

**ESA Position Paper
on the proposal for a
Council Regulation on the Community patent
(COM/2000/412)**

Brussels, 30th July 2003

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ESA welcomes the political agreement reached by the Council of the European Union regarding the Community patent. ESA considers the proposal made by the Presidency on 11.06.2003 as a major step towards the finalisation of this important piece of legislation.

ESA has always supported the coexistence of all Intellectual Property rights at Community level designed to provide both the most efficient protection for intellectual property rights as well as the best possible stimulus to further research and innovation. This stimulus is a precondition for seed companies in their future commitment to research and development for one of the most important tools – the seeds – for an innovative, sustainable and competitive agricultural production in the enlarged European Union.

Today, the European seed industry is placed in at the interface of different Intellectual Property rights as follows:

- the Patent system as harmonised by EU Directive 98/44/EC on the protection of biotechnological inventions providing for an adequate protection of plants incorporating patent protected inventions whilst excluding plant varieties as such
and
- the Plant Breeder's rights system at National and Community level (Regulation 2100/94/EC), based on the different acts of the UPOV Convention and providing for an efficient *sui generis* protection of plant varieties, for which patent protection is excluded by Art.53b of the European Patent Convention.

Seed is therefore a typical example of a product, where two different Intellectual Property Rights protection systems need to co-exist, each of them protecting well defined and different parts of the same product.

Although generally this coexistence provides a basis for strong and adequate protection, there is one provision of the UPOV Convention, which has no equivalent expression in the patent system. This provision is the so-called “breeder’s exception”.

The 1991 UPOV Act states in Article 15.1(iii):

“The breeder’s right shall not extend (...) to acts done for the purpose of breeding other varieties (...).”

This provision is transposed in the Community Plant Breeder’s Right by Regulation 2100/94/EC, Article 15.c):

“The Community plant variety rights shall not extend to (...) acts done for the purpose of breeding, or discovering and developing other varieties; (...).”

This provision is one of the fundamental principles of the UPOV Convention, thus confirming that the protection provided by plant breeder’s rights focuses on a particular combination of phenotypic characteristics (the plant variety *per se*), but under no circumstances on these characteristics individually. The individual characteristics remain freely available for the creation of new plant varieties containing new combinations in which these same characteristics may be found to varying degrees.

This provision is crucial for plant breeding where using existing plant genetic resources, even in the form of protected commercial plant varieties, is an indispensable precondition to further genetic progress.

The recent history of plant breeding has clearly shown the scientific and economic importance of this exception. It has enabled major and continuous progress in modern agriculture, e.g. the improvement of yields, strengthening resistances to diseases or adapting specific production to specific markets and climates.

The fact that there is no equivalent provision under the patent system to the breeder’s exception under the UPOV system creates an ambiguous situation when a plant as such is protected via a patent as the research exception in the patent proposal is too restrictive for plant breeding purposes.

The present provision of Article 9(a) of the Proposal for a Council Regulation on the Community Patent as agreed by the Council (COM 2000/412), excepting from

the scope of protection “(...) *acts done privately and for non-commercial purposes;*” does not provide for the same indispensable free access to plant genetic resources for further breeding as the UPOV based Community Plant Breeder’s Right.

Conclusion and Recommendation:

ESA in line with the respective provision of the Community Plant Variety Right, strongly requests to add the following sentence to Art 9 of the proposal:

“(x) acts done for the purpose of breeding, or discovering and developing other plant varieties.”