

Title: Patentability of inventions deriving from human bodily material: What about human rights?

Abstract: The increasingly complicated manner in which biotechnological inventions are attained, the growing number of public and private participants in the process of innovation, and the accelerated use of the patent system by them throughout all phases of R&D, has rightly called for attention by policymakers, practitioners and academics from a variety of disciplines. Central is the question how the process of innovation should be structured, facilitated and regulated, as to enhance the development of useful products such as biopharmaceuticals while social, ecological, cultural and human rights and interests are simultaneously to be protected. Among others those rights and interests of the groups (such as indigenous communities and families) and individuals that contribute to referenced process by handing over their biochemical material for R&D endeavors. The outcomes of such endeavors are often patented – temporarily “proprietaryized” – as to allow patentees and their facilitators to recoup their investments. Patent systems, such as those of the United States, Canada and Western Europe (i.e. the European Patent Convention), have primarily been developed and implemented according to economic parameters. This has certainly spurred (a certain kind) of technological progress. However, it increasingly becomes clear that the sole economic make-up and outlook of these regimes negates other important aspects of the inventions it applies to and the development of which it should stimulate. This is particularly clear in some fields of biotechnology – most notably those wherein human bodily materials are used to attain biopharmaceutical inventions. Several human rights and human rights instruments may be implicated by the ways in which these inventions are presently patented. They include (rights conveyed pursuant to) e.g. the Convention on Human Rights in Biomedicine and the International Covenant on Economic, Social and Cultural Rights. In view hereof, in several countries and regions around the world attempts are made to amend patent regimes, patentability requirements and exceptions and their workings. Initiatives to that extent include e.g. proposals to widen the disclosure requirement that is upheld in all patent regimes (i.e. pursuant to article 29(1) TRIPs). These proposals should lead to additional obligations for patent applicants – such as the obligation to include proof of prior informed consent of donors of human materials and of the underlying material transfer agreements in their patent applications. Other initiatives equally pursue to alter patent laws’ requirements and workings, as to align this proprietary system with the human rights system. In this presentation, these initiatives – and insofar as applicable, their legislative embodiments – are explained and discussed, as well as their contexts, goals, and effects. The prime focus is on the European Patent Convention and the case law of the European Patent Office and national patent law of EU member states, such as Germany and Italy, but comparisons to other systems may be provided. Of course, due attention is given to the host of relevant human rights instruments and their implications for current and future patent practices. It will show that whereas contemporary patent laws and their workings may certainly negatively touch upon human rights laws, it is most often not clear whether one could truly speak of outright violations. One could merely speak of legal (perhaps the more so, ethical) asymmetries between patent law regimes and human rights law regimes. Nevertheless, these asymmetries need to be addressed and, ultimately, solved. Contemporary initiatives may for a variety of reasons not result in clear-cut solutions, and may even lead to new complications. Illustrations hereof will be complemented by practical legal experiences deriving from previous implementations and recognitions of other non-proprietary rights in European patent law, such as on the bases of the Convention on Biological diversity. It will be shown that complications experienced in this respect correspond to some of the issues arising out of the currently endeavored implementation of referenced human rights in patent law regimes.

Bio: mr. Jerzy Koopman, LL.M., Ph. D. Researcher, Centre for Intellectual Property Law, Molengraaff Institute, Faculty of Law, Utrecht University & counsel, Life Science Law, The Netherlands. Jerzy Koopman’s legal work focuses on intellectual property law and the life sciences, most notably patent law as applied in the field of biopharmaceutical R&D (genomics, proteomics, natural products discovery etc). He approaches one and other from both a legal-technical and a socio-legal perspective, which involves ethical, economic, cultural and ecological issues. Jerzy studied law at Utrecht University and New York University School of Law. He acquired practical legal experiences by working at law firms in New York, Curacao, and Rotterdam, as well as at the District Attorney’s Office in Utrecht and at the Dutch Foundation for Refugees. Presently, Jerzy also counsels on life science law matters (E: j.koopman@lifesciencelaw.nl). He counsels, among others, in a multinational biological prospecting and R&D project undertaken by a group of public and private actors and for a NGO that represents (potential) facilitators of biochemical materials and associated knowledge to R&D. At CIER, Jerzy works as a Ph.D. researcher. In his project ‘Sharing nature and its biodiversity:

Claims to genetic resources, technology and biotechnological products in a proprietary perspective', various perspectives on the manner in which patent law may or may not apply to resources and outcomes of biotechnological R&D are analysed. The patentability of biotechnological inventions, most notably biochemical compounds with pharmaceutical applications, is analysed in view of the principles, goals and features of such instrument, and in respect of various cultural, ecological and economic perspectives thereon. In this respect, one could think of the issues with regard to, so to say, exploitation of traditional knowledge and cultural diversity, genetic resources and biological diversity; up- and downstream patenting and the so-called anti-commons; patenting of inventions derived from human biochemical materials (stem cells and so forth). The interaction between public law (e.g. human rights, cultural heritage and environmental law) and private law (e.g. intellectual property, contract and tort law), and the relevancy and potential of emerging principles and frameworks of bio-ethics receive special attention, as well as indigenous legal approaches and systems. The past years, Jerzy has worked as a visitor at a number of academic institutes, among others in Leuven, Belgium; Munich, Germany; New York, USA; Buenos Aires, Argentina; and Sidney, Australia. His article 'Octrooiering van biotechnologische uitvindingen en goede zeden: Recht onder vuur! [Patenting biotechnological inventions and morality: Law in the line of fire!], published in two parts in the journal B.I.E. (Part 2, 73/12, p. 503-512; Part 1, 73/11, p. 447-455), was awarded with the AIPPI/VIE prize 2006. Jerzy frequently lectures about the topics at hand at conferences and regularly teaches at Utrecht University and at the Technical University of Eindhoven. Jerzy is a member of various professional associations, including PIIPA, Corsage, ISE, AIPPI.