



AIPH position on Patents and Plant Breeder's Rights

Introduction

The current patent legislation has upset the balance which plant breeder's rights had previously managed to achieve in the plant propagating material sector. AIPH is afraid that this will lead to a situation whereby only the plant breeding companies with the largest patent portfolio will be able to survive, which in turn will mean that, in the future, the decisions regarding which varieties are introduced onto the market will be in hands of just a few companies. This means that just a couple of players will be at the beginning of the chain of production in the plant sector. This is not in the interest of the plant breeding sector itself, but also not in the interest of the growers nor the consumer and neither is it in the interest of society at large.

AIPH position

Because of this development AIPH has adopted the following position:

1. The use and exploitation of new varieties, on which patent rights are registered too, should be free, in line with the breeders exemption of the UPOV Convention (article 15, sub1).
2. Biological material protected by patent rights should be freely available for the development of new varieties.
3. The free availability of new and existing varieties and the use and exploitation of them should not be allowed to be obstructed in any way by patent rights.

Explanation

Before the raise of the biotechnology industry there was no penetration of patent rights into the plant breeder's rights system. Since the last 20 years the biotech industry started to register patents on traits built into plant varieties and in the case of plant varieties which are the result of a patented process. This means in practice that plant varieties can be protected, either directly or indirectly, by patent rights. So despite the fact that plant breeders rights have been created as the intellectual property rights specially for the protection of plant varieties, patents have been gaining in importance in the past decade.

Why do patent rights obstruct the free use and exploitation of varieties?

This obstruction is caused by the following difference between the plant variety right (PVR) system and the patent rights system:

The PVR system contains the breeders' exemption (as founded by the UPOV Convention (see Convention 1991, art. 15, sub 1). This exemption means that despite the right of the developer of a new variety to prohibit others from producing or selling plant propagating material of that variety, other breeders are allowed to use the protected variety for the development of new varieties and to use and to exploit those new varieties without permission from the original holder of the breeder's rights. So plant breeders rights protect a combination of genetic building blocks created by the breeder, but those building blocks as such can be used freely in creating new combinations and thus new varieties.

The patent right system does not have a provision which can be compared to the breeders' exemption. Consequently varieties containing patented traits or varieties which have been developed using a patented process, are not freely available for further breeding and newly-developed varieties which still come under patent protection, are not allowed to be used and exploited freely.

The patent holder can of course grant licenses. However, there is no guarantee whatsoever that each breeder would obtain a licence or would obtain a license on acceptable terms and conditions. Moreover, often in practice, not just one but several licenses will be needed, making a difficult situation even more difficult. It will be clear that open innovation, which has been so characteristic for plant breeding until now, is hampered by this.

Importance of the PVR-system for the growers

The plant breeder's right system, as laid down in the UPOV Convention, has made an important contribution to the success of plant breeding in the past few decades. Also thanks to this system, significantly breeding companies have developed, which are able to continue to invest in new and improved plant varieties. The plant breeder's rights are of importance to the growers as it provides the base for:

1. their necessary product innovation
2. their sufficient entrance to the available propagating material
3. their guarantee of the quality of the propagating material.

Conclusion

It goes without saying that new varieties are always developed out of existing varieties. Therefore, in order to serve the social interest by encouraging that new and improved plant varieties can continue to be developed in the future, it is essential that existing varieties can be used for the purpose of further plant breeding. As far as plant material is concerned, the publication of an invention or a deposit (in order to gain the patent rights) does not contribute in any way to the stimulation of innovation, and therefore represents no added value for society as a whole, if the protected material itself may not be made freely disposed for the purpose of the development of new varieties.

For all the above mentioned reasons AIPH opinion is that the breeders exemption in its full reach should be maintained also when a patent right is included.