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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Forty-First Session
Geneva, April 6, 2000

THE "BREEDER'S EXEMPTION"

Document prepared by the Office of the Union

Introduction

1. At its fortieth session, the Administrative and Legal Committee examined the validity of a clause under which a breeder wished to prohibit the use of a protected variety for the purposes of varietal creation (see document CAJ/40/4 and document CAJ/40/6, paragraphs 23 to 35).
2. The Chairman had concluded the discussions:
 - (a) by requesting delegations to provide additional information;
 - (b) by suggesting that the Committee should examine at the present session the question raised by the Delegation of France as to whether measures should be taken to ensure that "breeder's exemption" was actually applied.

Additional information on the issue of the validity of a clause under which a breeder wished to prohibit the use of a protected variety for the purposes of varietal creation

3. Annex I to this document contains the judgment that was referred to at the fortieth session.

4. Pioneer Hi-Bred International Inc. instituted proceedings against DeKalb Genetics Corp. for violation of Section 43(a) of the Lanham Act, misappropriation of trade secrets under the law of Iowa and common law, common law misappropriation, and breach of contract. DeKalb admitted having purchased and used Pioneer seed for breeding, research, and seed production purposes by engaging in a process referred to as “chasing the selfs”. The Court heard a motion to dismiss filed by the defendant.

5. The summary judgment contains the following passage:

“Research exception of Plant Variety Protection Act allowing the ‘use and reproduction of a protected variety for plant breeding or other bona fide research’ does not conflict with research prohibition on purchase contract attached to bags of plaintiff’s hybrid seed corn, and thus does not preempt plaintiff’s breach of contract claim, since research exemption is simply exception to rights granted plant breeder by PVPA, and does not by itself grant substantive right to public at large, since plaintiff did not register inbred seeds at issue under PVPA, and since present case therefore does not implicate rights afforded breeders, or exceptions to those rights.”

6. This decision is to be followed by a substantive judgment. The court pronounced “without deciding the enforceability of the bag tag or the legality of chasing the selfs”.

Measures to strengthen breeder’s exemption

7. As the law currently stands:

(a) according to Article 5(3) of the 1978 Act of the Convention, “authorization by the breeder shall not be required either for the utilization of the variety as an initial source of variation for the purpose of creating other varieties ...” and

(b) under Article 15(1) of the 1991 Act of the Convention, “the breeder’s right shall not extend to ... acts done for the purpose of breeding other varieties ...”

These provisions do not in themselves create a substantive right of access to the genetic variability that is constituted by a protected variety for the purpose of creating other varieties. However, there is no problem for quite a number of varieties, since the aim of protecting new plant varieties is to enable the holder of the breeder’s right in a (protected) variety to put it on the market under conditions that ensure him a return on his investment.

8. As noted by the Delegation of France at the fortieth session of the Committee, a problem arises more particularly for those varieties that are not placed on the market as such. Among such varieties are:

(a) self-fertilized lines contained in the formula of hybrid varieties, together with the components of other complex types of variety, such as synthetic varieties;

(b) varieties used within an integrated production system meaning that neither seeds or seedlings nor a product enabling plants of the variety to be obtained are to be found in commerce.

9. In the case of other varieties, failing agreement between the two breeders concerned, the breeder wishing to use seed or seedlings of a protected variety in order to create other varieties would be obliged to acquire a dose or a commercial quantity of the seed or seedling, although he may need only a single plant to carry out a crossing.

10. However, it should be noted that UPOV's bodies have never as yet been approached with complaints or requests based on an alleged inadequacy of the Convention provisions or of national legislation concerning "breeder's exemption". The derogations contained in explicit contracts (signed by the parties) or implicit contracts (deemed to have been concluded, for example, on opening a bag of seed), as also the "chasing of self" on which the judgment described above is based, nevertheless warrant closer examination as requested by the Delegation of France at the fortieth session of the Committee.

11. "Breeder's exemption" could be strengthened in the following ways:

(a) The provision could be redrafted in such a way that it no longer contains one of the "exceptions to the breeder's right" (the title of Article 15 of the 1991 Act), but a substantive right for third parties to use a protected variety for the purposes of creating other varieties, accompanied by an obligation to furnish samples for such purposes, and again accompanied by measures of constraint and penalties in the event of failure to do so.

(b) A system of deposit of samples with an official service could be instituted and that service would be entitled to provide samples to third parties wishing to use them in variety creation programs.

12. It would seem premature, at this juncture, to analyze the implications of those solutions. In the case of solution (b), reference was made at the fortieth session of the Committee to the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure. That Treaty has the following bases:

(a) To be patentable, an invention must be accompanied by a description which discloses it in a manner sufficiently clear and complete for it to be assessed and for it to be carried out by a person with average skill in the art.

(b) Where an invention concerns or involves a microorganism, the written description may no longer be sufficient to disclose the invention as referred to above. The description may be supplemented in such cases by the deposit of the microorganism.

(c) The aim of the Budapest Treaty is to facilitate patent procedure by permitting a single deposit with an internationally approved institution.

(d) The requirement of sufficient disclosure of an invention implies that samples of the microorganism must be available to third parties, under rules that may vary from one country to another, particularly as regards the special principles governing the patent system. Annex II to this document contains Rule 11, concerning the furnishing of samples, of the Regulations under the Treaty.

13. The issue of access to protected parent lines has also been raised, in the following terms, by the International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL) in a letter addressed to the Secretary-General of UPOV on October 12, 1999:

“The five conditions for granting breeder’s rights are novelty, distinctness, uniformity, stability and an acceptable denomination. According to Article 5 of the 1991 Act of the UPOV Convention, ‘the grant of the breeder’s right shall not be subject to any further or different conditions’. Any request to make available a variety that is not available on the market without restriction is not in compliance with the UPOV Convention.

The spirit of the UPOV Convention is clear in that respect, as shown by the 1978 and 1991 Acts:

1978: ‘Authorization by the breeder shall not be required either for the utilization of the variety ...’

1991: ‘The breeder’s right shall not extend to [...] acts done for the purpose of breeding other varieties ...’

Nothing in those texts implies that a breeder must make material of his variety available to third parties. On the contrary, the words “authorization” and “the breeder’s right shall not extend to ...” show that breeder’s exemption applies to varieties available on the market.

ASSINSEL considers that the provision of components to third parties under production licenses does not constitute ‘sale’ of the variety and that, in such case, the breeder’s exemption does not apply. Furthermore, the utilization of the genetic diversity of the component occurs through the intermediary of the hybrids which, in their case, are on the market. Consequently, access to the variability is possible”.

[Annexes follow]

JUDGMENT OF THE U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Pioneer Hi-Bred International Inc. v. DeKalb Genetics Corp.

No. 4-98-90578

Decided July 16, 1999

PATENTS

1. Infringement - Willful (§120.16)

TRADEMARKS AND UNFAIR TRADE PRACTICES

Unfair competition - Preemption (§395.02)

Plant Variety Protection Act does not explicitly preempt all state law in field of protection for sexually reproducing plants, since neither legislative history nor plain language of PVPA demonstrates intent that PVPA be sole legal protection for such plants.

PATENTS

2. Infringement - Willful (§120.16)

TRADEMARKS AND UNFAIR TRADE PRACTICES

Unfair competition - Preemption (§395.02)

Plant Variety Protection Act does not implicitly preempt all state law in field of protection for sexually reproducing plants by pervasive or dominant regulation that leaves no room for state supplementation, since sexually reproducing plants may be protected by general utility patents under 35 U.S.C. §101, as well as by common law of trade secrets and Plant Patent Act of 1930, 35 U.S.C. §§161-164.

PATENTS

3. Infringement - Willful (§120.16)

TRADEMARKS AND UNFAIR TRADE PRACTICES

Unfair competition - Preemption (§395.02)

Research exception of Plant Variety Protection Act allowing "use and reproduction of a protected variety for plant breeding or other bona fide research" does not conflict with research prohibition on purchase contract attached to bags of plaintiffs hybrid seed corn, and thus does not preempt plaintiff's breach of contract claim, since research exemption is simply

exception to rights granted plant breeder by PVPA, and does not by itself grant substantive right to public at large, since plaintiff did not register inbred seeds at issue under PVPA, and since present case therefore does not implicate rights afforded breeders, or exceptions to those rights.

Action by Pioneer Hi-Bred International Inc. against DeKalb Genetics Corp. for violation of Lanham Act's Section 43(a), 15 U.S.C. § 1125(a), misappropriation of trade secrets under state and common law, common law misappropriation, and breach of contract. On defendant's motion to dismiss. Denied.

Edmund J. Sease and Heidi S. Nebel, of Zarley, McKee, Thomte, Voorheess & Sease, Des Moines, Iowa; John A. Templer Jr., Thomas M. Cunningham, and C. Jean Pendelton, of Pingel & Templer, West Des Moines, Iowa, for plaintiff.

Susan K. Knoll, Michael E. Lee, Scott D. Eads, and J. Dean Lectenberger, of Arnold, White & Durkee, Houston, Texas; Richard G. Santi and H. Richard Smith, of Ahlers, Cooney, Dorweiler, Haynie, Smith & Allbee, Des Moines, for defendant.

Pratt, J.

This matter comes before the Court on a Motion to Dismiss filed by Defendant DEKALB Genetics Corporation ("DEKALB"), on January 26, 1999. Plaintiff Pioneer Hi-Bred International, Inc. ("Pioneer") filed a Resistance on February 10, 1999, and DEKALB filed a Reply on March 1, 1999. A hearing was held on May 6, 1999, and the Court now considers the matter fully submitted.

I. Background

Pioneer is the world's largest producer of seed corn. DEKALB is an international developer, producer, and marketer of agricultural products, including seed corn. DEKALB and Pioneer are competitors in the business of seed corn production, both in the United States and world-wide. Since approximately 1985, Pioneer has sold hybrid corn seed¹ in bags with a purchase contract, or "bag tag" attached. Among other provisions, the bag tag apparently prohibits purchasers from using the seed for breeding, research, or seed production purposes².

For purposes of this Motion, DEKALB admits purchasing and using Pioneer seed for breeding, research, and seed production purposes by engaging in a process referred to as "chasing the selfs."³ This process requires the purchase and planting of hybrid seed. Occasionally, and unintentionally, inbred seed is mixed in with the hybrid seed and is identifiable when "grown out" because the parent plants are smaller and less vigorous than the

¹ Hybrids result from the crossing of two "parent lines" or "inbreds".

² No copy of any version of a bag tag from any year was provided to the Court. DEKALB states that for purposes of this Motion the exact wording of the tags is immaterial and the Court need not determine whether purchase of seed with a bag tag creates an enforceable contract.

³ DEKALB asserts chasing the selfs is a standard industry practice. Pioneer characterizes the process as "theft. "

hybrid progeny. DEKALB thus isolated Pioneer inbred seed to be used for its own research and breeding.

Pioneer filed a five-count Complaint generally alleging violation of § 43(a) of the Lanham Act, misappropriation of trade secrets under Iowa Code Chapter 550, common law misappropriation, common law misappropriation of trade secrets, and breach of contract. In its response to DEKALB's Motion, Pioneer explains that it is, in part, DEKALB's engaging in chasing the selfs that forms the basis for its Complaint.⁴

In its Motion to Dismiss, DEKALB argues that counts II through V of Pioneer's Complaint are preempted by federal law, specifically, § 2544 of the Plant Variety Protection Act ("PVPA"), 7 U.S.C. §§ 2321-2582.

II. Standard for 12(b)(6) Motion to Dismiss

In addressing a motion to dismiss under Rule 12(b)(6), this Court "is constrained by a stringent standard... A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no* set of facts in support of his claim which would entitle him to relief." *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 545-46 (8th Cir. 1997) (quoting *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982) (citation omitted) (emphasis added)).

In addition, the complaint must be liberally construed in the light most favorable to the plaintiff and should not be dismissed simply because the court is doubtful that the plaintiff will be able to prove all of the necessary factual allegations. *See Parnes*, 122 F.3d at 546. Finally, when considering a motion to dismiss for failure to state a claim, a court must accept the facts alleged in the complaint as true. *See Cruz v. Belo*, 405 U.S. 319, 322 (1972). The Supreme Court has articulated the test as follows:

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183, 191 (1984). A motion to dismiss should be granted "only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995).

III. Analysis

⁴ Pioneer emphasizes, however, that the allegations of wrongdoing by DEKALB contained in the Complaint encompass more than just chasing the selfs.

DEKALB's Motion to Dismiss alleges counts II through V of Pioneer's Complaint are preempted as a matter of law by § 2544 of the PVPA. State laws that interfere with, or are contrary to the laws of Congress are invalid under the Supremacy Clause, Article VI, clause 2 of the Constitution. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991). State law can be preempted by federal law in one of three ways, referred to as explicit, field, and conflict preemption. *See Hunter Douglas, Inc. v. Harmonic Design*, 153 F.3d 1318, 1332 [47 USPQ2d 1769] (Fed. Cir. 1998) (citing *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990)), *cert. denied* 119 S.Ct. 1037 (1999), *overruled in part on other grounds*, *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1358 [50 USPQ2d 1672] (Fed Cir. 1999).

Congress' intent to supplant state authority may be explicit under the terms of the statute or implicit if: the federal regulation is "so pervasive" as to leave no room for state supplementation, if the act is in a field so dominated by the federal interest that the federal system should be assumed to preclude enforcement of state law on the same subject; or if the goals and obligations reveal a purpose to preclude state authority. *See Mortier*, 501 U.S. at 605 (citations omitted); *Heart of Amer. Grain Inspection Service, Inc. v. Missouri Dept. of Agriculture*, 123 F.3d 1098, 1102-03 (8th Cir. 1997). This implicit preemption is known as field preemption. "Even when Congress has chosen to occupy a particular field, preemption may occur to the extent that state and federal law actually conflict." *See Mortier*, 501 U.S. at 605. Such a conflict exists when it is physically impossible to comply with both state and federal regulations or when the state law stands as an obstacle to the accomplishment of Congress' objectives. *See id.* When considering preemption, however, courts must start with the assumption that the state laws are valid absent a clear and manifest intent of Congress to supersede the state laws. *See id.*

[1] Neither the PVPA's legislative history nor the plain language of the Act demonstrates Congress' intent that the Act be the sole legal protection for sexually reproducing plants. *See Pioneer Hi-Bred Int'l. v. Holden Foundation Seeds, Inc.*, 35 F.3d 1226, 1242 [31 USPQ2d 1385] (8th Cir. 1994) (holding that the PVPA does not preempt Iowa trade secret claims), *aff g Pioneer Hi-Bred Int'l. v. Holden Foundation Seeds, Inc.*, Civ. No. 81-60-E, 1987 WL 341211, at *44 (S.D. Iowa Oct. 30, 1987) ("Nothing in the statute or legislative history explicitly states that Congress intended to preempt state law or its remedies") (citations omitted). Congress has not explicitly, by the terms of the PVPA, expressed an intent to preempt all state law in the field of protection for sexually reproducing plants. *See Holden*, 35 F.3d at 1243.

[2] Neither does this Court find that Congress has implicitly preempted the entire field by such pervasive or dominant regulation that there is no room for state supplementation. There is statutory and common law protection available for sexually reproducing plants outside of the provisions of the PVPA. In addition to the PVPA, sexually reproducing plants may be protected by general utility patents under 35 U.S.C. § 101, as well as by common law trade secret protection, and by the Plant Patent Act of 1930, 35 U.S.C. §§ 161-164. *See, e.g.,* Nicholas J. Seay, *Protecting the Seeds of Innovation: Patenting Plants*, 16 AIPLA Q.J. 418 (1989). And in *Holden*, the Eighth Circuit explicitly held that Iowa trade secret law as applied to sexually reproducing plants was not preempted by the PVPA. *See id.*

As a matter of law, therefore, there is clearly room for state supplementation of federal protection for sexually reproducing plants, and alternative federal protection of the PVPA.⁵

DEKALB argues that the research exception of the PVPA allowing for the "use and reproduction of a protected variety for plant breeding or other bona fide research..." directly conflicts with the bag tag's research prohibition, and therefore there is conflict preemption of Pioneer's claims. A direct conflict requires a physical impossibility of compliance with both state and federal law or that the state law stands as an obstacle to the implementation of Congressional intent. *See Mortier*, 501 U.S. at 605.

[3] Without deciding the enforceability of the bag tag or the legality of chasing the selfs, DEKALB's argument fails for several reasons. The PVPA grants certain rights to breeders who register their plants under the Act as well as creating certain exemptions to those rights. See 7 U.S.C. §§ 2402 2542-2545 ("[t]he breeder of any novel variety of sexually reproduce plant... shall be entitle to plant variety protection therefor, subject to the conditions and requirements of this subchapter..."). Section 2544, titled the research exemption, is simply an exception to the rights granted to a plant breeder, it does not by itself grant a substantive right to the public at large.⁶ Sine Pioneer did not register the inbred seeds at issue for protection under the PVPA neither the rights afforded to protected breeders nor the exceptions to those rights apply in this case. There is therefore no conflict preemption in this case between § 2544 and the bag tag because § 2544 only applies to protected varieties and there is nothing in the record to indicate that the varieties covered by the bag tag are protected under the PVPA. The Court therefore declines to dismiss Pioneer's breach of contract claim as preempted by § 2544 of the PVPA.

DEKALB urges the Court to dismiss the misappropriation claims to the extent they are based upon alleged violation of the bag tag. However claims should not be dismissed under Rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief. *See Parnes* 122 F.3d at 545-46. Even if the Court had dismissed the breach of contract claim, the Court would not dismiss Pioneer's misappropriation claims because on the fact of the Complaint Pioneer alleges grounds other than breach of contract as forming a basis for those claims.

IV. Conclusion

⁵ DEKALB cites *Bonito Boats v. Thunder Craft Boats, Inc.*, 489 U.S. 141 [9 USPQ2d 1847] (1989) to support its argument that Congress intended sexually reproducing plants to remain in the public domain when used for breeding and other bona fide research purposes. The difference between the instant case and *Bonito Boats* for the purpose of this Motion is that in *Bonito Boats* patent law was the federal law at issue and the Court could cite to authority for the proposition that publicly known design and utilitarian ideas unprotected by patent, like subject matter of an expired patent, passes to the free use of the public as a matter of federal law. *See Bonito Boats*. 501 U.S. at 152 (citations omitted). This Court can find no authority to cite for the proposition that seed unprotected by the PVPA passes to the free use of the public as a matter of federal law.

⁶ The text of the research exemption provides "[t]he use and reproduction of a *protected variety* for plant breeding or other bona fide research shall not constitute an *infringement of the protection provided under this chapter*." 7 U.S.C. § 2544 (emphasis added).

For the preceding reasons, the Court now DENIES DEKALB's Motion to Dismiss Counts II through V of Pioneer's Complaint (docket number 15).

IT IS SO ORDERED.

[Annex II follows/
L'annexe II suit/
Anlage II folgt/
Sigue el Anexo II]

ANNEX II

EXTRACT FROM THE REGULATIONS UNDER THE BUDAPEST TREATY
ON THE INTERNATIONAL RECOGNITION OF THE DEPOSIT OF
MICROORGANISMS FOR THE PURPOSES OF PATENT PROCEDURE

Rule 11
Furnishing of Samples

11.1 Furnishing of Samples to Interested Industrial Property Offices

Any international depositary authority shall furnish a sample of any deposited microorganism to the industrial property office of any Contracting State or of any intergovernmental industrial property organization, on the request of such office, provided that the request shall be accompanied by a declaration to the effect that:

(i) an application referring to the deposit of that microorganism has been filed with that office for the grant of a patent and that the subject matter of that application involves the said microorganism or the use thereof;

(ii) such application is pending before that office or has led to the grant of a patent;

(iii) the sample is needed for the purposes of a patent procedure having effect in the said Contracting State or in the said organization or its member States;

(iv) the said sample and any information accompanying or resulting from it will be used only for the purposes of the said patent procedure.

11.2 Furnishing of Samples to or with the Authorization of the Depositor

Any international depositary authority shall furnish a sample of any deposited microorganism:

(i) to the depositor, on his request;

(ii) to any authority, natural person or legal entity (hereinafter referred to as "the authorized party"), on the request of such party, provided that the request is accompanied by a declaration of the depositor authorizing the requested furnishing of a sample.

11.3 Furnishing of Samples to Parties Legally Entitled

(a) Any international depositary authority shall furnish a sample of any deposited microorganism to any authority, natural person or legal entity (hereinafter referred to as "the certified party"), on the request of such party, provided that the request is made on a form whose contents are fixed by the Assembly and that on the said form the industrial property office certifies:

(i) that an application referring to the deposit of that microorganism has been filed with that office for the grant of a patent and that the subject matter of that application involves the said microorganism or the use thereof;

(ii) that, except where the second phrase of (iii) applies, publication for the purposes of patent procedure has been effected by that office;

(iii) either that the certified party has a right to a sample of the microorganism under the law governing patent procedure before that office and, where the said law makes the said right dependent on the fulfillment of certain conditions, that that office is satisfied that such conditions have actually been fulfilled or that the certified party has affixed his signature on a form before that office and that, as a consequence of the signature of the said form, the conditions for furnishing a sample to the certified party are deemed to be fulfilled in accordance with the law governing patent procedure before that office; where the certified party has the said right under the said law prior to publication for the purposes of patent procedure by the said office and such publication has not yet been effected, the certification shall expressly state so and shall indicate, by citing it in the customary manner, the applicable provision of the said law, including any court decision.

(b) In respect of patents granted and published by any industrial property office, such office may from time to time communicate to any international depositary authority lists of the accession numbers given by that authority to the deposits of the microorganisms referred to in the said patents. The international depositary authority shall, on the request of any authority, natural person or legal entity (hereinafter referred to as "the requesting party"), furnish to it a sample of any microorganism where the accession number has been so communicated. In respect of deposited microorganisms whose accession numbers have been so communicated, the said office shall not be required to provide the certification referred to in Rule 11.3(a).

11.4 Common Rules

(a) Any request, declaration, certification or communication referred to in Rule 11.1, Rule 11.2 and Rule 11.3 shall be

(i) in English, French, Russian or Spanish where it is addressed to an international depositary authority whose official language is or whose official languages include English, French, Russian or Spanish, respectively, provided that, where it must be in Russian or Spanish, it may be instead filed in English or French and, if it is so filed, the International Bureau shall, on the request of the interested party referred to in the said Rules or the international depositary authority, establish, promptly and free of charge, a certified translation into Russian or Spanish;

(ii) in all other cases, it shall be in English or French, provided that it may be, instead, in the official language or one of the official languages of the international depositary authority.

(b) Notwithstanding paragraph (a), where the request referred to in Rule 11.1 is made by an industrial property office whose official language is Russian or Spanish, the said request may be in Russian or Spanish, respectively, and the International Bureau shall establish, promptly and free of charge, a certified translation into English or French, on the request of that office or the international depositary authority which received the said request.

(c) Any request, declaration, certification or communication referred to in Rule 11.1, Rule 11.2 and Rule 11.3 shall be in writing, shall bear a signature and shall be dated.

(d) Any request, declaration or certification referred to in Rule 11.1, Rule 11.2 and Rule 11.3(a) shall contain the following indications:

(i) the name and address of the industrial property office making the request, of the authorized party or of the certified party, as the case may be;

(ii) the accession number given to the deposit;

(iii) in the case of Rule 11.1, the date and number of the application or patent referring to the deposit;

(iv) in the case of Rule 11.3(a), the indications referred to in (iii) and the name and address of the industrial property office which has made the certification referred to in the said Rule.

(e) Any request referred to in Rule 11.3(b) shall contain the following indications:

(i) the name and address of the requesting party;

(ii) the accession number given to the deposit.

(f) The container in which the sample furnished is placed shall be marked by the international depositary authority with the accession number given to the deposit and shall be accompanied by a copy of the receipt referred to in Rule 7, an indication of any properties of the microorganism which are or may be dangerous to health or the environment and, upon request, an indication of the conditions which the international depositary authority employs for the cultivation and storage of the microorganism.

(g) The international depositary authority having furnished a sample to any interested party other than the depositor shall promptly notify the depositor in writing of that fact, as well as of the date on which the said sample was furnished and of the name and address of the industrial property office, of the authorized party, of the certified party or of the requesting party, to whom or to which the sample was furnished. The said notification shall be accompanied by a copy of the pertinent request, of any declarations submitted under Rule 11.1 or Rule 11.2(ii) in connection with the said request, and of any forms or requests bearing the signature of the requesting party in accordance with Rule 11.3.

(h) The furnishing of samples referred to in Rule 11.1 shall be free of charge. Where the furnishing of samples is made under Rule 11.2 or Rule 11.3, any fee payable under Rule 12.1(a)(iv) shall be chargeable to the depositor, to the authorized party, to the certified party or to the requesting party, as the case may be, and shall be paid before or at the time of making the said request.

11.5 Changes in Rule 11.1 and Rule 11.3 when Applying to International Applications

Where an application was filed as an international application under the Patent Cooperation Treaty, the reference to the filing of the application with the industrial property

office in Rule 11.1(i) and Rule 11.3(a)(i) shall be considered a reference to the designation, in the international application, of the Contracting State for which the industrial property office is the "designated Office" within the meaning of that Treaty, and the certification of publication which is required by Rule 11.3(a)(ii) shall, at the option of the industrial property office, be either a certification of international publication under the said Treaty or a certification of publication by the industrial property office.

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