

# Seminar on Enforcement of PVR

## Identification of Protected Material

by

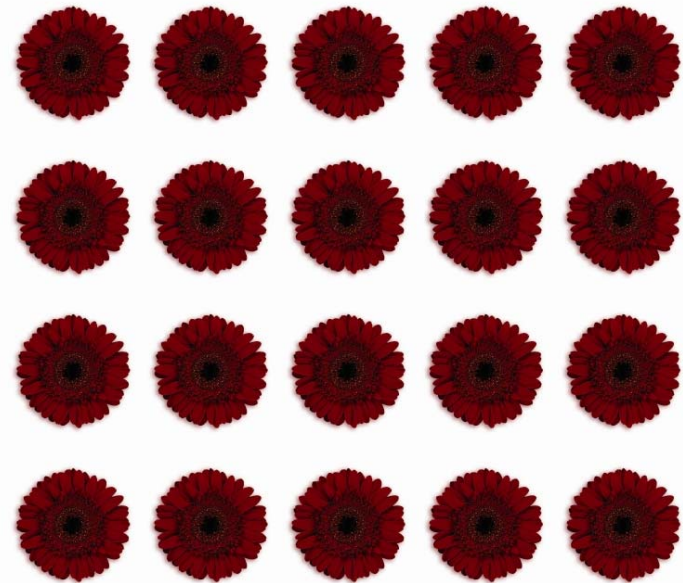
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- Identification of material
- Exercising our rights
- Challenges involved

## FIND THE FAULT!



**THE FAULT IS THAT THREE OF THE GERBERA HAVE BEEN PROPAGATED WITHOUT A PROPER LICENSE.**

Dealing with unlicensed propagating material of a protected variety, and the harvest obtained from it, is a Plant Breeders' Rights infringement. It can have **serious consequences** for your company and is a **criminal act** in many countries. Make sure that you deal with legal plant material only. Be aware that anybody in the whole value chain can be held liable for a Plant Breeders' Rights infringement. For more information please visit: [www.ciopora.org](http://www.ciopora.org)



# Different ways to infringe a PVR

- Rename the variety
- Claim different protected variety
- Combine the production with legal and illegal material
- Illegal propagation
- EDV / mutation

# How to identify protected plants

- Suspicion of infringement of a PVR – what to do?
- Visual identification
- Genetic identification
- Timing issue: how long will the infringer have the plants in its glasshouses?
- Planning process: contact the infringer and/or go to court?

# Typical step one – seizure

- Bailiff and expert enter the infringers premises
- Collection of plants, production plans, invoices, counting the plants
- Available with a short notice
- Request for seizure to be filed with the court
- Seizure is obtained if infringement is demonstrated
- The plants collected during the seizure to be further analysed (visual and genetic)
- Decision to be made: court, settle or withdraw

# Visual Identification

- Clearly distinguishable— Easy to recognize?
- The variety denomination must according to Article 17 in the regulation follow the plant through the chain
- We have the EDV concept if varieties are similar
- So are the effective tools in place?

# Poinsettias as an example



# Visual Identification

- 53 points of measurements for Distinctness  
14 just on the green leaves
- Most points are subjective measurements
- 122 CPVO protected and 28 under procedure
- Influenced by temp., light, water, feed and any combination hereof



# Visual identification of motherplants



# Visual identification of finished plants



# Visual identification in transit





# Visual identification at retail



# Visual identification at retail



# Visual identification at retail



# Visual Identification

## CPVR Regulation 2100/94 Article 17

- Compulsory use of variety denominations
- Any person who offers protected varieties or material of protected varieties must use the variety denomination registered with CPVO



# Visual Identification





# Visual Identification

- A quick search showed that of about 25 species of pot and bedding plants and more than 150 varieties none included the correct variety denomination.



# Visual Identification

- A grow out test – the only way of validating a suspicion
- Time consuming – easily 1 year
- Has to be done by experts – same as doing the DUS test as the basis for granting the title
- The material is maximum 4 weeks in the production facilities after you see it in the market

# Genetic Identification

Is DNA fingerprinting the way to prove infringement?

- ISF and CIOPORA favour use of DNA for plant identification
- ISF's arbitration system based on DNA analysis
- Do courts accept DNA analysis as proof?
  - In Spain and Israel, yes
  - In the Netherlands, maybe (Danziger judgment)
  - In Denmark/Scandinavia, no judgements yet

# Danziger vs. Astée in the Netherlands

- Astée's varieties = EDV of Danzigers Gypsophila variety?
- 3 DNA analysis : Jaccard similarity 0.944, 0.937, 0.87
- CPVO found 17 visual differences
- The court expressed reservations in respect of the DNA AFLP fingerprinting technology
- Court decision: Visual differences were substantial in number and significance – Astées varieties were not EDVs
- Israeli Court: Same varieties - opposite result. AFLP method reliable and visual differences not too many; Astées varieties = EDVs

# DNA Analysis

- How to make a reliable DNA analysis
- How do we get a reliable sampling of the genome?
- Selection of Primer pairs
- Sufficient number of samples
- Sufficient number of reference variety samples

# Identical, EDV or not similar at all?

- Result of the DNA test: Identical, EDV or not similar
- An EDV is an "Essentially Derived Variety". UPOV 1991 Act Art. 14/CPVR Regulation Art. 13
- Variety with single parent (mutation, GMO) or plagiarism
- EDV concept protects the investments of the breeder
- EDV protectable with CPVO – only visual test (DUS)
- No sale of PVR registered EDV without consent of the original breeder (CPVR Regulation Article 13)

# Reversal of Burden of Proof

- Faster, cheaper and easier to prove difference than similarity
- CIOPORAS position paper April 2008: Jaccard Similarity Coefficient of  $>0.90$  the burden of proof should shift in EDV-disputes.
- ISF's "View on Intellectual Property": ISF is in favour of the reversal of the burden of proof in EDV-disputes. Agreed thresholds: shift of burden of proof if Jaccard Coefficient  $>0.96$  (lettuce),  $>0.85$  (Oilseed Rape),  $>0.60$  (Rape)
- Article 13 Italian PVR law: "Use shall be presumed unauthorised in the absence of proof of the contrary"
- Danish Patent law: Reversal of burden of proof in process patent infringement cases

# Going to Court?

- Can you prove the infringement?
- Which court has jurisdiction, is competent and specialised?
- How many years?
- What are the costs ? (lawyers, experts, visual and genetic tests)
- Time to be spent internally
- If you win: Cease of production, marketing and sale, destruction, compensation, damages , publication
- Future value of judgement? Is the PVR still on the market or is it replaced by a new and better PVR?



# Conclusions

- PVR is difficult – almost impossible - to enforce today
- Urgent need for fast, efficient and cheap enforceability of PVR
- Reversal of burden of proof when Jaccard Coefficient  $>0.90$  unless other threshold is agreed in the industry.
- Varieties are not clearly distinguishable from each other with current minimum distance
- DNA finger prints to be formally recognized in infringement cases.
- CPVO to use DNA fingerprints in the application procedure
- Community PVR Court and/or specific PVR courts in each country
- Enforcement of use of variety denominations (CPVR Regulation Article 17)

# Questions?

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