

EXPERIENCE OF BREEDERS: Role of Contracts in the Exercise of Breeder's Rights

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in Relation to Plant Breeders' Rights
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INTRODUCTION

- ♦ **Scope of the Breeder's Right:** Exclusive exploitation rights for protected variety propagating material
- ♦ Protection of the variety does not extend to the total plant material
- ♦ Extension to harvested material is only possible when it originates from unauthorized propagating materials, and the breeder has not had reasonable opportunity to exercise his rights in relation to said propagating material.



INTRODUCTION (II)

- ◆ The added value of many varieties in several crops (flowers, fruits, vegetables) is found only in the harvested material, not in the propagating material
- ◆ The breeder must go "downstream" to capture this added value, getting closer to the producer, distributor, and end consumer
- ◆ Transfer of production to third countries→
Difficulty in exercising breeder's rights at origin:
 - No effective protection system exists
 - Practical difficulties in pursuing legal action
 - Need to identify the variety and its legitimate origin in the target market

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INTRODUCTION (III)

- ◆ The contracts used by breeders for material from protected varieties could help solve some of these problems
- ◆ We focus on some examples of strategies used by breeders, based on control of the harvested material

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PRELIMINARY EXPLANATIONS

Examples and conclusions shown:

- ◆ Based on 12 years of experience within GESLIVE
- ◆ Reference is made to protected varieties in accordance with the UPOV system, generally in the EU

But:

- ◆ National legislation regarding contracts and obligations has bearing on this matter
- ◆ Anti-trust and competition laws must be considered
- ◆ Law is not an exact science

We cannot guarantee the validity of all of these conclusions for all countries!



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GENERAL CONSIDERATIONS

- ◆ **Protection of the variety (when it exists) must be included on all commercial documentation referring to any of its material:**
 - Knowledge of the protection could have legal consequences for claims
- ◆ **In view of the risk of unauthorized propagation, it is appropriate to enter into an "exploitation agreement" with the purchaser of the material (or inclusion thereof in the conditions of sale):**
 - Stating the protection of the variety
 - Prohibiting (or establishing conditions for) subsequent propagation
 - Allowing inspection by the breeder or his agent



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EXPLOITATION LICENSE FOR THE PRODUCER - TRADER

- ◆ Licenses granted directly by the breeder to the producer or trader of the harvested material
- ◆ Involvement of the propagator (seed producer, nursery) is limited to providing propagation services to the licensee (sub-license)
- ◆ Royalties are usually based on the harvested material (“end point royalty”)
- ◆ The benefit to the trader is assurance of the exclusive supply of a competitive product
- ◆ Examples of these contracts exist in the fruit and vegetable and ornamental plants (cut flowers) sector, as well as in field crops (barley for malt producers, rice)



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EXPLOITATION LICENSING OF THE PRODUCER – TRADER (II)

- ◆ **ADVANTAGES:**
 - Capturing the added value provided by the variety in the appropriate phase
 - Control of the use of the variety and of the material quality
 - Identification of the legitimate product in the market
 - Reduction of the purchase cost of propagating material, making compensation to the breeder proportional to the profits obtained
- ◆ **DISADVANTAGES:**
 - Consideration of anti-trust guidelines and competition laws
 - Consideration of the exhaustion of breeder's rights



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USE OF TRADEMARKS

- ◆ Trademarks have been being used as protection mechanisms (protection closed to some species)
- ◆ Trademarks only protect the denomination and the registered mark, not the plant material
- ◆ The usefulness of the trademark is solely dependent on its ability to create value by identifying the product in the market

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USE OF TRADEMARKS (II)

- ◆ Purpose of trademarks linked to a plant variety:
 - Protection of the harvested material, based on the value of the trademark
 - Guarantee of material quality
 - Creation of integrated systems for valuing the variety (clubs)
 - Identification of the breeder's activity and materials as compared to the competition
- ◆ Integration of the brand can be done directly (variety license + trademark) or through specific distribution channels
- ◆ The brand **does not** replace the variety denomination

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VARIETY IDENTIFICATION SYSTEMS

- PBR for most fresh products (cut flowers, fruits, vegetables) is new for the market
- Production is being moved to third countries where plant breeders' rights don't exist, or practical enforcement is not possible
- There is no systematic nor effective control of access to pirated fresh products (originating from unauthorized propagations) in the market
- "Black lists" are very dangerous (and could be very expensive in case of error!)
- "White lists" are not easy in many cases (when the original license only concerns propagating material)

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VARIETY IDENTIFICATION SYSTEMS (II)

- One response repeatedly received from the main EU supermarkets was the implementation by the breeders of an open standard system (but simple and inexpensive) to determine "legal origin"
- The traceable identification system:
 - Based on an internet database comprising all licenses
 - All licenses are detailed, specifying all data about grower, plots, number of plants and harvest forecasts (audits)
 - Material coming from licensed plants must be labeled with traceable stickers (numbered with specific serial codes)
 - Stickers are printed in-house through direct access to the internet database
 - The system is fully open (and free) for all packers

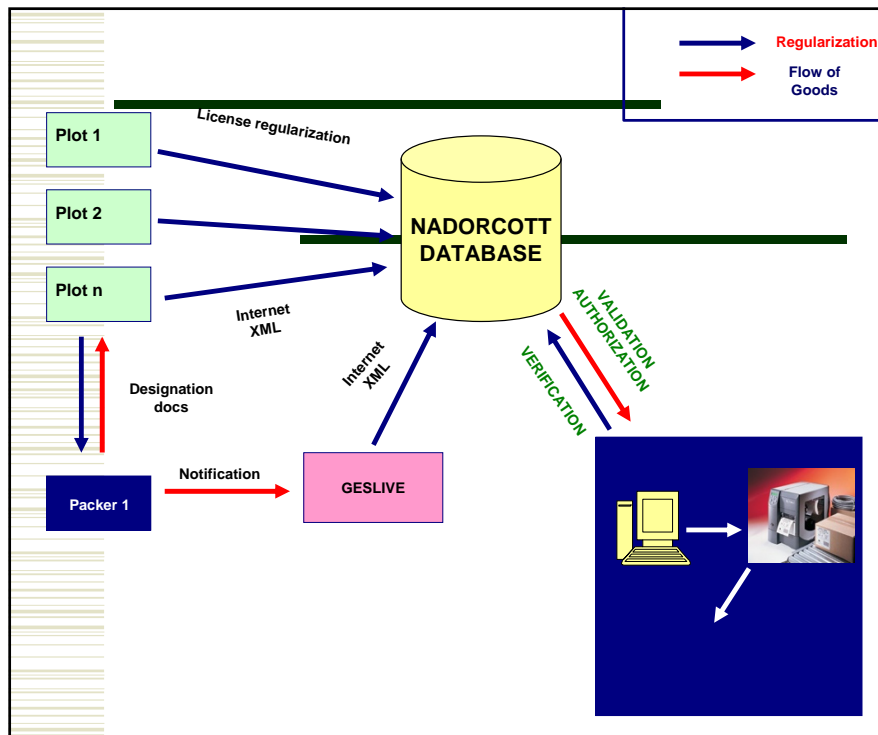
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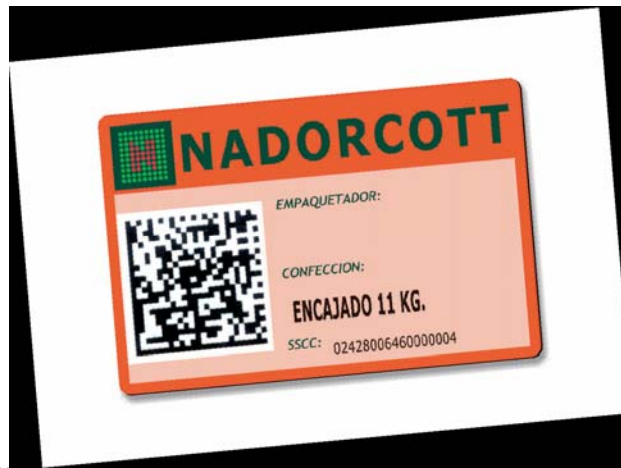
THE “NADORCOTT” CASE

- “Nadorcott” is an EU-protected mandarin variety, originating in Morocco
- As one of the later mandarin varieties and of very high quality, it has commercial advantages (average price for growers is triple other common citrus varieties)
- In 2003, GESLIVE was appointed by the breeder to manage licenses in Spain, up to 50,000 plants per year
- During 2004, more than 1,500,000 already-existing plants (3,000 hectares) were detected (propagated without breeder authorization)
- Considering the difficulties of fighting a significant percentage of the Spanish citrus sector, a general regularization process was offered to all growers and packers concerned

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THE GENUINE “NADORCOTT” LABEL



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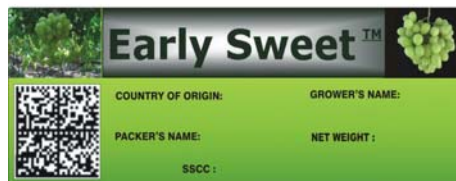
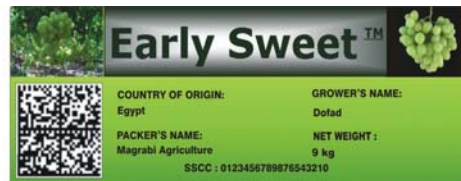
IMPLEMENTING AN IDENTIFICATION SYSTEM

- The Nadorcott identification system was easily accepted by the EU market, as it fulfilled most of their requirements: open, simple, easy, inexpensive
- Presence of illegal fruit on the market was drastically reduced after introduction of the identification system
- The regularization process concluded successfully in 2007 (>2,000,000 plants; 600 growers; 14 M € in royalties collected)
- Today, this system is being implemented for worldwide Nadorcott production, and for other protected varieties as well (seedless grapes, stone fruit, tomato, etc.)
- The system is specially useful for controlling imports of final products to the EU from third countries, where practical enforcement of PBR would be difficult

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EXTENDING THE IDENTIFICATION SYSTEM



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OTHER CONTRACTUAL MODELS

- ♦ **Integration Contracts:** delivery of propagating material (seeds, plants) to the farmer is linked to a commitment for return from the harvest for supplying the production chain (semolina, malt, bakery)
- ♦ **Renting plant material:** The plants are rented to the farmer; the breeder maintains ownership



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OTHER CONTRACTUAL FORMULAS (II)

- ◆ **Production services:** Service contract between breeder and farmer:
 - The breeder provides the genetics and the propagating material
 - The farmer provides the land and the cultivation service
 - The harvest belongs to the breeder
 - Be aware of the farmer's compensation system as well as the risk!

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CONCLUSIONS

- The breeders of new varieties contribute a large part of the value added in the ornamental, fruit, and horticultural sectors.
- The UPOV system is an efficient tool for protecting breeders' rights for many crops
- However, for species where all of the value added is found in the harvested material, a system based exclusively on the propagating material can limit the possibilities for breeders to exercise their rights
- The contractual mechanisms presented attempt to overcome these limitations within the possibilities offered by each country's legal system
- Presence of plant breeders' rights is a growing factor in the global fresh produce market

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THANK YOU FOR YOUR
ATTENTION!



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