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18 July 2008

Submissions of Christopher Prescott on the ACIP Issues Paper on the Enforcement of Plant Breeders Rights – Options Paper Reply

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Summary:

Farmers Privilege

The 'farm saved seed' provision is an area that should not be imposed on ornamental taxa as I believe it should only be relevant as an agricultural exemption primarily for seed (grain) crops. Therefore I would recommend looking at option 10B or option 14 with the provision that still enables taxons' to be exempted in the future.

Essentially Derived Varieties

I believe that option 22 should be considered in the area of EDV's.

Some of the ambiguity should firstly be removed from varieties that are EDV's. This way it would reduce the scope of as to what constitutes an EDV in relation to the importance of the attribute and therefore enabling the PBRO a more transparent guideline. I would suggest that a provision should be made that the only EDV's that the PBRO should be concerned with are the ones where the Initial variety has already been "Applied" for in any UPOV country. This way an EDV from a wild or heritage source can still be considered by the PBRO. EDV's then could be split into two categories.

1. A spontaneous or a manipulated mutation from a protected (or applied for) variety remains the property of the breeder of the IDV regardless of the commercial significance or the difference of the mutation. This is already the practice with ornamental varieties with the use of contracts. It can be modified where a question can be put in the application as to who discovered the mutation. If there is no harmonious agreement between the breeder of the IDV and the person who discovers the mutation (as expressed in option 22), then neither can receive the benefit of protection, also the IDV owner can run a case against the discoverer of the mutation should they decide to market the new variety outside the PBR regime. This would mean that a mutation can be protected under PBR as exists now, but only when permission is granted by the breeder/owner of the IDV.
2. An EDV that is the result of genetic manipulation or piggy back breeding that result in a "same" looking variety but with increased yields or improved disease resistance etc should be covered by the recommendations in option 22.

Alternate Dispute Resolution (ADR) and PBR

I would be in favour of option 33. The PBR office has a practical list of field experts in their QP list that could be utilised within an ADR panel with relevant knowledge on a broad range of crops.

This could also be an area that potentially advantages the ornamental applicants as apposed from the agricultural and some of the horticultural sectors, as the majority of infringements are perpetrated from small to medium sized businesses, that within themselves represent low monetary disadvantage to the PBR holder but without an inexpensive dispute resolution possible, less action against these infringements could embolden more separate contravention, rendering PBR as a tool to protect the rights of the breeder ineffective (as is the case currently). The main reason that no actions of enforcement have been presented to the courts in this sector is because the majority of applicants (50% of PBR applications are from the ornamental sector) perceive that enforcing their right is far more expensive than the possible recuperation of unpaid royalties.

I would agree that ADR should be optional not compulsory.

Acquisition of evidence

I would agree with option 38 in using a similar acquisition to the UK model, but with the added level of protection for the alleged infringer to have the notice of possible infringement coming from the PBR office itself. This could be made by the applicant giving the details of the alleged infringer to the PBR office along with a prima facie case to satisfy the PBRO that it is not frivolous. This would also be effective in creating a body between the applicant and their customer in a less threatening environment. It could also help in the setting up of an ADR framework prior to any court involvement, or demonstrate at the beginning which action to take against a possible infringement.

Customs provisions for PBR

I would agree with option 42 as I stated in the original submission that PBR should be brought into line with other areas of IP protection in relation to customs seizure. I disagree with the statement that “such circumstances may be too rare to justify introduction of the system” as in 2006 I was aware of three circumstances (two proceeding St Valentines day, one proceeding Mother’s day) where the PBR applicant had informed his agent of a shipment of rose flowers from either China or India into Sydney that had been grown without the expressed permission of the breeder. The applicant had supplied the Australian agent the details of where the material was coming from and which port the infringed varieties were to be landed. The agent contacted customs who said they couldn’t provide any assistance. As it turned out, one of the shipments had the PBR rights enforced by pressure on the importer that they would be in breach of PBR and the grower in China then paying the royalties owed to the breeder just prior to the flowers landing. (I have no details as to what the outcome of the other two shipments and can only assume the flowers arrived and the PBR right was not enforced). Steps need to be taken to prevent this from happening similar to that in Europe, so that in Australia seizures by customs would force the growers in countries that believe they can grow flowers with impunity and export them to first world destinations would be a wrong assumption. This could also increase the amount of varieties that are protected under PBR in Australia.

Exemplary damages

In the case where ADR cannot achieve an appropriate outcome, the applicant would need to proceed with court action if they are to successfully enforce their PBR rights. I suggest that exemplary damages should be awarded to a successful litigation. My preference would be as outline in option 44 using the NZ example as a base. The reason as I have stated earlier, why not many PBR infringements are tested in court is the perceived high cost for little or negative gain and even using the NZ example will only give the applicant only a modest increase in penalty payments should they be successful in a typical infringement in a cut flower rose case.

Central Information & Collective peak body

1. The question as to whether the government should facilitate developing models of a collective/peak body, I would acknowledge it to be beneficial for agricultural and horticultural applicants but would not be of the same benefit in the ornamental sector as royalties are easily collected by the sale of labels in the case of nursery stock, and from the invoice from the licensed propagators in the case of cut flower varieties.

Education & Awareness

2. The most effective way to improve education and awareness in the cut flower area would be in the trade magazines as I outlined in the first submission, these publications tend to be amenable to displaying press releases and submitted articles, but keep in mind that the nursery and the cut rose industries are separate even though most outside the industry combine the two together, and as such have different publications (for example the "Australian Horticulture" magazine would not reach many cut flower growers). The other area would be for speakers to make presentations at conferences.
3. It would be an excellent idea that curriculum in all facets of the industry cover PBR. This would help in generational change in attitudes.

Standard Contracts

4. I have no objection to standard contracts provided they separate the concerns for each sector of the industry.

End Point Royalties

5. This question would relate to areas beyond my knowledge and wouldn't be applicable to the cut flower industry
6. In the cut flower industry the first point royalties are the EPR, as royalties are not commonly collected on harvested product but from the plants that produced it.
7. This again is a question better answered by participants within the areas that EPR are applicable.