

The cascade of protection in relation to parent lines and hybrids and the relevance of the breeders' exemption

The analysis outlined on this page represents the view of the CPVO in relation to the scope of protection extended from the parental lines to the hybrids and the potential use of such hybrid for the breeding of other varieties in relation to the breeders' exemption.

The following question has been analysed by the CPVO: **Can holder 1 of varieties A and B prevent breeder 2 from the repeated use of a single hybrid H in the breeding of a new 3-way hybrid variety Z?**

Production scheme of single hybrid and 3-way hybrid

A x B Parent lines

 H Single hybrid

H x C Parent lines

 Z 3-way-hybrid

To evaluate the situation, the following Articles of COUNCIL REGULATION (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (hereinafter referred to as 'the Basic Regulation') must be taken into account:

Article 13: *Rights of the holder of a Community plant variety right and prohibited acts*

1. A Community plant variety right shall have the effect that the holder or holders of the Community plant variety right, hereinafter referred to as 'the holder', shall be entitled to effect the acts set out in paragraph 2.

2. Without prejudice to the provisions of Articles 15 and 16, the following acts in respect of variety constituents, or harvested material of the protected variety, both referred to hereinafter as 'material', shall require the authorization of the holder:

- (a) production or reproduction (multiplication);
- (b) conditioning for the purpose of propagation;
- (c) offering for sale;
- (d) selling or other marketing;
- (e) exporting from the Community;
- (f) importing to the Community;

(g) stocking for any of the purposes mentioned in (a) to (f).

The holder may make his authorization subject to conditions and limitations.

5. The provisions of paragraphs 1 to 4 shall also apply in relation to:

(c) varieties whose production requires the repeated use of the protected variety.

Article 15: Limitation of the effects of Community plant variety rights

The Community plant variety rights shall not extend to:

(c) acts done for the purpose of breeding, or discovering and developing other varieties;

Analysis

According to Art. 15. c) of the Basic Regulation the effects of CPVR are limited in the case of “acts done for the purpose of breeding or discovering and developing other varieties”. The so called breeder’s exemption allows thus free access to protected varieties for the development therefrom and exploitation of new varieties. In this respect, the Basic Regulation does not impose any limitation in the application of this exception to hybrids. Indeed, under the breeder’s exemption any variety can be used to breed and develop another variety. The fact that one of the parent varieties to the variety Z is a hybrid itself does not limit the applicability of the breeder’s exemption. The above scheme shows that breeder 2 uses the hybrid H to make a new 3-way hybrid Z. Therefore it is a different variety bred and developed under the breeder’s exemption. It could be concluded, then, that the protection of a hybrid would not prevent the use of said hybrid for the creation of a new variety by a third party.

Does it make a difference if the single hybrid H is protected through the protection of its parental lines or if it is protected in its own right?

In the opinion of the CPVO Article 15(c) of the Basic Regulation (the breeder’s exemption) applies equally regardless of whether H is protected through its parent lines or if it enjoys protection in its own right. However, it should be noted that variety H cannot be multiplied without the authorization of holder 1 pursuant to Article 13(2)(a) of the Basic Regulation.

Disclaimer: *The scope of protection is determined by national courts, and in the end, by the Court of Justice of the EU. The opinion of the CPVO is not binding on courts and it is up to each market player to assess what action s/he deems appropriate to take.*