concluded in 1973 to develop a European-wide patent system, is accused of compromising its legal independence to accommodate corporate interests. The EPO has repeatedly ignored complaints coming not only from external civil society groups but also from its own staff. And whereas corporate bodies have been invited to attend the Conference, the request of Greenpeace and other NGOs to participate has been formally refused by the EPO.

The main criticisms leveled against the EPO are threefold: firstly, the dubious legal basis on which it has granted patents on life including genes, animals and plants and humans; secondly, the lack of legal independence in the decision making process concerning the granting of patents and appeals against those decisions; and thirdly, the excessive discretionary powers exercised by the EPO President.

## ***1. Dubious legal basis for granting patents on life***

The issue of permitting patents on life (plants, animals, parts of the human body and genes), which has been smouldering at the EPO for years, is now set to become explosive. Despite the fact that Article 53(b) of the EPC, expressly prohibits the patenting of plant varieties and animals and that the EPO's own Court of Appeal has re-affirmed that prohibition in 1995, in practice hundreds of patents have been granted on human genes, animals and plants

This practice has been made possible by a special adaptation of the Implementing Regulations in a decision taken by the EPO's Administrative Council at the behest of its President, Ingo Kober. These changes were justified, it was argued, to bring EPO practice into line with the EU Directive 98/44/EC, which allows patents on genes, parts of the human body, animals and plants. But the EU Directive has proved to be so controversial that the vast majority of member states have refused to implement it while The Netherlands and Italy have even challenged it before the European Court of Justice. In any case, the EPO is completely separate from the EU institutions and, therefore, is not obliged to harmonise its legislation with the directives for the single market.

---

<sup>1</sup> Members as of 1 November 2000: 15 EU member states, Switzerland, Cyprus, Liechtenstein, Monaco and Turkey.

The EPO decision is of dubious legality for a number of reasons. First of all, the provisions of the Implementing Regulations (Rules 23b-e), which allow patents on human genes; plants and animals violate Article 53b of the EPC. Secondly, since the decision of the Administrative Council has led to a substantive change of patent law, it has effectively brought about legislative change and by so doing it has overstepped the boundaries of its legal mandate. Such legislative change can only be made with a proper legal mandate by the member states of the Convention. Thirdly, the manner in which the Administrative Council's decision was made disregarded due process. The decision, which was announced by the EPO President, pre-empted the decision by the EPO's supreme legal authority, the Enlarged Board of Appeal, where the patentability of plant varieties was still under consideration but no final conclusion had been arrived at.

Internal opposition to the procedures used by Mr. Kober and the Administrative Council was also expressed by the EPO legal experts represented by the Association of Members of the Boards of Appeals (AMBA) as well as the Staff Union of the office (SUEPO).

Greenpeace calls on the Ministerial Conference to rescind the Administrative Council's decision as it violates the EPC which stipulates that:

*"In the case of conflict between the provisions of this Convention and those of the Implementing Regulations, the provisions of the Convention shall prevail"*  
(Article 164 (2)).

## **2. Lack of legal independence in decision making process**

The question concerning the legal independence of EPO decision making arises from the autonomous legal and financial status of the organisation. The EPO, which enjoys supranational immunity, not only decides on the granting of patents but it also administers the legal procedures for appeals against the patents awarded.

The crux of the matter, however, is that the EPO finances itself exclusively from income generated from granting of patents and examination of applications for patents, which amounts to very large amounts of money. In 1999, EPO revenue was DM 1.3 billion (Euros 660 million) with profits stated at DM 250 million (Euros 125 million).

Since the cost of having a patent granted for industry is high (on average DM 60,000 per patent), and EPO revenue depends on the number of patents granted, the organisation together with patent lawyers and corporations all have a vested interest in getting the maximum number of patents granted.

Indeed, internal papers leaked to Greenpeace provide strong evidence that the EPO's own staff feels that the legal independence of the organisation is being jeopardised as the separation of judicial and executive powers has become increasingly blurred. The SUEPO signaled alarm at the increasing influence of commercial interests on the decision making process in a letter sent to the German Minister of Justice and parliamentarians in June 2000.

EPO officials now call for the organisation to be placed under EU supervision so that the European Court of Justice would provide for independence of the legal judgements.

Furthermore, EPO staff is unable to deal with the work overload as there has been a dramatic increase in the number of applications for patents and patents awarded. They went on strike for eight months this year in protest against the inadequate resources available to deal with the workload.

### ***3.Excessive discretionary powers of EPO President***

EPO President, Ingo Kober, who was instrumental in pushing through the controversial Administrative Council decision to grant patents on life, has become the target of mounting criticism also. EPO legal officials consider that the Director abused his power by pre-empting a decision on the patentability of plants and animals as this should be decided by the Enlarged Board of Appeals (EBA) which is the supreme legal body designated to pronounce on such issues.

And to add fuel to the fire, Mr. Kober simultaneously sent a letter to the EBA urging the members to grant patents on animals and plant varieties.

Mr. Kober's intervention in the regular ongoing procedures not only nullified the deliberations of the EBA; it also biased the procedures in favor of corporate interests.

So the President now stands accused by his own staff of jeopardising the separation of powers. "In general, and in the face of questions which have been raised in public and are still unanswered....this raises questions as to the sensitivity of the EPO leadership towards the separation of powers" they wrote in a letter to the German Minister of Justice.

The handling of the Ministerial Conference in November has also become the object of criticism. In a paper leaked to the public, the EPO legal staff has accused management of the following:

- poor preparation of the conference which has been too hasty and lacks a basic plan;
- public criticism of the EPO has not been taken into account;
- a full public debate on the changes proposed by EPO management would be necessary before decisions are taken;
- fundamental questions such as the creation of an independent judiciary have not been addressed
- in the absence of an independent judicial system, excessive powers would accrue to the Administrative Council, which would lead to increased legal insecurity

Stung by this criticism the member governments have begun to react. In a preparatory meeting in September, they forced the EPO to withdraw a number of proposals designed to belatedly legalise the controversial implementing regulations concerning patents on life.

Greenpeace now calls on all member country ministers participating in the conference to:

- Stop patents on life - genes and parts of the human body, animals and plants;
- Rescind the decision of the Administrative Council of June 1999 as it violates the founding European Patent Convention;
- Take a firm decision to establish an independent judicial system for judging patent applications and appeals under EU supervision;
- Reform the current financial basis of EPO;
- Create an international commission to scrutinise the activities of the EPO and the powers of its President;
- Jointly initiate new European legislation on patents which prohibit patents on forms of life and genes;