

Hot Topics in Plant Variety Rights

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Thomas Bouvet

VÉRON **VA**
& ASSOCIÉS
A V O C A T S
Paris ■ Lyon

Hot Topics in
Plant Variety Rights

Summary

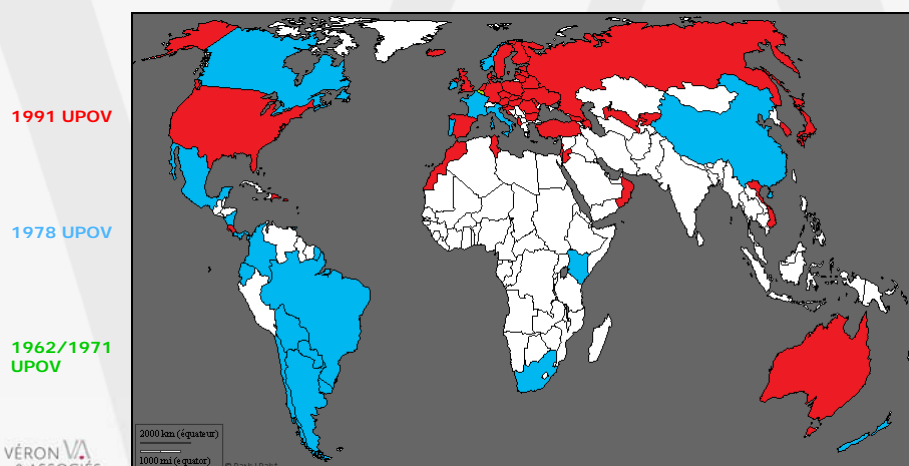
- Introduction
- 1. Essentially derived varieties
- 2. Farmer's privilege
- 3. Action for nullity of CPVR

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Introduction

- UPOV Member States
- Plant breeders' rights (PBR) in Europe
 - ▶ Community plant variety rights
 - ▶ National Plant Breeders' rights

UPOV Member States on 22/10/2009



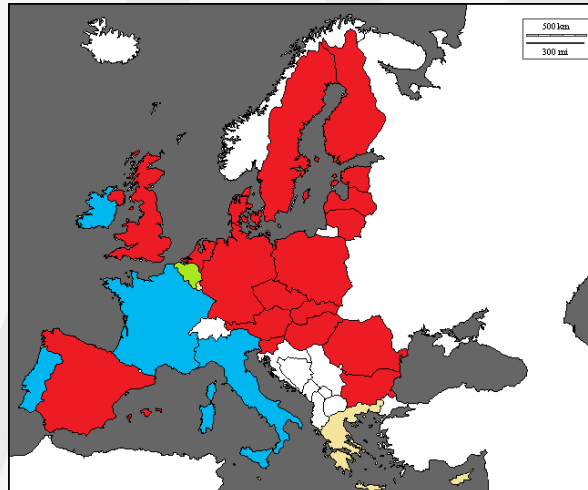
European UPOV Member States

1991 UPOV including
the European
Community

1978 UPOV including:
- France
- Italy
- Portugal

1962/1971 UPOV
including Belgium

EU Member States not
parties to UPOV:
- Cyprus
- Greece
- Luxembourg
- Malta



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Main differences between the 1978 and 1991 UPOV Conventions

1978 UPOV	1991 UPOV
Limited genera and species	All genera and species
15-year protection 18 years for trees and vines	20-year protection 25 years for trees and vines (EU 25/30 years for trees, vines and potatoes)
Protection for reproduction material (including plant)	Protection of i) reproduction material, ii) harvested material and iii) (option) products made directly from harvested material
Protection for i) protected variety and ii) varieties whose production requires the repeated use of the protected variety	Protection for i) protected variety and ii) varieties whose production requires the repeated use of the protected variety, iii) non distinct variety, and iv) essentially derived variety
No provision on farmer's privilege (but acts of infringement did not include farm-saved seed)	Farmer's privilege optional (acts of infringement include farm-saved seed)
Dual protection prohibited	Dual protection possible

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CPVR data

■ Number of applications received

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total
Agricultural	957	365	343	405	407	406	442	417	495	536	499	610	732	790	172	7 576
Vegetable	458	125	157	224	184	246	184	175	238	267	296	342	295	411	96	3 698
Ornamental	1 513	835	953	1 102	1 195	1 267	1 415	1 506	1 643	1 706	1 800	1 616	1 788	1 632	261	20 232
Fruit	233	61	77	104	95	94	117	124	141	146	139	168	162	181	37	1 879
Total	3 161	1 386	1 530	1 835	1 881	2 013	2 158	2 222	2 517	2 655	2 734	2 736	2 977	3 014	566	33 385

■ Number of Community titles granted per crop sector

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total
Agricultural	570	415	410	389	342	394	347	534	497	474	630	613	541	235	6 391
Vegetable	170	160	228	93	105	161	171	169	197	232	243	258	244	35	2 466
Ornamental	666	381	814	1 017	884	904	1 102	1 081	1 429	1 388	1 294	1 627	1 312	311	14 210
Fruit	55	53	39	49	39	59	81	83	55	84	122	118	112	67	1 016
Total	1 461	1 009	1 491	1 548	1 370	1 518	1 701	1 867	2 178	2 178	2 289	2 616	2 209	648	24 083

CPVR data

■ Applicants' country of origin

EU Country	Number of applications	Non EU country	Number of applications
NL	11 437	US	3 734
DE	4 726	CH	1 448
FR	4 578	JP	471
DK	1 557	AU	375
UK	1 530	IL	329
IT	819	NZ	221
BE	704	TW	45
ES	517	CR	17
SE	174	ZA	17
AT	92		
CZ	76		
PL	68		
IE	52		
HU	44		
CY	25		
GR	19		
SI	7		
PT	6		
FI	5		
LU	4		
EE	2		
MT	2		
SK	1		
Sum	26 445		

PBR case law

- Board of Appeal of the CPVO
 - ▶ www.cpvo.europa.eu
 - ▶ Number of decisions: 3 in 2009, 4 in 2008, 7 in 2007,...
- National and European case law
 - ▶ www.cpvo.europa.eu > PVR case law database

1. Essentially derived varieties

- Article 14-5 1991 UPOV Convention
- Article 13-5 Regulation No. 2100/94
- UPOV explanatory notes, draft of 31/8/2009

Essentially derived varieties: Scope of CPVR

- Article 15 Regulation No. 2100/94: breeder's exemption a cornerstone of plant breeders rights

"Limitation of the effects of Community plant variety rights: (...)

(c) acts done for the purpose of breeding, or discovering and developing other varieties"
- Article 13 Regulation No. 2100/94

5) The [protection] shall also apply in relation to:

 - a) **varieties which are essentially derived from the variety** in respect of which the Community plant variety right has been granted, where this variety is not itself an essentially derived variety;
 - b) varieties which are not distinct in accordance with the provisions of Article 7 from the protected variety; and
 - c) varieties whose production requires the repeated use of the protected variety.
- The protection conferred by CPVR thus extends to Essentially derived varieties

Essentially derived varieties: Definition

- Article 13 Regulation No. 2100/94

6) For the purposes of paragraph 5 (a), a variety shall be deemed to be essentially derived from another variety, referred to hereinafter as 'the initial variety' when:

 - (a) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety;
 - (b) it is distinct in accordance with the provisions of Article 7 from the initial variety; and
 - (c) except for the differences which result from the act of derivation, it conforms essentially to the initial variety in the expression of the characteristics that results from the genotype or combination of genotypes of the initial variety.
- Article 14- 5- c) 1991 UPOV (similar example Section 7-5 in the UK 1997 Plant variety Act)

c) Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.

Essentially derived varieties: Definition

- *An essentially derived variety:*
 1. *is predominantly derived*
 2. *is distinct*
 3. *except for the differences which result from the act of derivation, conforms essentially to the initial variety*

Essentially derived varieties: Condition 2 > distinctness

- Clearly distinguishable from the initial variety and any other variety
- Distinction assessed like for any other variety by reference to the expression of the characteristics (**DUS**)

Essentially derived varieties: Condition 3 > conformity

- *“Except for the differences which result from the act of derivation, it conforms essentially to the initial variety”*
 - ▶ It expresses all, or almost all, the essential characteristics of the initial variety
 - ▶ essential characteristics = necessary and fundamental to the definition of the initial variety
 - ▶ Except for the characteristics distinguishing it clearly from the initial variety

Essentially derived varieties: Conditions 2 and 3

- Apparent contradiction between conditions 2 and 3
 - ▶ EDV must be in conformity more than being distinct, *i.e.* there must be more essential characteristics retained than differences
 - ▶ Less difference in number (one or a few differences)
 - 1991 UPOV Convention preparatory work (IOM/IV/2, 22 June 1989, p. 12 No. 6)
 - UPOV Guidelines (IOM/VI/2, 17 August 1992, p. 3 No. 12)
 - ▶ Less difference in significance

Essentially derived varieties: Conditions 2 and 3

- Court of The Hague, 13 July 2005,
Astée Flowers BV v. Danziger Flower Farm
(Dangymini / Blancanieves, Summer Snow)

Blancanieves is not an EDV: "*the differences found (...) are so substantial in number and significance*"

- ▶ 17 differences out of 21 essential characteristics
- ▶ Differences of significance
- Appeal decision expected by the end of 2009

Essentially derived varieties: Condition 1 > predominantly derived

- EDV's genome must predominantly originate from the initial variety's one
 - ▶ The initial variety's genetic material must have been used to produce the EDV
 - ▶ There can be only one initial variety
 - UPOV Guidelines (IOM/VI/2, 17 August 1992, p. 3 No. 8)
- Genetic distance will vary between species
 - ▶ CIOPORA and ISF study of EDV for various species

Essentially derived varieties: Condition 1 > predominantly derived

- Direct derivation, *e.g.* mutation or genetically modified variety
- Indirect derivation is possible
 - ▶ 'A' derived into 'B', 'B' derived into 'C': 'C' can be an EDV from initial variety 'A'
- Can EDV be more than a second generation variety?
 - ▶ Some authors answer NO
 - ▶ Personal opinion is YES
 - ▶ UPOV Guidelines (IOM/VI/2, 17 August 1992, Annex p. 1)
 - ▶ 1991 UPOV Convention preparatory work (IOM/IV/2, 22 June 1989, p. 12 No. 6)
 - ▶ [[AxB]xA]xA: hybrid can be EDV from A (backcrossing)

Essentially derived varieties: How can EDV be produced?

- Examples in Article 14- 5- c) 1991 UPOV or in Section 7- 5) in the UK 1997 Plant Variety Act are NOT exhaustive
- But EDV cannot be produced by ordinary breeding and selection
 - ▶ UPOV and CPVR refer to deriving v. breeding
 - ▶ EDV must be obtained by a method aimed at keeping similar characteristics (1991 UPOV Convention preparatory work, IOM/IV/2, 22 June 1989, p. 12 No. 6)

Essentially derived varieties How to prove derivation?

- Information regarding the condition of breeding
 - ▶ PBR application for EDV (some offices request to mention the breeding process)
 - ▶ Breeder's books or notes
- Presumption in view of the genetic distance between the initial and derived varieties?
 - ▶ UPOV Guidelines (IOM/VI/2, 17 August 1992, p. 3 No. 17)
 - ▶ CIOPORA Position Paper of 8 April 2008
 - ▶ ISF Position Paper for Ray-Grass

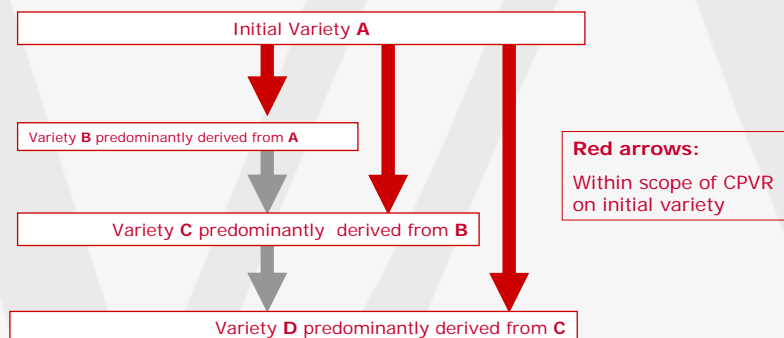
Essentially derived varieties How to prove derivation?

- Court of The Hague, 6 August 2008, *Van Zanten v. Hofland* ('Ricastor')
 - ▶ Claimant proved Jaccard coefficient = 1.00 > 100% identity
 - ▶ Defendant's argument on hybridization "*relied on no evidence*"
- Court of The Hague, 7 September 2007, Summary proceedings ('Dangypmini' / 'Million Star') (decision on the merits expected late 2009)
 - ▶ Claimant proved Jaccard coefficient = 0.91 > 91% identity
 - ▶ Defendant's arguments regarding development are not credible and are supported by no evidence

Essentially derived varieties: Protection of the derived variety

- EDV may be protected by CPVR
 - ▶ EDV is assessed like any other variety
- But the protection does not extend to EDV
 - ▶ Article 13 Regulation No. 2100/94
 - 5) *The [protection] shall also apply in relation to:*
 - a) *varieties which are essentially derived from the variety in respect of which the Community plant variety right has been granted, **where this variety is not itself an essentially derived variety:** (...)*

Scope of protection on the initial and derived varieties



Essentially derived varieties: Procedural issues

- Before national courts, not the CPVO
 - ▶ Infringement action
 - ▶ Declaratory judgement (Art. 99 Regulation No. 2100/94)

2. Farmer's privilege (farm-saved seed)

- Basic principle
 - ▶ Article 15-2 1991 UPOV Convention
 - ▶ Article 14 Regulation EC No. 2100/94
- Implementing rules
 - ▶ Regulation EC No. 1768/95
 - ▶ Regulation EC No. 2605/98 (level of remuneration)

Farmer's privilege: General principle

- Article 14 Regulation EC No. 2100/94 (extracts):
 1. For the purposes of safeguarding agricultural production, farmers are authorized to use for propagating purposes in the field, on their own holding the product of the harvest which they have obtained by planting, on their own holding, propagating material of a variety other than a hybrid or synthetic variety, which is covered by a Community plant variety right
 2. The provisions of paragraph 1 shall only apply to agricultural plant species of: (a) Fodder plants: (b) Cereals: (c) Potatoes: (d) Oil and fibre plants
 3. Conditions to give effect to the derogation provided for in paragraph 1 and to safeguard the legitimate interests of the breeder and of the farmer, shall be established, before the entry into force of this Regulation, in implementing rules pursuant to Article 114, on the basis of the following criteria:
 - ▶ small farmers shall not be required to pay any remuneration to the holder
 - ▶ **other farmers shall be required to pay an equitable remuneration to the holder**, which shall be sensibly lower than the amount charged for the licensed production of propagating material of the same variety in the same area
 - ▶ **relevant information shall be provided to the holders on their request, by farmers and by suppliers of processing services**

Farmer's privilege: Equitable remuneration (Art. 5 Regulation No. 1768/95)

- Art. 5 of Regulation No. 1768/95 amended by Regulation No. 2605/98 distinguishes between two situations:
 - ▶ Remuneration is the object of an agreement between the holder and the farmer (Art. 5§1)
 - ▶ Remuneration is NOT the object of an agreement between the holder and the farmer (Art. 5 §§ 2-6)

Farmer's privilege: Equitable remuneration Agreement between the holder and the farmer

- *"The level of the equitable remuneration to be paid to the holder may form the object of a contract between the holder and the farmer concerned"*
 - ▶ The agreement must be applied to assess the equitable remuneration
 - ▶ Interprofessional agreements do not apply if an agreement was entered into
 - ▶ ECJ, 8 June 2006, C-7/05 to C-9/05 (§21)
 - ▶ The agreement must comply with Art. 14-3, *i.e.* the remuneration shall be sensibly lower than the amount charged for the licensed production of propagating material

Farmer's privilege: Equitable remuneration No agreement between the holder and the farmer

- *"The remuneration shall be sensibly lower than the amount charged for the licensed production of propagating material of the lowest category of the same variety in the same area"* (Art. 5§2 Regulation No 1768/95 and 2605/98)
 - ▶ Agreements between organisations of holders and of farmers, at Community or national level, may serve as guidelines (Art 5§4) provided they have been notified to the Commission and published (ECJ, 8/6/2006, C-7/05 to C-9/05)
 - ▶ If such interprofessional agreements are NOT applicable to the holder and the farmer, the remuneration shall be 50% of the amounts charged for the licensed production (Art. 5§5)
 - ▶ If the farmer has made use of more than 55% of farm-saved seeds, over the period, the remuneration shall correspond to the one which would be paid if variety (protected by CPVR) was protected by a national PVR and provided it would be more than 50% of the amounts charged for the licensed production (Art. 5§6)
- In the absence of licensed production, the remuneration shall be *"sensibly lower than the amount which is normally included, for the above purpose, in the price of propagating material of the lowest category"* (Art 5§2-2)
- A remuneration is *"sensibly lower"* if it does not exceed the one necessary to establish or stabilize a reasonably balanced ratio between the use of licensed propagating material and farm saved seeds. Such ratio is reasonably balanced if it ensures that the holder obtains, as a whole, a legitimate compensation for the total use of his variety (Art. 5§3)

Farmer's privilege: Equitable remuneration

- ECJ, 8/6/2006, C-7/05 to C-9/05, *Saatgut-treuhandverwaltungs v. Deppe, Hennings, Lübbe*
 - ▶ A remuneration of 80% of the amount charged for the licensed production of propagating material is NOT equitable
 - ▶ The remuneration of 50% provided for in Art. 5§5 is fixed and is not an upper or lower limit

Farmer's privilege: Information

- Information regarding the use of farm-saved seeds is due, to the holder, by:
 - ▶ the farmer (Art. 8 Regulation No. 1768/95)
 - ▶ the processor (Art. 9)
 - ▶ official bodies (Art. 11)
- Information regarding the level of remuneration, is due to the farmer by the holder (Art. 11)

Farmer's privilege: Information

- Case law regarding information due to the holder by the farmer:
 - ▶ ECJ, 10/04/2003, C-305/00, *Schulin v. Saatgut-treuhandverwaltungs*
 - ▶ The holder may not request information from a farmer against which it has no indication that the farmer has used or will use farm-saved seeds
 - ▶ As soon as the holder has such indication, it may request information
 - ▶ ECJ 11/03/2004, C-182/01, *Saatgut-treuhandverwaltungs v. Werner Jäger*
 - ▶ "Organization of holders" has a broad meaning
 - ▶ The holder may not request information from a farmer against which it has no indication that it has used or will use farm-saved seeds

Farmer's privilege: Information

- Case law regarding information due to the holder by the processor:
 - ▶ ECJ, 14/10/2004, C-336/02, *Saatgut-treuhandverwaltungs v. Brangewitz GmbH*
 - ▶ The holder may not request information from a processor against which it has no indication that the latter has processed or intends to process farm saved seeds of a variety of the holder
 - ▶ As soon as the holder has such indication, it may request information to the processor
 - ▶ The requested information may concern harvested material made:
 - For the farmer in relation to which the holder has indication
 - For any other farmers, provided the holder has indication regarding one farmer

Hot Topics in
Plant Variety Rights

Farmer's privilege: National practice

- France
- Germany
- The Netherlands
- UK

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Plant Variety Rights

Farmers' privilege: In France

- Farmer's privilege does not exist in French PBR law > farm-saved seed is an infringement
 - ▶ Court of Appeal Nancy, 13 September 1988
- Farmer's privilege included in French patent law, Art. L. 613-5-2 French Intellectual Property Code
 - ▶ Under conditions set by Art. 14 Regulation (EC) No. 2100/94
- Agreement reached for implementing Regulation No. 2100/94 only for wheat (*triticum aestivum*) on 26 June 2001 repeated yearly since then:
 - ▶ Farmers pay a Voluntary Compulsory Contribution (VCC) of €0.5 / ton of wheat sold; a total of €7,000,000 is collected per year
 - ▶ VCC paid back:
 - ▶ to "small farmers"
 - ▶ to seed sellers who themselves pay it back to farmers who purchased seeds (€2 per 100 kg of purchased seeds)
 - ▶ Balance of VCC is shared as follows:
 - ▶ 85% to wheat breeders
 - ▶ 15% to a funds sustaining plant breeding: FSOV (approximately €1,000,000 per year)

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Farmer's privilege: In Germany

- Art. 10a PVR Act (1985 *Sortenschutzgesetz* amended in 1997)
- Farmer's privilege included in German patent law (*Patentgesetz* §9c, "Landwirteprivileg")
 - ▶ Under conditions set by Art. 14 Regulation (EC) No. 2100/94
- Interprofessional agreement of 3 June 1996 (CPVO bulletin 16 August 1999)
- Several decisions in 2007 following ECJ decisions
 - ▶ Distinction whether remuneration is due before publication of the interprofessional agreement
 - ▶ Equitable remuneration is 50% of the amount charged for the licensed production of propagating material

Farmer's privilege: In The Netherlands

- Farmer's privilege provided for in Art. 59 PVR Act of 1967 revised in 2005 and in Decree of 8 December 2005 (2006?)
 - ▶ limited to cereals and potatoes
- Absent agreement between the holder and the farmer, the equitable remuneration is
 - ▶ 60% for potatoes
 - ▶ 60% at least for cereals

of the amount charged for the licensed production of propagating material

Farmer's privilege: In the UK

- Farmer's privilege provided for in
 - ▶ Section 9 Plant Variety Act of 1997
 - ▶ Section 60§5g Patent Act of 1977
- For varieties listed in Order made by the Ministers No. 1025 of 8/4/1998 (identical to Art. 14§2 Regulation No. 2100/94)
- Order No. 1026 of 8/4/1998 on information due to the holder

3. Action for nullity of CPVR

- Article 59 Regulation No. 2100/94
 - ▶ Objection to grant
- Articles 67 to 69 Regulation No. 2100/94
 - ▶ Appeal against decision to grant CPVR within 2 months
 - ▶ CFI EC, 31/1/2008, T-95/06, Nador Cott
- Articles 20 and 21 Regulation No. 2100/94
 - ▶ Nullity or cancellation action before the CPVO
- Article 105 Regulation No. 2100/94
 - ▶ Obligation of national court to hold CPVR valid

Action for nullity of CPVR

- Do Art. 20 and 21 EC Regulation create a right for parties to initiate nullity or cancellation actions?
 - ▶ Literally, the right of action belongs to the Office only
 - ▶ No provision in the Regulation suggests such action may be initiated by a party
 - ▶ CFI EC, T-95/06, 31/1/2008, Nador Cott (seems to deny the existence of nullity action § 81 (Spanish) and §§ 112-117; *contra* interpretation Board of appeal CPVO A010/2007)
 - ▶ But...

Action for nullity of CPVR

- Board of Appeal, CPVO, A 006/2007, 4/12/2007, *Schräder v. CPVO* ('Lemon Symphony')
 - ▶ Claimant > revocation because no longer stable
 - ▶ CPVO > letter confirming intention not to revoke
 - ▶ Claimant appeals against the letter (Art. 67 and 68)
 - ▶ CPVO holds the appeal inadmissible
- Appeal admissible but unfounded
 - ▶ *"A decision within the meaning of 67, 68 of CR 2100/94 is not necessarily a formal decision effected by means of service. A decision also exists if its content has the character of a ruling that concerns the rights of the party addressed and that gives the impression of being intended to be final. The Office's letter of 10 May 2007 that was addressed to the appellant constitutes such a ruling."*
 - ▶ *"However, the appeal is unfounded because the appellant has no right to cancellation of the plant variety right for Lemon Symphony. Firstly, such a right presupposes that the appellant has a right to a decision by the Office with respect to Article 21 CR/2100, or that the Office is obliged to issue a decision regarding the outcome of the cancellation proceedings and to address this to the appellant. (...) Not even the first precondition is met here. The appellant has no right to issuing of a decision with respect to Article 21 and the Office is not obliged to decide by means of a decision that the preconditions for the cancellation of the plant variety right for Lemon Symphony are not met."*
 - ▶ *"Proceedings pursuant to Article 21 CR/2100 are ex officio proceedings which are initiated and carried out officially. This does not exclude the possibility of third parties providing the Office with material and arguments in order to prompt it to cancel the disputed plant variety right. However, such prompts and indications do not constitute a request with respect to which the Office would have to decide by means of a decision. Even if a correspondence develops between the Office and the third party, this does not make the third party a party to proceedings."*

Action for nullity of CPVR

- Board of Appeal, CPVO, A 009-2008, 2/12/2008, *Barber v. Plantones Certificados* ('barberina')
 - ▶ Claimant > nullity action for lack of novelty
 - ▶ Defendant > nullity action does not exist
> 2-month period of Art. 69 expired
- Does not clearly address the issue of admissibility
 - ▶ *"in assessing evidence concerning the validity of a Community plant variety right the CPOV is entitled to use pieces of evidence provided by a third party"* (§ 55)
 - ▶ *"The time limit mentioned in Article 69 does not refer to the period of time **available** to a third person to bring a nullity petition"* (§ 56)

Action for nullity of CPVR

- Board of Appeal, CPVO, A 010/2007, 23/1/2009, *Schröder v. CPVO*
 - ▶ Claimant > revocation for no longer meet official description
 - ▶ CPVO > letter confirming intention not to revoke
 - ▶ Claimant appeals against the letter (Art 67 and 68)
 - ▶ CPVO holds the appeal inadmissible
- Appeal admissible

"A decision within the meaning of [67, 68 of CR 2100/94] is not necessarily a formal decision effected by means of service. A decision also exists if its content has the character of a ruling that concerns the rights of the party addressed and that gives the impression of being intended to be final. The Office's letter of 10 May 2007 that was addressed to the appellant constitutes such a ruling."

Moreover, in its decision of 31 January 2008 in case T-95/06 (Nador Cott), at point 81, the Court of First Instance presented, as it seems, a rather liberal point of view regarding the admissibility of actions brought before the CPVO with regard to Articles 20 and 21.

As a result the Board holds the present appeal to be admissible. »

Hot Topics in
Plant Variety Rights

Thanks for their help

- Thomas Musmann, Rospatt Osten Pross
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VÉRON VA
& ASSOCIÉS
AVOCATS

Contact information

1, rue Volney
75002 Paris
Tel. +33 (0)1 47 03 62 62
Fax +33 (0)1 47 03 62 69

53, avenue Maréchal Foch
69006 Lyon
Tel. +33 (0)4 72 69 39 39
Fax +33 (0)4 72 69 39 49

thomas.bouvet@veron.com
www.veron.com

VÉRON VA
& ASSOCIÉS
AVOCATS
Paris ■ Lyon