Plant Breeding Legislation in Europe

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INTELLECTUAL PROPERTY AND ADMINISTRATION

It seems that some people today believe that breeders, researchers, and others, who are devoted to the development of new plant varieties, be it agricultural or horticultural species, are akin to the "alchemists" of ancient times. Convinced that they are able to transform any base metal into the most precious of all: gold! Influenced by a deep belief in the mystical teachings of chemistry, the alchemists had faith that they would, eventually, reach their ultimate goal.

After more than 10 years in close contact with breeders and researchers, I have realised, that modern breeding programmes truly do include techniques and methods far beyond the "golden" eggs. Consequently it is of the utmost importance for the plant breeder to protect his invention. This paper is an attempt to inform you of the basic ideas of intellectual property legislation in Europe and the practical implementation of such systems through plant variety rights legislation. I will also highlight a positive approach to the necessity of royalty collection.

You may consider plant novelty protection as an insurance as well as an investment, i.e. protection of your product will ensure that you are able to recoup the development costs.

Seen from an investment point of view, you can consider two angles:

1) Product protection of a variety or a concept, which includes an improvement of the product, will enable a larger market share and consequently a bigger turnover
2) Product protection of a variety or a concept, which is providing a more efficient production cycle, will result in a better GROSS PROFIT.

There is more to this than just the protection of the product. It may be a novel plant variety, a method for transforming specific characteristics from one plant variety or plant species to another, i.e. a distinct colour (blue roses); or a technical solution of a production method, which will reduce the use of resources or otherwise enhance productivity; it could be a new way of presenting or marketing the product; or a characteristic logo or label connected to the identification of the product itself or its origin. All these aspects need protection.

I will now concentrate on plant variety protection through the legislative measures, which are enforceable in Europe today:

The aim of the legislation is to protect the breeders' intellectual property through an approved right to claim certain rights in connection with commercial exploitation of a protected plant variety. This includes the collection of royalties in order to ensure a financial gain to the breeders, which will enable—or at least contribute to—the continuation of their breeding programmes.

The UPOV convention has formed basis for the national legislation in most European countries. In fact, legislation in accordance with the recommended UPOV stipulations has been operational for a number of years in the majority of European countries producing or consuming plant varieties. However, the list of

protectable species has been limited in certain countries. In the past a plant breeder domiciled in or represented by a national of the specific country files an application in each country which they consider appropriate.

As of 27 April 1995, any breeder, being citizen of, or domiciled in, any member state of the European Community or in a UPOV member state, can file an application for their plant variety directly with the European Community Variety Office located in Brussels, Belgium.

Based on the UPOV (1991) Convention, the EU Directive prescribes that it is necessary to obtain the approval of the variety owner's (the breeder's) in order to:

- Produce or reproduce (by multiplication) the variety.
- Conditioning for the purpose of propagation.
- Offer the variety for sale.
- Selling or other marketing of the variety.
- Exporting the variety from the Community.
- Importing the variety to the Community.
- Stocking the variety for any of the purposes listed above.

In addition to the stipulations of the UPOV Convention, the EU Directive further entitles the variety owner the right to prescribe conditions and limitations to his authorisation.

The legislation also includes stipulations for the initial breeder's influence on essential derived varieties as well as the concept of farm-saved seed, which is of the utmost interest to breeders and producers of agricultural crops.

This protection is valid for up to 25 years, however for grape and tree varieties this period is extended to 30 years.

In order to commercially exhaust a protected plant variety, the variety has to have been given a name which is then approved and registered by the appropriate plant novelty authority. The variety should then be designated by this approved variety name, even beyond the expiry of the protection period.

It should however be noted, that filing of applications for national protection in one or more single European countries is still an alternative.

WHAT IS A PLANT NOVELTY

It Should be Distinct. At least one essential characteristic should differ from any known variety of the same species;

It Should be Uniform. Homogenous within the specific generation; and

It Should be Stable. The variety should, by continued propagation, maintain the characteristics claimed for this variety when propagated in accordance with the methods prescribed by the variety owner.

In the European system, the majority of DUS-testing—the so-called comparative trials—is performed at centralised testing stations. But due to the fact, that within the implementation of the new legislation [EU Directive and UPOV (1991) based national legislation], any plant species can be protected, the need for extended testing facilities has arisen. This has resulted in the development of contractual testing facilities, which even may be at the breeder's own facilities. You may recognise this system, and indeed, we have borrowed the idea from this part of the world.

It would take too long to explain the newly developed standardised licence agreement system fully. The following is a brief outline of the concept.

The contractual system consists of a basic licence agreement, outlining the rights and obligations of licensor as well as licensee. In addition, the licensee will have to sign an addendum for the specific use of certain varieties, valid for a specified period. The addendum may also include further restrictions or conditions, i.e. territory of exhaustion, limits to production quantities, compulsory use of trade marks or labels, etc. The addendum could allow the propagation and sale of propagation material; the propagation and sale of the finished product; the production of finished plants only; or, the production of cut flowers. Special licence agreement arrangements with trade organisations and distributors are also available.

The mere mention of the word ***royalty*** raises the blood pressure of many flower growers around the world. Why is it necessary to pay extra for a plant with a fancy name? The subject is often avoided because it causes controversy, but consider this idea: you are paying a rental fee to the variety owner for use of his/her invention. In other words, you do not buy the variety, you only rent the right to use it.

If I develop a new plant with characteristics that you want to produce and sell, why not rent my technology? And why complain about the rent? Aren't you using my inventiveness for your own gain?

The question of how much rent or royalty is another issue. If you think the rent is too high, you do not have to rent my technology. But just because you think it is too high, does not give you the right to use my technology without paying the rent.

Royalty payments are not just an add-on cost for the propagator. A royalty pays the inventor for his inventiveness and the development cost of a new cultivar. One new plant cultivar that is truly superior must support the development costs for itself, as well for all its sisters and brothers that didn't make the grade. Royalty payments for use of superior plant cultivars are essential in our industry. New plant cultivar development depends on it. Honesty demands it. If you do not support the concept of royalty payments the development of new cultivars will suffer a serious set back.

If you think the royalty is too high, grow a different cultivar. But if you choose to grow a cultivar with a royalty, figure the cultivar rent as a necessary cost. Remember, some day, we will all have to account for our excesses; it is just a deferred settlement.....!

LITERATURE CITED

European Community Directive 2100/94. 1996. Lov om plantenyheder, Lovbekendtgørelse nr.51 af 9. Februar.

Danish Standardised Licence Agreement Arrangements (draft). Copyright: Danish Association of Plant Breeders.

Hammer, Allan. 1991 Royalty. Growfer Talks. June, p. 91.