

## **“ Growers also have an interest in plant breeders’ rights!”**

Mia Buma, a Dutch lawyer, specializes in intellectual property law, particularly plant variety rights. As an advisor to the *Novelty Protection Committee* within the international horticultural organization AIPH, she's right up close to the action. We spoke with her about plant variety rights and important topics in that field.

Patrick Dieleman

Until the end of 2003, I chaired the " *Novelty Protection* " committee within AIPH. Mia was my secretary at the time. It was wonderful to see each other again. During that time, we were working on, among other things, a checklist that propagators and growers of protected cultivars can use when concluding licensing agreements with breeders. The updated version is still available at [aiph.org](http://aiph.org). We'll let Mia tell us about the current operations.

### **U P O V**

"From the very beginning of AIPH's founding in 1948, plant breeders' rights have been part of its advocacy efforts. This has always been done from the perspective of the growers. AIPH was involved in the preparation of the 1961 UPOV Convention (see box) and was later also involved in the revisions of 1978 and 1991." Mia explains that AIPH's position is unique, as growers often take second place in plant breeders' rights. "It primarily concerns the breeders. But growers also have a vested interest, of course. They need access to high-quality propagating material and don't want to have to wait years for new varieties, which they and society need. Access must also be possible at reasonable prices. A level playing field is needed, so that growers in different locations around the world still have access to new propagating material at the same prices. AIPH is well aware of the balance required for this. The breeders naturally think primarily from their own perspective, but ultimately we are their customers. They need growers to create and market a final product." It appears that AIPH is the only international player in

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this field for ornamental growers, and across all forms of plant production, also one of the only players with a grower's background. Mia confirms that AIPH is respected in this regard. We're happy with that position within UPOV, that we can participate in discussions there on an equal basis, just like the plant breeders do. Imagine those meetings: the official delegates from the countries that actually make the decisions, are up front, but the business representatives sit on the back benches. We're the only representatives of the ornamental horticultural growers there. I wasn't really aware of that myself until Peter Button, former Vice Secretary-General of UPOV, said to me two years ago at his farewell, that AIPH is a serious organization, well-organized, and contributes qualitatively. I found that a huge boost.

### **A I P H c o m m i t t e e ' N o v e l t y P r o t e c t i o n '**

Twenty years ago, the *Novelty Protection Committee* met at least twice a year during the AIPH spring meeting and congress. "That changed about ten years ago. Since then, representatives of AIPH members have been able to join. This applies to people who are passionate about the subject matter and committed to the committee's work. I coordinate with them when it's necessary to determine our position in any discussion at UPOV or CPVO (the EU Community Plant Variety Office). We also have regular consultations with CPVO, thanks to an annual meeting with the chair and vice-chair. We are valued there as well, because we present the position of buyers of ornamental plant variety rights. Within AIPH, consultations with CPVO seem relevant only to EU members at first glance, but other AIPH members are also interested in how the EU views issues related to plant variety rights. For example, as representative of AIPH, I have a good relationship with Canada, which is very interested in this and regularly requests advice."

AIPH also regularly receives requests for input from UPOV. "For example, they asked us for a horizon interview following the appointment of the new Vice President Secretary. That results in some influence."

### **D i s c u s s i o n p o i n t s**

A hot topic is a ruling by the European Court of Justice regarding Nadarcott mandarins. In short, the court ruled that the plaintiff who had brought one of the first new seedless varieties onto the market could no longer assert his rights to the (fruit of) trees that had already been planted when

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the provisional protection of the plant variety right was still in effect (the period between the application and the definitive granting of the right). "This is causing quite a stir because a breeder can assert his plant variety right to the fruits, if he had no previous opportunity to do so. This ruling does not contribute to the correct interpretation of the relevant UPOV article. The judges have not sufficiently understood the practical application of plant variety rights. An expert group has been established within UPOV to investigate how that UPOV article was precisely intended in the 1991 Convention." Mia points out the importance of *explanatory notes* on the UPOV texts. "These serve to clearly explain what exactly is meant by the treaty provisions, with a view to practical application. Judges can use them, for example, but also legislators who must implement the treaty provisions in their own country and ensure that plant variety rights can be enforced." Some lawyers find it difficult to grasp the daily practice of breeding, propagation, cultivation, and harvesting that lies behind all these texts. Mia does her best to clarify this for the people she meets at UPOV. I think it's especially useful for your readers to know that there's a debate about the final product: when is something considered propagating material and when is it harvested material? I do advise exercising your plant breeder's rights as early as possible in the supply chain and thus collecting your royalties to prevent problems. However, you are allowed to collect royalties on harvested material if this wasn't possible earlier, for example, if your protected material was 'illegally' propagated in a country that hasn't joined UPOV and that material is then imported into the country where you do have plant breeder's rights.

Mia explains that an evaluation of the EU Plant Variety Rights Regulation is being prepared, but it's still uncertain when or even if it will be voted on. "We're trying to find a solution to deal with the new breeding techniques. This is less of an issue in ornamental horticulture, but mainly in agriculture, fruit and vegetables, where they're already working on the 'new genomic technics. This is of particular interest to large finishing companies with locations all over the world."

Furthermore, efforts are underway to have new emerging countries join UPOV. "India, for example, doesn't have a robust plant variety rights system. As AIPH, we were asked to participate in a meeting on this topic. Plant breeders don't want to sell their products to India because they don't get anything in return. With so many mouths to feed, a country like India would benefit from joining. China, for example, has made enormous changes in the last 25

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years and, during that period, has established a well-functioning plant variety rights system in accordance with UPOV."

### **T r a d e m a r k   o r   p l a n t   b r e e d e r ' s   r i g h t ?**

Mia understands that a small breeder might choose trademark rights instead of Plant breeders rights, to limit costs and further follow-up. "But I must say that AIPH and the Dutch organization Plantum don't simply recommend this development. It doesn't benefit innovation, and in my opinion, as a breeder, you also run a risk if someone discovers you don't have a plant variety right. You then risk losing out. As a trademark holder, you're not really in a good position to enforce your rights, especially with ornamental horticultural products. With agricultural products or vegetables, this action is not done or even unacceptable. This is obviously more relevant with large-scale products and on a global scale. The plant variety right is rock solid: you've been granted it, and the DUS (testing the distinctness, uniformity, and stability of the candidate variety) has established that it is the variety you bred."

Mia was delighted with the invitation she recently received from UPOV for an interview about AIPH Green City activities related to plant variety rights. "Many of the UN's sustainability goals relate to ornamental horticulture products and landscaping. Our sector can make a huge contribution to a greener and more sustainable society."

## **Frame**

### **T o p i c s**

We looked at some more questions that are sometimes asked by members:

#### **Control of plant breeders' rights**

Sometimes growers ask how far the inspection agencies, which are engaged by breeders, are allowed to go. According to Mia, that's quite a stretch. "These breeders stipulate in their license agreements that growers must grant access to the inspectors and allow them to inspect their records. That's not legislation, but it is contractually stipulated as a condition for producing the propagating material to the end-product." If there is a suspicion of illegal product, a government agency can demand access to a company or cultivation site based on suspicion of an economic offense.

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## **Patents versus plant breeders' rights**

Mia explains that a modus operandi has finally been found in the relationship between patents and plant variety rights. “Essentially, biological processes, such as crossbreeding and selection, are not patentable in the EU because they are not considered technical inventions. For a few years now, this exception has also applied to products (read: plants) produced using these biological processes. However, if a 'technical' process is used, such as targeted mutagenesis, the resulting plant can be patented. But this last point is still under discussion; a discussion that would take us too far afield here.”

## **Frame**

### **U P O V**

UPOV is the name of both the treaties and the organization responsible for the protection of plant varieties. UPOV aims to stimulate the development of new plant varieties by granting breeders intellectual property rights in the form of plant variety rights. UPOV was established in 1961 with the entry into force of the accompanying treaty. The office is located in Geneva.

## **Two testimonials from Flemish breeders**

### **R u d y V e l l e , L e n s R o s e s**

"We used to have one variety (CV) protected by plant breeder's rights, but we stopped doing that because it wasn't profitable ," responds Rudy Velle. "Nowadays, we protect the names of our best CVs through trademarks. That protection lasts for ten years and can be renewed afterward. Plant breeder's rights, on the other hand, cannot be renewed. You can, of course, also apply for both, so that the trademark remains valid after the plant breeder's right expires. A trademark is much less expensive than a plant breeder's right, because the latter requires a three-year investigation to determine whether it's a new variety. Moreover, you have to pay an annual fee to maintain your plant breeder's right."

Theoretically, a variety that is only protected by trademark law can also be propagated by someone else and marketed under a different name. “But then they have to compete with a well-known name. Moreover, they are not allowed to use that protected name in their communications or they have a problem.” Lens Roses does not hire a specialist to apply for a

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trademark. “You can apply for a trademark online. It's quite easy. Companies who apply for you, don't work for free either. Unless you enter into a partnership in which they also monitor the protection and detect possible infringements. As a small breeder, it's difficult for us to check all of that ourselves.” The best-known variety with a protected trademark at Lens Roses is *Rosa* 'Guirlande d'Amour'. “We can hardly drive around Europe to find out that nursery X in southern Germany has grown a hundred 'Guirlande d'Amour'.” But Rudy is convinced that they would quickly find out if someone were to offer larger quantities of roses with their brand on the market.

### **T h i e r r y R a e s , R u d y R a e s F l o w e r S e e d s**

Rudy Raes Bloemzaden specializes in the production and sale of seeds and young plants for bedding and balcony plants. Thierry Raes, who runs the company together with his sister Elfie, responds to our questions: “Almost all of the cuttings we propagate are protected by plant breeders' rights, but that doesn't apply to our genetics. We do have a few varieties, such as *Myosotis sylvatica* 'Mr. Blue Sky' and the *Salvia microphylla* 'Salvinio' series, which are effectively our own and are protected by plant breeders' rights. This is done in consultation with a German colleague who also sells these varieties. Products from cuttings are easy to propagate, and without that protection, they would naturally be widely abused.”

Things are different with the Primulas, which Raes breeds himself: "Our Primulas are hybrids. You can't possibly recreate them if you don't have the parental lines. If you were to pollinate one of our hybrids, for example, *Primula acaulis* 'Primus Yellow' with itself or with another Primula, you'd get a completely different plant, a second generation (F2), with completely different characteristics. So the hybridization itself offers some protection."

### **Third frame piece**

### **M a r c D r i e g h e , D r i e g h e A z a l e a b v**

Marc Drieghe and his son Jeroen began breeding azaleas over 25 years ago. Highlights in their portfolio include Finesse (white and pink), Oase de Lo, and the sports (flower color mutations) Linde de Lo and Hanne de Lo. "The latter was discovered by colleague Geert De Waele and named after his daughter, but the breeder of the original variety holds the plant variety rights for the sport."

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The assessment of the candidate azalea varieties is still carried out at the Bad Zwischenahn research center (Germany). "We had our first varieties protected under European law. But because the propagation—with the exception of two growers in Germany—is done entirely in Belgium, we're now limiting ourselves to Belgium," explains Marc. Marc and Jeroen rely on Elisabeth De Waele (Lieven's daughter) for the inspections. "We prefer not to visit colleagues ourselves. That can sometimes lead to discussions about quantities." Marc hasn't encountered any infringements yet. But perhaps the fact that the azalea industry has become a small world plays a role.