

## Intellectual Property Rights<sup>©</sup>

**Jørgen H. Selchau**

GPL International A/S, Lavsenvænget 18, PO Box 29, DK-5200 Odense V, Denmark

### INTRODUCTION

In Danish legislative terms, the proper translation of Intellectual Property Rights is Immaterial Rights. The legislative provisions, which are protecting, e.g., art and literature, inventions, and trade marks against wrongful exploitation, are as a whole named "The Immaterial Right" (IR). The IR is divided into subgroups, each consisting of specific legislation:

- Copyright legislation, covering art and literature.
- Patent and Utility Patent legislation, covering inventions and products.
- Law on Plant Novelties and the EU-Directive, covering plants.
- Design legislation, covering design.
- Trade Mark legislation, covering trade marks, signs, and ensigns.

IR, thus, comprises almost any thinkable form of protection of rights, which can be mastered by more or less ingenious brains. The true watermark of all immaterial legislation, which ties up the individual areas of legislation into one similar group, is *the principle of monopoly*. The content of the monopoly regulations differs more or less from one type of immaterial legislation to the other, and is thoroughly described in the various legislations.

In the European immaterial legislation, plant varieties, animals, and mainly biological methods for production of plants and animals are banned from proper patent protection, but instead specific legislation has been established for each area. The exception only covers plant varieties and is regulated by national legislation breeders' rights on plant novelties as well as the EU Council Directive 2100/94.

The exception for animal races causes huge problems of interpretation and the question of protection through patent has a determining significance, since no exact regulation by legislation has been established parallel to the breeders' rights for plant varieties.

In the European Community a *Directive on Legislative Protection of Biotechnological Inventions* has been implemented by the member countries at latest 30 July 2000.

Protection of plant novelties encompasses all varieties of all genera and species, both traditional varieties of grown plants, e.g., cereals and ornamental plants, e.g., roses and poinsettias. Protection is available at the time of the application to new varieties, which must be distinct, uniform, and stable.

To a breeder of new plant varieties, an IR is only useful if it is enforceable. It is the aim of this paper to familiarise you with various intellectual property rights with a view to facilitating its enforcement by the holder in various national legal systems.

### COMMUNITY PLANT VARIETY RIGHT

The UPOV 1991 Convention is forming the basis for the national legislations in the majority of European countries, and applicable means of protection exist in all relevant countries, which produces or consumes plant varieties. Only the number of species, which were protectable in the individual countries has been differing.

Consequently, a holder of rights should file an application in every country, which he finds will serve his purpose. However, since 27 April 1995, a breeder, who is a citizen of or domiciled in the European Community or in one of the UPOV-member countries, may file an application to the *Community Plant Variety Office* (“the Office”), situated in Angers, France.

The Community Plant Variety Right (CPVR) is a form of intellectual property akin to a patent. On the basis of one application to the Office, a breeder may be granted a single intellectual property right, operative throughout the European Community. The right has uniform effect within the entire territory of the Community and may not be granted, transferred, or terminated otherwise than on a uniform basis in the whole area.

Based on the UPOV 1991 Convention, Article 13 of the Community Directive 2100/94 provides that the holder of a CPVR shall be entitled to effect certain acts in relation to variety constituents of the protected variety, and that others wishing to effect those acts in relation thereto must first obtain the authorisation of the holder, who may attach conditions and limitations to his authorisation. The acts in question are:

- Production or reproduction (multiplication).
- Conditioning for the purpose or propagation.
- Offering for sale.
- Selling or marketing.
- Exporting from the Community.
- Importing to the Community.
- Stocking for any of these purposes.

The scope of protection extends to harvested material of the variety (for example fruit) where this has been obtained through the unauthorised use of variety constituents of the protected variety (the fruit tree), where the holder has not had a reasonable opportunity to exercise his right in relation to those variety constituents. Furthermore, the basic regulations provide similar provisions to be made in relation to products directly obtained from harvested material of the protected variety.

Apart from material of the protected variety itself, the CPVR also extends to varieties, which are essentially derived from the protected variety; to varieties, which are not distinct from the protected variety, but having been bred independently, are not exactly the same as the protected variety; and to varieties, whose production requires the repeated use of the protected variety (i.e., hybrids, where the protected variety is a parental line).

## **INFRINGEMENTS**

The Community Directive prescribes the acts or omissions which constitute infringement of CPVR:

A holder of CPVR may bring an action for an injunction or compensation, or both, against any person who, without being entitled to do so, effects one of the acts mentioned earlier. Furthermore, the holder of rights may bring an action for infringement against a person, enjoying exploitation rights, but who contravenes a limitation or condition attached to those rights.

If the infringing party has acted intentionally or negligently, he shall be liable to compensate the holder of rights for any further damage resulting from the act of infringement. In addition, where the liable party has made any gain at the expense of the holder of rights or a person enjoying exploitation rights, the regulations make

provision for restitution of the profits by the competent courts.

The regulations provide that an action for infringement may be brought by the holder of rights and also by any person enjoying exploitation rights except where expressly excluded by the holder or by the Office. Persons enjoying exploitation rights may alternatively intervene in an action brought by the holder of rights for the purpose of claiming compensation for damage suffered. Furthermore, the regulations provide, that any person who, within the territory of the Community, offers or disposes of to others for commercial purposes, variety constituents of a protected variety, or a variety covered by the provisions in respect of essentially derived varieties, must use the variety denomination designated for the protected variety. The holder of a CPVR may bring an action for an injunction or compensation, or both, against any person who omits the correct usage of a variety denomination, or who omits the relevant information in this respect.

Where a variety is protected by a CPVR, neither its designated denomination nor any designation which might be confused with it may be used within the territory of the European Community in connection with another variety (or material thereof) of the same, or a closely related, species. The holder of a CPVR may bring an action for an injunction or compensation, or both against any person who uses the variety denomination of a protected variety or a designation that may be confused with it. The holder of a CPVR may require reasonable compensation from any person who has, in the time between publication of the application for a CPVR and grant thereof, effected an act that he would be prohibited from performing subsequent thereto.

#### **LIMITATION PERIOD**

Claims pursuant to the acts mentioned shall be time barred after 3 years from the time at which the CPVR has finally been granted and the holder has knowledge of the act and of the identity of the party liable or, in the absence of such knowledge, after 30 years from the termination of the act concerned.

#### **ROLE OF THE OFFICE IN INFRINGEMENT PROCEEDINGS**

Strictly speaking, proceedings for the enforcement of Community plant variety rights do not come within the sphere of operations of the Office. Parties wishing to pursue legal actions against the perpetrators of infringements should seek assistance from persons qualified to give legal advice in relation to the initiation of court proceedings in the appropriate territory. However, it is of course in the interests of the Office to do everything in its power to assist the holders of rights in bringing such proceedings and achieving a successful outcome.

Generally, most European holders of rights feel that both national and Community plant variety protections are satisfactory. The major problem is how to enforce these rights, in practise, since finding the information needed to challenge those, who may infringe your rights is extremely difficult. The establishment of specific contracts with growers and farmers with understandable and acceptable terms may be the way ahead, and since the introduction of intellectual property rights on plants in Denmark, a standardised licence agreement system, has been in existence, developed by the Ornamental Section of the Danish Association of Plant Breeders and the Danish Association of Horticultural Producers.

### **STANDARDISED LICENCE AGREEMENT SYSTEM**

The standardised licence agreement system consists of basic licence agreement regulations and terms and individual licence agreements, which provide the licensee to perform the appropriate exploitation of the protected variety, for example:

- Propagation and sales of propagation material (and finished plants) **or**
- Propagation for own use and sales of finished plants **or**
- Production of finished plants from acquired young plant material **or**
- Production of cut flowers.

The standardised licence agreement system further provides a distribution agreement, a trade mark agreement as well as nonpropagation and trial agreements, and all agreements are available in the major languages.

### **CONCLUSION**

The economical importance of intellectual property rights has reached a considerable level and the values are still growing. The importance of intellectual property rights certainly will enhance in the future.

Within the field of consumer goods, technological development has caused an unification of the quality of the goods, and for the everyday products — including plants and flowers — it is not a technical standard, which ensures the success or failure of the product. The competition is mainly determined by the shape of the product and not on the function. The beautiful and attractive consumer goods sell at better prices than the less smart products, despite the fact, that the products provide similar use. Modern forms of communication enable global advertisement through satellite-TV and internet, and the modern consumer does certainly recognize her preferred goods — also her ornamentals — on their Trade Marks.