CPVO
Community Plant Variety Office

SUMMARY ON THE CPVO SEMINAR ON 24/06/15 ON THE RELATIONSHIP BETWEEN PATENTS AND PLANT VARIETY RIGHTS

On 24 June 2015 the Administrative Council of the CPVO (AC) held a seminar on the interface between patents and plant variety rights (PVR), see enclosed agenda.

1. Opening

Martin Ekvad, CPVO President, opened the seminar and presented excuses of Andy Mitchell, AC Chair, who was absent due to train strikes. The CPVO AC organised this event in order to be informed about the latest developments on this topic. Indeed the seminar had as objective raising awareness and sharing knowledge among experts from different areas on various issues. The seminar was well-timed and was inspired by the recently released decisions of the Enlarged Board of Appeal of the European Patent Office in the Tomato and Broccoli cases which threw the relationship between patents and plant variety rights into the spotlight. About 90 participants attended the seminar from the members and observers of the AC including the European Commission, experts from the European Patent Office and national patent offices of the EU Member States, academics and COPA-COGECA.

2. Presentations

2.1 Overview of state of affairs

The presentations touched upon the scope of protection of plant related inventions in the framework of the European patent Convention and of the future European Unitary patent system. Speakers also elaborated on the potential impact that the breeder's exemption introduced under the European Unitary patent system will have on plant variety rights and the scope of protection. The idea that a right to use patented material should be introduced under the condition that an exploitation fee is paid to the patent holder was presented. A comparative overview has also been drawn between the extent of the research exemption under some national patent laws and the breeder's exemption in EU and national plant variety laws. It was also indicated that the Expert Group on the Development and Implications of Patent Law in the Field of Biotechnology and Genetic Engineering set up by the European Commission in December 2013 will provide its forthcoming report by the end of the year. [1] This will allow the Commission to better map the current trends and will provide a basis for the Commission when determine whether future changes in the current legislation are necessary.

2.2 Some Users initiatives and prospects

From the side of the breeding industry the creation by the European Seed Association of the PINTO (Patent Information and Transparency On-line) data-base was launched with the aim of improving transparency regarding the patent status of plant varieties. Moreover the International Licensing Platform (ILP) launched in 2014 provides an example whereby companies have agreed on a system of access to biological material covered by patents at fair and reasonable prices. The concerns of farmers have been expressed by COPA-COGECA highlighting the constant need of farmers for better varieties and higher yields in all climates of the EU. It was argued that a balanced plant variety protection system contributes to these objectives whilst patents don't.

2.3 Situation in some Member States

[1] Pursuant to Article 16 (c) of the Biotech Directive; Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.

The perspective of different national legislations in France, the Netherlands and Germany was presented. The trend in these countries is to ensure free access to genetic resources to breeders which might in some cases even go beyond what the European Patent Convention and/or the Biotech Directive seem to allow if such material is covered by patent. It was argued that there is a risk that patents on plant related innovations could block access to genetics and that it would contribute to a market concentration to the detriment of small and medium sized breeders. It was also argued by some that the bar to acquire a patent is too low and that it should be raised. Native traits are public property and should not be patented. Taken into account the political climate in the Netherlands, the Netherlands will put the issue on patentability of plant related innovations on the agenda of a forthcoming Council of the EU meeting under any other business in July this year and they will issue a study on the topic in November this year.

3. Panel Discussion

Based on the above the discussions may be summarized as follows.

Institutions, law makers and the industry, each of them individually and with each other, share responsibility in finding a balance between patents on plant related inventions and plant variety rights.

What can the **industry** do? The example of the PINTO data-base and the International License Platform (ILP) already provides a valuable tool to disseminate information and reducing the gap which exists when searching information related to plant varieties and patents. Attempts have been done to include more species to the ILP but so far without success. This does not exclude that further attempts can be done in the future. However, the point was raised that since these are voluntary systems they can only be part of a solution but do not solve the issue since not all players on the market participate. It was also argued that industry cannot be expected not to protect plant related innovations by patents as long as this is legally possible.

What can **institutions** do? The CPVO and the European Patent Office are the leading institutions in their respective domains. The relationship between the two systems of protection has shown the importance of enhancing cooperation among those institutions. It should be explored if sharing of knowledge and information amongst experts of these bodies will allow a better understanding of the extent of the prior art in the field of plant breeding. In this respect CPVO and EPO stated that they were willing to explore further ways of strengthening cooperation. The CPVO is ready to offer its collaboration to contribute to the better identification of the information the EPO needs to define the state of the art in this field, through its consolidated expertise, the support of its entrusted examination offices and the breeders.

What can **law makers** do? It was agreed that PVR and patent are two important systems. Whether it is wise to allow patents on native traits is challenged by certain member states and by, at least some groups of society. It was argued by some that a prohibition on patents obtained on plants derived from essentially biological methods as well as native traits and genes, would solve the above mentioned problems and restore the unbalance created by recent case law. However, it was also pointed out that part of the breeding industry is in favor of leaving the patent legislation as it is. From the discussions it seemed as if few Member States have a clear position on the issues raised in the seminar.

To get a political agreement may be a challenge. The point was raised that even if Member States can agree on specific amendments, there is always the risk that if EU legislation is opened the debate will enter into unpredicted directions.

Discrepancies in legislations of different Member States and the EPO practice is nevertheless not an option in the long run. Law makers can in this respect achieve what industry and agencies can't. A common effort at legislative level could contribute to addressing some of the concerns raised above and to reach a harmonized approach.

4. Final remarks

In summary the Commission made the following final remarks:

- Innovation is crucial in order for EU breeding companies to be competitive in the EU as well as on the global market. Providing intellectual property rights to innovators is a good tool to provide incentives for innovation. Moreover, plant breeding is at the heart of the food chain and contributes to improve the quality of life in a greener economy.
- The various presentations show that the legislation in the Member States on the patentability of plant related innovations vary. In addition, the jurisprudence of the European Patent Office (EPO) seems to go in one direction whilst the legislation in some Member States goes in another direction.
- Different standards on intellectual property protection in the EU are an obstacle for the implementation of the principle of free movement of goods and fair competition. It is important for the whole agro-food chain - including breeders, producers, farmers and consumers - that the same standards are applied throughout the EU.
- Co-operation between EPO and CPVO should be further explored.
- Sharing of information and increasing transparency are of key relevance. Breeding companies initiatives are welcome such as the ESA database and the International Licensing Platform.
- The balance between plant variety rights and patents on plants is important. Taking into account that breeding is an incremental activity and is fundamental for agriculture and horticulture and food security, no intellectual property right should restrict access to plant diversity.
- Concerning the Biotech Directive, the Commission is willing to co-operate across directorates to analyse possibilities to reach a clear implementation of the Biotech Directive.

5. Closing

Before thanking everyone for the active participation Mr Martin Ekvad, President of the CPVO, stated that in order to facilitate the sharing of information and the fostering of the dialogue between the different players involved, the organization of a seminar on the same topic open to the public, or at least to interested stakeholders, could be considered, preferably in a coming AC meeting.