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Title : Essentially derived varieties and the perspective of growers

By: Mia Buma, secretary of the Committee for Novelty Protection of AIPH

Introduction:

The International Association of Horticultural Producers is honored to contribute the perspective of ornamental growers at this EDV seminar.

1. I will first give a short overview of the arguments for the introduction of the EDV provision in the 1991 Convention. To understand this regulation it is necessary to know why it was introduced.
2. Secondly I will evaluate the EDV provision: has it brought the benefits that were intended when it was introduced?
3. Following this I will give AIPH's opinion on the EDV provision.
4. Finally I come to a resume and conclusions.

1. The arguments for the introduction of the EDV provision in the 1991 Convention

To understand the EDV provision it is necessary to know why it was introduced. What was the reason for introducing an extension of the breeders right to varieties which are essentially derived from varieties to which PVR had already been granted ?

The main reason was the fact that under the system of the former Conventions (1961 and 1978) one difference between the new and the initial varieties was enough to get the grant of a breeders right. One of the consequences of this system was that a new and successful protected variety was used by other breeders to develop a new successful variety just by adding a very small different detail to the successful variety and to ask for a new breeders right. For that reason some people already warned that to grant a breeders right, wider distances were needed and that criteria for acceptance of and agreement on distances between varieties had to be made. The existing situation could damage the position of the holder of the first existing breeder's right seriously. The opinion was that the distances between varieties had to become wider to be able to grant a breeders right. For that reason in the years before 1991, UPOV was busy formulating and describing the main characteristics for 10 to 12 important varieties with the goal of helping to decide if the criteria for distinctness had been reached. Supporting this work the Royal Horticultural Society (RHS) helped in cooperation with the Dutch ornamental industry to formulate criteria. They developed the RHS Colour Chart. This chart had and still has two positive effects: all UPOV countries could use the same color criteria for the decision for the grant of a breeders right and it provided clarity about the needed distances between

the colors of the initial and the new variety to decide if a new independent breeders right can be granted.

Secondly the existence of mutants in propagating material was another reason to find clearer and fairer criteria for the decision to grant a new breeders right. A mutant hardly differs from the initial variety except by one or two characteristics. However the mutant finders could still apply for their own PVR for this mutant, if it could be distinguished from the initial variety. The fact that this competitor hardly did any breeding work, was felt in the breeding world to be unfair.

A third development asked for a solution that create more clarity and fairness in deciding on whether to grant a new breeders right. This was of the development of biotechnology, which made it easier to create mutants with the use through genetic manipulation.

For those reasons the EDV concept was introduced in the UPOV Convention 1991. The provision defines that if a breeder brings a new variety onto the market that is not significantly different from its parent variety, he can apply for a breeders right but still needs permission from the owner of the already existing protected variety, who can exercise full rights to the breeder of the EDV. In other words this new variety can have breeders right protection but the finder has to ask permission from the breeder of the initial variety if he wants to sell material from this new variety.

Since the introduction of the EDV concept in article 14.5 of the Convention 1991, AIPH has raised the question: can the problems as mentioned be solved by the EDV regulations? Or stronger: is the EDV provision the suitable juridical solution for these problems? Is there even a juridical solution for these problems? I'll come back to this under point 3.

2. Evaluation of the EDV provision: has it brought the benefits that were intended when it was introduced?

I explained the arguments for the introduction of the EDV. These arguments were rather clear and understandable. But the working-out of it in the UPOV Convention was quite problematic, because if the protection of a protected variety has to be extended to material which is not the variety itself, how and where do you draw the dividing line?

In the UPOV diplomatic conferences of the 1991 Convention, much hectic debates took place what the right formulation of the EDV provision should be. The same happened during the legislative progress of the European regulation on Community plant variety right (EC NO 2100/94 of 27 July 1994). This explains why the definition of EDV is not clear in any law text, nor in the UPOV Convention, nor in the national legislations. The definitions used do raise a lot of new questions. For that reason in 1991 the UPOV members agreed that UPOV would develop guidelines (explanatory notes) to determine whether a variety is essentially derived or not. Because of the complicated issue of EDV those guidelines are still under discussion. The most important discussion points still deal with the following key issues of EDV:

- how can it be proven or determined that a variety is essentially derived from another variety?
- what is the degree of genetic relatedness? Or in other words: when is a variety predominantly derived?
- what degree of phenotypic similarity between two varieties may lead to the conclusion that the new variety is derived from the parent variety? When is there similarity in the essential characteristics and which characteristics are to be considered essential?

Many involved parties in the breeding world have tried to give answers or guidelines on these questions. For example ISF has given guidelines in its Views on Intellectual Property,

CIOPORA International has published its Position Paper on EDV in 2008 and has announced that it will publish its reviewed positions in The Green Paper 2014. Member states have tried to give answers and explanations of the EDV provision in the explanatory memorandum within their own legislative implementation processes. UPOV is busy completing its own explanatory notes on EDV (UPOV/EXN/EDV/2 Draft 3, date February 7, 2013).

Nevertheless to litigants, judges and lawyers these guidelines have not given much help as can be seen from the jurisprudence in the very few Court cases, which are published so far:

- Danziger-Astee, Judgment of the Appeal court in the Hague (NL) December 29, 2009 and the earlier judgment in this case: Court The Hague (NL) July 13, 2005.
- Van Zanten-Hofland, Court The Hague (NL) August 6, 2008
- Danziger-Biological Industries, Court The Hague (NL) September 7, 2007
- Exotic Plant– Deroose Plants, Court of Commerce Gent (Belgium), December 3, 2012

I only briefly mention the court cases here, as this afternoon, Tjeerd Overdijk will go into detail in the jurisprudence in his presentation about the Court decisions on EDV in the Netherlands .

3. Opinion of AIPH on the EDV provision.

As said before: since the introduction of article 14.5 Convention 1991, AIPH has raised the question: can the problem of EDV be solved with a juridical solution? AIPH opinion is that essentially the EDV issue is not a juridical one for several reasons.

To understand why the solution is not a juridical one I first want to give three general statements on behalf of AIPH:

1. Statement: The goal of PBR is to stimulate plant breeding by an intellectual property right system. This ensures that we (society) expect that certain entrepreneurs can for certain products, during a certain period of time and under strict conditions, gain a monopoly. The only reason for this is that we as society have the opinion that it is important that certain intellectual and/or economical activities are stimulated, because these activities contribute to technical and intellectual progress, which subsequently supplies important and useful products to our society.
2. Statement: Innovation and product renewal is the basis for progress in the ornamental sector. Therefore plant breeding is fundamentally important. AIPH supports a Plant Breeders Rights system that stimulates breeding. An effective working Plant Breeders Rights system is very important. However the EDV rules seem to favour existing breeders above new breeders by making it more difficult for new breeders to receive a new independent breeder's right. Society in general and the growers in particular have an interest in new varieties and do not question where these varieties come from: breeders or new breeders. AIPH supports rules and regulations that stimulate product renewal.
3. Statement: One of the main principles of PBR is the so called breeders exemption. This allows breeders to use protected varieties for their breeding programs. As we all know, new varieties obtained by breeding sometimes hardly differ from the parent varieties. AIPH is of the opinion that the rules on EDV should not restrict this breeders exemption in any way.

Against the background of these statements you will understand the following arguments of AIPH that essentially the EDV issue is not a juridical one:

1. argument: The EDV rule as described in article 14.5 of the Convention does not agree with the juridical base and the essence of the UPOV Plant breeder's rights system.

2. argument: The EDV rule complicates the mutation issue instead of simplifying it.

1. To explain the first argument AIPH wants to mention two important issues about the correct juridical base of EDV:

The first is: What is the exact meaning of the UPOV definition in UPOV Convention 1991 about the breeder (art. 1, iv UPOV 1991): “breeder means the person who bred or discovered and developed a variety”.

One of the basic legal principles in the PVR system is that a person, who works out in his mind a thought that leads to a new variety, can apply for breeder's right. The system does not protect a physical plant, but the thought bringing process of a new variety. The eureka moment!

The legal system of intellectual property rights is to distinguish these property rights from physical properties. An intellectual property is the fruit of the processes of the mind. An abstract thought that can be protected by an intellectual property right, in our case breeder's right. So the object of intellectual property is abstract. An abstract right you cannot feel, smell or hear. The object of IP is a creation of the mind, a product of the brain.

Ladies and gentlemen, the other important point is that: in civil law, to which Intellectual Property belongs to, you have to unravel complex issues to come finally to a good and clear understanding. If the understanding is no good, the base of the legislation will be no good. You can compare this with building your house on the ice. To avoid this, it has to be clear what the object of the law is. As said: the object of intellectual property is abstract.

If this is clear, it will be clear too that it is impossible to give another definition to 'breeder' than one who creates varieties. If such a new created variety meets the criteria of the plant breeder's rights system, the plant breeder's right will be granted to the breeder.

The concept of EDV does not differ from this abstract right. At most you could conclude that: what we forgot to formulate as a criteria to be granted for the breeder's right, yet we try to formulate that as an extra criteria called EDV. So in AIPH's opinion the problem should be solved at the right place and at the right moment in the UPOV system: so EDV should be solved under the conditions for the grant of the breeder's right (chapter III of the UPOV Convention 1991) and not under art. 14 UPOV Convention 1991, as EDV does not deal with the scope of the breeder's right.

2. The second argument of AIPH that essentially the EDV issue is not a juridical one is, as said, that the EDV provision makes the mutation issue complex instead of simplifying it. Before the enforcement of the UPOV Convention 1991, (in a nutshell) one relevant question had to be answered before there could be a ruling granted on a new PBR. “Is there a new variety or not?” Since the introduction of the EDV in 1991, there became a second question which had to be answered first. “Is this new variety essentially derived from another variety, yes or no?”

Unsolvable questions arise: one of the criteria for EDV is that the derived variety has to be independent and to be different from the initial variety. But what is an independent variety from an juridical point of view, as every variety biologically originates from other varieties?

Because of the fact that every new variety, like every living thing in nature, is borne from parents, the only question here is: is the offspring different enough from his parents to grant it a new breeder's right.

Governments and their controlling bodies should take their responsibilities seriously in setting out a logical, fair and consistent system in their decision-making process when they grant breeder's rights. In addition to this it has been realised during recent decades, how difficult it is for controlling bodies

to decide on the question as to whether there is a new variety or not. As mentioned earlier the introduction of an EDV exacerbates these problems.

It is clear, AIPH has fundamental problems with EDV.

In general we can see that when someone starts breeding with a new crop the progress you make with relatively small investments is initially enormous. But the more important the crop becomes, often through that same breeding work, the more investments the breeding requires and the less progress is made. If you bring that all under an EDV, this type of breeding might stop or at the very least, it will reduce healthy competition amongst breeders. Our fear is that in the final analysis this provision will not stimulate breeding at all but in fact will encourage the opposite.

Nevertheless AIPH admits that since the introduction of it in the 1991 Convention the existence of the EDV provision is a fact. And in the course of time the practise teaches us that for the most part, conflicts are solved between the breeder from the initial variety and the holder of the alleged EDV or the mutant finder.

However, AIPH pleads from the juridical point of view for another solution than the EDV provision in the UPOV Convention. We base our opinion on the arguments above.

We know it takes time to change Conventions and we know until this happens breeders and growers will have to deal with the EDV provision. Therefore AIPH did give in 2007 her recommendations or guidance concerning the existing EDV provision. See UPOV document CAJ-AG/07/2/4, annex II, which you can find on the UPOV website.

Another solution could be in AIPH's opinion that UPOV should focus on the real important discussion, this being the distances between varieties and not on getting more and more complicated explanations of the articles of EDV in the UPOV Convention 91. The essence of the discussion should be: What is a variety, is there a new variety, yes or no? Who is a breeder and when can a breeder apply for a breeders right?

If one can live with a certain bandwidth between varieties (which should be possible at least in ornamentals), the issue of EDV could be solved in a less complicated and more juridical clear way. Criteria for acceptance of and agreement on distances have to be made. UPOV should continue to formulate and describe the relevant characteristics for important varieties as was started before the introduction of the 91 Convention, with the goal of helping to decide if the criteria for distinctness has been reached. So determination of what the characteristics are for the different varieties, is needed. On the hand of these characteristics it has to be decided what an important characteristic is: disease resistance is more important for some varieties than for others, think of vegetables; for ornamentals the color of the flower is more important than the stand of the leaves; how important is the new characteristic for the commercial horticultural sector, how important is the new characteristic compares with other relevant characteristics ?

AIPH is very willing to give contributions to the thoughts and discussions to help in coming to objective criteria for examining the distinction. After these questions are answered, the next set of questions arise regarding proof, evidence and enforcement of the right. These are essentially two different types of questions. The answers to these last set of questions have to be given as well, but not in PBR-law.

4. Resume and Conclusions

1. AIPH has fundamental problems with EDV from the juridical point of view and therefore pleads for a solution other than the EDV provision in the UPOV Convention. The

provision does not agree with the juridical basis. The essence of the UPOV Plant breeders right system and on basis of our arguments herein, it follows that AIPH wishes to not regulate this issue by the EDV provision.

2. Regulations of any kind to solve the EDV issue should never block the breeders exemption as the breeders exemption is a very important possibility to improve the assortment of any crop. It is a basis for fair competition between breeders and opens the possibilities for new breeders.
3. AIPH is not in favour of rules that make the entrance to the market for new varieties more difficult or rules that strengthen the position of existing breeders against the position of new breeders. As stated breeders rights serves the general interest of society. This interest is stimulating breeding. The general interest of stimulating breeding and the interests of breeders (organised in associations or not) are not always equal. Breeders have opposing interests and do not want new competitors.
4. AIPH has made clear that is not the goal of PVR to provide a monopoly position to existing breeders, nor to give certain breeders economic powers through cartels and to benefit some breeders above other breeders. On the contrary, current anti cartel rules, especially in the EU, are strongly enforced by the authorities with the aim of avoiding illegal competition and forbidding cartel agreements. The EDV provision in UPOV 1991 could easily create these scenarios.
5. The EDV provision is difficult to understand in the perspective of the essence of the intellectual property right system. The provision discourages breeding activity, as it's difficult to imagine any commercial situation in which the holder of an breeder's right would honour someone else's EDV and give that person permission to exploit the EDV in the market. Contrary, this could damage the holder of the first breeder's right.
6. AIPH considers it a disadvantage that questions of proof, which are caused by the EDV provision, are continuously mixed up with questions of principal law system.
7. AIPH is very willing to give contributions to the thoughts and discussions to help in coming to objective criteria for examining the distinction.

Thank you for your attention !