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IAM MAGAZINE, IP IN THE LIFE SCIENCES INDUSTRIES 2009

ENFORCEMENT OF PLANT VARIETY RIGHTS IN MEXICO CAN BE CHALLENGING, DUE TO THE LIMITED LEGAL REMEDIES AVAILABLE AND THE PECULIARITIES OF THE DOMESTIC MARKET. HOWEVER, THANKS TO THE EFFORTS OF THE RELEVANT AUTHORITIES, STRONG PROTECTION IS NONETHELESS AVAILABLE

As Mexico is a signatory to the UPOV Treaty, the criteria for the protection of plant varieties are identical to those in any other member state: the plant variety must be new, distinctive, uniform and stable.

Likewise, plant breeders' rights in Mexico are basically the same as those granted in other countries – that is, the right to be recognised as the creator of the plant variety, and the exclusive right to exploit the plant variety for production, reproduction, distribution or sale, as well as for the production of other plant varieties and hybrids for commercial purposes.

As a member only of the 1978 UPOV Treaty, Mexico has not yet signed the UPOV Act of 1991. Therefore, the term of protection for plant varieties is shorter than in other countries: 18 years for perennial species (forest and fruit trees, vines and ornamentals) and their rootstocks; and 15 years for all other species. This notwithstanding, the rights granted to plant breeders in Mexico are basically the same as in any other UPOV member state. However, the enforcement of these rights in Mexico differs substantially from that in other UPOV member states.

ENFORCEMENT OF PLANT VARIETY RIGHTS

In countries such as Ecuador and Colombia, plant variety rights are enforced by judicial authorities. It is possible to bring civil and even criminal actions against infringers – something which acts as a powerful deterrent. In Mexico, however,

civil and criminal actions are not available to enforce plant breeders' rights; the sole remedy is an administrative action.

The authority responsible for the enforcement of plant variety rights in Mexico is the National Service of Certification and Identification of Seeds (SNICS), a subdivision of the Ministry or Secretariat of Agriculture, Livestock and Rural Development, which is an administrative authority.

The SNICS was created in 2003, the same year that the Federal Law on Vegetal Varieties entered into force. Since then, the SNICS has been responsible for studying applications for the protection of plant varieties, granting the corresponding plant breeders' certificates and enforcing plant variety rights in Mexico, among other things.

In Colombia, it is possible to request the authorities to take action against third parties that exploit plant variety rights without authorisation, even if the corresponding plant breeders' certificate has not yet been granted. The authority needs only to issue a preliminary office action stating that an application for obtaining plant variety rights has been filed and studied by the authority.

In Mexico, by contrast, the Federal Law on Vegetal Varieties provides that if the applicant has satisfied the requirements of novelty and denomination, and has filled in the application correctly, the SNICS will issue an office action indicating that an application for plant variety rights is under prosecution and that the applicant is therefore to be presumed as the holder of the corresponding rights.

However, unlike in Colombia, in Mexico it is not possible to take action against third parties that exploit plant varieties without authorisation. The only effect of the abovementioned office action is that it entitles the applicant to seek damages from the date of issuance.

Damages may be sought only after infringement has been confirmed by the SNICS. The SNICS is not entitled to award damages, since only the civil courts have the power to do so in Mexico. It is thus necessary to wait until the SNICS has issued the plant breeders' certificate before bringing an infringement action, and until infringement has been declared before seeking damages.

In this context, Article 48 of the Federal Law on Vegetal Varieties provides that the following activities constitute infringement:

- To modify the denomination of a protected plant variety without the ministry's authorisation.
- To represent oneself falsely as the creator of a plant variety.
- To divulge or commercialise a plant variety as though it were of foreign origin when this is not the case, or to divulge or commercialise a plant variety as though it were of national origin when this is not the case.
- To oppose inspections conducted in accordance with the Federal Law on Vegetal Varieties.
- To exploit commercially the features or content of a protected plant variety, attributing these features or content to another plant variety.
- To violate the preliminary injunctions provided in the Federal Law on Vegetal Varieties.

Infringements are punishable by a fine of up to 10,000 times the minimum daily wage (approximately US\$40,000), depending on the specific infringement. Imprisonment is not an available penalty, as it is in Colombia and Ecuador.

INTERIM RELIEF

It is also possible to request the SNICS to issue a preliminary injunction ordering:

- The withdrawal from circulation or a prohibition against circulation of plant varieties or propagating material that infringes rights protected by the Federal Law on Vegetal Varieties.
- The withdrawal from circulation of objects, crates, containers, packages, paperwork and advertising material that infringes any of the rights protected by the Federal Law on Vegetal Varieties.
- The seizure of any property affected by a violation of the rights protected by the Federal Law on Vegetal Varieties.
- The suspension or cessation of any acts that violate the Federal Law on Vegetal Varieties.

In accordance with the Federal Law on Vegetal Varieties, where the plant variety or its propagating material is being traded, all traders shall be obliged to refrain from disposing of it as of the date of notification of the injunction. Producers, nursery workers, manufacturers, importers and distributors shall be subject to the same obligation, and shall be responsible for immediately

recovering plant varieties or propagating material that has already been traded. The chapter on preliminary injunctions set out in the Federal Law on Vegetal Varieties is almost identical to the provisions set out in the Law on Industrial Property, and the SNICS has thus adopted many practices followed by the Mexican Institute of Industrial Property in connection with the implementation of preliminary injunctions.

For instance, in order to obtain a preliminary injunction, it is necessary to post a bond or security to cover any damages that may be caused to the defendant. The advantage of requesting a preliminary injunction is that, in theory, the allegedly infringing activity can be temporarily suspended while the infringement proceeding takes place before the SNICS. However, the defendant also has a right to post a counter-bond or countersecurity to cover damage and prejudice that might be caused to the plaintiff, so this advantage is not always enjoyed in practice. If a counter-bond is deposited with the SNICS, the defendant may have the injunction lifted and continue with the allegedly infringing activity until the SNICS has ruled on whether infringement has occurred.

If infringement is declared, the defendant's counter-bond will be delivered to the plaintiff so that it can seek damages from the defendant. If the amount covered by the bond is not enough to indemnify all damages in full, the plaintiff may commence a civil action in order to collect additional damages from the defendant.

If the SNICS declares that no infringement has occurred and its decision becomes final, the bond posted by the plaintiff will be delivered to the defendant so that it may recover any damages caused by the plaintiff's action. When issuing a final ruling in connection with the infringement proceeding, the SNICS will also decide on whether to maintain or lift the injunction.

At the time of writing, the SNICS has not yet issued any preliminary injunctions. This is mainly because plaintiffs are still uncertain as to how the SNICS will implement injunctions that involve the seizure of perennial species.

Additionally, the very nature of the products to be seized prevents the plaintiff from taking them away from the defendant; so surveillance of the seized goods, which could easily be harvested by the defendant, is a complex issue.

So far, the SNICS has not established any criteria relating to the value of the bonds and counter-bonds required in this type of case. Discussions with SNICS officers suggest that they will follow the practice of the Mexican Institute of

Industrial Property, whereby the requested counter-bond is double the amount of the bond originally deposited by the plaintiff.

PECULIARITIES OF THE MEXICAN LANDSCAPE

The enforcement of plant variety rights in Mexico differs significantly from the typical enforcement of industrial property rights in big cities, and even from the enforcement of plant breeders' rights in other Latin-American countries. For instance, in Ecuador and Colombia, ornamental varieties are commonly commercialised by well-established companies or large associations of cultivators. In Mexico, by contrast, plant varieties are cultivated and commercialized by individuals with small extensions of land, which makes it necessary to bring numerous infringement actions in order to enforce the rights of a single breeder.

Further, breeders in Ecuador and Colombia are entrepreneurs who are usually respectful of rights recognised by law and are willing to settle infringement proceedings by paying royalties to the plant breeder.

Indeed, in Colombia, statistics confirm that the production and commercialization of ornamental varieties is 99% legal and represents a very significant part of the national income.

In contrast, in Mexico infringers usually have very limited financial resources and are thus not always in a position to pay either the fines imposed by the SNICS or the royalties required by the plant breeder in order to continue with the commercialisation of the plant varieties.

This may be why today the SNICS spends considerable time and energy in educating cultivators about plant breeders' rights and about those plant varieties that are protected in Mexico. These efforts have prompted the creation of associations of cultivators, which are in a better position to comply with the obligations contained in the licence agreements that they must execute with plant breeders in order legally to exploit plant varieties in Mexico.

A bill is also before Congress which would introduce a new law for the

protection of plant varieties, recognising all additional rights granted by the UPOV Act of 1991. This would improve and extend the protection of plant breeders' rights in Mexico, which is of great significance to the country's economic development. Experience in countries such as Ecuador and Colombia shows that appropriate protection of plant breeders' rights can have many advantages for the cultivators and merchants of such products, such as enhanced products that boost competitiveness on the national and foreign markets; better and longer harvest seasons; and thus increased employment and an improved economy.

Despite this complex scenario, and despite the fact that the SNICS was only recently set up, on the whole it is doing a great job in protecting plant variety rights, considering that the legal remedies available are much more limited than those in other Latin American countries.

There is obviously still room for improvement, beginning with signing up to the UPOV Act of 1991, which would extend the term of protection and allow for enhanced protection of essentially derived plant varieties, among other benefits.

Nevertheless, even while these changes are awaited, it should be recognised that thanks to the good work being done by the SNICS, the efficient and proper enforcement of plant variety rights is already a reality in Mexico.