

CIOPORA

International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants

CPVO Seminar on the Enforcement of Plant Variety Rights Customs actions

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Athens, 15 April 2010

Agenda

- Main types of rights and infringement
- Enforcement by customs actions
 - Legal Basics
 - Procedure
 - Determination of infringement
- Examples of enforcement activities

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Main types of rights of breeders

Community rights:

- CPVR: Community Plant Variety Rights on basis of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community Plant Variety Rights, administered by CPVO
- CTM: Community Trademarks on basis of Council Regulation (EC) No. 40/94 on the Community trademark, administered by the Office for Harmonization in the Internal Market (OHIM)
- Both rights are valid for all 27 Member States

National rights:

- Additionally or alternatively most Member States offer their own protection system for plant varieties and trademarks
- Systems are administered by national plant variety/trademark/IP-offices
- The granted right is only valid in the territory of the granting country

Main types of infringement

- Commercial introduction of EDVs by sport finders without consent of titleholder of initial variety
- Unauthorised propagation, production and/or sale of plants or parts of plants of protected varieties
- Trade
 - Import of plants or parts of plants into consumption regions (USA, EU, Japan a.o.) from unauthorized sources
 - Trade of plants or parts of plants from unauthorized sources
 - Facilitation and intermediation of trade of plants or parts of plants coming from unauthorized sources in the EU

Enforcement of IP-Rights:

Legal background

- By national laws and court proceedings; some harmonization gained by **Directive 2004/48/EC** on the enforcement of intellectual property rights
- By border seizures under
 - **Council Regulation (EC) No 1383/2003** concerning “customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights” and
 - Commission Regulation (EC) **No 1891/2004** laying down provisions for the implementation of Council Regulation (EC) No 1383/2003 and Commission Regulation (EC) **No 1172/2007** amending Commission Regulation (EC) No 1891/2004

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Procedure of customs action

1. Application for customs actions by right-holder or ex-officio controls by customs (hardly happens in the ornamental and fruit business)
2. Customs check incoming goods and inform right-holder about suspicious goods
3. After notice right-holder has 3 days to
 - i. Have goods released in case of no infringement,
 - ii. Find agreement with infringer on destruction (no retroactive legalization of goods), or
 - iii. Initiate court case for decision about infringement

Infringement?

Fake and illegal plants

“Fake” plant:

- Definition: a plant that is grown or traded with a “fake” name, normally the name of another more successful variety, or the name of a non-protected variety, or a fancy name.
- Infringement: if the variety grown or traded is protected and/or if the “fake” name given to such variety is protected.
- Example: Cripps Pink apple (protected by CPVR) imported with the PINK LADY® brand from China



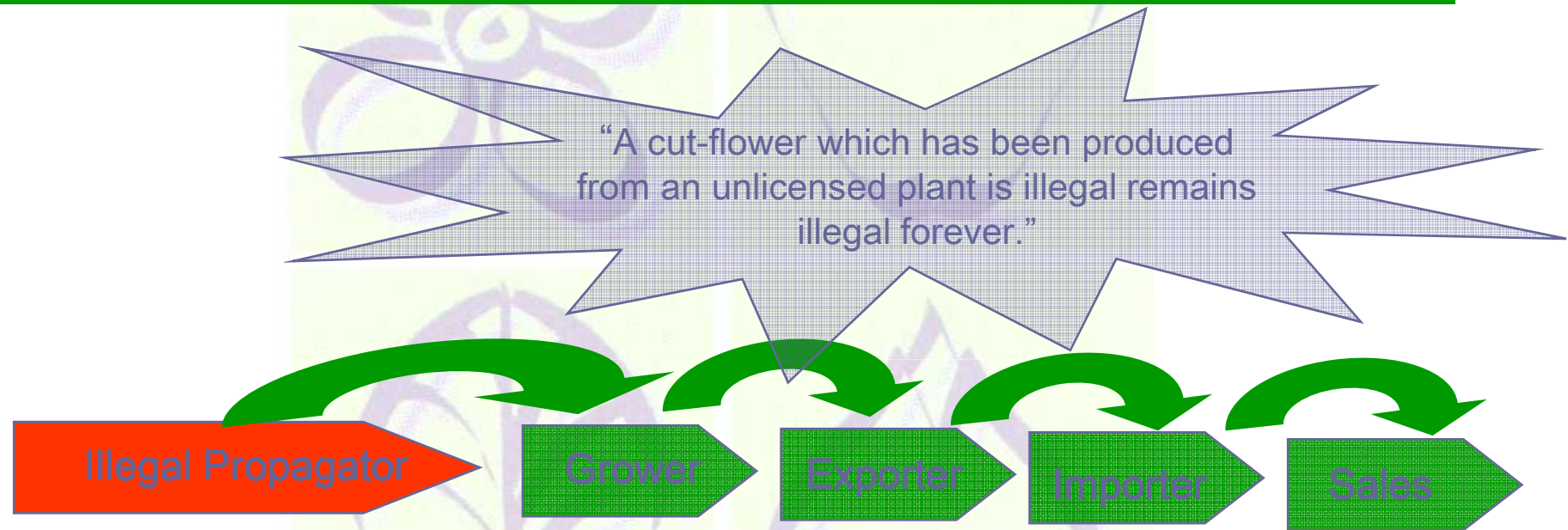
“Illegal” plant:

- Definition: a plant of a protected variety produced or propagated, stocked and/or conditioned, offered for sale or sold, exported or imported, WITHOUT license (authorization by the owner).
- The plant itself is of course not legal or illegal, but all the above mentioned acts executed on it can be legal or illegal depending on the existence and conditions of a license.
- Problem: legal and illegal plants look exactly the same, the only difference is a (missing) valid license
- Example:



Infringement?

Once illegal – forever illegal



The German Supreme Court has ruled:

A duty exists for every single member in the value chain to verify, whether any IP-right is tangent and might be violated, especially for cross border transactions. It has at least to be checked, whether the party one is obtaining a product from did execute a compliance check with IP-rights with reasonable care.

Infringement?

Goods in transit

Do goods in transit constitute an infringement?

➤ **Contra:**

- Transshipment as such not mentioned in the basic law as one of the infringing acts
- The ECJ denied in the “Montex-case” (C-405/03) a trademark-infringement for goods in transit interpreting the Trademark Directive (89/104/ EEC of the Council of 21 December 1988)

➤ **Pro (“Manufacturing Fiction”):**

- Recital 8 of Council Regulation No 1383/2003 of 22 July 2003 states that national infringement proceedings “will be conducted with reference to the criteria used to establish whether goods produced **in that** Members State infringe IP rights.”

The Manufacturing fiction is under debate

- National European courts decide differently
- The UK court of Appeal and Court of Antwerp referred questions on the Manufacturing Fiction to the ECJ; decisions are not yet available

Infringement? Goods in transit

Press release – 21. January 2010

Successful custom actions against
illegal carnations

Recently Dutch customs at Amsterdam
Schiphol airport have seized six flower
shipments containing Colombian
carnations.

CIOPORA's comments:

- The flowers were in transit to Russia and were confiscated on the basis of a Community Plant Variety Right
- Do we feel safe?

Latest News :

Osmocote Europe celebrates its 40th Europe anniversary

Ecuador studies the possibility of establishing direct flights to Russia

by Ron van der Ploeg

QUITO, Ecuador, December 16, 2009: Following his state visit to Russia, Ecuador's president Mr. Rafael Correa has announced that his country will start direct cargo flights to Russia to serve the export of fresh cut flowers. Executive president Ignacio Pérez Arteta of industry body Expoflores says that to date there are no direct flights to Russia adding that the government and the Ecuadorian flower industry are seriously looking at the possibilities. Pérez emphasizes on the necessity of a minimum of two direct flight per week. "It will give Ecuadorian exporters major, quick and cheap access to the Russian market. The plans for direct flights is at a moment that Russia is gaining importance as export destination for roses Made in Ecuador. Besides, we can save up to 25% of custom fees."

Pérez points out that the passage of Ecuadorian flowers through Amsterdam reduces the shelf life of cut flowers. Ecuadorian flowers at present have to travel to Amsterdam (Netherlands) where they are trucked to Moscow. Upon arrival the shelf life of the flowers has already decreased significantly, so Russian vendors can not send them to other Russian cities. The high cost of road transport from Amsterdam to Moscow adds to the total transport costs. Flowers that travel via Amsterdam to Russia are up to 30 to 35 percent more expensive", Pérez added.

The plan for direct flight to Russia is part of a very positive evaluation of president Correa's official visit to Russia from October 29 to 31. Rafael Correa is the first Ecuadorian leader ever to visit Russia although Ecuador and Russia maintain a 65 years of bilateral diplomatic relations. "Russia is our biggest export market for bananas and cut flowers," said Correa, who also mentioned the series of agreements signed with the Russian government during his visit. He explained that among the agreements signed with Russia is one that avoids double taxation for Russian investments, which will hopefully attract more Russian investors.

Ecuador is the world's fourth-largest exporter of flowers. Revenues from flower exports accounted for \$ 450 million in 2008. Russia purchases slightly more than 10% of Ecuador's roses.



Flora Culture
International
online and
February issue

How to detect “illegal” plants

1. Breeders: Assist customs by good preparation
2. Customs: Duly check papers
3. Customs: Carefully look at presentation of the goods
4. Customs: Thoroughly check the variety identification

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How to detect “illegal” plants

1. Good preparation by breeders

- Intelligence activity in the country of production and export and in the country of import and sale for target identification
- Checking of licenses and authorization chains. Any license whose conditions have not been fulfilled by the licensee should be revocable and revoked prior to an action
- Have a lawyer prepared to act immediately

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How to detect “illegal” plants

2. Customs: check papers

- The phytosanitary certificate must be duly and completely filled in:
 - Correct identification of the product (species and variety denomination) and
 - Undisputable identification of the grower
 - A phyto **should not** be in the name of a trading company
- The invoices must clearly mention the species and varieties, the quantities, the grower's name (even if he's not the selling party) and the data must coincide with the ones on the phyto and airwaybill
- Plants should come from a producing country

How to detect “illegal” plants

3. Customs: check presentation of the goods

- The boxes should
 - look clean, professional, without damages
 - be identified by the printed (or labeled) logo of the grower or of the exporter. Labels should carry information on the product (species, varieties, quantities) and on the grower
- The packing and bunching of the goods must also be professional and clean, and single bunches should also carry the variety identification

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How to detect “illegal” plants

4. Customs: check variety identification

- Art. 17 and 18 of the Council Regulation (EC) No 2100/94 of 27 July 1994 on Community Plant Variety Rights require the (correct) use of the variety denomination; a violation constitutes an infringement of the CPVR (Art. 94 (1) (b))
- Check at least if color and shape match with the denomination and/or trade name mentioned on the papers, the boxes or the bunches
- If no name is mentioned, proceed to classify plants based on the main morphological characters (color, shape, size of the bud, size and shape of the leaflets, specific signs) and on the confrontation with the “most probable” candidates.
- If none of the “most probable” candidates is identified, then make a “deeper” classification based on secondary morphological characters.
- Customs should consult with breeders at least in case of doubt.

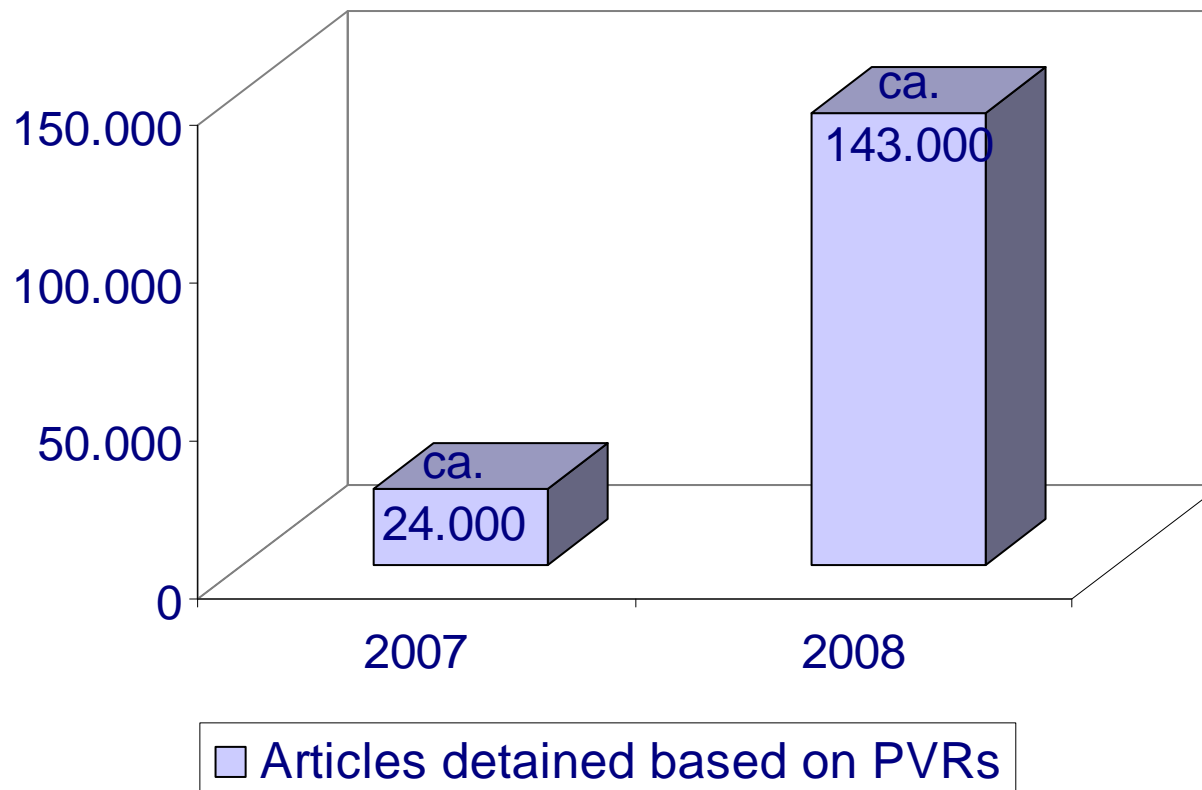
Examples of enforcement activities

Confiscations of

- Roses from Colombia in Miami (customs, on trade marks, February 2004)
- Roses from Brazil in Lisbon (customs, on breeders' rights and trademarks, February 2005)
- Apples from China on the Fruit Logistica international exhibition in Berlin (on breeders' rights and trademarks, February 2005)
- Roses from India in London (customs, on breeders' rights and trademarks, December 2005)
- Carnations from Turkey at the Hungarian border (customs, on breeders' rights, March 2006)
- Roses from Ethiopia in Amsterdam (customs, on breeders' rights and trademarks, December 2007)
- Valentines actions in February 2008
- Gerbera at Turkish-Bulgarian border (customs, March 2008)
- Carnations from Colombia in Amsterdam (customs, January 2010)

Examples of enforcement activities

Goods detained by customs based on PVR



Source: Report on EU customs enforcement of intellectual property rights – results at the European border - 2008

Examples of enforcement activities: The Valentines-Project

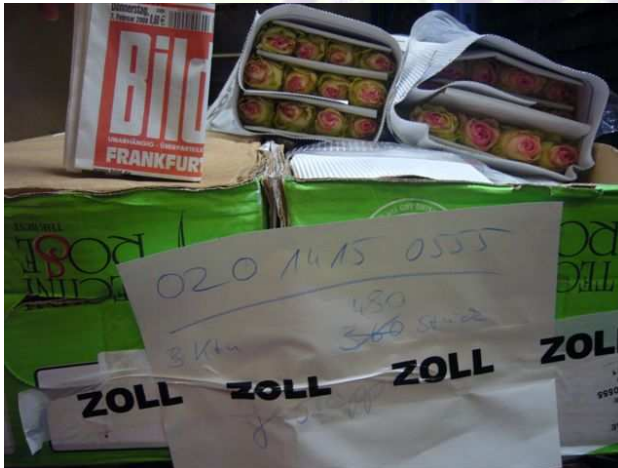
Unique approach

- ❑ Pilot-project of 15 rose-breeders for increased enforcement of IP-Rights in the plant breeding sector
- ❑ Parallel activities in several countries at the same time
- ❑ Joint effort of breeders, customs and European Commission to protect compliance with IP-Rights and fair trade

Some results

- ❑ ~160 CPVRs are subject to applications for customs actions and can easily enforced over 12 months (and easily prolonged)
- ❑ 20 shipments with tens of thousands confiscated and illegal roses destroyed
- ❑ Increased openness of trade and growers towards discussions on joint efforts for ensuring compliance with IP-rights, e.g. extraordinary Expoflores meeting in Valentines' week
- ❑ Deterrent effect for infringers
- ❑ New requests for license contracts

Examples of enforcement activities: Some impressions



Examples of enforcement activities: Some impressions



Conclusion

- The breeders and CIOPORA are more and more active in the enforcement of rights
- More acts than many are aware of may constitute an infringement – propagators, growers and trade should know about their responsibilities
- The detection of infringing goods is often difficult, good preparation and cooperation is essential
- Finally, joint efforts and close cooperation between breeders, custom authorities and other industry players will result in benefits for the whole industry



Thank you

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