

Section 15: Inventions contrary to public order or morality not patentable inventions

(1) An invention is not a patentable invention if the commercial exploitation of the invention, so far as claimed in a claim, is contrary to—

- (a) public order (which in this section has the same meaning as the term *ordre public* as used in Article 27.2 of the TRIPS agreement); or
- (b) morality.

Examples

The commercial exploitation of the following inventions is contrary to public order or morality and, accordingly, those inventions are not patentable:

- an invention that is a process for cloning human beings:
- an invention that is a process for modifying the germ line genetic identity of human beings:
- an invention that involves the use of human embryos for industrial or commercial purposes:
- an invention that is a process for modifying the genetic identity of animals that is likely to cause them suffering without any substantial medical benefit to human beings or animals, or an invention that is an animal resulting from such a process.

(2) For the purposes of subsection (1), commercial exploitation must not be regarded as contrary to public order or morality only because it is prohibited by any law in force in New Zealand.

(3) The Commissioner may, for the purpose of making a decision under this section, seek advice from the Māori advisory committee or any person that the Commissioner considers appropriate.

Compare: Patents Act 1977 s 1(3), (4) (UK)

Contrary to public order or morality - general

1. Section 14 outlines the specific requirements for a patentable invention which includes (d) that it is not excluded from being a patentable invention under section 15 or 16.

2. The purpose of section 15 is that an invention is not considered to be a patentable invention if the commercial exploitation of the invention as claimed is contrary to public order or contrary to morality.

3. A patent will not be granted for an invention whose exploitation would be generally expected to encourage offensive, immoral or antisocial behaviour. This section provides a reasonably objective test which has to be applied to each invention and its particular set of facts and circumstances. What is to be regarded as contrary to public order or morality will vary according to changes in social

attitudes and on no account ought examiners to allow their own personal and individual beliefs to colour their judgment on this matter.

4. For the purpose of this section mere publication of excluded subject matter is not considered sufficient to exclude an invention from being a patentable invention. This section is considered to cover only where the invention relates to the commercial exploitation of excluded subject matter. If, however, the specification includes matter the publication or exploitation of which would generally be expected to encourage offensive, immoral or antisocial behaviour, then irrespective of whether the invention itself is open to objection under the situation can be dealt with by excision of the offending matter.

5. Consideration of public order and morality should include an assessment of the concepts of the invention as at the filing or priority date of the application. The concept of public order covers the protection of public security and the physical integrity of individuals as part of society, and encompasses the protection of the environment. With respect to morality, the culture inherent in New Zealand society as a whole or a significant section of the community should form the basis for determining what behaviour is right and acceptable, and what behaviour is wrong or immoral. The concerns of interest groups, evidence including appropriate public polls and research, corresponding foreign legislation, caselaw and guidelines may be taken into consideration.

6. Subsection (2) brings the exclusion in subsection (1) in line with the wording of article 27(2) of the TRIPS agreement in that the commercial exploitation must not be regarded as contrary to public order or morality only because it is prohibited by any law in force in New Zealand. The effect of subsection (2) is to clarify that an act or action prohibited by a law is not to be considered as necessarily the same thing as being contrary to public policy order or morality (e.g. articles which are capable of being used in illegal or immoral ways). However, the existence of such a law or regulation may be a material fact to be taken into consideration in determining whether to refuse an application under subsection (1). The nature and probable uses of the invention will need to be considered as well as the exact terms of the prohibition. Thus if the prohibition is directed unconditionally to the very act which the inventor proposes very careful deliberation must be given as to whether to invoke subsection (1).

7. Subsection (3) allows ~~for~~ the Commissioner to seek advice from the Māori Advisory Committee when making a decision under this section ~~from the Māori advisory committee or any person that the Commissioner considers appropriate.~~ The referral to the Māori Advisory Committee forms part of the examination procedure and should be completed within the normal examination timeframes.

8. If the applicant identifies a Māori conflict, the Commissioner will refer the application to the Māori Advisory Committee. The Commissioner may also refer an application to the Māori Advisory Committee if the Commissioner thinks that:

- the invention is derived from Māori traditional knowledge, or
- the invention is derived from indigenous plants or animals.

9. Further information on the Māori Advisory Committee can be found on the IPONZ website.

810. Section 15 provides some examples of specific excluded subject matter which includes:

- i. processes for cloning human beings,
- ii. processes for modifying the germ line genetic identity of human beings,
- iii. the use of human embryos for industrial or commercial purposes,
- iv. processes for modifying the genetic identity of animals that is likely to cause them suffering without any substantial medical benefit to human beings or animals, or an invention that is an animal resulting from such a process.

911. The exemplified matters of section 15 are also excluded specifically under section 16 and these guidelines deal with these matters under that section.

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