

## COMMENTARY

by Bernard Dixon

## A PATENT CASE OF EURO-MASOCHISM



Following my discussion last month of the urgent need for unified European legislation on biotechnology, I'm grateful to the editors for good-naturedly allowing another dose of Euro-masochism. My subject this time is the equally urgent need for modernization in patent law. Every bit as significant as intellectual or technical cleverness, these

are the two topics which will determine the fate of bio-industries in Europe over the next decade.

In one sense, it seems perverse to highlight a question that was supposed to have been resolved as recently as 1978. That was the year during which the European Patent Convention (EPC) came into force and brought a vigorous, liberating dose of harmonization to formerly disparate legislation among 11 different countries. Industry has undoubtedly benefitted from this continent-wide tidying up by the lawyers. Sadly, however, the EPC has also ossified patent law to such a degree that it no longer adapts as quickly as before to progress in pure and applied science. Given the unprecedented growth of biotechnology based on gene splicing over the same period, the situation today is one of frustration and uncertainty.

Top of the list of grouches about the EPC is the lack of a period of grace during which a patent may be sought and granted even after a discovery has been publicized in the scientific literature or elsewhere. Permitted under the previous German, Italian, and British laws, such a period was eliminated during the nine years of negotiations which led up to the 1978 convention—on the grounds that something already disclosed could not be “absolutely novel.” It seems that university scientists, who had most to lose from this manoeuvre, were asleep during that time and did not therefore lobby to safeguard their interests. Today, however, the absurdity of a position which places all European researchers at a disadvantage compared with their peers in the United States and Japan is abundantly clear.

Having taken a straw poll during a recent conference organised in Brussels by the Centre for European Policy Studies and the Commission of the European Communities, I have to concede that there is minority opposition to the idea of reforming the EPC to include a 6–12 month grace period. But I must also record that two of the opponent's three counter-arguments are of the sort which can be marshalled at any place, any time, to challenge any proposed change in any law. First, they say that the EPC is still comparatively new and should therefore be left alone. Second, a few voices argue that a grace period would not help them—“them” being medievalists who have little interest in links with academe. The third argument—that because American companies are interested in such a change, Europeans should oppose it—can be dismissed with even greater contempt. Against such feebleness and xenophobia, I forecast that the chorus calling for reform

will soon swell to such proportions that the legislators will not be able to resist.

A second area where the EPC is already out of line with the realities of modern bioscience, and with American practice, is plant breeding (see *Bio/Technology* 3:855, Oct. '85). While it may have been justified to exclude plants from patent protection 10 years ago, because they were the products of conventional, somewhat empirical techniques, they are now being increasingly based on the precise arts of genetic engineering. The methods are repeatable and can be comprehensively described, as required by patent law. Why, then, exclude plants from the EPC, leaving their creators with the much weaker protection afforded by traditional plant variety rights? If the convention is not modified soon in this regard, European companies will be reconsidering their investment intentions in this nascent sector of biotechnology.

Opposition to change here is more substantial than with the grace period. Predictably, part of it comes from those—including the Soviet Union and some traditional plant breeders—who would have to pay royalties on patented varieties. The remainder is political. There are fears that the main food crops of a particular country could become the property of one or a few multinational companies, and that novel varieties could mean greater agricultural productivity in Europe and thus greater agricultural surpluses of the sort which are such an embarrassment to us already.

These are all weighty political arguments. But they were well answered during the Brussels meeting by Salomon Wald, from the Science and Technology Policy Division of the Organization for Economic Cooperation and Development (OECD) in Paris. If the economic danger did exist, Dr. Wald said, it could be controlled by other means. “Besides,” he added, “people who express such fears forget that even today, peasants have to buy their annual seeds from seed companies which often belong to a small number of large corporations.” On European surpluses, Wald was equally blunt: “The option of deliberately delaying technological progress to avoid social and economic troubles does not exist for any length of time in one part of the world if other parts refuse to follow this strategy. It is more than likely that plant genetics will continue to make fast progress in the U.S.A. and Japan, and it would not be a very reasonable policy to keep European industry technologically behind to give some hypothetical and in any case temporary relief to agriculture.”

Critics of the EPC have a catalogue of other complaints—high on the list being the fact that an organism deposited in a culture collection becomes available at the time of the compulsory first publication of the patent application, before the depositor knows whether his claim will be accepted. Again, Euro-biocrats feel they are out of line with both American and Japanese practice, and with the realities of modern technology. Clearly, the EPC is in need of early overhaul.

No more masochism, I promise, for the whole of 1986.

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