

**The French Commission
for Sustainable Development (CFDD)**

***OPINION N° 2000-04 (December 2000)
on the PATENTABILITY OF LIVING ORGANISMS***

In 1998, after ten years of negotiations, a European directive established the patentability of all living organisms with the exception of human beings, all their elements and products, including elements of human origin, genes, cells, organs and tissue. In the immediate aftermath of the directive, some member states refused to transpose it into national law, seeing public opinion, already decidedly edgy over the Terminator gene, rising up against the idea. Petitions started to do the rounds demanding that ethical constraints on the patentability of living organisms should be renegotiated. The CFDD notes that the terms of patent legislation in the biotechnology sector are not compliant with the objectives of sustainable development, which require the accommodation of balanced development of the manufacturing fabric, caution in respect of potential technological risks, and economic and social fairness.

The effects on public research and the industrial fabric

The CFDD deplores the fact that public research should be encouraged by its own managers or by private parties, to seek patents very early on in the development process of an innovative area. As a result of this approach, we are seeing hitherto unheard-of practices of secrecy and withholding of research materials and information which have a particularly damaging effect on research teams, who have few resources at their disposal and who rely on international co-operation to carry out their own research projects. The CFDD is concerned about the proliferation of start-ups on the basis of a single patent, with their true destiny being one of absorption as part of the general trend towards concentration, which is a particularly bad thing for product diversity. Finally, it criticises public research's submission to the objectives of major agro-chemicals corporations, whose concern is to find plant species which can be grown in vast pedo-climatic plots, to the detriment of a more diversified genetic crop development. This manner of organising research and development does not satisfy the needs of sustainable agriculture that farmers and consumers are interested in. It is precisely those people who should be involved in defining the objectives of public research programmes. The CFDD warns that patents are today being handed out in an overly-wide-ranging manner, which impedes subsequent innovation in terms of improvements or derivative inventions. This practice is particularly negative in the areas of public health and agriculture.

Patents and technological risks

Today, patents are being issued too early in the research process, which means that we are courting danger in the way risk evaluation is being carried out. This is true for start-ups which, under pressure from shareholders, have also demonstrated their penchant for taking unreasonable risks in their experiments on human beings. It also applies to big corporations who, by deciding too early on that there was a fabulous market for patented transgenic crops, were allowed to put crop types on the market which failed to meet the market's expectations, and for which there is no clear-cut balance between risk and benefit. Patents push the economic system into a rapid rotation of products and ever-shorter time-to-market deadlines, whereas in fact, we need to be evaluating the risks attached to such products before they can be put on the market.

Economic and social fairness

The current system by which patents are issued is unfair in every respect, and in particular for the companies themselves. By favouring patents on genes and allowing all the functions of research to be tied up, the possible development of multiple types of products is being prevented, and the juicy carrot is being held out to the researcher capable of carrying out the simple task of decoding, to the detriment of one developing a saleable invention. It is also unfair for the community at large, because the confusion that is deliberately being created between patentable inventions and non-patentable discovery means that the public domain is being deprived of an element of our natural heritage to which it had previously enjoyed unfettered access. Finally, the system itself has a negative impact on public health, since the issuing of patents on genes directly means that they cannot be used as diagnostic tools, even when the researcher uses a mutation of the patented gene. Such problems are already fairly thorny in the case of the identification of genes susceptible to breast cancer. Generalised patentability results in products which concentrate a large number of successive patents, resulting, on the one hand, in an increase in costs, and on the other, in difficulties putting them into effect. Patented genes are often the product of collections in the Third World, and it is still rare for the country of origin to enjoy any financial benefit. Finally, the patents issued on plant species prohibit farmers from sowing part of their harvest the following year, which is something that needs to be publicly renegotiated to find grounds for agreement between inventors and users.

Patents and poor countries

The CFDD believes finally that in a far broader sense, the patents systems has become unfair. Until now, it has been used as a tool by the elite club of rich, developed countries. Now, the World Trade Organisation has forced the developing countries to join this club, even though they are no more than importers of patented technologies. When patented techniques are necessary for the protection of human health, the environment and food, they really must be automatically required to have a licence, with a licence fee which is affordable to technology-importing countries which could then both equip themselves with a local manufacturing base and satisfy the basic needs of their populations. Provisions do already exist which require a court to decide on the issuance of these licences and to fix the cost of the licence fee, but these powers are not exercised in practice. It is time this situation was reversed to extricate us from this dilemma which breeds inaction and forgery.

Reorientation of the patenting system

The CFDD feels compelled to demand that the patentability of living organisms be renegotiated on new precepts which are more respectful of economic and social fairness and of the representations that human beings have of themselves and of other living things. The CFDD is struck by the distance that seems to separate the patenting bodies from public opinion, and is asking as a result that the NGOs representing civil society should be involved in the forthcoming revision of the European patent convention and indeed in any initiative led in this area. Up until now, only NGOs representing industrial interests have been allowed to take part.

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