



UPOV Seminar

**Analysis of court decisions  
on propagating material and harvested  
material – Germany**

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# Agenda

- I. Relevant provisions**
- II. Case law**
- III. 'Intended for the production'**
- IV. Loopholes in the protection**
- V. Policy considerations**
- VI. Conclusions**

## **Section 2 N°2 German PVR Act 1997**

**"With the meaning of the present Act,**

**(...)**

**2.**

**propagating material shall be plants and parts of plants, including seeds, which are intended for the production of plants or otherwise for growing (...)."**

## **Section 10 para. 1 N°1 German PVR Act 1997**

**"(1) Subject to the provisions of sections 10a and 10b, plant variety protection shall have the effect that only the holder of the plant variety right shall be entitled**

**1.**

- a) to produce, to condition for purposes of propagation, to place on the market, to import or export propagating material of the protected variety, or**
- b) to store propagating material of the protected variety for one of the purposes designated at (a),"**

## Section 10 para. 1 N°2 German PVR Act 1997

„2.

to carry out acts in accordance with No. 1 with other plants or parts of plants, or products obtained directly therefrom, if propagating material was used in their production without the consent of the holder of the plant variety right, and the holder of the plant variety right did not have an opportunity to exercise his/her variety protection right with regard to this utilisation.”

# ' Achat '



Erkaha, CC-BY-SA 4.0

# ' Achat '

## - Federal Supreme Court (1987)

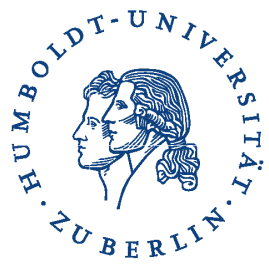
**Facts:** The plaintiff is holder of the plant variety right of the potato variety 'Achat'. The defendant is an agrarian cooperative society. In 1977, the defendant received a large number of potatoes of the variety 'Achat' from a Dutch distributor. The potatoes were propagated without the plaintiff's permission. The defendant stored the potatoes without any treatment against germination. In spring 1978, at a time when potatoes are usually sowed, the defendant sold the potatoes in sizes suitable for planting labelled as table potatoes to farmers. The farmers sold some of the potatoes as table potatoes and used others as planting material.

**Findings:** The Court held that the defendant sold 'propagating material' to the farmers. Anybody distributing material suitable for propagation to farmers during planting season infringes the breeder's right if he does not take measures to make sure the material he sells can not be used as propagating material if there occurs a further propagation afterwards. It is irrelevant whether the potatoes are labelled as table potatoes. However, the distributor is only liable if a possible later propagation is foreseeable for the distributor at the time of sale and if the distributor accepts this possibility.

→ See also Court of Appeal of Düsseldorf (1996) – 'Cilena' (evidence collected by test buyer)



# 'Melanie'



Aqwis, CC BY-SA 3.0

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# 'Melanie'

## - Federal Supreme Court (2006)

**Facts:** The plaintiff is the proprietor of the German Plant Variety Rights in the variety 'Melanie' and the Community Plant Variety Right 'Amethyst', both belonging to the botanical species *Calluna vulgaris*. He is claiming an infringement of his plant variety rights by the defendant. The defendant is the company responsible for the purchases of the garden centres of the B-group of companies. The defendant bought plants of *Calluna vulgaris* from intervenor N° 2, a company situated in the Netherlands, who had bought plants from intervenor N° 1, a company situated in France. The plaintiff considers *Calluna vulgaris* plants sold by the defendant to infringe his plant variety rights.

**Findings: The Federal Court of Justice held that the sale of whole plants does not fall within the scope of section 10 para. 1 N° 1 German PVR Act as the provision only covers propagation material. Pursuant to section 2 N° 2 German PVR Act “propagation material” includes only plants and parts of plants, which are intended for the production of plants or for cultivation.**

However, the court held that the plants were 'other plants' within the meaning of section 10 para. 1 N° 2 German PVR Act in relation to which the plaintiff had not been able to exercise his plant variety rights. Regarding the production of plants in France, the plaintiff was unable to exercise his right which, as a national right, was limited to the territory of Germany.

The Court also held that, regarding plants of the variety 'Amethyst' whole (pot) plants could not be seen to be 'harvested material' within the meaning of Art. 13 para. 3 Regulation 2100/94, as 'no act of a harvest' occurred in their production. The Court considered those plants as 'variety constituents' within the meaning of Art. 13 para. 2.

# 'Goldfinger'



<http://www.ars.usda.gov/is/graphics/photos/k7244-2.htm>

24.10.2016

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# 'Goldfinger'

## - Regional Court of Düsseldorf (1998)

**Facts:** The plaintiff is the holder of several German plant variety rights including the variety 'Goldfinger' and of exclusive licenses of poinsettia plant species. The defendant was a propagator having concluded a licence agreement with the plaintiff, in which he was obliged to only obtain propagating material from the breeder or accordingly licensed third parties. However, the defendant received 134.000 plants covered by rights of the plaintiff from a third party who did not have such a licence anymore. The defendant later sold millions of cuttings.

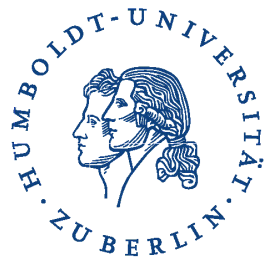
**Findings: The Regional Court held that the defendant infringed the plaintiff's plant variety rights by selling 'propagating material' pursuant to sections 2 N° 2, 10 para. 1 N° 1 German PVR Act.**

# **' Intended for '**

- Criterion has a long tradition**
  - \* German PVR Acts 1953, 1968, 1985, 1997
  - \* Explanatory memorandum of 1997 unclear
  
- Courts and commentators**
  - \* 'Achat', 'Cilena' → broad interpretation of propagating material and breeder-friendly assumptions, especially for agricultural species
  - \* 'Born' and 'chosen' prop. material
  - \* 'Goldfinger' → Cuttings are material intended for the purpose of growing
  - \* 'Melanie' → pot plants only covered by second level of 'cascade' under German PVR Act



# Loopholes in the protection



## - Agricultural sector

\* Breeders can live with the narrow definition of propagating material as long as 'Achat' principles apply

## **- Ornamental sector**

- \* Breeders could win their German cases, but...**
  - 'Melanie' → broad definition of plants and parts of plants on second level of 'cascade'
  - 'Goldfinger' → intended for the purpose of growing
- \* Cases not settled**
  - Unauthorized importation of legally produced plants or cut flowers
  - Application of 'Achat' principles to ornamental consumption plants → chosen propagating material?
  - Use of legally produced pot plants for production of cut flowers

# Policy considerations

- **Difficulties in the enforcement?**
  - \* Agricultural sector: no
  - \* Ornamental sector: yes, but where are cases?
- **Changes in technology**
  - \* Plant cells are totipotent → vulnerability
  - \* Less time and resources necessary for the re-production of plants
  - \* 'Achat' principles can solve many cases
- **Exclusive rights in the value chain**
  - \* Advantages of 'Cascade' systems
  - \* Problems on the second level
- **Weakening the PVR system → more patents**

# Conclusions

- Restrictive concepts of prop. material can be handled in the agricultural sector
- But: Loopholes of protection for ornamental breeders
- Loopholes concern use of consumption products → revision of 2nd level of 'cascade'
- Intermediate solution under UPOV 1991
  - \* Broad definition of propagating material
  - \* Barriers for protection of harvested material should be lowered through careful interpretation



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