

Seminar on Enforcement of PVR

Identification of Protected Material

by

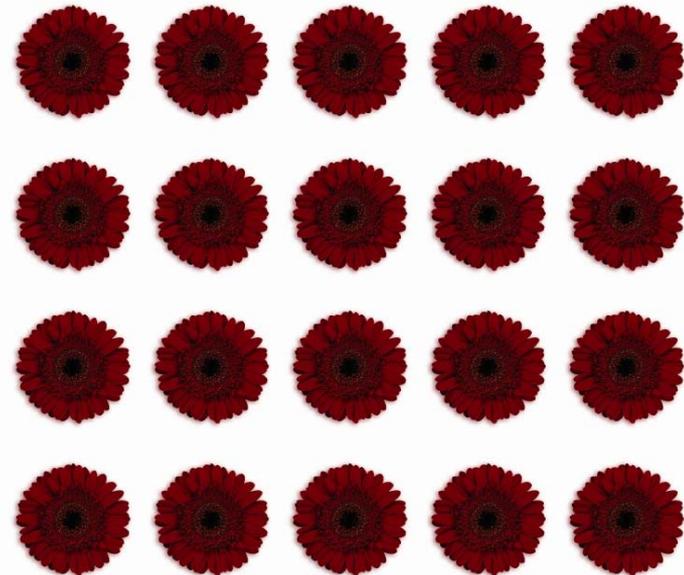
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- Identification of material
- Exercising our rights
- Challenges involved

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



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. Asteé 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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