

**"PBRs enforcement: new (and advanced) technology helping traditional legal tools"**

A right does not really exist if it cannot be enforced and to enforce a right one needs to build a case. Speaking of which, no matter the jurisdiction to be dealt with, building a case means basically gathering evidence.

Any practitioner knows very well that information turns into evidence as long as it enjoys the legal requirements set by the procedural rules approved by the lawmakers to grant a due process; in a nutshell, evidence must comply with the so-called Rule of Law.

And PBRs are no exceptions.

Nobody could argue that if you want to bring a case to Court you need to gather evidence proving

- The existence and enforceability of your PBR;
- The existence of an infringement;
- The damages to be compensated.

New technology is day by day substituting for the traditional ways of investigation. Recently, the Court of Bari has opened a new path to enforce PBRs in Italy, setting a few principles that lead to a full deployment of new and advanced technologies in traditional tools offered by the code of civil procedure.

**DNA tests**

Deciding an appeal against a 1<sup>st</sup> tier interim relief, the Court of Bari stated that a DNA test could amount to reliable evidence as long as it was carried out in compliance with protocols and methods approved and accepted by the international scientific community. Obviously, the case decided by means of the Court order n 5128/2022 is not the first one relying on DNA tests; this is the first time the IP Chamber of Court of Bari turned the scientific method into evidence acceptable in a lawsuit, rejecting all exceptions raised by the defendant aimed to frustrate DNA tests outcome.

Up to the 1<sup>st</sup> tier order (Docket n. 15804/21) issued in the case at discussion, DNA tests were challenged by infringers because they did lead to a 100% sure identification. Since DNA tests are carried out through microsatellites and markers, without a full reading of the DNA heritage of the biological material tested, the standard defense was: the outcome is not reliable because it is not based on a comparison between the full DNA heritage. Dealing with plant varieties, nobody could argue that accepting this interpretation was a synonym of imposing to the PBRs owner a so-called *probatio diabolica*. Thanks to the two interim relief orders issued by the Court of Bari the previous caselaw is very likely to be completely overruled soon, leading to accessible – hence real – enforcement of PBRs.

**Drones investigations**

In late fall 2021, the Court of Bari was requested by Sun World International LLC, owner of a PVR registration for the new variety Sugrathirtyfive, branded AUTUMN CRISP®, to decide whether or not a pre-trial *ex parte* investigation order could be granted relying on a drone investigation in which drones were deployed to take pictures of the vineyard where the defendant had allegedly propagated Sugrathirtyfive without the prior authorization.

The investigation carried out through drones was considered admissible evidence by the Court of Bari that granted an *ex parte* order by means of which the plaintiff got access to the defendant's vineyard. Of course, no access was possible without the assistance of a neutral expert appointed by the Court and a Bailiff writing the minutes and certifying the accuracy of the procedure. Since the order was an *ex parte* one, such procedure did not require the presence of the defendant or his legal representative(s).

Despite the exceptions raised concerning the violation of the right of defense, the Court of Bari stated in the 1<sup>st</sup> tier decision and confirmed in the appeal order that requiring the presence of the defendant against whom an *ex parte* order was granted would be a nonsense, since *ex parte* orders were provided for by lawmakers for those cases where a prior notice would frustrate the enforcement of the court order.

For sake of clarity, Sun World International LLC did not itself conduct and submit to Court any drone investigation. Obviously – and this is point stressed by the Court of Bari in the two decisions at discussion - a drone investigation is legally acceptable as long as it is carried out by a private investigation agency duly authorized by local authority. With such an authorization, we can call the deployment of drones an investigation finalized to gather evidence to be submitted to Court. Without, it is trespassing.

Furthermore, the drone investigation was the basis for granting access to the vineyard in order to lead to a technical assessment handled by an expert witness appointed by the Court. Since the pre-trial investigation concerned a PBR infringement, in its very core the technical assessment coincided with the proper sampling of biological material and the following DNA test. In order to grant each party right to get a proper defense – thus respecting the due process principle - both plaintiff and defendant were authorized by the Court to submit the samples picked by the expert witness to a DNA test hiring their own lab. Each sample the expert picks is divided in three parts and tested by more the one laboratory. Of course, only the expert witness appointed by the Court was required to have the samples tested; on the contrary, each party was free to choose its own strategy: the defendant decided not to get an independent DNA test report, while the plaintiff did it and the outcome was identical to the one gotten by the expert witness.

Defense is a right, not an obligation. Again, the Rule of Law and Due Process principles are preserved.

### **Restrictive order**

A wind of chance is blowing in Apulia: not only new and advanced technologies have been accepted as “reliable evidence”, but an interim relief restricting the growing, harvesting and commercialization of grapes has been granted.

Such a restrictive order imposes an immediate interruption of any kind of activity different from the mere “maintenance” of vines until the end of the action on the merits. The defendant will have to refrain itself from doing anything but keeping its vines alive, until the issue of first tier decision of the action on the merits. The decision of the Court was so strongly and deeply motivated, that its IP Chamber rejected the two motions lodged by the defendant to get rid of such a restrictive order

considered well balanced by Court: vines could be kept alive, being ready for a new harvest in case the decisions are overruled at the end of the action on the merits. In the meanwhile, no commercial detriment is to be caused to the plaintiff.

Good news, indeed. Once we get the first removal order against an infringer, we will say “great news, indeed.”