



Position

Brussels

6 January 2011

ESA_11.0051

ESA is the voice of the European seed industry, representing those active in research, breeding, production and marketing of seeds of agricultural, horticultural and ornamental plant species. It represents 37 national seed associations (and with that more than 1000 seed businesses in the EU, most of them SMEs) and 61 direct company members.

ESA's mission is to work for fair and proportionate regulation of the European seed industry, freedom of choice for customers in supplying seeds as a result of innovative, diverse technologies and production methods, and for effective protection of intellectual property rights relating to plants and seed.

Contact:

ESA

European Seed Association

Tel. 0032-2-7432860

secretariat@euroseeds.org

www.euroseeds.org

on

Enforcement of Plant Breeders' Rights

ESA members are aware that the holders of the Plant Breeders' Rights themselves are responsible for the enforcement of their Plant Breeders' Rights. However, the collection of evidence of illegal reproduction of propagating material seems even more difficult than it generally is regarding other counterfeited products because of the specific nature of the object of protection. Propagating material consists of living material which, via its use, transforms into other products; many characteristics are not immediately and/or directly visible and in case of some crops quantities are very small but still of a high value. There are procedural remedies available to collect evidence on the basis of which a court case can be initiated, such as seizure of evidence or seizure of goods. However, there are still some obstacles that hinder efficient action against infringements. Besides own initiative from companies, the legislator should undertake action as well to make all legal tools really effective.

ESA appreciates initiatives already taken such as the adoption of Directive 2004/48/EC on the enforcement of intellectual property rights and the Council Regulation (EC) No 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights. However, there are still issues that need to be addressed and improved. In this respect ESA pleads for:

- One competent EU court, possibly linked to the future EU Patent Court, or one per Member State for infringement cases regarding EU Plant Breeders' Rights in order to create more expertise in the field of EU Plant Breeders' Rights within courts;
- Similarly, one competent court per Member State for infringement cases regarding national plant breeders' rights;
- In infringement cases where an expert opinion on variety identity and/or (lack of) distinctness is required a possibility for holders of plant breeders' rights to apply for such an expert opinion to be carried out by CPVO examination offices;

- Acceptance by Courts of official reports and expert opinions of CPVO examination offices;
- Actions on own initiative of examination office/inspection authorities/customs authorities;
- Reversal of burden of proof: an example of the reversal of proof in favour of the Plant Breeders' Right Holder can be found in article 107.2¹ of the Italian Code on Intellectual Property Rights; this article relates to the extension of protection to harvested material obtained through unauthorized use of propagating material of the protected variety and it states clearly that use shall be presumed unauthorized in the absence of proof of the contrary;
- Penalization of infringements and adoption of the EP and Council directive on criminal measures aimed at ensuring the enforcement of intellectual property rights for which an amended proposal was published on 26 April 2006 with reference COM(2006)168 final.

¹ *“L'autorizzazione del costitutore è richiesta per gli atti menzionati al comma 1 compiuti in relazione al prodotto della raccolta, comprese piante intere e parti di piante, ottenuto mediante utilizzazione non autorizzata di materiali di riproduzione o di moltiplicazione della varietà protetta, a meno che il costitutore non abbia potuto esercitare ragionevolmente il proprio diritto in relazione al suddetto materiale di riproduzione o di moltiplicazione.*

L'utilizzazione si presume non autorizzata salvo prova contraria.” (Article 107(2) of the Italian Intellectual Property code (D.lgs.n 30/2005)

The authorisation of the breeder is necessary for the acts, listed in paragraph 1, carried out in respect of the harvested product, including entire plants and parts of plants, obtained through the unauthorised use of the propagating material of the protected variety unless the breeder had a reasonable opportunity to exercise his right in respect of said propagating material. The use is presumed to be unauthorised except if the contrary is proved.