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UPOV/ENFORCEMENT/05/3
ORIGINAL: English
DATE: October 4, 2005

UPOV

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

MEETING ON ENFORCEMENT OF PLANT BREEDERS' RIGHTS

Geneva, October 25, 2005

PRESENTATION BY THE
INTERNATIONAL SEED FEDERATION (ISF)

submitted by ISF

Enforcement of Plant Breeders' Rights
Opinion of the International Seed Federation

B. Le Buanec – Geneva, 25 October 2005

The preamble of the 1961 Act of the UPOV Convention explains the reasons why the Protection of Plant Breeders was necessary, as follows: "The Contracting States, convinced of the importance attaching to the protection of new varieties of plants not only for the development of agriculture in their territory but also for safeguarding the interest of breeders…". This rationale has not been explicitly kept in the 1991 Act, but the need to encourage the development of new varieties is certainly still as important today as it was 45 years ago, if not more important in the view of the challenges we are facing to feed 6.5 billion people now and 9 billions soon, while preserving the planet.

Several instruments are at the disposal of breeders for protecting their intellectual property rights and recouping their research investments, such as patents, trade marks, trade secrets, contracts. However, for plant varieties per se, they depend in several countries on the so-called Plant Breeder's Right as provided for by the UPOV Convention and the ensuing national and regional laws and regulations.

However, plant breeders are increasingly confronted with infringement.

There are three main kinds of infringement as regards plant varieties:

- The unlawful appropriation of germplasm from others for seed production and sale
  - Either directly
  - Or by plagiarism.
- The illegal sale of seed of protected varieties, also called in some countries brown bagging or bolsa blanca.
- The use of farm saved seed without paying the due fees to the breeder.

I will consider these three cases successively.

1. Unlawful appropriation of germplasm

a) Direct appropriation of varieties

At the moment this is mainly an issue for the vegetable seed industry where we may see:

- Copies of new varieties sold as old unprotected varieties (often old umbrella varieties under E.U. rules).
- Existing varieties registered as if they were genuinely new ones because the DUS tests are not efficient enough to detect this and in particular because they are not compared with the original varieties.

A better scrutiny in DUS testing and, most importantly, a better cooperation between Plant Breeder's Right offices could certainly improve the situation.

b) Plagiarism

In order to be protected by PBR, a variety, among other criteria, has to be distinct from any other variety. To be deemed to be distinct, it must clearly be distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. The difficulty of assessing distinctness lies in the interpretation of the word “clearly” in the group ”clearly distinct”. That question of “minimum distance” has been under debate since the implementation of the first Act of the Convention and there is no simple answer. The general trend during the past years has been a decrease of the minimum distance, partly at the request of the breeders themselves. The technical evolution of the past 15 years allows a quicker development of close varieties and the introduction of the concepts of essential derivation and dependence takes that new situation into account. It is possible to say that these concepts have changed breeding practices and plagiarism is less important today than it was in the past. In case of essential derivation, it is up to the breeders to defend their rights either by arbitration or by legal cases in civil courts.

2. Illegal sale of seed of protected varieties

All the Acts of the UPOV Convention expressly forbid the sale of seed of protected varieties protected by PBR. However, in most of the countries that are parties to the UPOV Convention, this regularly occurs in large quantities. Some figures are presented below as examples:

Level of brown bagging for wheat in some countries [1]	
China	55%
Argentina	45%
Poland	30%
Finland	23%
Czech Republic	20%
United Kingdom	18%
Canada	7%
United States	5%

Similar figures may be found in other crops as well.

In several countries, in addition to infringing the right of the breeder provided by private law, the sale of non-certified seed also infringes the public seed law. A closer cooperation between plant breeders associations and relevant ministry departments should be organized based on better intelligence and better education of all the interested parties.

3. Farm Saved Seed

This is probably the most complex and worrying issue for the seed industry of self-pollinated crops, but increasingly also for hybrids of vegetables and field crops. There is a new trend in several countries to vegetatively reproduce F1 hybrids through grafting and direct

[1] ISF 2005 survey

propagation of scions. Farmers are sometimes using F2 seed harvested from F1 field crops and, in this regard, the recent official initiative of the Saskatchewan Canola Development Commission to fund a study to investigate the economics of using farm-saved hybrid seed is enlightening and appalling.

The three former Acts of the UPOV Convention, namely 1961, 1972 and 1978, put no limit on the use of farm saved seed, the authorization of the breeder not being required for the production of the propagating material of the protected variety if it is not for commercial marketing of the propagating material. Obviously those conventions do not provide an effective protection system. Indeed, in painting the darkest possible picture of the situation but which is the legal - and increasingly practical - reality, all farmers could buy their seed of a variety from the breeder just once and then produce their own seed of it on the farm every year thereafter. The breeder, after all his breeding time and investments, would have a market for one year.

The evolution of pedigreed seed acreage in Canada can give an idea of the gravity of the situation.

Spring Wheat Pedigreed Seed Acreage in Manitoba and Saskatchewan		
Year	**Manitoba**	**Saskatchewan**
1998	38,000	37,500
1999	34,500	32,000
2000	28,500	26,000
2001	23,000	23,000
2002	21,000	25,000
2003	20,000	26,000

Canola Pedigreed Seed Acreage in Saskatchewan	
1999	34,600
2000	17,950
2001	11,500
2002	9,000
2003	11,500

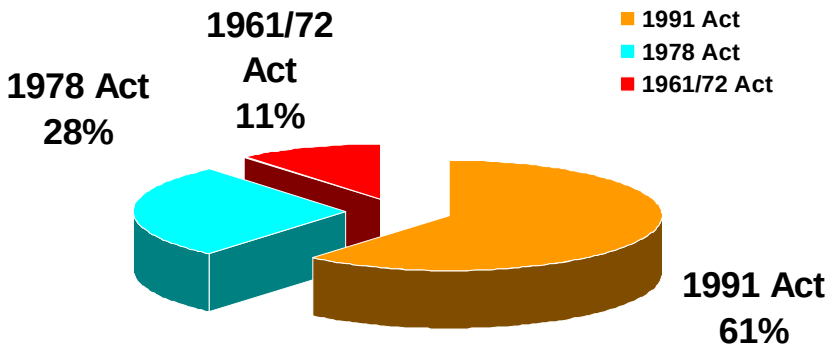
It would be possible to illustrate similar evolution in many countries, but this would be tedious.

The Farm Saved Seed issue has been partially corrected by the 1991 Convention in which the right of the breeders covers the production or reproduction of the propagating material of the protected variety. Unfortunately the act provides for an optional exception that reads: “Each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder’s right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, etc. “. I think that it is not necessary to go further, as you all know this article very well.

The Contracting Parties to the 1991 Act of the Convention, which implement that optional exception, should consequently have in their national laws some clauses limiting farm saved seed and also explaining how the legitimate interest of the breeder is safeguarded. The

enforcement of these clauses is the main subject of this workshop. But before enforcing a right, this right has to exist and it is necessary, before speaking of enforcement, to speak of the implementation of the 1991 Act in various countries. A recent survey answered by 18 ISF members gives the following answers.

STATUS AS PARTIES TO UPOV



This shows that, in our representative sample, 45% of the laws of the Contracting Parties of the 1991 Act do not provide for reasonable limits and the safeguarding of the legitimate interest of the breeder and consequently, in our opinion, are not in conformity with that act. So, before speaking of enforcement, we first have to speak of the implementation of the law. ISF members request the UPOV Council to be vigilant when a State which is not a member of the Union asks for advice with respect to the conformity of its laws with the provisions of the Convention. In particular they consider that accepting a law which is not in conformity on the basis of a “constitutional clause”, i.e. an article stating that in case of nonconformity and in accordance with the constitution of the country the UPOV Convention would apply, is not acceptable. Even if legally speaking this kind of clause may be correct, in practice it is not possible to implement it for two reasons:

- The text of the Convention does not have the necessary precision to be used as a law at national level.

- The various stakeholders in a country, farmers, breeders, judges, will certainly not be inclined to refer to such a clause.

This review is required by article 34.3 of the 1991 Act of the Convention, which is the only act that is accessible today.

The Convention does not explicitly require the Council to give advice on the laws of the countries that have already signed the Convention before depositing their instrument of accession. However Article 30 (1)(i) demonstrates that Every Member State of UPOV has committed itself to "adopt all measures necessary for the implementation of this convention; in particular it shall provide for appropriate legal remedies for the effective enforcement of breeders rights" and it is the task of the Council of UPOV, according to article 30.2, to verify if the laws of such States are in conformity with the Convention.

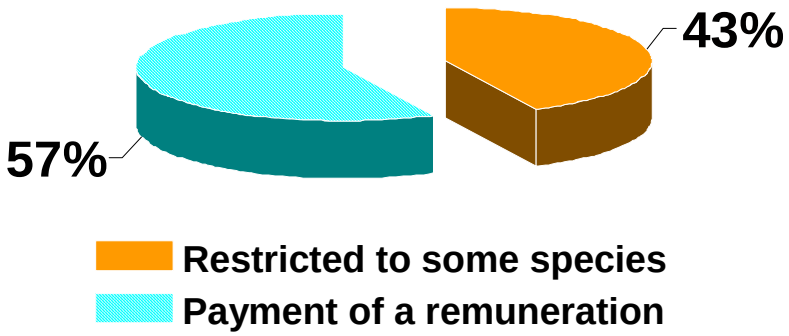
ISF members suggest that the UPOV Council reviews all the existing laws of the Contracting Parties in that regard. With UPOV now having made such substantial progress with persuading countries and regional organisations to become members, surely this is a necessary next step, in particular in the light of the scale of the practical problems shown above. Indeed the UPOV declared objective is to provide protection of new varieties of plants by an intellectual property right.

A list of check points could be established to verify the most important features, such as the scope, the breeder's exception, the farmer's exception, the conditions of protection, etc. In reviewing the laws, the Council should also, according to article 30(1), check if appropriate legal remedies for the effective enforcement of breeders' rights are provided for, which is not always the case and is very important in view of enforcing the breeder's rights. This would not be easy to do, but is in line with the present initiative taken to the Union on the explanatory notes and on key articles of the Convention.

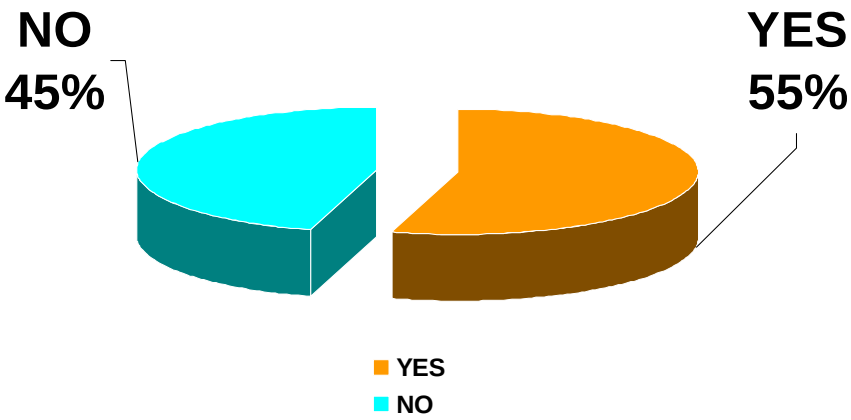
However, the experience gained on the explanatory notes of Article 15(2) shows that it is not easy to obtain any clear-cut positions on the meaning of expressions like "reasonable limits" and "safeguarding the legitimate interest of the breeder". During the discussion at the last CAJ meeting on 1st April 2005, one of the countries even indicated that, after consultation with the farmers, it was considered that it was not possible to put limits on farm saved seed. To my knowledge, countries did not ask the opinion of the public before deciding if they should protect the intellectual property of the music or the film industries before banning illegal downloading. This shows that the practical implementation of the FSS exception in many cases is, to say it cautiously, unbalanced with regards to the legitimate interest of the breeders.

But let us now consider the countries where the spirit of the 1991 UPOV Convention is kept with limitations on farm saved seed and with the safeguarding of the legitimate rights of the breeder.

What kind of limitations?



Does your country implement a royalty collection? (1991 Act)



As we have seen earlier, according to our survey, 55% of the Contracting Parties to the 1991 Act of the UPOV Convention provide for some kind of limitation on farm saved seed, 57% of them limit that exception to certain species and 43% provide for the payment of a remuneration to breeders, with, in general, the exclusion of small farmers from that obligation of remuneration.

Seeing that, one could believe that the situation is improving and breeders are starting to get return on their investments, which would be consistent with the spirit of the 1991 Act. In fact this is hardly the case. Indeed, most of the countries where there is a royalty collection are in the European Union and covered by the Community Plant Variety Rights Regulation (EC) No. 2100/94 and its implementing rules on farm saved seed No. 1768/95 and No. 2605/98. The 1994 implementing rules state “The level of equitable remuneration to be paid to the holder (of the breeder’s right) […] may form the object of a contract between the holder and the farmer concerned. Where such contract has not been concluded or does not apply, the level of remuneration shall be sensibly lower than the amount charged for the licensed production of propagating material […]. The level of remuneration shall be considered to be sensibly lower […] if it does not exceed the one necessary to establish or to stabilize a reasonably balanced ratio between the use of licensed propagating material and the planting of FSS of the varieties […]”. In case of no agreement, the level shall be 50% of the normal royalty rate (2605/98). In order to balance the breeder’s right and the possible exception of FSS, when there is no contract between the farmers and the breeders, the farmer shall,

without prejudice to information requirements under other Community legislation or under legislation of Member States, on request of the breeder, be required to provide a statement of relevant information to the breeder.

Two immediate reactions arise from reading those conditions:

- To get the remuneration he is entitled to receive by law, the breeder must have a contract with the farmer, both agreeing on the level of royalty, which is in essence rather strange.

- If there is no contract, the experience is that in most of the countries, with few exceptions, there is no payment at all.

But let us now examine the situation which could be considered as reasonable, with an agreement between the breeders' association and the farmers' union of a country. I will take the example of Germany.

- The Community Plant Variety Rights Regulation and its implementing rules of 1994 and 1995, as well as the new German PVP Act adopted in July 1997 provide for equitable remuneration of breeders and disclosure of data on the use of farm saved seed. The disclosure obligation applies to farmers as well as mobile cleaners, the remuneration obligation applies to the farmers only.

- A "Cooperation Agreement on Farm Saved Seed" has been passed between the German Farmers' Association and the German Plant Breeders' Association in 1996. The effective functioning of the system depends on the information given by the farmers and the mobile cleaners on their production and use of FSS.

- In 2001, the German High Court stated that the disclosure obligation was subject to the condition that the farmer actually uses FSS. Consequently farmers are no longer obliged to answer the questionnaire sent by the Breeders' Association as regards the varieties protected by the German law. Collection of royalties is very difficult or almost impossible in those conditions.

- In 2003, the European Court of Justice stated that the enforceability of the disclosure obligation by the farmer is subject to the breeder presenting evidence that the farmer uses or will use farm saved seed, which is not included in the European Regulation.

- In 2004, The European Court of Justice rejected the principle of a comprehensive disclosure obligation by mobile cleaners, irrespective of the presence or absence of evidence. The disclosure obligation is supposed to be enforceable only if the breeder can produce evidence that the mobile cleaner has processed or intends to process seed of the variety for which the breeder requests the data, without any indication of those conditions in the Community Regulation. It is interesting to note that the decision of the ECJ was in contradiction with the proposals of the attorney general.

- In 2005, the German High Court of Justice confirmed the ECJ's decision and even went further: not only is the enforceability of the disclosure obligation of mobile cleaners, albeit established by-laws, subject to the breeder producing evidence but even the extra-judicial request to provide information on farm saved seed processing needs to be founded on evidence. Evidence obtained for one year cannot be used for past or future years.

- In conclusion, the breeders' rights, title and interest in farm saved seed, have practically ceased to be enforceable.

This situation is now almost the same in all European countries, except in France where the agreement between breeders and farmers is based on royalty payment at the point of delivery of the harvested product. However, this agreement covers only wheat, i.e. a minority of the areas grown to crops for which FSS is common practice.

In conclusion, we can say that even when breeders have been given rights on farm saved seed, in conformity with the 1991 Act of the UPOV Convention, those rights are almost impossible to enforce. Some figures will give you the size of the problem, according to the results of our survey.

Canada

Country	Crop	Certified %	FSS %	Brown bag %
Canada	Wheat	17	76	7
	Barley	21	66	13
	Canola	92	6	2
	Peas	14	74	12

China

Country	Crop	Certified %	FSS %	Brown bag %
China	Rice	27	66	7
	Maize	24	72	4
	Wheat	22	23	55
	Beans	13	26	61

Finland

Country	Crop	Certified %	FSS %	Brown bag %
Finland	Cereals & Pulses	30	47	23
	Potato	40	47	13
	Forage	100		
	Oilseed Rape	85	13	2

Italy

Country	Crop	Certified %	FSS %	Brown bag %
Italy	Soybean	90	10	
	Alfalfa	75	5	20
	Durum wheat	90	10	
	Soft wheat	70	30	
	Barley	80	20	

Poland

Country	Crop	Certified %	FSS %	Brown bag %
Poland	Wheat	7	93*	* Including brown bagging
	Rye	5	95*	
	Barley	15	85*	
	Oat	5	95*	
	Triticale	8	92*	
	Oilseed Rape	60	40*	
	Potato	3	97*	

United Kingdom

Country	Crop	Certified %	FSS %	Brown bag %
United Kingdom	Wheat	51	31	18
	Winter Barley	55	15	30
	Spring Barley	66	14	20
	Oilseed Rape	58	36	6
	Field Beans	37	18	45

FSS % in Cereals
(for 14 countries having answered)

Total area M ha	Certified seed	FSS
139,903,794	45,484,625 (32.5 %)	94,419,168 (67.5 %)

FSS % in Cereals
(for 14 countries having answered)

Average loss for the seed trade (73 $/ha)	$ 6,896,376,030
Average loss in royalties for plant breeding (5 $/ha)	$ 472,095,840
Collected (?) royalties on FSS on	5,591,874 ha
Average loss in royalties for plant breeding (5 $/ha)	$ 444,136,470

As you may see, the figures are huge. I thought it was important to have them in mind. And it is not only a financial loss for the breeders. It is also a loss for society in terms of thousands of jobs in the seed industry and plant breeding community with, as a consequence, the loss of potentially huge benefits to agriculture, horticulture and environment coming from the use of new improved varieties.

Ladies and Gentlemen, when breeders tell you that the situation is very serious, it is really the case. And the question is “What can we do together to improve it?”

Several actions have to be considered:

Breeders certainly have to better organize themselves and they are starting to do so, in particular by establishing breeders’ organizations and/or contracting firms of private investigations to assist PBR owners in tracking down and bringing to justice those who blatantly infringe plant breeders’ rights.

But this is definitely not enough and a good cooperation with UPOV and Plant Breeders’ Rights Offices is necessary.

As first actions, we would suggest:

- Better cooperation between Plant Breeders' Rights Offices and good harmonization in DUS testing to avoid direct appropriation of varieties.

- Closer cooperation between breeders' organizations and the relevant ministry departments to fight brown bagging in countries where trade of non-certified seed is illegal.

- Specialization of courts in countries or regional entities to facilitate the procedures in case of litigation, as it is done for instance in Europe for Trade Marks.

- Establishment within UPOV of a formal review of proper implementation and effective enforcement of the Convention with two objectives:

    - Review the conformity of all existing laws with the provisions of the 1991 Act of the UPOV Convention without evading the issue of FSS and other relevant subjects related to scope and enforcement and giving opinion to the Council of UPOV on the laws of acceding countries, pursuant to articles 30 and 34 of the Convention.

    - Review the many cases of infringement that are occurring and propose appropriate legal remedies for the effective enforcement of breeders' rights, pursuant to article 30 of the Convention.

The spirit of the 1991 Act of the UPOV Convention makes it, on paper, an effective *sui generis* system to protect plant breeders' rights. Its implementation in many countries and the possibility to enforce the rights when the Convention is correctly implemented make it, in practice, frequently ineffective. Many breeders are questioning the effectiveness and relevance of Plant Breeders' Rights and, in spite of their initial enthusiasm, are now searching for other legal mechanisms to protect their intellectual property. It is time to take action at the UPOV level.

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