Experiences concerning propagating and harvested material

Seminar on Propagating and Harvested Material in the context of the UPOV Convention

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Introduction

- Distinction between "propagating material" and "harvested material" is complex (and has provoked endless discussions)
- Lack of adequate definition in the UPOV Convention, giving rise to different interpretations (EU Community PVRs provide a good approach trough "variety constituents)
- Differences in legal treatment (particularly referred to enforcement) – and some uncertainties…
- Seeds have always been a substantial part of mankind diet, owing to its nutritional values
- Thus, for many crops both "propagating material" and "harvested material" refer to the same botanical entity. How to differentiate them?
- Under the "farmers exception", farmers are allowed to (re)use harvested material obtained at their own holdings as propagating material
- This presentation aims to present some experiences in European Union countries in regard to those issues (with my special gratitude to my colleagues of BSPB, BDP-STV, SICASOV and ANOVE-GESLIVE for the information provided for this presentation)

Differentiation between "Propagating material" and "harvested material": Spain

- Spain' seed market:
  - Certified seed: 25%
  - Farm Saved Seed: 35% (estimated)
  - Brown bags: 40% (estimated)
- Intentional infringement on PVRs is considered as a crime by the Spanish Criminal Code (up to three years imprisonment), although referred only to propagating materials
- Wide case law (more than 300 sentences in the last 15 years)
- Importance of distinction between "reproductive (propagating) materials" and "harvested materials"

Differentiation between "Propagating material" and "harvested material": Spain

- Main defense arguments pleaded in case law:
  - "Authentic" farm saved seed (farmers exception)
  - Harvested material
- No specific diligence obligations to the seller
- Relevant indications or evidence of infringement (harvested material used as propagating material) in Spain' case law:
  - Division and identification of the material by varieties
  - Presence of seed processing machinery
  - Processing, cleaning and/or treating
  - Purity and germination degrees
  - Price (higher than commodity grains – lower than certified seed)
  - Dates (coincidence with sowing season)
- Plenty of sentences condemning seed sellers (most of them between 6 months to 1 year imprisonment)

Differentiation between "Propagating material" and "harvested material": UK

- United Kingdom seed market:
  - Certified seed: 60%
  - Farm Saved Seed: 40%
  - Brown bags: few cases (up to 10 per year)
- Farm saved seed declaration is compulsory to farmers
- Broad agreement on FSS between BSPB, farmers and seed processors.
- Active involvement by authorities (DEFRA - PHSI)
- Some cases charged with criminal offences (marketing uncertified seed to farmers, false accounting…), fined and given one to two years suspended prison sentences

Differentiation between "Propagating material" and "harvested material": United Kingdom

- Unlicensed use of farm saved seed in spring 2013 in the United Kingdom, investigation and enforcement by The British Society of Plant Breeders:
  - Weather conditions in the UK in autumn 2012 were not conducive to the establishment of autumn sown cereals
  - Representations were made to Defra by the farming unions to allow the transfer of farm saved seed between holdings for the spring sowing season to cover any perceived shortfall of seed
  - The Ministry did not agree to any change in seeds legislation
- Around 700 farmers were identified who had declared no crops in spring 2012 and then declared "farm saved seed" in 2013. Further 700 farmers did not declare farm saved seed.
- BSPB reacted sending a questionnaire to farmers on the provenance of seed:
  - Where the use of unlicensed seed was established, offenders were sent a letter asking them to remedy the situation by paying the full licensed rate and signing a non-reuse undertaking.
  - Where serious infringements were established (trade in unlicensed seed, processed or treated, sold in bags at a marked up price compared to commodity) the case was passed to the relevant authority for investigation.
- BSPB used the enforcement process as an educational opportunity to farmers

Differentiation between "Propagating material" and "harvested material": Germany

- Germany' seed market:
  - Certified seed: 45/50%
  - Farm Saved Seed: 50/55%
  - Brown bags: cases in some crops (like spelt)
- Collection of farm saved seed is organized by STV
- Access to information on FSS to invoice royalties debated at length
- Sentence by the Court of Justice of the EU (C-242/14):
  - Farmers using FSS are obliged to pay equitable remuneration to the breeders as late on 30 June of the following campaign.
  - Otherwise, the use of FSS is considered as an infringement to the PVR
  - Potential enforcement of PVR on harvested material is open

Differentiation between "Propagating material" and "harvested material": Germany

- Sentence ruled by the federal court of justice (Bundesgerichtshof) in 1987 (X ZR 55/86) describes the obligation of the distributor of material which can be used either as propagating material or harvested material (consumption goods):
  - Anybody selling/distributing material suitable for propagation to farmers during planting season puts the plant breeder's right at risk.
  - Consequently, the seller of harvested material has the duty of care that the buyer will not use the material as propagating material.
  - This applies in particular if the deal takes place in a typical time for sowing/planting, if the buyer is farmer (who cultivates) and the seller sells the material in a typical amount for planting.
  - The seller – even if he labels e.g. potatoes as table potatoes – is deemed responsible of infringing the PVR if he does not take measures to make sure the material sold can not be used as propagating material if there occurs a further propagation afterward.

Enforcement of PVR on "harvested material": France

- French farmers and seed market are generally highly professional
- FSS not allowed under previous PVR legislation (before 2011)
  - Several cases ruling PVR' infringements for farmers reusing harvested material as propagating material (particularly in potatoes)
- After 2011, FSS is allowed
  - Most actions by SICASOV pursue collection of equitable remuneration owed to breeders
  - Few cases concerning cooperatives distributing harvested material between farmers, identifying varieties just at sowing time.
- For cereals, retribution for FSS is channeled trough the « Contribution Volontaire Obligatoire », by which 0,7 € per Tm of harvested material is retained to farmers
  - Small farmers and users of unprotected varieties are excluded.
  - Money is also returned when use of certified seed is proven

Enforcement of PVR on "harvested material": France

- Sentence ruled by the "Tribunal de Grande Instance" of Rennes (May 29th 2012), confirmed by the Court of Appeal of Rennes:
  - Three companies were condemned for infringement of PVR on a shallot protected variety.
  - The two first companies, which respectively reproduces and conditioned the seeds in unauthorized manner, were found infringing the PVR by "*producing, reproducing, conditioning for the purpose of propagation or stocking for those purposes, variety constituents of the protected variety"*
  - The third company, which commercialized the harvested product, was also found infringing the PVR by "*offering for sale, selling and/or stocking for those purposes, harvested material obtained trough unauthorized use of variety constituents of the protected variety".*
  - Interestingly, the Court found responsibility in all concerned parties, from (unauthorized) reproduction of seeds to production and sale of harvested material coming from the illegal seed.

Enforcement of PVR on "harvested material": Spain

- Several sentences ruled on enforcement directly to harvested material, mostly referred to protected fruit varieties
- Typical cases derived from inspections carried out by GESLIVE on commercial orchards, where protected varieties were detected without information on the source of propagating material.
- Sentence ruled by the Court of Appeal of Zaragoza on July 2nd 2007:
  - "Provisional protection" does not exclude full protection come into force once the protection is granted
  - Breeder can enforce the "*ius prohibendi*" against anybody who has done any act falling under scope of PVR while "provisional protection", once the protection was granted.
- Sentence ruled by the Court of Appeal of Murcia on March 3rd 2011 (appeal 641/2011):
  - Confirmed harvested material falls under the scope of PVR, allowing enforcement by breeder on growers' orchard when supplier of variety constituents is unknown (even if orchard was planted before protection was granted)

Conclusions

- Importance of clear distinction between “propagating material” and “harvested material”
- Stakeholders, lawyers and Courts are faced in some cases with the lack of adequate definition by PVR legislation
  - EU Community Plant Variety Rights provides a very good example of simple but accurate definition of the object of the right as “A plant grouping consists of entire plants or parts of plants as far as such parts are capable of producing entire plants, both referred to hereinafter as 'variety constituents”
- This situation provokes uncertainties that are being solved by way of legal practice and case law
- The experiences and cases presented are examples of how those problems are being solved in practice in some relevant European Union countries.

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