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A001/2017 – Cancellation case ‘Royal Braeburn’

Issues:

- burden of proof –
- suitability of examination offices/testing stations –
- discretion vs. *ex officio* examination –

GRUR Expert Committee for the Protection of Plant Varieties
26 October 2018

Introduction / Background

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- EU11960 relating to apple variety ‘Royal Braeburn’ (RB) was examined by the Examination Office (EO) GEVES in Beaucozé/Angers and granted in 2003.
- RB was relied on by CPVO to reject candidate variety ‘Braeburn 78’ (B78) from South Tyrol for lack of distinctness (after technical examination in 2012-2013).
- In A001/2015 the CPVO submitted photographs from said technical examination showing both varieties to demonstrate that they do not exhibit a different size.
- The B78 case is pending (T-177/16).

First instance proceedings - Request for cancellation

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- Cancellation of RB was requested by the applicant of B78 in 2016 on the grounds that RB was no longer stable/uniform since 2012-2013.
- The request was based on the following evidence:
 - The CPVO's photographs from the A001/2015 case (cf. Art 78(1)c CR/2100).
 - A declaration by the renowned pomologist Prof Bergamini to the effect that in his expert view the fruits of RB on said photos do not show the striation required by its plant variety description.

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First instance proceedings - Further course of the procedure

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- The CPVO informed the holder who did not provide any arguments in reply to the request for cancellation.
- The CPVO also (secretly) asked the EO at Angers for comments. The EO essentially replied as follows:

“We can confirm that the trees of the variety Royal Braeburn are still conform to the description established in 2002: Royal Braeburn has a pattern over color of ...”

No evidence was provided to substantiate/verify this statement.
- This reply was also not communicated to the Petitioner prior to decision N° NC 4 rejecting the request for cancellation.

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Second instance proceedings

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- Initial phase

- The Petitioner filed an appeal, and submitted as further evidence, in particular
 - a declaration by Mr Weifner with pictures of fruits of RB harvested from trees obtained from the holder of RB and cultivated at the internationally recognized research center at Laimburg, South Tyrol
 - a second declaration by Prof Bergamini concluding that from the pomologist point of view said pictures demonstrate that RB does not show the characteristic striation and therefore is no longer uniform/stable

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Second instance proceedings

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- Initial phase – appellant's requests

- The Petitioner requested, in particular, that
 - the decision be set aside and EU11960 be cancelled
 - Mr Weifner be heard as a witness and Prof Bergamini be heard as an expert (Art 78(1) CR/2100)
 - by analogy with Art 57(3) CR/2100, a complementary examination be carried out for RB at an EO other than GEVES, preferably at Wurzen (DE)
 - an inspection of fruits of RB harvested in 2017 and stored at GEVES until at least January 2018 be carried out in acc. with Art 78(1) CR/2100 and Art 60 of 874/2009
 - the appeal fee be reimbursed in light of the violation of Art 75 (right to be heard, reasoned decision) and 76 (*ex officio* examination)

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Second instance proceedings

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- Further course of the procedure - unlawful inspection

- The first Rapporteur in the proceedings “*came to the conclusion that it was necessary to have a look at the harvested fruits*” of RB and similar varieties incl. B78.
- The Board issued a first interim decision on 26.09.2017 which was sent to the parties.
- However, the inspection was carried out secretly by the first Rapporteur, the Registrar and the staff at GEVES on 23.10.17.
- The Petitioner happened to learn about the inspection, and requested that (i) the results of said inspection be disregarded in light of the violation of Art 60 EC 874/2009, and (ii) an inspection is carried out following the proper procedure, and (iii) strengthened the request to hear Mr Weifner and Prof Bergamini

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- Second inspection

- The inspection, the oral proceedings and the hearing of the witness and the expert took place on 13.03.2018.
- In preparation of the inspection, the Appellant had requested that the reference varieties for the different notes of the relevant characteristic should be available as controls in order to allow a reliable comparison with fruits of RB.
- During the inspection and the subsequent oral proceedings no such controls were available to the parties, neither actual fruits, nor pictures of the fruits of RB.
- Surprisingly, pictures of two reference varieties for note 3 of characteristic 38 of TG/14/8 (but not for the adjacent notes 2 and 4) were introduced into the Record of the inspection, i.e. after closure of oral proceedings.

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Second instance proceedings

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- Second inspection

- According to the applicable test guidelines (TG/14/8, 95-10-20) , any assessment of mutant plants such as Royal Braeburn requires **10** plants. The fruits of RB were taken from **4** trees.
- The fruits were not taken from each of the 4 sides of the tree, but only of the two well-exposed sides. Moreover, the fruits were taken from the middle of the tree, but the terminal fruits were rejected.
- Prof Bergamini strongly disagreed with the methodology applied by GEVES and insisted that fruits should be taken from all 4 sides of the tree, and that the terminal “King’s fruit” should be retained.

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Second instance proceedings

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- Oral proceedings and testimonies

Evidence/facts relied on by Appellant to raise serious doubts:

- Prof Bergamini’s expert testimony:
 - The photographs from fruits of RB harvested in both Angers and Laimburg are sufficient to tell that they do not exhibit the required striation
 - The fruits harvested at Laimburg are representative, as Laimburg unlike Angers is an environment in which the red color develops well, but not as intense as in Angers, so the stripes can be better observed at Laimburg.
 - In his expert view this evidence is reliable, and raises serious doubts that RB is not stable in a typical apple environment.

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Second instance proceedings

- Oral proceedings and testimonies

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- As to the second inspection carried out on 13 March 2018, photographs are required as controls because the reference varieties acc. to the guidelines mature earlier than RB so that the actual fruits cannot be compared side-by-side. However, no such controls were available.
- The assessment should ideally be made 1-2 days before harvest. Alternatively, it could be made at samples of fruits at the time of eating maturity (January).
- However, the picking was not according to the guidelines and proper methodology.
- Therefore, in his expert view the inspection was too late and the fruit samples are to be considered as “*manipulated*”. He recommends to repeat the assessment.

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Second instance proceedings

- Decision - Order

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1. The appeal was dismissed.
2. The appellant shall bear the costs of the appeal *proceedings* acc. to Article 85(2) CR2100/94.

N.B.: It was actually meant that 50% of the appeal *fee* shall be refunded acc. to Art 83(4) CR2100/94 because of the procedural violation by the CPVO. The Appellant insisted that the decision should be corrected in accordance with Art 53(4) and Art 51 of EC 874/2009, but this was not followed.

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Second instance proceedings

- Decision – burden of proof

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- “A third party seeking a declaration of nullity of a plant variety right must adduce evidence and facts of sufficient substance to raise serious doubts as to the legality of the plant variety right following the examination provided for in Articles 54 and 55 of that regulation” (cf. Schäder/CPVO, C-546-12)
- The Appellant submitted evidence in acc. with Art 78 CR/2100 (photographs, and supporting declarations, and testimony) which was considered as sound and serious by a recognized pomologist.
- The CPVO relied on statements/opinions of its staff which it found trustworthy, even though it was not supported by any documentation which could be verified by any third party.

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Second instance proceedings

- Decision – burden of proof

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- The Board was however “not convinced of the evidence”, because
 - the first photographs taken by the CPVO itself were intended to only show shape (and not striation),
 - photographs are only *indirect* proof of lacking striation, and
 - “*the origin of the trees at Laimburg cannot be traced as representing an official sample of the protected variety Royal Braeburn*” (emphasis added)
- The first two arguments were rebutted by Prof Bergamini, the third argument cannot convince in view of the confirmation by an independent official of the Research Center (Dr Guerra) that the trees were obtained from the holder.

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Second instance proceedings - Decision – burden of proof

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- The Board came to the following general conclusion regarding photographs taken at GEVES:

“According to experiences of the GEVES examiners and the former Rapporteur Mr [...] the light conditions under which the photographs are taken influence the visibility of the striation very much. Low light conditions were better for visibility than high light conditions and even better than the standardized light conditions applied for photographs at the GEVES station. The Board therefore comes to the conclusion, that the striation could only be observed in a reliable way from the living plant material.”

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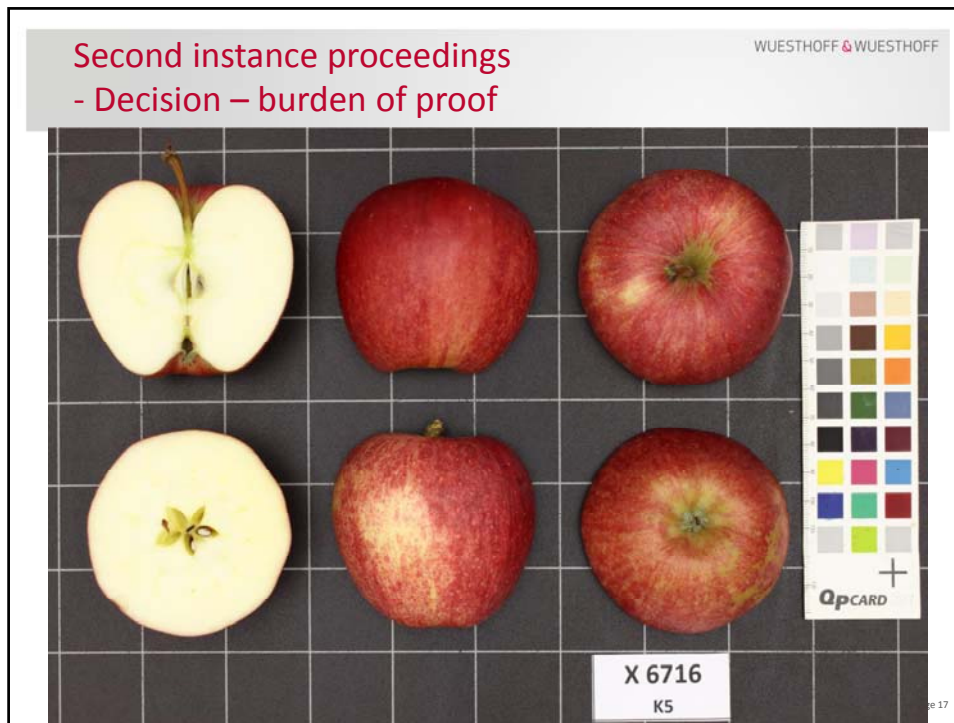
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Second instance proceedings - Decision – burden of proof

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Second instance proceedings
- Decision – suitability of testing stations

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- The protection by a PVR is valid throughout the EU. It follows that the essential characteristics - which are the prerequisite for granting the title - should also be exhibited throughout the EU.
- According to Prof Bergamini, the striation of RB should better be observed at the Research Center at Laimburg, because the conditions at Angers are too extreme.

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- Decision – suitability of testing stations

- The Board declared that because of the ‘genotype-environment interaction’ *“DUS data and results at different locations can never be used to support distinctness [?] decisions”, and “DUS examinations preferably have to be made at one and the same location with all test conditions and material as equal as possible.” (emphasis added)*
- Furthermore, in view of the arrangement made for mutations of Braeburn made in 2004 (upon proposal by the CPVO and approval by the Admin. Council; Art 14(1) CR/2100), the request for a complementary testing at another location was rejected.
- **Open question:** How could a petitioner adduce sufficient evidence to raise serious doubts under these prerequisites (same location (Angers), same conditions, same trees)

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- Decision – discretion vs. *ex officio* examination

- The CPVO/Board has a broad discretion. However, the principle of the examination of the facts on its own motion also applies in proceedings before the Board (Schräder/CPVO, C-546/12).
- Assuming the Board were correct in concluding that
 - photographs could not be used, but only living material, and
 - reliable data to raise serious doubts could only be produced under identical conditions at the same, ‘official’ EO
 the Petitioner would factually have been prevented from corroborating its cancellation request, when the Board did not grant its requests for an additional testing or to appoint another independent ‘court expert’ in case Prof Bergamini was not found reliable.

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Concluding remark

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On the contrary, the Board of Appeal was required to use its broad investigative powers under Article 76 of Regulation No 2100/94, ..., to verify the source of the notes of expression of reference variety KW 043 in the last and penultimate versions of the comparative distinctness report and draw the appropriate conclusions. In fact, in accordance with the principle of sound administration, laid down in Article 41(1) of the Charter of Fundamental Rights, the Board of Appeal was required to examine carefully and impartially all the relevant particulars with a view to assessing the validity of the Community plant variety right at issue and to gather all the factual and legal information necessary to exercise that discretion..."

T-140/15, Aurora/CPVO, par. 77

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Thank you for your attention!

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Feel free to contact me with any comments or questions.

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