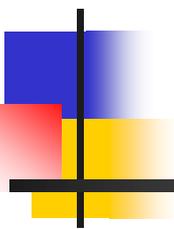


Seminar on the breeder's right in relation to harvested material

Court cases in China, focusing on trees

“San Hong Mi You” Pomelo Case:

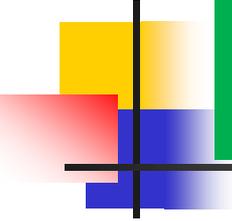
**Propagating Material and Harvested
Material of Pomelo**



LI Judan

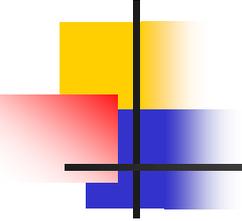
Institute of Law, Chinese Academy of Social Sciences

May 27 , 2021

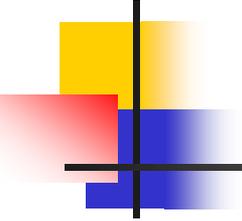


Content

- Relevant Provisions in China
- Summaries of the Case
 - The fact
 - Focus of Dispute
 - Conclusion
- Discussion and Suggestion



Relevant Provisions in China

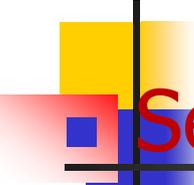


- **Seed Law Art. 28** **the scope of the breeder's right**

- Breeders have the exclusive right to the protected variety. Production or reproduction, selling or other marketing the propagating material of the protected variety, and production or reproduction, selling or other marketing the propagating material of the variety for commercial purposes, whose production requires the repeated use of the protected variety, shall require the authorization of the breeder, unless **otherwise provided** in this Law, relevant laws and administrative regulations.

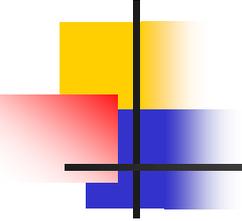


Seed Law Art. 29

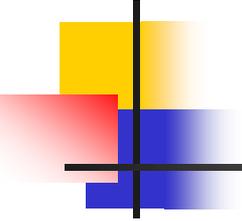


Seed Law Art. 29 Exceptions to the Breeder's Right

- If the protected variety is used under the following circumstances, it may not require the authorization of the holder of the breeder's right and not pay the royalty, but may not infringe other rights enjoyed by the holder in accordance with this Law, relevant laws and administrative regulations:
 - **(i) acts done for the purpose of breeding other varieties and other research activities;**
 - **(ii) farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings;**

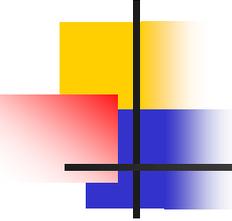


Summaries of the Case



- **“San Hong Mi You” Case**

- Cai Xinguang vs. Guangzhou Runping Commercial Co . , Ltd (2019) Intellectual Property Court of the Supreme People’s Court of China No .14
- The accused variety is one kind of pomelo.
- The denomination is “San Hong Mi You” .

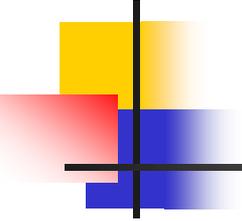


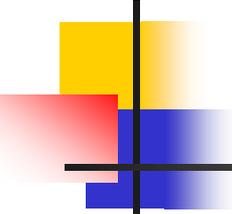
The fact

- The Plaintiff (Cai Xinguang) is the breeder and the titleholder of “San Hong Mi You” , filed the application on 10 November 2009 and was granted the breeder's right on 1 January 2014.
- The defendant is Runping Commercial Co . Ltd, a supermarket founded in 2008.
- On 5 January 2018, the plaintiff found that the defendant had sold “San Hong Mi You” fruits and provided related invoices, photos and videos as evidence.

Focus of the Dispute

- **The court of first instance held that whether the sued fruit of “San Hong Mi You” is the propagating material is the key to this case .**
- (i) According to the application document, the “San Hong Mi You” is propagated through grafting of branches of bud mutation, not through cell tissue of the fruit.
- (ii) The seed of the “San Hong Mi You” fruit has been degraded and can not be used as propagating material in agricultural production.
- (iii) There is no evidence that the fruit of the alleged infringement came from the propagating material of the protected variety, and the defendant sold the fruit as propagating material.

- 
-
- **The alleged fruit is not the propagating material of the citrus. The defendant's sale of fruit does not constitute an infringement of the breeder's right.**
 - The Guangzhou Intellectual Property Court in the first instance **rejected the plaintiff's claim** .
 - The plaintiff **appealed to** the Intellectual Property Court of the Supreme People's Court of China against the judgment of first instance.



The second instance

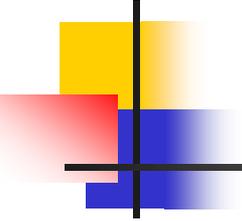
- The court of second instance confirmed the facts identified by the court of first instance, and invited Professor Cao Li, an expert assistant, to express his views on whether the fruit of “San Hong Mi You” was the propagating material .
- Professor Cao thought that pomelo was usually reproduce asexually by seedlings, and the seeds in its fruit were usually degraded and difficult to reproduce. In practice , there were a few farmers sold seedlings planted with degraded seeds. If the cell of the fruit was used to cultivate seedlings, it required a high level of laboratory and a cost of 300000 to 500000 yuan.

Focus of the Dispute

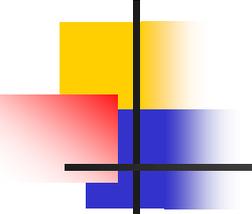
The following two issues relating to propagating material were discussed in the second instance judgement

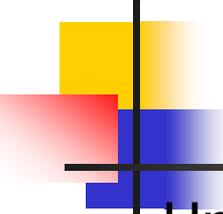
1. Whether the fruit is the propagating material of the pomelo?

- Despite the Seed Law explicates that the term “seeds” as mentioned in this Law refers to the planting or reproduction materials of crops and trees, including grains, fruits, roots, stems, seedlings, buds, leaves, flowers, etc, it does not specify which part of the plant are the propagating material of the particular variety.
- The court put forward three requirements,
 - (i) *it is alive,*
 - (ii) *it has the ability to reproduce,* and
 - (iii) *the new individuals propagated have the same characteristic as the protected variety.*

- 
-
- In this case, **the seed and cell of pomelo fruit do not have the ability to reproduce the protected variety**(the fruit skin is dark red , the white skin is pink , and the flesh is purple) **and do not belong to propagating material of the protected variety.**

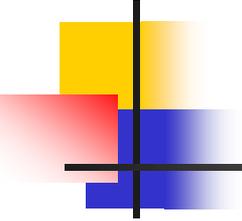
- **2. How do identify those plant parts that can be used both as propagating materials and harvested materials as propagating materials ?**

- 
-
- If the part of the plant , which can be both propagating material and harvested material , can be identified as propagating material in a tort dispute , the court shall examine the **intention** of selling the plant material (to sell as propagating material or as harvest material), and **the intention** of using the plant material (to consuming or to reproduce the protected variety) .
 - If the alleged infringer sells these plant materials as propagating materials or are used to propagate the protected variety, the sales or the utilization will constitute an infringement of the breeder's right.



Conclusion of the Case

- Unless otherwise provided by laws and regulations, the court shall consider any act of **planting the propagating material** of the protected variety without the permission of the breeder as reproducing the protected variety that infringes the breeder's right.
- **The court of second instance dismissed the appeal and upheld the first sentence, held that the alleged fruit is not the propagating material of the pomelo. The defendant's sale of fruit does not constitute an infringement of the breeder's right.**



■ Discussion and Suggestion

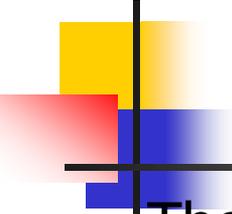
Discussion

Question:

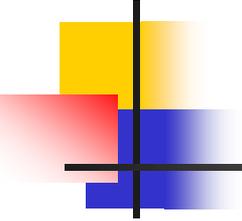
How to exercise breeder's right in relation to the harvested material?

If the holder of PVR can claim the right to the harvested material of the protected varieties, obtained through the unauthorized use of propagating materials of protected varieties, it will contribute to strengthen the protection of breeder's right, reduce holder's burden of proof, and improve the efficiency of safeguarding right.

The case of "San Hong Mi You" in China is an example of the need to incorporate relevant acts in respect of harvested material into the scope of the breeder's right.

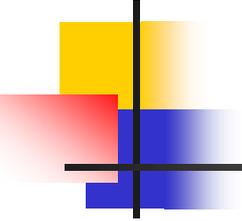
- 
-
- The provision under Article 14(2) of the 1991 Act means that breeders can only exercise their rights in relation to the harvested material if they have not had a “reasonable opportunity” to exercise their rights in relation to the propagating material. [UPOV/EXN/HRV/1 12]
 - The above expression means that, when breeders exercise their rights in relation to the harvested material, they should prove that the alleged harvested material are obtained through the unauthorized use of propagating material and they have not reasonable opportunity to exercise their rights in relation to the propagating material.

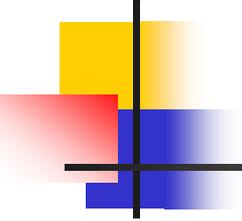
- 
- As we know, it is difficult for the breeder to prove that the claimed harvested material obtained through the unauthorized use of propagating material, and it is easy for the seller of the harvested material to prove that his harvested material obtained through the authorized use of propagating material.
 - If Members implement the provision under Article 14(2) of the 1991 Act, their related laws should regulate the burden of proof of the breeders and the seller in an appropriate manner. For example, if the breeder proves that the related harvested material belongs to the harvested material of the protected variety, the seller should prove that his harvested material is obtained by the authorized propagating material. If the seller can not prove or is unwilling to provide related evidences, then the related behavior involving the harvested material will constitute an infringement of the right of the breeder and shall bear the tort liability.

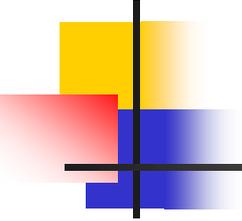


Suggestions

- 1. The revised text of UPOV/EXN/HRV/1 should clearly provide that the breeder may conveniently exercise the breeder's right to the propagating material or the harvested material(or products made directly from harvested materials) according to the principle of exhaustion of the breeder's right.
- 2. The revised text of UPOV/EXN/HRV/1 may give examples of how to allocate burden of proof when the breeder exercises the breeder's right over the harvested material. This rule of evidence is the same as that of the breeder when he exercises the right to the propagating material.

- 
-
- 3. The revised text of UPOV/EXN/HRV/1 may give some advices to sellers of harvested materials (or products made directly from harvested materials) of the protected variety. They shall review that whether or not harvested material they sold have been obtained through the unauthorized use of propagating material. If necessary, they may mark the variety denomination of the variety used to produce harvested material.

- 
-
- *The above represents are only personal views.*
 - *If any question, welcome to continue the discussion.*
 - My E-mail: lijudan@cass.org.cn

- 
-
- *Thank you for your attention!*

May 27 , 2021