



CHINA

# Report on Questions and answers Plant Variety Rights Enforcement Seminar

30 November – 2 December, 2020

This seminar is jointly organised by IP Key China, the Community Plant Variety Office (CPVO), the Development Center of Science and Technology, Ministry of Agriculture and Rural Affairs (DCST, MARA) and the Office of Protection of New Varieties of Plants, National Forestry and Grassland Administration (PVPO, NFGA), P. R. China.

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**Day 1. Monday 30 November 2020**

**第一天 (2020年11月30日, 周一)**

**OPENING AND SESSION I. LEGAL ASPECTS**

*Chair : Martin Ekvad, CPVO*

**Session I. Legal aspects**

**Overview of Enforcement Plant Variety Rights under the UPOV Convention**

*Mrs Yolanda Huerta, International Union for the Protection of New Varieties of Plants, UPOV*

**The Latest Development on PVP in China**

*Dr. CUI Yehan, DCST, MARA, P. R. China*

**Do MARA testing centers also engage in DNA testing apart from DUS testing?**

MARA has facilities to do DNA tests. It is used in managing reference collections and discarding varieties which are very different in terms of DNA. Distinctness assessments are still done by morphological observations.

**How far are you in the process of adoption the new PVP regulations, what steps need to be taken still? Are there ongoing discussions on certain provisions?**

The Ministry of Justice is reviewing the matter and a regulation may be adopted in 2021. As Dr Cui mentioned in his presentation, issues such as EDV, protection for all species, propagating/harvested material, and Farm Saved Seeds are looked into.

**Can you please let us know when we can expect the new PBR regulations getting into force?**

Reply: same as previous question

**When will the revised PVP regulation in China be announced and implemented?**

Reply: same as previous question

**EU Legislation and Experiences on the Enforcement of PVR**

*Mr. Francesco Mattina, CPVO*

**The procedure for filing an objection or opposition, is there any limitation on the time limit and reason for the same objector, Especially malicious objections. For example, we should reply official action within 3 months, but to same objectors, there is no limitation.**

Objections can be filed at any time by any interested parties between the date of publication of a Community Plant variety right ('CPVR') application and the date of grant of the CPVR certificate. Following Article 59 of the CPVR Regulation 2100/94, the grounds on which objections can be based upon are lack of DUS, novelty or entitlement and an impediment related to a proposed variety denomination. The objector has the obligation to substantiate the grounds of the objection providing detailed facts, arguments and items of evidence to be assessed by the CPVO.



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Objections cannot be filed before national Courts nor claims on the validity of CPVRs. National courts hearing an action relating to a CPVR shall treat the CPVR as valid.

**For the varieties that have been applied for, but have not granted, but illegal reproduction has been found. Is there any special accelerated procedures to apply for granted as soon as possible in EU level or country level**

As regards acts prior to the grant of a CPVR, the holder may require reasonable compensation from any person who has, in the period between the publication of the CPVR application and the date of grant of the CPVR, effected an act that would have required the authorization of the title holder after the grant. The right to claim a reasonable compensation falls under the provisional protection regime. No injunctions can be claimed by national Courts during the provisional protection period.

**How do you make sure that the granted variety is different from the existing variety?**

CPVRs are granted following a technical examination of the DUS requirements. Characteristics are observed in growing trials and distinctness is assessed on the basis of their expression at morphological level. In infringement proceedings of granted plant variety rights, DNA laboratory tests can be admitted by national Courts as a mean of evidence.

**Under what circumstances will criminal liability be pursued? Have you considered invalid right ?**

Criminal law is not harmonized at European Union level. It is therefore disciplined in each Member States. Member States shall ensure that criminal liability rules applicable at national level to the infringement of national plant variety rights are also made applicable to penalize infringement of Community Plant Variety Rights (CPVRs). Granted CPVRs are to be deemed valid by national Courts. Only the CPVO has exclusive jurisdiction to declare a granted CPVR null and void.

**Can PVR be issued based on DNA fingerprinting, or it has to be DUS-based?**

CPVR can be issued only on the basis of DUS testing. DNA fingerprinting can be used as supportive especially to improve the selection of the reference varieties of common knowledge which are the closest to the candidate variety. Therefore, these techniques can improve the quality of DUS testing and contribute to economies of scale in respect with the duration of the technical examination and the number if varieties to be compared.

### Judicial Enforcement on Plant Breeders' Rights in China

*Mr. PAN Caimin, the Supreme People's Court (SPC), P. R. China,*

**Does the Supreme Court in PVR enforcement cases sanction DNA fingerprint testing to determine identification or similarity of a variety? In the event such test is conducted by a foreign reputable testing laboratory, does this test report have standing in Chinese courts? Or should this DNA test only be taken by certified Chinese test laboratories?**

Reply: The Supreme Court can accept DNA fingerprints as evidence. Certain procedures must nevertheless be followed in order to ensure the quality of the DNA finger prints. If a foreign lab has produced fingerprints which are convincing and has followed the same procedures as in China, such fingerprints can be accepted as evidence.

**So the international test laboratories shall follow the method of Chines rules?**

In essence, yes

### Role of Customs in Enforcement



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Mr. Tjeerd Overdijk, Vondst Lawyers

Day 2. Tuesday 1 December 2020

第二天（2020年12月1日，周二）

## SESSION II – THE PRACTICE OF ENFORCEMENT

第二部分：执法实践

**Chair: Dr. CUI Yehan, DCST, MARA, P. R. China**

主持：中国农业农村部科技发展中心处长，崔野韩博士

### Farm Saved Seed in the EU

Mr. Per Henrikson, Swedish Seed association (SVUF)

**How do you determine who are small farmers?**

The definition of small farmer differs per UPOV Member and is to be established in a discussion between breeders/Right holders and farmers. In the Community Plant Variety Right system there are definitions fixed for cereals and potatoes linked to the surface of the farmers' holding. For cereals this is the area the is needed to produce 92 tons of cereals and for potatoes this is the area needed to produce 185 tons of potatoes.

### The Strategies of Safeguard PVRs of Agricultural Plants in China

Dr. LI Judan, Institute of Law, Chinese Academy of Social Sciences

**In the slide 'Judgements', can you confirm that these are all PVP cases?**

All the cases I mentioned in the slide on page 5 are PVP cases. However, these are certainly not all the PVP cases in China, but only the PVP cases published online in China Judgement Online. As a matter of fact, most of PVP cases resolved through mediation in the litigation have not been published, and PVP cases involving the protection of trade secrets have also not been published. In addition, a number of PVP cases are still pending.

**Even if there is little statistics on negotiations and settlements, do you think it is broadly applied.**

I've heard a few examples of negotiation and mediation. I think the cases resolved through negotiation in the field of PVP are still few in general in China, because most of right holder do not realize the value of negotiated settlement of disputes, nor can they be fully used. Further, the use of negotiation to resolve PVP disputes requires higher skills and is based on sufficient evidence of infringement. I have not heard of resolving PVP disputes through arbitration so far. Professional companies in the management of variety rights can play a good guiding role in the future.

**Does the fact that there is a risk for an infringer to be held liable in a court have the effect that an infringer is more inclined to settle, or are the potential sanctions not sufficiently tough to deter infringers**

A unified conclusion cannot be drawn. In some of these cases, the legal liability of the infringer does not serve as a deterrent to potential infringers. But in some cases, although the infringer did not



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bear a heavy liability, the judgment also played a good role. Because the alleged infringer is a more standardized company, the alleged infringement and the defeat itself will have a greater social impact. For some small sellers, there is always a big fluke that their infringement will not be found. Therefore, the effect of judgment sometimes depends on the alleged infringement company.

**What is the procedure in China for collecting evidence at the premises of a grower? In the EU one can ask the court to organize a seizure with the help of a bailiff in order to collect plant material. Is this possible in China?**

In China, there are usually four ways to collect evidence of infringement, including collection of evidence by notarial procedures or administrative enforcement procedures or preservation of evidence by the people's court. In China, the plaintiff may also apply to the court for evidence preservation, and the court shall examine the application in accordance with relevant regulations, such as Certain Provisions of the Supreme People's Court concerning Evidence in Civil Proceedings of Intellectual Property Rights.

**As regards the administrative procedure to gather and present documentary evidences including notarization proceedings that are acceptable in Chinese judicial proceedings, is there any possibility for revision of these rules and simplify them? These administrative rules are very complicate and expensive for foreign PVR holders.**

On the premise of ensuring the balance between the validity of evidence and the legal responsibility of all parties, both the court and the administrative organ are trying their best to reform the procedure and provide the greatest convenience for PVR holders. All these procedures are the same for Chinese PVR holders and foreign PVR holders. These administrative rules are also complicate and expensive for Chinese PVR holders. A good news is that these costs can be compensated in litigation if the PVR holder provides proof. This cost is calculated separately and is not included in the tort compensation. From past judgements, the Court fully supports this claim.

#### **Agricultural Breeders Perspective**

Mrs. Magali Pla, Limagrain

**Does Limagrain hesitate to invest in and to bring its best performing varieties to countries where the scope of protection and enforcement is limited**

The level of protection and enforcement provided by a country wherein Limagrain intends to invest for breeding activities is definitively taken into account by Limagrain in a risk assessment. As shown in my presentation for wheat global development, the investment can be rather concomitant to the evolution of the law system in the country of interest. However, and to a certain extent, Limagrain also considers the possibility to be present in a country wherein scope of protection and enforcement is limited in order to be able to promote or support the law evolution.

#### **Point of View of Ornamental Breeders**

Mr. Matthias Meilland, Meilland Roses

**You mentioned that it is difficult for a foreign breeder to be paid royalties outside of China. What are the solutions to this, please?**

Indeed it is not possible under Chinese tax law, for an EU breeder to send an invoice from the EU to a Chinese licensee, who pays the invoice directly to the EU. Our company has set up a legal entity/company in China. This entity invoices Chinese licencees. The Chinese entity can then send the money to Meilland in the EU.



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**Are there any successful PVR cases in China? If so, how to claim the quantity of infringement and the amount of compensation?**

Reply: We only had one case going through the whole court system. This case was a case based on contract law. It took many years and the damages were not very high. We always try to reach an agreement with the grower/licensee meaning that the infringer pays for the unlawful use. This is better for business than going to court and enable us to focus on business and developing a network of reliable partners.

### Beijing KWS IP Protection Experience Sharing

*Mr. KUI Haiyu, Beijing KWS Agriculture Technology, Co. Ltd.*

**Thank you for sharing KWS' experiences in China. Did you ever face issues that infringing farmers or companies were not aware about the concept PVP or did grow KWS varieties under fake names?**

Reply: It happens that the employees of the growers/licensees are not aware of the PVP concept. However, top management is aware and they are responsible.

**Do case 1 and 3 both use DNA reports? What's the qualification of report producers?**

Reply: By collecting evidence in the field, and making DNA fingerprints, and sometimes notarize them, makes a very strong case when approaching the infringer. In most cases a settlement can be reached when the infringer sees the evidence. If not, we initiate a formal infringement procedure.

### Farmers Perspective

*Mr. Thor Kofoed, European Farmers Organisation / General Confederation of Agricultural Cooperatives (COPA/Cogeca)*

**Since you have the perfect variety list and farmers prefer to make a decision based on this list in Denmark, does this means the marketing activities from seed companies are not so important?**

Reply: Seed companies still engage in marketing activities and they compete in quality, prices etc. However, the existence of the list which includes data on the performance of the variety ensures the farmer that the variety in question has been tested by an independent body. Accordingly, it is a safeguard from seed companies that otherwise would have been tempted to exaggerate the performance of their varieties.

**Who provides the list of varieties? Who organizes the VCU test?**

Reply: Before seeds of a variety in the agriculture sector are put on the market it must undergo a VCU and DUS test. The VCU and DUS tests are organized by competent authorities in each Member State. When the test is positive the variety is put on the list. For the DUS tests technical protocols adopted by the CPVO

The CPVO is responsible for managing the EU plant variety protection system. However, DUS tests that are done in the framework of a listing procedure mentioned above, can also be used as a basis for the CPVO to grant an EU plant variety right.

**I would like to ask whether Danish field seed marketing is through distributors or direct sales to farmers?**



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Reply: Seed companies may sell directly to farmers or through distributors. However, most sales are made through cooperatives.

#### Point of View of Ornamental Producers

*Mr. Peter van der Weijden, International Association of Horticultural Producers (AIPH)*

**What does AIPH considers a reasonable royalty or license fee in terms of percentage of market sales price?**

Reply: It is difficult to give a simple and straightforward answer to this question. The level of the royalty can be based on number of plants, number of pots, size of the field etc.. It is up to the parties to find an appropriate way to calculate the price. In addition, the level of the royalty should have some correlation to the price of the plant. In some countries plants are expensive and in some they are cheap and this should also be taken into account. It is important that the level of the royalty is reasonable so that both the breeder and the licensee/grower can make a profit.

#### Q&A 问答环节

**It seems our EU guests focus a lot on border measures and FSS royalties. On a side note, are there any infringing activities on the part of seed/seedling producers and distributors in Europe?**

Reply: In the EU the seed market is regulated to some detail. We do not have major problems in the EU except for the Farm Saved Seed situation in some EU Member States. In the vegetable sector we have experienced some infringing activities.

### Day 3. Wednesday 2 December 2020

第三天（2020年12月2日，周三）

#### SESSION III – TECHNICAL ASPECTS OF ENFORCEMENT

第三部分：品种权实施与维权相关技术

**Chair: Dr. ZHENG Yongqi, PVPO, NFGA, China**

主持：中国国家林业和草原局植物新品种保护办公室，郑勇奇博士

#### Practical Tools to Overcome Infringement in the Vegetable Seed Sector

**Mr Liam Gimon, Anti-Infringement Bureau for Intellectual Property Rights on Plant Material (AIB)**

**Is there any successful enforcement case in EU based on trades secret regarding theft of parent seeds?**

Reply: Not that I know of as yet, but we have been bringing cases like this forward to the authorities  
Comment: There is a case, but there the question was whether a former employee took material home. The plaintiff in that case is Enza

#### Practical Tools to Overcome Infringement

*Mr. Maarten Leune, Royalty Administration International (RAI)*



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**Identification of Protected Material**

*Mrs. Hedwich Teunissen, Naktuinbouw Examination Office, The Netherlands*

**MNP Marker and Its Applications for Enforcement Purposes**

*Dr. PENG Hai, Jiangnan University*

Thank you for your presentation. Can your newly developed markers and methodology also be used for testing vegetable varieties in addition of rice varieties. Does your lab have databases, of are you developing, for fingerprinting vegetable varieties? Does your testing laboratory also do tests for foreign private companies? Thank you!

Response: Yes, we have developed our MNP marker method and constructed or are developing MNP fingerprinting database for several vegetable species. We have tested vegetables and fruits for several foreign private companies.

Is this national EDV standard applicable to all species and only accepts the MNP marker technology

Response: Our national EDV standards are only applicable for 16 plant species at presents and only accepts MNP marker method.

So how can companies do DNA comparison on other species where there are no MNP markers?

Response: You must develop MNP marker methods for your interesting species if they are not included in our national standards and then you can do the DNA comparison using MNP markers.

In the case where SSR and MNP produce DIFFERENT results, which result would be recognized by the court?

Response: It is the duty of the judge on court to decide to accept MNP or SSR result. However, the more markers used and highly accuracy of MNP marker method will be important factors for the judge to consider..

**Development of Databases of Molecular ID's of Ornamental Varieties Using SSR Markers for PBR Enforcement and DUS Examination**

*Dr. ZHENG Yongqi, Director of Molecular Identification of Plant Varieties and On-site DUS examination, PVP Office of NFGA, P. R. China*

Do you do orchid testing if a company requests it?

Yes we can do orchid testing if requested by a company. My lab is focused on ornamental plants and woody plants. Our commitment is to provide breeders useful tools to enforce their PBR efficiently.

Dear Mr Zheng, Thank you for your presentation. My question: Do I understand correctly that different labs in China are building their own databases, or are these databases to be integrated into a national database in time? Do courts accept your present test reports? How does this relate to national standardization and how does this work in practice? Thank you!

PVPO of the NFGA has 2 official molecular labs for relevant works. At present, we are still at a phase for developing methodologies reliable and workable for various species/genera. So far my lab



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has not provide any report to courts, however my lab was appointed by Beijing Supreme Court as a lab for providing evidences for variety distinguishing.

In practice, our first step is to develop markers, the second step is to standardization the techniques, and the next is to construct database of varieties as many as possible. The database will be finally integrated as a national platform open to the public. The database will be mainly used for the PVP Office for DUS examination, variety management and related uses.

**When do you expect these databases to become a national standard and national database?**

The databases will be continually updated to accumulate all varieties available in China, and it much depends on available resources, particularly the finance, currently it is a rather small scale project, somewhat like pilot experiment. It will also much depend on policy/regulation clarification for the uses of molecular techniques and the databases of MIDs.

**Who can get access to the data in the database?** As long as the databases constructed with official standards, my idea is the it will be open to the public.

**Where can we find more info on the national standards?**

China has governmental authority in charge of standardization of all sectors, and they have online databases to search for standards in use and in preparation.

**General question: if data base is not ready, standard are not ready: how do European plant varieties proof infringement in Chinese courts?**

In this case, it will be decided by the courts to accept whatever evidences they consider OK. They may ask a lab to do the molecular test together with other types of proofs.

**For crops that do not yet have testing standards, even in the case where the lab is not certified, evidence produced by the lab may be recognized by the court as long as the evidence collection procedure is legitimate**

This is not a question, rather a comment. I agree.

#### Q&A 问答环节

Merging different databases with different markers is not so easy. It is comparing apples with pears. To build on internationally accepted DNA databases is important. A nice example of an initiative thereto is the CPVO financed R&D **project on a** harmonized SNP set of tomato. This project involves several partners from EU as well as China, Japan and Korea

**What is the general genetic similarity between the varieties of different breeders abroad?**

There is no general level of similarity over crops. Per crop the genetic variation available in breeding programs defines the level of genetic similarity.



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