

Market protection against 'more of the same'

Breeder's rights might seem straightforward, but exercising them often turns out to be a struggle. Any breeder doing so eventually could get lost in a legislative maze or end up paying huge sums of money. According to Fleuroselect managing director Marcel Bartels new varieties are better off with co-operative control.

By Guus Wijchman

In his role as managing director of Fleuroselect Marcel Bartels has attended many meetings about plant breeder's rights. Last year in Brussels, he noticed that the largest lobby consisted of lawyers. "They clearly have an interest in legislation regarding this field, which is as detailed as possible. The more refined this is, the more chances they get to offer their legal services when plant breeder's rights are infringed," Bartels states.

The major reason why breeders apply for breeder's rights is for charging royalties. When a supplier states the royalties separate to the sales price, it is usually accepted in the market. In that sense, plant breeder's rights are for breeders the source from which they pay for the costs regarding development and marketing of new varieties. Bartels however does question the essence of these rights.

Unique is relative

In Bartels' view plant breeder's rights should play a protective role for unique inventions. The

rights should take care of those that introduce new plants, so they can eventually earn back the money and time they invested in the development of the new product.

"Plant breeder's rights do, to a certain degree, protect the product but they absolutely do not protect the market for that product," Bartels comments. When these rights function properly, these should guarantee the unique character of a product and preserve it for the plant breeder. In his view unique is something of which there is no second specimen. "To what extent plants protected by plant breeder's rights are unique appears to be an especially relative matter in the consumer market," Bartels states. "Because, even when a variety is protected by plant breeder's rights, these can also be given to varieties that are more or less similar." Using DNA techniques lawyers do know how to handle these often-minimal differences according to Bartels. For instance, although one after the other red poinsettia is given

breeder's rights, these are to the consumer practically identical. Therefore according to Bartels, plant breeder's rights fail when it comes to being unique.

Further breeding

Bartels also points out the phenomenon that a plant breeder for further breeding may use varieties for which plant breeder's rights have already been given. The ornamental plants industry allows unpunished elaboration of someone else's 'protected' product. It is even possible to obtain plant breeder's rights for the new creation.

Bartels draws a comparison to the computer world; it is unthinkable that others tinker with patented software, like Microsoft Windows. "No company can make off with this in order to market its own variation. And to have one's own variation patented is utterly unthinkable," he notes, pointing out how Microsoft itself had Windows 95 succeeded by Windows 98, 2000 and XP. "Whilst patents make it impossible to elaborate on protected products, plant breeder's rights have little protection to offer to the original plant breeder."

Enormous costs

Plant breeder's rights should both offer the plant breeder the opportunity to recover the costs on his investment and tackle others that propagate the protected variety without his consent. It is at this point that lawyers are queuing to offer their services to the aggrieved

plant breeder.

Bartels illustrates how exercising these rights is high on impossible by pointing out the enormous costs involved. As soon as a plant breeder thinks he can establish illegal propagation of his protected variety or varieties, he can have the total production seized. The costs for starting up the entire legal procedure will, according to Bartels, quite easily mount to several tens of thousands of euros. In the unlikely event of the judge deciding in the favour of the propagating company, the consequences for the plant breeder will be incalculable. Therefore, the risks that could be involved are far too big for the average plant breeder, he thinks. That also explains why high-profile law suits concerning ornamental plant breeder's rights are a rarity.

Collaboration

Bartels however does not entirely slate plant breeder's rights. These rights do offer breeders a tool for collecting royalties. Furthermore, the ever-increasing companies in the ornamental plants industry are more easily able to bear the financial risks involved in enforcing plant breeder's rights. "This especially concerns those companies that jointly deal with the inspection on compliance with these rights," Bartels says.

Within his Fleuroselect organisation breeding companies therefore have set up their own inspection system, which



Marcel Bartels,
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supervises the compliance with plant breeder's rights. Under authority of those companies, inspectors visit nurseries in many European countries. This happens at random or on the basis of concrete indications from third parties. The right of free admittance to these nurseries is laid down in the terms and conditions of sale. Only because of the joint approach, the participating companies can afford the costs for random checks on compliance with the observance of plant breeder's rights. The inspection system also ensures that producers of the end product are sooner inclined to pay royalties over varieties protected by plant breeder's rights. "Additionally, this also illustrates once again that checking on the compliance with plant breeder's rights is almost exclusively meant to secure the earnings from royalties," states Bartels. With this system of checks Fleuroselect overcomes the limitations within plant breeder's rights with regard to this particular point. However, the system almost exclusively concerns

vegetatively reproduced crops for which these rights are granted. Fleuroselect has of old known regulations for the mutual protection of new varieties from seed. This concerns the well-known gentlemen's agreement, which for years formed the backbone of the organisation.

Violations

The Fleuroselect gentlemen's agreement includes the mutual respect for a new variety. Every year, a panel of judges from this organisation looks at new entries on 30 trial fields in different countries. These (anonymous) entries in trial planting are always compared to existing varieties. Each time, when a new variety clearly positively distinguishes itself in a number of ways from what is already available to the market, this becomes the new standard. Next, all Fleuroselect-members are allowed to include this variety immediately or after a certain period in their catalogues and supply programmes. "The plant breeder gets all the revenues of the sold seeds,"

Bartels emphasises.

This gentlemen's agreement is occasionally violated within the organisation. It does happen that a Fleuroselect member introduces a variety to the market, which is the spitting image of an already established improvement of the assortment. In cases where mediation and arbitration do not provide a solution, it is next up to the committee of judges to determine (anonymously) whether there is sufficient distinction between both varieties. More often than not, the most recently introduced variety is withdrawn.

Shape, colour, fragrance

DNA tests and biotechnology is of no consequence whatsoever to the Fleuroselect gentlemen's agreement. "This is because this organisation only attaches value to new varieties that are true improvements compared to the existing assortment. Improvements in shape, colour and fragrance, which the consumer as a rule can also establish," Bartels says.

In comparison to applying for breeder's rights, Bartels claims the Fleuroselect gentlemen's agreement is affordable. Examining a new variety in Fleuroselect costs the plant breeder only €275. If the Fleuroselect judges reach the conclusion that the new variety is indeed unique and an improvement for the assortment, then the same plant breeder can pay €100 annually; by doing this, he is certain that

his product will keep its unique position within the organisation. The entire industry – for as far as it's a member of Fleuroselect – will respect this product, promote and distribute it, for the entire duration of this gentlemen's agreement. This period varies from between eight to twenty-five years.

Organising uniqueness

According to Bartels lawyers and plant breeder's rights officials are constantly refining these rights to make them fit even more varieties; thus successfully ridding the legislation of all its loopholes. "In spite of that, plant breeder's rights are utterly inadequate with regard to rating and protecting a truly unique product," he thinks.

"Suppose that today no rules whatsoever were laid down in the ornamental plants industry with regard to the protection of new varieties," Bartels says. "In that case, one day some sort of patent right on flowers would appear. I may assume that this right would organise the uniqueness of a product entirely differently as well as protection of the market for a new variety and would do so much more thoroughly than today under plant breeder's rights." ■

Author note: Fleuroselect's main activities include the testing, protecting and promoting of new flower varieties. The hundred member companies include breeders, producers and distributors of ornamental varieties. The association was founded in 1970 and is currently based in Noordwijk, the Netherlands. www.fleuroselect.com