美國植物專利保護法制及植物品種專利核准案件解析

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壹、前言

早期專利保護的對象並不包括生命體,美國在 1930 年修正專利法,增列第 15 章「植物專利」之後,植物新品種研發的智慧財產權才開始逐漸得到保障。 然而該法僅及於無性繁殖的材料,而且摒除馬鈴薯等塊根莖類作物。其後國際間開始討論一般植物品種智財權保護的問題,並於 1961 年制定植物新品種保護國際公約 (International Convention for the Protection of New Varieties of Plants),期以專利法的特別法的型態,來保護植物育種家的權利。各國根據該公約制定植物品種保護法,或稱植物育種家權利法,有些則併入種苗法中。該公約經 1972 年、1978 年的修正後,得到西方國家為主的認可,在 1990 年之前共有 19 個國家,包括美國,加入植物新品種保護國際聯盟(UPOV,Union Internationale pour la Protection Des Obtentions Végétales)。該法經各會員國實施有年之後,發現若干的問題,因此又在 1991 年通過修法,來加強植物品種權的保護;加上世界貿易組織(WTO)在 1994 年簽署通過貿易相關之智慧財產產權(TRIPs,Trade Related Aspects of Intellectual Property Rights)協定,規定 WTO 會員國必須對植

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物品種權保護後,第三世界國家紛紛制定相關的內國法,而 UPOV 的會員國也 因之躍升到了 51 個之多。

另一方面,鑒於生物科技的進展,美國聯邦最高法院在 1980 年首度在 Diamond v. Chakarabarty (447 US 303) 判例中承認微生物可專利後,1985 年美國 專利商標局上訴及衝突委員會更在 Ex parte Hibbred et al. 案件上指出包括植物 在內,任何人為創造之物 ³皆可以受到實用專利的保護。雖然植物能否專利曾經 受到質疑,然而最高法院在 2001 年針對 AG Supply, Inc. v. Pioneer Hi-Bred International, Inc.的判決,已經確定美國以植物專利 (Plant patent)、實用專利 (Utility patent)、與植物品種保護 (PVPA, Plant Variety Protection Act),三管齊下保障育種家權利的體制。

美國在擴張專利保護植物品種方面有具體的成果之餘,並沒有忘掉向其他國家推展其理念。目前在日本、澳洲與紐西蘭也已經得用專利保護植物品種,雖然申件件數不多。在歐盟,植物品種仍然被實用專利排除在外,然而歐洲物專利局上訴委員會在 1999 年宣告,轉基因植物若非專指單一品種,則得接受保護,因此也就開了一扇可以宣告植物權利的大門 4。雖然美國的官方文件認為 TRIPs 27.3(b) 所規定的可專利性對於動植物之可以例外,是不必要的 5,然而其他國家如瑞士則贊同在 TRIPs 中可以例外之設定,讓各國得以有不一樣的規定 6。顯然在 WTO 會員國就 TRIPs 中關於植物能否專利的意見達到共識之前,還有很長的距離。

本文將先就美國三種植物智財權保護體制略加以介紹,其次以 2001 年當年 這三種體制的許可件數以及植物種類加以比較,最後則針對各種植物的實用專利 宣告範圍加以分析,以期將美國的植物權利保護的實況更清晰地呈現。

貳、美國植物權利保護三制

⁴ Henson-Apollonio, V. 2002 Patent protection for plant material In: WIPO-UPOV Symposium on the Co-existence of Patents and Plant Breeders' Rights in the Promotion of Biotechnological Developments. 見: http://www.upov.int/eng/Symposium2002/SYM_02_4e.pdf

³ "Anything under the sun that is made by man could be patented."

⁵ WTO 1999 Review of the provisions of article 27.3(b). Communication from the United States. IP/C/W/162

WTO 2001 Review of the provisions of article 27.3(b). Communication from Switzerland. IP/C/W/284

美國植物專利針對「任何人發明或發現以無性繁殖的,獨特及新穎之植物新品種,包括經培育而成之芽突變,突變株,雜交株及新發現之苗株,除了塊根莖繁殖植物外」,皆可以得到為期 20 年的專利。不過所謂發現是指在栽培的狀況下自然產生的突變,若是野外所發現的植株,則不能成為植物專利的客體 ⁷。他人若對享有植物專利的品種進行繁殖,或使用、銷售該植物或植物的部位,皆屬侵權行為。至於侵權的賠償與實用專利類似,包括因侵權的利潤損失、以及強制未來的侵權行為等。

植物專利也須符合專利法「非明顯性」的要件,但書面揭示要求較為寬鬆,而且只能有一項申請專利範圍,其內容限定於主張單一品種的整株植物,而不能及於該植物的部分特性或功能 7。舉例而言,我國育種家在1981年所獲得的'黃帝'蝴蝶蘭的植物專利「Orchid plant: Golden King」 8,其單一宣告的字句為「蝴蝶蘭屬蘭花雜交植物新而且獨特的一個品種,其特徵與眾不同的主要是在本屬中少見的,花色全面純黃;與其雙親、同樣雜交群與其他黃花蝴蝶蘭相當不同的是,花更大更多、開花期較長、花黃色無斑」。

美國實用專利則針對「任何人發明或發現任何新的、有用的方法、機器、製造物、或物之組合,或上述之新穎且有用的改良」,皆可以得到為期 20 年的專利。實用專利的保護要件是該項發明(新品種)具備新穎性、可利用性、發明性,申請者還需要揭露如何鑑別、製造與使用其發明。由於植物品種很難用書寫的方式來完全描述,因此至少需要告知大眾如何得到該植物,通常是將之或其他材料寄存。若是雜交種,則需寄存兩個自交親。

如前所述,實用專利現在在美國已經適用於植物本身;然而與植物專利最大的不同是,植物專利的權利範圍僅限於植物本身,但實用專利的保護範圍由申請者自行主張,包括育種方法、自交系親本、該品種所產生的植株種子與花粉、前述材料的外型特徵…等;因此申請者會挖空心思撰寫,期以可能的情況下得到最廣泛的專利範圍,而被告侵權者則會盡其所能說服法庭該範圍的不妥與無效⁷

雖然美國專利法已將生命體不得專利的禁梏給予解除,除了人類以外,然 而針對一般植物育種方法而言,創新的品種很難符合專利法「非明顯性」的要件。

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⁷ Evenson, D.D. 2000 Patent and other private legal rights for biotechnology inventions (intellectual property rights-IPR). In V. Santaniello, R.E. Evenson, D. Zilberman and G.A. Carlson, eds. (2000) Agriculture And Intellectual Property Rights: Economic, Institutional and Implementation Issues in Biotechnology. New York: CABI Publishing. Pp.11-25.

⁸ PP4,715

舉例而言,由一矮株白花品種和高莖紅花品種交配後,將可選到矮株紅花的新品種,可說是明顯的基本育種學基本概念;雖然過程可能是艱辛費時,就原理說卻很難認為是具明顯性的。這或許是當初國際上若干國家捨專利不用,而另創一特別法的重要理由。

美國植物品種保護法案 (PVPA) 基本上是根據 UPOV 公約所制定,不過 1991年公約將所有植物納入保護,然而 PVPA 則限於有性 (種子) 繁殖植物;當然這個例外因為植物專利的能涵蓋無性繁殖植物而未受質疑。 PVPA 的保護要件是該品種需要具備新穎性、可區別性、一致性、穩定性,以及一個有效的品種名稱。

PVPA 與專利法最大的不同在於專利法所保護的客體範圍由申請者自行提出,而 PVPA 則預先將以規定。根據 PVPA 第 111 條的規定,受保護品種、以及其「從屬品種」的自身以及其收穫材料皆得以受到保護。未得到授權,對這些材料進行生產、供與銷售、進出口、為了上述活動加以儲存等,皆屬於侵權的行為。而所謂從屬品種,包括三種,即 1. 實質衍生自該品種,而該品種本身並非實質衍生自其他品種者、2. 與該品種相較,不具明顯可區別性之品種、與 3. 須重複使用該品種始可生產之品種。

參、農民免責與育種家免責

植物品種保護法中的所謂農民免責與育種家免責也與專利法有相當大的區別。所謂農民免責,是指對於受保護品種,農民得以在自己的農地上所收穫的該品種的種子,回種於自己農田上,而能免於侵權的告訴。同樣的行為在專利法則屬於侵權。實際上美國早期 PVPA 在農民免責上的規範不夠明確,也此才會出現Asgrow Seed Company v. Winterboer (1991) 的有名案例 ⁹。農民 Winterboer 在留種自用之餘,將過剩的種子出售給他人播種。雖然地方法院裁決該農民侵權,但是聯邦法院對於 PVPA 的解釋顯然不同,而讓種苗業者相當不滿。後來該案件在最高法院給於駁回,而且經 1994 年 PVPA 的修法後,在第 113 條中才給農民免責明確的規定。根據該條文,美國的農民免責適用於所有接受保護的植物,不過由於 PVPA 僅限於種子繁殖的物種,大多數無性繁殖植物因為屬於植物專利的範

⁹ 見:黃柄縉,1996 植物新品種之保護。國立台灣大學法律學研究所碩士論文,台北。

疇,因此皆無農民免責的問題。即使如此,許多以種子繁殖的蔬菜、花卉植物還是得以適用,因此 Janis and Kesan還是會有「過於寬鬆」之議 ¹⁰。

實際上各國農民免責的規定有所差異。歐盟植物品種權法 (1994) 第 14 條限定農民免責僅適用於禾穀類、油料、纖維、飼料以及馬鈴薯等作物,但不及於雜交種與合成品種,而且小農 (所種植的面積小於能生產 92 噸禾穀者) 不用向權利人繳任何費用;德國植物品種保護法 (1997) 第 10 條略同於歐盟的規定,英國植物品種法 (1997)第 9 條則將農民免責適用的作物交由主管單位公告;荷蘭種子與種植材料法 (1999 修訂) 似乎沒有相關規定,而中國植物新品種保護條例 (1997) 根據 UPOV1978 年公約,在第 10 條中規定農民可自繁自用授權品種的繁殖材料,但沒有植物種類的限定。顯然各國針對自身國情,例如對於重要農作物,或大農小農的認定,而有不一致的裁量權。 Janis and Kesan 認為植物品種保護法在農民免責上「過於寬鬆」之說法或許適用於美國,但不能因之認為 UPOV的農民免責一定保護無力。

專利保護的最終目的在於促進科技的進步,因此在專利法中常會有研究免責的設計,發明人雖有專屬權利,但也需要將其發明公開,以便他人據以研發,只要不涉及商業行為。就研究免責而言,Straus ¹¹認為歐盟專利法允許研究免責,並且可以由專利植物進一步開發新品種,只要該新品種不具有該植物所以獲得專利的基因;但美國專利並未明文規定研究免責,不過 McManis 引 Janis and Kesan之言,認為美國或許會有採用研究免責的提議 ¹⁰。

根據 UPOV1991 年公約第 15 條第 1 款的所謂「育種家免責 Breeders' exemption」,他人除了可以為「研究目的」使用該品種之外,還可以由受保護品種進一步開發新品種;而且明文規定,所開發出來的新品種,只要不是原品種的從屬品種,都可以進行生產、繁殖、調製、銷售、進出口等行為,可說完全享受一個獨立的新品種權利,比起專利法的研究免責,顯然是更為清晰。美國 94 年的修正版在第 114 條中規定,為了育種或其他研究目的而使用或繁殖受保護品種,也免於侵權的告訴,除非所育成的品種是屬於前述的從屬品種。

McManis, C.R. 2002 Are there TRIPs-compliant measures for a balanced co-existence of patents and plant breeders' rights? Some lessons from the United States of America's experience to date. In: WIPO-UPOV Symposium on the Co-existence of Patents and Plant Breeders' Rights in the Promotion of Biotechnological Developments.

見:http://www.upov.int/eng/Symposium2002/SYM_02_8e.pdf

¹ Straus, J. 2002 Measures necessary for the balanced co-existence of patents and plant breeders' rights. A predominantly European view. In: WIPO-UPOV Symposium on the Co-existence of Patents and Plant Breeders' Rights in the Promotion of Biotechnological Developments. 見:http://www.upov.int/eng/Symposium2002/SYM_02_7e.pdf

從屬品種的規定是植物育種家權利法在各國實施多年的體驗中,發現育種家免責的缺失,而後在 1991 年公約中給予修補的。根據公約第 14 條,植物品種權利範圍亦及於前述三類的從屬品種;而依該條文的精神,實質衍生品種指的是需由起始品種經由育種而來,與起始品種明顯可區分,但仍保有起始品種的大多特徵 ¹²。這種修正可說是育種家權利與育種事業進步間的平衡;一方面,若嚴格限制育種家使用受保護品種,將會造成農業生產進步的阻礙,另一方面若過度強調育種家免責,則會讓他人進行所謂「修飾性」育種--即育出的品種與受保護品種在遺傳組成上僅有相當少的部分不同--而削減育種家的權利。

因此 Janis and Kesan 所認為的, PVPA 育種家權利「過於寬鬆」¹⁰的說法, 在美國 1994 年採用 UPOV 的精神而予以修法後,實際上已經有了大幅度的縮緊

肆、美國植物權利保護案件 2001

根據美國 PVPA 第 42 條第 1 款,任何以有性繁殖的植物,或以無性繁殖的塊根莖植物品種,皆得申請保護。不過由其主管機關,即美國農部之下的植物品種保護局 (Plant Variety Protection Office) 的資料,可知直到為止,申請過的植物物種僅 193 種,其中糧食類 26 種、蔬菜 36 種、觀賞植物 27 種、纖維油料等特用作物 12 種、飼料作物或草類 80 種、塊根莖則有馬鈴薯。木本類的雲杉是雜交種,果樹類如桃子等,似乎都是無性繁殖品種(;),但也在名單中。

就 2001 年當年通過受 PVPA 保護的品種資料分析,全年有 510 件(表一,根據 UPOV 資料則為 526 件),其中大豆、玉米、小麥分別有 134、94、57 件,就共佔了 56%。蔬菜類有 41 件佔了 8%。雖然當年並沒有番茄的品種,不過在 1985 至 2000 年間共通過了 50 個品種。雜交種很少見到,但當年向日葵雜交一代品種則有 6 件。就整個趨勢而言,PVPA 的核准是上升的,而以 2001 年為最高峰。雖然 McManis 指出近四年來玉米,近兩年來大豆的「申請」件數減少 10,基本上由於要得到 PVPA 的重要性減少的結論前,宜再多觀察幾年。

¹² 郭華仁、謝銘洋、陳怡臻、劉東和、黃鈺婷、盧軍傑 2000 植物育種家權利解讀。台灣大學農藝學系。見:http://seed.agron.ntu.edu.tw/IPR/draft/booklet1.htm

表一,2001年美國實用專利與植物品種保護對植物案件核准件數

植物	實用專利 13			品種保護 ¹⁴
	轉基因	一般	小計	
大豆	1	79	80	134
玉米	21	85	106	94
小麥	4	0	4	57
飼料作物與草類	0	0	0	56
馬鈴薯	1	0	1	32
其他蔬菜	0	0	0	29
田豆類	0	0	0	20
向日葵	0	5	5	19
菜豆類	0	2	2	18
高粱	0	0	0	13
棉花	2	0	2	9
大麥	0	0	0	8
燕麥	0	0	0	8
油菜籽	0	3	3	6
萵苣	0	1	1	4
其他油籽	0	0	0	2
桃	0	0	0	1
番茄	4	0	4	0
水稻	3	3	6	0
甜瓜	1	0	1	0
金盞菊	1	0	1	0
青花菜	0	1	1	0
紅蟬花	0	1	1	0
<u>天竺葵</u>	0	1	1	0
合計	38	181	219	510

http://www.uspto.gov/patft/index.html。主要是由植物名稱搜尋,因此或有遺漏的案件。http://www.ars-grin.gov/cgi-bin/npgs/html/pvplist.pl

件,棉花2件,大豆、馬鈴薯、甜瓜、與金盞菊各1件。在這38件之外,另約30件轉基因植物專利並未指明植物種類,因此不予計算。

在實用專利案件的非轉基因品種當中,大豆、玉米兩類作物就佔了 80%,分別為 80 與 106 件,其餘如水稻、向日葵、番茄、小麥油菜籽等各都 10 件以下。玉米在實用專利的案件高於在 PVPA 者,而大豆者 PVPA 的案件約為實用專利的兩倍。兩種法制下都各有通過審查的還有油菜籽、向日葵、萵苣、棉花、菜豆類、小麥、馬鈴薯等。就玉米而言,85 件非轉基因品種中,4 個合成雜交種,1 個合成品種(族群),57 個自交系,23 個雜交種。在 2001 年,天竺葵與紅蟬花這兩種應是無性繁殖的觀賞植物,各得到一個實用專利證。

根據 McManis 引用 Janis and Kesan的研究,認為 PVPA 在鼓勵育種投資方面似乎無法與專利相比,頂多只是用來作為行銷的工具 ¹⁰。然而由表二的數據可知,至少包括飼料作物與草類、許多蔬菜、田豆類、高粱、大麥、燕麥等在內的許多植物,在美國還是以申請 PVPA 為主;Janis and Kesan或許是以大豆、玉米的研究而將其結論過度推演到所有的植物。

植物專利證件在 2001 年中所包含的植物共計 128 種 584 件,其中依次以菊花、玫瑰、鳳仙花、聖誕紅、天竺葵等最多,佔 37% (表二)。就植物種的分布而言,除了若干水果(草莓、藍莓、葡萄等)、果樹(杏、胡桃等)、樹木(橡樹、榛木等)、洋蔥、薄荷、以及兩種草類外,大多數是屬於花卉等觀賞植物。

表二,2001年美國植物專利核准件數

植物	件數	植物	件數		
菊花	76	桃子	15		
玫瑰	48	朱菫	14		
鳳仙花	40	擎天鳳梨	12		
聖誕紅	26	杜鵑	11		
天竺葵	24	康乃馨	11		
秋海棠	17	矮牽牛	11		
長壽花	17	美女櫻	11		
火鶴花	15	藍眼菊	10		
其餘 112 種植物計 225 件					
	全計	583 件			

由以上的分析可知植物專利與其他兩種法制,的確在物種上有明顯的區分,大多無性繁殖植物品種皆申請植物專利,很少數則也申請實用專利。以同一個紅蟬花(*Mandevilla ×amabilis*)品種 'Rita Marie Green'為例,Monrovia Nursery Company 在 1998 年 8 月同時提出實用專利以及植物專利的申請,兩者皆於 2001 年獲得專利 (6,300,547 與 PP11,787)。在實用專利中的權利範圍涵蓋該品種以無性以及有性繁殖,而在植物專利中僅及於無性繁殖者。

由於大豆為自交作物,因此品種種類單純,通過 PVPA 與實用專利兩種法制的審查案件各皆有相當多的品種。就玉米而論,在實用專利,合成種、自交系與雜交種皆有案例,在 PVPA 的資料上雖然無法查明玉米品種的類別,不過至少有兩個通過 PVPA 審查的自交系同時也得到該年的實用專利,如品種 PH8V0 (PVPA-200000205 / Patent-6,313,382) 與 PH0B3 (PVPA-9900041 / Patent-6,333,451)。

因此可說三種法制提供美國種苗公司較為多樣的選擇,很少數的情況下, 同一品種會同時受到兩種保護。

伍、美國植物品種實用專利權利範圍的解析

發明人若是要取得美國專利的保護,就必須以書面向專利商標局提出專利的申請,在專利說明書中必須包括兩部分,即是請求範圍 (claim) 以及說明 (specification),其中尤以請求範圍最為重要。專利請求範圍是專利權人主張專利的依據,若是將來有第三人侵權或進行任何法律上的訴訟,專利權人可以據此專利申請範圍主張其專利權。

專利請求範圍是由一組「單句」所構成的權利描述,用以限制一些條件或是範圍,來界定該發明所請求保護的權利範圍。專利申請案的申請範圍通常只見一個「獨立請求項」(independent claim);如果申請專利範圍中只有一項,則稱之為單項式,該項即為獨立項,無需標示項次,植物專利就是屬於此類。實用專利申請範圍通常超過一項,稱之為多項式,第一項是獨立項,用以釐定該專利的界限;接下來一系列的「依附式權利請求項」(dependent daim),依照順序盡可能的放在一起以做進一步的界定 15。

¹⁵ 以實用專利 6,320,104號「多葉萵苣」為例,所請求保護的權利範圍是:

就專利請求範圍文句的結構而言,可包含下述三要素:前言、連接詞、與主體。前言是一個介紹性的段落,對於申請專利的範圍蓋括的加以定義、給予命名,或是敘述與先前技術的關係,描述該發明的用途及特性等等 ,其目的是為了對於專利請求範圍加以命名或定義。由於大部分的發明均為組合發明,其發明本身有一個以上之元件,所以大多數的專利請求範圍皆需一個連接詞,連接前言與主體部分。連接詞介於前言和主體之間。植物相關的專利常用開放式的連接詞「至少包含」(comprises 或是 comprising) ¹⁶,代表主體中所引述之元件為該發明之部分元件,他人縱使增加一些步驟於專利範圍之前後,仍包含在專利申請範圍之中,仍有可能侵害專利權。

在美國,有關植物品種本身或者是與其育成方法有關的方法等都可以是專利請求的範圍,另外更包含一基因,或者是導入此基因因而具有一特別的特性之新品種,有可能是一獨立的或純化的蛋白質、一獨立的或純化將某一蛋白質編碼的核酸序列、質體(plasmid)、包含某段基因序列的載體(vector)、包含某載體或某段基因序列的植物體及此植物體之後裔,這樣的專利請求,可能都會出現在各個核准的專利中的專利請求範圍。

一般而言,植物的專利範圍之請求可能可以出現的形式如下:

1、以品種本身

此類的專利範圍是可以用植物品種本身,並附以品種命名來申請,而不論是有性繁殖作物或無性繁殖作物,如:專利第 4,594,810 號,範圍 1:「玉米自交系,名為 HBAI」。另外針對 F1 的雜種也可以做如是的請求:專利第 4,5,157,208號,範圍 1:「雜交一代玉米植株,名為 DK 524」。

2、以品種之外表型

- 1. 萵苣種子名為 RZ 97.41561, (寄存於) NCIMB, 號碼為 40877。
- 2. 範圍 1 種子所產生的萵苣植物或其部份。
- 3. 範圍 2 之植株而具有多葉特徵者。
- 4. (任何) 萵苣植株而具有範圍 2 之植株所有型態與生理特徵者。
- 5. 由範圍 2 之植株所產生的萵苣種子。
- 6. 產生一代雜交萵苣種子的方法,至少包含將第一個萵苣親本植物與第二個萵苣親本植物 雜交來產生一代雜交萵苣種子,而該第一或第二個萵苣親本植物即是名為 RZ 97.41561 者,且其 NCIMB 號碼為 40877。
- 7. 由範圍 6所述方法所產生的種子。

¹⁶ 其他較少被使用的有:「包括」(including)、「具有」(having)、「其中」(wherein)..等。然而「至少包含」(comprise 或 comprising)一詞最建議使用。見:彭鑒扥 1993 專利說明書的撰寫。頁 18。

針對品種外表型的特性或者是兼具外表型和基因型的特性來作專利申請範圍的型式。舉例如下:

專利第 6,180,857 號,範圍 11: (任何)玉米植株,或其部分而具有範圍 2 之植株所有型態與生理特徵者」。

像範圍 11 這樣的專利申請是一種很常見的型式,在範圍 11 中指明其專利範圍包括所有與範圍 2「型態上」、「生理上」特性相同的植株。

若是將此專利範圍套入 UPOV1991 法案所賦予育種家權利範圍的意涵來理解的話,近似於受保護品種的從屬品種中的「與受保之品種相比無明顯地可區別性之品種」。

又如專利第 4,351,130 號,範圍 10:「具有隱性高 (基因)的水稻植株而有伸長的上位節者」,主要是以一個隱性的長高基因使稻米植株產生延長的上位節間的外表型性狀來限定專利申請範圍。

3、以品種的基因組成

除了外表型的性狀以外,針對基因的層次來作專利範圍的請求,也是可以在專利申請項中發現。以專利第4,569,152號,範圍9來作說明:「雄不稔玉米植株,至少包含具有細胞質雄不稔性,而該細胞質名為LBN」。此句是宣稱該細胞質的性狀為其權利範圍。

另外又如專利第 5,107,064 號,範圍 1:「甘藍的種子,至少包含具由…品種…矮性基因…,此種子栽培後會產生節間縮短的全稔性植株,而且經由噴施… 吉貝素 (gibberellin) 後節間也不會伸長」,指出一使植株矮化的基因及轉移入此矮化基因的植物。

無論是植物的命名、該植物的外表型性狀、該植物基因的層次等方式,都 是有可能來做為專利申請項的撰寫方式。所以說一個植物品種的專利範圍會因為 所撰寫的方式有所不同而造成日後權利範圍的不同。

由於植物品種的專利,涉及植物體特性者頗多,因此以下嘗試以 PVPA 適應 植物育種學所採用的術語,來針對美國專利商標局實用專利核准的若干植物品種 案例,解析其權利宣告範圍。

一、玉米雜交種-專利第 6,180,857 號 (見附錄一)

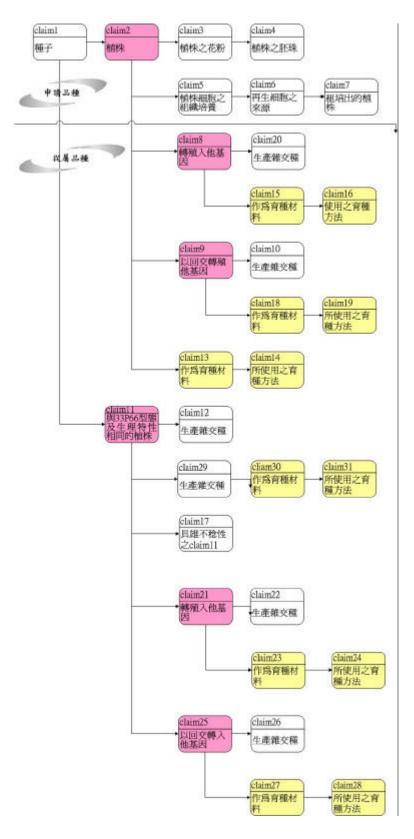
以下是專利第 6,180,857 號「玉米雜種 33P66 及其種子」的各項範圍,這些範圍或可以由 PVPA 的概念加以理解,如圖一為的樹狀圖。

範圍 1 為本專利的獨立請求項,為該玉米雜交品種的種子,即是本專利的主體,以 PVPA 的術語,範圍 1 可說是本專利的「繁殖材料」。範圍 2~6 分別為由該繁殖材料所長出的植株、該植株的花粉、胚珠、組織、及細胞等,這些植株的部分,本身或無商機,然而可能由之發展出可賣的種子,因此以依附式權利請求項加以申請,俾能在以下各範圍中加以串聯。

再由 PVPA 的術語而論,本專利主體的權利及於一些從屬品種,包括 1.)實質衍生自有品種權保護之品種,如範圍 8 與 9,由專利品種經由轉基因法或回交育種法所得到的新品種; 2.)與受保之品種相比無明顯地可區別性之品種,如範圍 7 與範圍 11。比 PVPA 更加詳盡的是,本專利的範圍還及於「與受保之品種相比無明顯地可區別性之品種」的實質衍生品種,例如範圍 21 與 25 即是由範圍 11 分別經轉基因法或回交育種法而得到。另一點需要注意的是,在 PVPA 中,若品種本身是實質衍生自其他品種,則不得享有實質衍生的從屬權利,然而在專利法中,並無此規定。

雖然本專利品種的權利範圍並未及於從屬品種第三類「須重複使用受保護品種方可生產之品種」,然而前段第一類從屬品種,即範圍 8、9,其權利範圍就及於第三類從屬品種,分別是範圍 20、10。前段第二類從屬品種,即範圍 11,其權利範圍就及於第一類從屬品種,即範圍 21、25;而範圍 21、25 的權利又及於其第三類從屬品種,分別是範圍 22、26。這樣的詳細描述,顯然是比 PVPA 更為詳盡,權利範圍也擴大到「須重複使用受保護品種的從屬品種方可生產之品種」,甚至於「須重複使用受保護品種的從屬品種方可生產之品種」。

然而專利與法 PVPA 差異最大的育種家免責,可在範圍 13、14 見到。在專利法下,其他育種家不可以使用專利品種做進一步行育種,即「在玉米育種程序中,至少包含利用範圍 2 的玉米植株或其部分作為來源,以植物育種技術育成玉米」,如範圍 13。而範圍 14 更明述這些育種技術,包括輪迴選種、回交育種、譜系育種、RFLP 選拔、基因標誌選拔、轉基因等。也就是說專利法不但把專利品種的「基因組合」--因此表現出獨特的特性組合--視為專利權人的私有財產,甚至於把專利品種的「所有基因」--不代表獨特的特性組合--視為專利



圖一: 專利第 6,180,857 號玉米雜交品種 33P66 的權利範圍。

權人的私財,因此他人不得由這「所有基因」所依附的個體去進一步改良,不論所改良出來的新品種,其「基因組合」與專利品種者相差多遠。

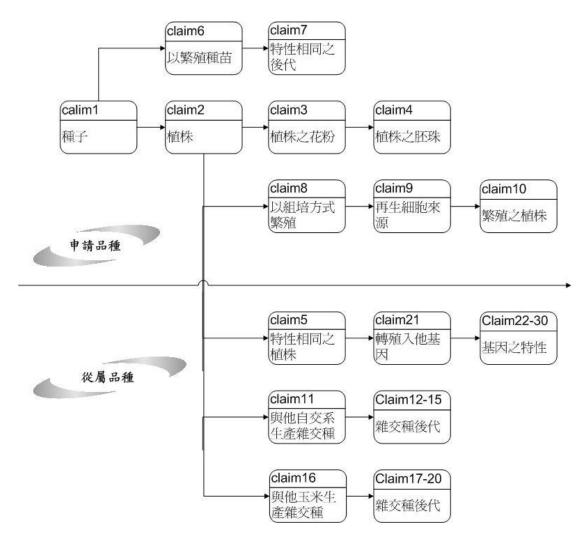
更有甚者,專利法這樣嚴格的限制他人使用其專利品種於進一步的育種工作之外,此等權利更及於專利品種的從屬品種,如範圍 13、30,以及專利品種的從屬品種的從屬品種,如範圍 15、18、23、27 等。這樣的權利範圍直如天羅地網,可以說假設在十年內所有新品皆受到美國式實用專利保護,那麼,十年後的育種家只能拿十年前的老品種作為育種材料,育種科學的進步將有十年的斷層。

從以上的敘述,我們不難發現,專利權人巨細靡遺將所有他人可以做的利用都納入專利申請範圍中,包括傳統的育種方式以及轉殖外來基因的生物技術,這樣的保護無疑是為該命名為 33P66 的玉米雜種品種,擴大了原本此雜種品種的權利範圍,而無論利用該品種所產生之的族群在遺傳的組成上與 33P66 玉米雜種品種相似性高或低。

二、玉米自交系-專利第 6,194,642 號 (見附錄二)

玉米自交系通常並不是農民所種植的商業品種,而是種子公司用來生產商業品種的材料,或許因此其權利範圍的宣告與前例直接商業品種者有所不同。本專利(圖二)的主體是玉米自交系,而且延伸到該種子所產生的植株或組織、植株上的花粉、胚株等(分別為範圍 2、6、3、4)。專利品種的權利也及於其從屬品種,包括與受保之品種相比無明顯地可區別性之品種例如範圍 5、7、10,以及須重複使用受保護品種方可生產之品種,例如範圍 11 與其他自交系雜交所產生的品種,或者如範圍 16 與其他非自交系雜交所產生的品種。當然實質衍生自本自交系的材料也在其權利範圍,如將範圍 5 (從屬品種) 經由轉基因法所產生者,即範圍 21,而在範圍 22~30 中者將一些可能被轉入的基因一一羅列。

與前例雜交種比較不一樣的地方在於,本專利由範圍 11 的種子與範圍 16 的種子,分別進一步依附了三個層次的範圍,即由該等種子所長出的植株(範圍 13、18)、此植株所產生的種子(範圍 14、19)、再由此種子所產生的植株(範圍 15、20)。範圍 11 通常就是雜交一代的商業種子,但是此專利限制他人將雜交一代種子所產生的種子(在 PVPA 中的受保護品種種子的收穫物)做進一步的行為。在 UPOV91 年新公約中,為了避免他人自行繁殖種苗,或者為了遏止種苗 到他國生產,然後將產品進口,而規避品種權利,因此將權利由繁殖材料擴展及



圖二:專利第 6,194,642 號玉米自交系 GSC2 的權利範圍。

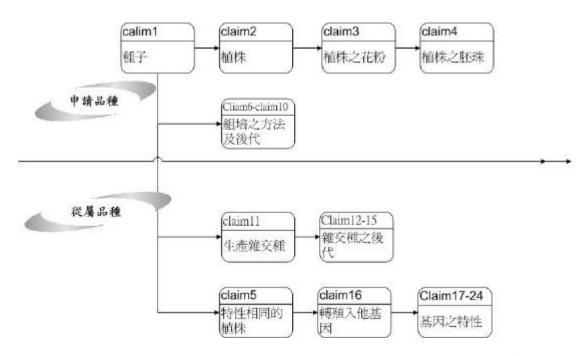
於收穫物。本專利範圍 14 或 19 的種子,雖也可做如是觀,但是更進一步地,他人也不可以將範圍 14 或 19 的種子拿去直接種植,即所謂的雜交二代。雖然雜交二代的表現一般不如雜交一代,但是若其表現勉強可接受,則也不無可能拿去播種。這或可說是 PVPA 保護所不及之處。

另一個與前專利案例不同的地方在於,前例中在範圍 13、15、18、23、27、30 等,嚴格限制其他育種家的進一步開發,然而在本專利,這樣的明白地範圍宣告並不見,也就是說僅宣告這些植株、種子的權利,但沒有明文宣稱取這些

材料進一步育種的權利範圍,容易造成模糊地帶,最終僅能依判例來形成可遵循的規範。同樣的模糊地帶也出現在轉基因的限制,在範圍 21-30 中限制他人將範圍 5 (從屬品種) 以轉基因方式進行育種,但是類似的範圍宣告卻不見於專利品種本身 (即範圍 2),然而顯然專利權人不可能忍受他人將其專利品種去做小部份的修飾。

三、大豆品種--專利 6,177,619 (見附錄三)

本專利範圍的宣告(圖三),類似於前例玉米自交系者,範圍 1~6 為大豆品種代號 9318055217152 的種子,及該種子所長出的植株與植株的部份。而範圍 5 7、10 為專利品種的從屬品種(性狀極類似專利品種者),不論這些從屬品種是直接由種子產生,或經由組織培養的程序間接而得。本專利也及於「須重複使用受保護品種方可生產」的從屬品種,他人不得以本專利品種作為親本去產生雜交品種,即範圍 11,甚至於不得由夾交種再產生雜交二代種,如範圍 13~15。同樣地,他人不得進行範圍 5 從屬品種的轉基因育種,但是在其他從屬品種,即範圍 7、10,或專利品種本身,即範圍 2 則沒有這樣的宣告。



圖三:專利第 6,177,619 號大豆品種 931805521715 的權利範圍。

四、香米品系--專利 5,663,484 (見附錄四)

本專利是水稻一系列香米 (Basmati) 品系的植株以及其種子,而非單一個新品種。本發明主要在於育種程序上發現新的選拔方法,足以使過去香米改良無法突破的瓶頸得以解除。這些新的方法見諸專利範圍 18~20,其中範圍 18 所陳述的方法主要是「至少包含」以稻米的一些特性,包括直鏈性澱粉成分百分比、鹼擴散值、澱粉指數等的綜合評鑑,來選拔種子。而範圍 19、20 僅就前方法另分別再加上煮米後種子增長率或米粒裂開指數。也就是說任何包括這些方法進行的稻育種程序都在其專利範圍之內。發明者拿了源自巴基斯坦等地的 Basmati 品系多個,來與美國長秈米品系多個,進行各類雜交組合,然後以其新發明的選拔方法,選出一系列的優良香米新品種。

就專利品系的主體而言,範圍 1 指出任何水稻品種,只要由如下的特性,皆為專利權人的私財:若種在美洲其高度在 80-140 公分之間、對光週期不敏感、穀粒的澱粉指標在 27-35 之間、香氣成分 (acetyl pyrroline) 在 150-2000 ppb 之間、穀粒的平均長度在 6.2-8,寬度在 1.6-1.9 厘米,長寬比在 3.5-4.5 之間、煮後長度增加 0.75-1.5 倍者。範圍 5 所述的專利品系是範圍 1 者的特定特性,只是多一個產量在 3000-10000 lbs 的規定;範圍 2 所述的專利品系是範圍 1 者的特定特性,如澱粉指標在 24-29 之間,只是多一個鹼擴散值約 2.9-7;範圍 3 者同範圍 2 者,只是多了一個米粒裂開指數要在 1-4 之間;範圍 4 者同範圍 2 者,只是多了心腹白的比率的規定。範圍 6、7、11 者所陳述的品系,其特性皆落在範圍 1 者之間,只不過多了直鏈性澱粉成分百分比與鹼擴散值的規範。

範圍 8、9、15 所陳述的品系較為特殊,因為這些範圍皆非直接或間接依附於範圍 1。範圍 8、9 分別直接說明是附有品系代號,以及寄存編號的種子,所長出的水稻植株。範圍 15 所陳述的品系,在大多特性皆與範圍 1 者雷同,僅多了一個 chalk index 的規範;範圍 16、17 分別同與範圍 15 者,僅分別多了香氣成分以及米粒裂開指數。

這樣的專利宣告,實際上是完全禁止他人進行水稻的育種,只要他所育出來的六個品種特性都落在範圍 1 之內,而不論用哪種育種方法,包括已有的或將來新的方法。因此,有如前述玉米雜交種對於進一步育種的限制,只不過用了不一樣的範圍宣告來達到相同的目的而已。

五、轉基因植物-專利 4,801,540、5,107,065 與 6,329,574

通常取得轉基因植物專利的內容不但包括了轉基因植物本身,還包括了基因操作之方法,而本文將不在生物技術之實施方法加以著墨,而只是將針對植物品種或植物本身重要的專利申請範圍提出討論。

同樣是屬於番茄轉基因作物的專利申請,由於權利申請範圍的寫法之不同所帶來之保護效果的不同。以專利第 4,801,540 號和第 5,107,065 號為例,兩者都是屬於 Calgene 公司生產番茄 'FlavrSavr'有關的的專利案件。在前者的案件中,主要的發現是導致番茄果實軟化的基因,其宣告範圍計 14 項,其中範圍 1~13 皆是針對基因層次相關者,只有在最後一項提到番茄細胞 ¹⁷。而在專利第 5,107,065 號中,主要的發明在於如何用遺傳工程的方法,抑制前述基因的表現,範圍 1~9 都在描述這個方法,範圍 13 宣告含有抑制該基因表現的植物細胞專屬該專利權人 ¹⁸,不論是單子葉植物 (範圍 14)、雙子葉植物 (範圍 15)、或是裸子植物 (範圍 16) 者。除了抑制該基因的表現外,本專利還及於減輕該基因表現的技術 (如範圍 29),而更擴及到任何雙子葉植物,具有該基因的表現被抑制或減輕的植株,以及植株的後裔 ¹⁹。也就是說他人不得使用本專利的方法,用來培育出任何具有延遲果實軟化特性的雙子葉植物品種。

由於果實軟化基因實際上是延遲果實軟化技術上欲抑之而後快的對象,因此可以理解專利第4,801,540號該基因的專利,所涵蓋的範圍何以較小。反之,抑制果實軟化的技術相當具有商業價值,當然所宣告的權利範圍是相當寬廣。

在 2001 年的專利第 6,329,574 號,「含高離胺酸可稔的轉基因玉米植株」中,專利權人描述其創新,主要在發展出新的,整套適用於玉米的轉基因以及選拔的技術,並且能據以創造出含有高離胺酸 (lysine)、高胺基酸 (amino acid)、抗蟲性 (insect resistant) 的玉米植株出來。在其全部 40 項的權利範圍當中,包括許多含此創新的方法的植株,在此處暫時不論,而只針對具有轉基因表現出結果者加以解析。

¹⁷ Claim 14. A tomato plant cell comprising a DNA construct according to any of claims 8 to 13.

¹⁸ Claim 13. A plant cell wherein expression of a gene indigenous to said cell is inhibited according to the method of claim 1 or 9.

¹⁹ Claim 30. A plant and progeny thereof derived from a cell having inhibited or reduced expression of a gene indigenous to said cell and produced according to the method of any one of claims 1, 9, 27 or 29, wherein said cell is a dicotyledenous cell.

在範圍 1,專利權人對於含高離胺酸玉米植株及其原理加以陳述 ²⁰,大意是該植株具有某段基因序列,使得種子高離胺酸含量提高。文句內並可看出何以離胺酸含量能夠提高。根據此範圍的宣告,他人不得進行玉米的育種,若所育成的品種因這些轉基因而提種子的高離胺酸含量。例如說,假如有人用回交的方法,將此專利品種高離胺酸的特性轉入另一個品種,而產生高離胺酸最新品種,這是侵權的。若本轉基因品種只能申請 PVPA 保護,則因為回交法的運用,高離胺酸最新品種與高離胺酸專利品種兩者間的親緣關係可能較遠,而不能用實質衍生品種條例來維護本專利權人的權利。當然由於高離胺酸基因本身受到專利保護,因此問題只出現在能否進行交互授權,以及基因專利的授權以及育種家免責兩者擇一,何者更能被公眾接受。

在本案件當中有 11 項,每項文句的內容在如何增加高離胺酸含量方面的用字,與範圍 1 者幾乎雷同,僅在其他品種特性,或植物材料上有所變化 ²¹ (與範

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Claim 1. A fertile transgenic Zea mays plant comprising isolated DNA comprising a tissue-specific promoter operably linked to a first non-plant DNA sequence encoding a dihydrodipicolinic acid synthase (DHDPS) which DHDPS is substantially resistant to feedback inhibition by endogenously produced free L-lysine and wherein said DNA further comprises a second sequence attached to the 5' terminus of the DHDPS encoding sequence which encodes a plant DHDPS chloroplast transit peptide (CTP) which localizes the DHDPS in the chloroplasts of the cells of said plant, wherein said DNA is expressed so that the transgenic Zea mays plant exhibits an increased level of lysine in its seed over a plant which does not comprise said DNA, and wherein said DNA is heritable.

²¹ Claim 8. A fertile transgenic Zea mays plant comprising...DNA sequence...increased level of lysine, and...contains a high level of an essential amino acid....

C9. A fertile transgenic Zea mays plant comprising...DNA sequence...increased level of lysine, and ... the transgenic plant is insect resistant.

C10. A fertile transgenic Zea mays plant comprising...DNA sequence...increased level of lysine,...plant is insect resistant, ... the level of the amino acid in said transgenic plant is increased....

C31. **A Zea mays seed** obtained from a fertile transgenic Zea mays plant comprising...DNA sequence...increased level of lysine....

C32. **A Zea mays seed** obtained from a fertile transgenic Zea mays plant comprising...DNA sequence...increased level of lysine,...level of the amino acid in said seed is increased

C33. A Zea mays seed obtained from a fertile transgenic Zea mays plant comprising...DNA sequence...increased level of lysine,... the transgenic plant is **insect resistant**.

C34. A Zea mays seed obtained from a fertile transgenic Zea mays plant comprising...DNA sequence...increased level of lysine,...the transgenic plant is **insect resistant**,...level of the amino acidin said seed is increased

C35. Food or feed produced from a Zea mays seed obtained from a fertile transgenic Zea mays plant comprising...DNA sequence...increased level of lysine....

C36. Food or feed produced from a Zea mays seed obtained from a fertile transgenic Zea mays plant comprising...DNA sequence... an increased level of lysine, ...level of the amino

圍1文字雷同處用虛線取代,黑體字顯示與範圍1不同的要點)。範圍8、9、10的植株除了皆是高離胺酸外,分別還有高胺基酸、抗蟲、以及高胺基酸兼抗蟲。而在範圍31、32、33、34,分別是範圍1、8、9、10 所羅列的玉米植株所產生的種子;範圍35、36、37、38 則分別是範圍31、32、33、34 種子31、32、33、34 所產生的莖稈、葉、或穀粒。實際上這樣縝密的鋪陳,有其必然,也有其不必然。不必然的是,若用 PVPA 來保護,由於品種權利已經由繁殖材料擴及於收穫物,因此範圍31、32、33、34 已經被涵蓋;雖然本實用專利不以個別的品種申請,但一個專利實際上已經涵蓋具有玉米高離胺酸、高高胺基酸、抗蟲,以及這些特性組合的任何品種,因此單一專利申請費雖高,實際上可能更為合算,更不用說規避育種家免責的好處。

陸、討論與結論

根據上文就美國專利保護三制的分析,可以知道在該國根據不同植物的屬性,而有不一樣的申請管道;無性繁殖的觀賞植物大多以植物專利來申請;主要農作物包括大豆以及玉米,則向實用專利或者 PVPA 申請;轉基因植物皆以實用專利保護。包括牧草、草皮草、麥類、許多蔬菜則皆申請 PVPA,而少見以實用專利保護者;其原因或是因為專利門檻較高,以至於申請案件被駁回,或者是種子公司一開始就鎖定品種保護法,則有待盡一步確認。在美國三個制度並存之下,業者傾向於用更強的專利法保護是自然的傾向,然而至少在 2001 年 PVPA的核准案件仍達到歷史高峰,因此要說 PVPA 沒有提升育種投資的誘因,是有所不妥的,更何況在其他國家,植物品種保護法是唯一或幾乎唯一的保護法制。

關於植物育種家權利法對權利人的保護不足的說法,主要是出於農民免責以及育種家免責的規定;根據 UPOV 的 1991 年公約,現在已經讓各會員國自行

acidin said seed is increased....

C37. Food or feed produced from a Zea mays seed obtained from a fertile transgenic Zea mays comprising...DNA sequence...increased level of lysine,...the plant is insect resistant. C38. Food or feed produced from a Zea mays seed obtained from a fertile transgenic Zea mays plant comprising...DNA sequence...increased level of lysine,...the plant is insect resistant...level of the amino acidin said seed is increased....

決定農民免責的幅度;而若干國家特別規定農民免責僅適用於小農以及主要農作物,這些國家基於農業國情所做的規範,應是體會到農業並不僅是商業行為,才會有此設計,這是大農制美國所不必考慮的。可說農民免責實際上是政治經濟學的範疇,而無關立法的良窳。

現時各方針對植物品種保護法與專利法的爭論,主要著眼於育種家免責。育種家免責反映出法制上的可商議之處,但也有其於政治經濟學上的考量,亦即專利法對於育種家免責的壓縮,所衍生的育種材料取得的問題,特別是跨國公司與小種苗公司、第三世界育種家之間的植物智財權紛爭,俗稱「種子戰爭」者²²。美國實用專利案件中,大豆與玉米兩種作物的案件就佔了將近一半,而這些品種大都由一兩家擁有絕大多數轉基因技術專利的大種子公司所推出,要說這幾家公司沒有囊括世界大豆與玉米,甚至於其他作物,種子市場的企圖心,是無法令人相信的。而要達到那樣的目標,除了轉基因品種管理法規上的束縛需要解套外,專利法強有力的保障當然也是不可或缺。因此美國極力說服各國取消 TRIPs 27-3(b)之可以限制專利保護植物創新的規定,其出發點可說昭然若揭。

由於育種家不斷改良新品種是解決迫切的世界糧食問題的必要條件,而育種家一方面需要智財保護作為動力,另一方面又殷切於得到新種原以為育種的資材,因此若非能取得兩者間的平衡點,否則註定失之一隅,無論何方取勝,終將危及農糧生產。因此還是要回歸到植物品種保護法與專利法對於育種家免責的規定,來加以比較分析,俾能獲得該平衡點。

如第三節所述,植物品種保護法在 1991 年 UPOV 公約增列的育種家權利及於從屬品種後,已經相當程度地縮小了育種家免責的範圍,特別是轉基因技術以及基因本身專利擁有者不得任意用其技術將他人的受保護品種加以改良。此規範保障的其實是沒有轉基因技術或專利的小公司;反之,如前節對於轉基因植物專利案件的分析中所述的,在只有植物品種保護法的國家,若「某小公司將轉基因專利品種的特性用回交法來改良該小公司自己的品種」,則擁有該轉基因專利品種者只能就專利基因向該小公司宣告其權利,而不能宣稱該小公司侵害到該轉基因品種的育種家權,因為用回交法將 B 品種的某特性轉到 A 品種,所得到的新品種與 A 接近,而與 B 相遠。這一點若是為真,可以說是在 1991 年 UPOV 公約修定時未能考慮到的。由於轉基因是科技的創新,並非自然界能輕易辦到,因此若與自然產生的植物性狀一般看待,是低估第一個將外來基因轉到對象植物的貢獻,對於轉基因品種的專利權人,的確有所不公。

²² 郭華仁 2000 原住民的植物遺傳資源權與傳統知識權。見:蔡中涵 (編) 2000 生物多樣性 與台灣原住民族發展研討會,台灣原住民文教基金會,台北。頁 165-185。

另一方面,根據前節的分析,專利法所保障的植物品種範圍可能過於廣泛。不但轉基因專利品種如此,一般品種也是一樣,例如玉米雜交品種在專利保護下,他人可能不得取以作為回交的非輪迴親 (如第 6,180,857 號範圍 13、14);而在專利第 5,663,484 號範圍 1 下,他人更不得育出具有特定的七個特性組合的水稻品種。更不用說在專利法下,這樣的預種行為一開始就被專利法禁止;相對的,在植物品種權法中,育種家可以任意進行任何育種,只有在當育成的品種是受保護品種的從屬品種,而且要上市之前,才需要與原權利人協商 ²³。專利法保護的過於廣泛,應是在於將發明人的的貢獻過度推演的結果。

植物體是由上萬的基因所組成,不同的品種有其獨特的基因組合,而育種家的貢獻只是在於提出一個全新而且與現有所有「基因組合」顯著不同的組合,但是並不宜把自然產生的「所有基因」視為自己的私有財產。因此當有人用轉基因的方法轉入受保護品種,該轉基因新品種雖然本身因為是新而且有區別性的,因而可以申請保護,但其上市則需經由原品種專利權人的同意,只因為該轉基因新品種的基因組合大部分還是由原品種專利權人所創造出來的,即使轉基因的方法相當具有原創性。而在品種保護法之下,若一個受保護品種若本身就是實質衍生自某起始品種,則該受保護品種的權利人不得享受實質衍生品種的規定,也就是別人可以安插一個基因到「他」的受保護品種,而不需經「他」的同意就可上市;這是因為不論是「他」的受保護品種,或者他人由該品種實質衍生新的品種,基本上這些品種的「基因組合」主要還是與原始品種者沒有大異,並不是「他」所創造出來的。而在專利法之下,可能同時把人為的「基因組合」以及自然的「所有基因」都據為己有,因此才會產生如此強大的保護能力。

因此取得平衡點的關鍵,可能在於如何釐清人為的以及自然的貢獻;套句名言,可說是: Due part of anything under the sun that is made by man could be IP-protected。

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²³ Jördens, R. 2002: Legal and technological developments leading to this symposium: UPOV's perspective. In: WIPO-UPOV Symposium on the Co-existence of Patents and Plant Breeders' Rights in the Promotion of Biotechnological Developments.

見:http://www.upov.int/eng/Symposium2002/SYM_02_2e.pdf

附錄一 玉米雜交種--專利第 6,180,857 號

- 1. Hybrid maize seed designated 33P66, representative seed of said hybrid 33P66 having been deposited under ATCC accession number PTA-1522.
- 2. A maize plant, or its parts, produced by the seed of claim 1.
- 3. Pollen of the plant of claim 2.
- 4. An ovule of the plant of claim 2.
- 5. A tissue culture of regenerable cells of a hybrid maize plant 33P66, representative seed of said hybrid maize plant 33P66 having been deposited under ATCC accession number, wherein the tissue regenerates plants capable of expressing all the morphological and physiological characteristics of said hybrid maize plant 33P66.
- 6. A tissue culture according to claim 5, the cells or protoplasts being from a tissue selected from the group consisting of leaves, pollen, embryos, roots, root tips, anthers, silks, flowers, kernels, ears, cobs, husks, and stalks.
- 7. A maize plant, or its parts, regenerated from the tissue culture of claim 5 and capable of expressing all the morphological and physiological characteristics of hybrid maize plant 33P66, representative seed having been deposited under ATCC accession number.
- 8. A hybrid maize plant according to claim 2, wherein the genetic material of said plant contains one or more transgenes.
- 9. A hybrid maize plant according to claim 2, wherein the genetic material of said plant contains one or more genes transferred by backcrossing.
- 10. A maize plant, or its parts wherein at least one ancestor of said maize plant is the maize plant, or its parts of claim 9, said maize plant capable of expressing a combination of at least two 33P66 traits selected from the group consisting of: a relative maturity of approximately 113 based on the Comparative Relative Maturity Rating System for harvest moisture of grain, above average test weight, above average Diplodia Ear Rot resistance, strong Southern Leaf Blight resistance, acceptable Gray Leaf Spot resistance, acceptable root lodging resistance, and well suited to the Central Corn Belt, Western Corn Belt and Eastern Corn Belt including the Southeast, Southcentral and Southwest regions of the United States.
- 11. A maize plant, or its parts, having all the morphological and physiological characteristics of the plant of claim 2.
- 12. A maize plant, or its parts, wherein at least one ancestor of said maize plant is the maize plant, or its parts, of claim 11, said maize plant capable of expressing a combination of at least two 33P66 traits selected from the group consisting of: a relative maturity of approximately 113 based on the Comparative Relative Maturity Rating System for harvest moisture of grain, above average test weight, above average Diplodia Ear Rot resistance, strong Southern Leaf Blight resistance, accept able Gray Leaf Spot resistance, acceptable root lodging resistance, and well suited to the Central Corn Belt, Western Corn Belt and Eastern Corn Belt including the Southeast, Southcentral and Southwest regions of the United States.

- 13. A method for developing a maize plant in a maize plant breeding program using plant breeding techniques, which include employing a maize plant, or its parts, as a source of plant breeding material, comprising: using the maize plant, or its parts, of claim 2 as a source of said breeding material.
- 14. The maize plant breeding program of claim 13 wherein plant breeding techniques are selected from the group consisting of: recurrent selection, backcrossing, pedigree breeding, restriction fragment length polymorphism enhanced selection, genetic marker enhanced selection, and transformation.
- 15. A method for developing a maize plant in a maize plant breeding program using plant breeding techniques, which include employing a maize plant, or its parts, as a source of plant breeding material, comprising: using the maize plant, or its parts, of claim 8 as a source of said breeding material.
- 16. The maize plant breeding program of claim 15 wherein plant breeding techniques are selected from the group consisting of: recurrent selection, backcrossing, pedigree breeding, restriction fragment length polymorphism enhanced selection, genetic marker enhanced selection, and transformation.
- 17. The maize plant of claim 11 where in said maize plant is male sterile.
- 18. A method for developing a maize plant in a maize plant breeding program using plant breeding techniques, which include employing a maize plant, or its parts, as a source of plant breeding material, comprising: obtaining the maize plant, or its parts, of claim 9 as a source of said breeding material.
- 19. The maize plant breeding program of claim 18 wherein plant breeding techniques are selected from the group consisting of: recurrent selection, backcrossing, pedigree breeding, restriction fragment length polymorphism enhanced selection, genetic marker enhanced selection, and transformation.
- 20. A maize plant, or its parts, wherein at least one ancestor of said maize plant is the maize plant, or its parts, of claim 8, said maize plant capable of expressing a combination of at least two 33P66 traits selected from the group consisting of: a relative maturity of approximately 113 based on the Comparative Relative Maturity Rating System for harvest moisture of grain, above average test weight, above average Diplodia Ear Rot resistance, strong Southern Leaf Blight resistance, acceptable Gray Leaf Spot resistance, acceptable root lodging resistance, and well suited to the Central Corn Belt, Western Corn Belt and Eastern Corn Belt including the Southeast, Southcentral and Southwest regions of the United States.
- 21. A hybrid maize plant according to claim 11, wherein the genetic material of said plant contains one or more transgenes.
- 22. A maize plant, or its parts, wherein at least one ancestor of said maize plant is the maize plant, or its parts, of claim 21, said maize plant capable of expressing a combination of at least two 33P66 traits selected from the group consisting of: a relative maturity of approximately 113 based on the Comparative Relative Maturity Rating System for harvest moisture of grain, above average test weight, above average Diplodia Ear Rot resistance, strong Southern Leaf Blight resistance, acceptable Gray Leaf Spot resistance, acceptable root lodging resistance, and well suited to the Central Corn Belt, Western Corn Belt and Eastern Corn Belt including the Southeast, Southcentral and Southwest regions of the United States.

- 23. A method for developing a maize plant in a maize plant breeding program using plant breeding techniques, which include employing a maize plant, or its parts, as a source of plant breeding material, comprising: obtaining the maize plant, or its parts, of claim 21 as a source of said breeding material.
- 24. The maize plant breeding program of claim 23 wherein plant breeding techniques are selected from the group consisting of: recurrent selection, backcrossing, pedigree breeding, restriction fragment length polymorphism enhanced selection, genetic marker enhanced selection, and transformation.
- 25. A hybrid maize plant according to claim 11, wherein the genetic material of said plant contains one or more genes transferred by backcrossing.
- 26. A maize plant, or its parts, wherein at least one ancestor of said maize plant is the maize plant, or its parts, of claim 25, said maize plant capable of expressing a combination of at least two 33P66 traits selected from the group consisting of: a relative maturity of approximately 113 based on the Comparative Relative Maturity Rating System for harvest moisture of grain, above average test weight, above average Diplodia Ear Rot resistance, strong Southern Leaf Blight resistance, acceptable Gray Leaf Spot resistance, acceptable root lodging resistance, and well suited to the Central Corn Belt, Western Corn Belt and Eastern Corn Belt including the Southeast, Southcentral and Southwest regions of the United States.
- 27. A method for developing a maize plant in a maize plant breeding program using plant breeding techniques, which include employing a maize plant, or its parts, as a source of plant breeding material, comprising: obtaining the maize plant, or its parts, of claim 25 as a source of said breeding material.
- 28. The maize plant breeding program of claim 27 wherein plant breeding techniques are selected from the group consisting of: recurrent selection, backcrossing, pedigree breeding, restriction fragment length polymorphism enhanced selection, genetic marker enhanced selection, and transformation.
- 29. A maize plant, or its parts, wherein at least one ancestor of said maize plant is the maize plant, or its parts, of claim 11, said maize plant capable of expressing a combination of at least two 33P66 traits selected from the group consisting of: a relative maturity of approximately 113 based on the Comparative Relative Maturity Rating System for harvest moisture of grain, above average test weight, above average Diplodia Ear Rot resistance, strong Southern Leaf Blight resistance, acceptable Gray Leaf Spot resistance, acceptable root lodging resistance, and well suited to the Central Corn Belt, Western Corn Belt and Eastern Corn Belt including the Southeast, Southcentral and Southwest regions of the United States.
- 30. A method for developing a maize plant in a maize plant breeding program using plant breeding techniques, which include employing a maize plant, or its parts, as a source of plant breeding material, comprising: obtaining the maize plant, or its parts, of claim 11 as a source of said breeding material.
- 31. The maize plant breeding program of claim 30 wherein plant breeding techniques are selected from the group consisting of: recurrent selection, backcrossing, pedigree breeding, restriction fragment length polymorphism enhanced selection, genetic marker enhanced selection, and transformation.

附錄二 玉米自交系--專利第 6,194,642 號

- 1. Hybrid maize seed designated 33P66, representative seed of said hybrid 33P66 having been deposited under ATCC accession number PTA-1522.
- 2. A maize plant, or its parts, produced by the seed of claim 1.
- 3. Pollen of the plant of claim 2.
- 4. An ovule of the plant of claim 2.
- 5. A tissue culture of regenerable cells of a hybrid maize plant 33P66, representative seed of said hybrid maize plant 33P66 having been deposited under ATCC accession number, wherein the tissue regenerates plants capable of expressing all the morphological and physiological characteristics of said hybrid maize plant 33P66.
- 6. A tissue culture according to claim 5, the cells or protoplasts being from a tissue selected from the group consisting of leaves, pollen, embryos, roots, root tips, anthers, silks, flowers, kernels, ears, cobs, husks, and stalks.
- 7. A maize plant, or its parts, regenerated from the tissue culture of claim 5 and capable of expressing all the morphological and physiological characteristics of hybrid maize plant 33P66, representative seed having been deposited under ATCC accession number.
- 8. A hybrid maize plant according to claim 2, wherein the genetic material of said plant contains one or more transgenes.
- 9. A hybrid maize plant according to claim 2, wherein the genetic material of said plant contains one or more genes transferred by backcrossing.
- 10. A maize plant, or its parts wherein at least one ancestor of said maize plant is the maize plant, or its parts of claim 9, said maize plant capable of expressing a combination of at least two 33P66 traits selected from the group consisting of: a relative maturity of approximately 113 based on the Comparative Relative Maturity Rating System for harvest moisture of grain, above average test weight, above average Diplodia Ear Rot resistance, strong Southern Leaf Blight resistance, acceptable Gray Leaf Spot resistance, acceptable root lodging resistance, and well suited to the Central Corn Belt, Western Corn Belt and Eastern Corn Belt including the Southeast, Southcentral and Southwest regions of the United States.
- 11. A maize plant, or its parts, having all the morphological and physiological characteristics of the plant of claim 2.
- 12. A maize plant, or its parts, wherein at least one ancestor of said maize plant is the maize plant, or its parts, of claim 11, said maize plant capable of expressing a combination of at least two 33P66 traits selected from the group consisting of: a relative maturity of approximately 113 based on the Comparative Relative Maturity Rating System for harvest moisture of grain, above average test weight, above average Diplodia Ear Rot resistance, strong Southern Leaf Blight resistance, accept able Gray Leaf Spot resistance, acceptable root lodging resistance, and well suited to the Central Corn Belt, Western Corn Belt and Eastern Corn Belt including the Southeast, Southcentral and Southwest regions of the United States.

- 13. A method for developing a maize plant in a maize plant breeding program using plant breeding techniques, which include employing a maize plant, or its parts, as a source of plant breeding material, comprising: using the maize plant, or its parts, of claim 2 as a source of said breeding material.
- 14. The maize plant breeding program of claim 13 wherein plant breeding techniques are selected from the group consisting of: recurrent selection, backcrossing, pedigree breeding, restriction fragment length polymorphism enhanced selection, genetic marker enhanced selection, and transformation.
- 15. A method for developing a maize plant in a maize plant breeding program using plant breeding techniques, which include employing a maize plant, or its parts, as a source of plant breeding material, comprising: using the maize plant, or its parts, of claim 8 as a source of said breeding material.
- 16. The maize plant breeding program of claim 15 wherein plant breeding techniques are selected from the group consisting of: recurrent selection, backcrossing, pedigree breeding, restriction fragment length polymorphism enhanced selection, genetic marker enhanced selection, and transformation.
- 17. The maize plant of claim 11 where in said maize plant is male sterile.
- 18. A method for developing a maize plant in a maize plant breeding program using plant breeding techniques, which include employing a maize plant, or its parts, as a source of plant breeding material, comprising: obtaining the maize plant, or its parts, of claim 9 as a source of said breeding material.
- 19. The maize plant breeding program of claim 18 wherein plant breeding techniques are selected from the group consisting of: recurrent selection, backcrossing, pedigree breeding, restriction fragment length polymorphism enhanced selection, genetic marker enhanced selection, and transformation.
- 20. A maize plant, or its parts, wherein at least one ancestor of said maize plant is the maize plant, or its parts, of claim 8, said maize plant capable of expressing a combination of at least two 33P66 traits selected from the group consisting of: a relative maturity of approximately 113 based on the Comparative Relative Maturity Rating System for harvest moisture of grain, above average test weight, above average Diplodia Ear Rot resistance, strong Southern Leaf Blight resistance, acceptable Gray Leaf Spot resistance, acceptable root lodging resistance, and well suited to the Central Corn Belt, Western Corn Belt and Eastern Corn Belt including the Southeast, Southcentral and Southwest regions of the United States.
- 21. A hybrid maize plant according to claim 11, wherein the genetic material of said plant contains one or more transgenes.
- 22. A maize plant, or its parts, wherein at least one ancestor of said maize plant is the maize plant, or its parts, of claim 21, said maize plant capable of expressing a combination of at least two 33P66 traits selected from the group consisting of: a relative maturity of approximately 113 based on the Comparative Relative Maturity Rating System for harvest moisture of grain, above average test weight, above average Diplodia Ear Rot resistance, strong Southern Leaf Blight resistance, acceptable Gray Leaf Spot resistance, acceptable root lodging resistance, and well suited to the Central Corn Belt, Western Corn Belt and

- Eastern Corn Belt including the Southeast, Southcentral and Southwest regions of the United States.
- 23. A method for developing a maize plant in a maize plant breeding program using plant breeding techniques, which include employing a maize plant, or its parts, as a source of plant breeding material, comprising: obtaining the maize plant, or its parts, of claim 21 as a source of said breeding material.
- 24. The maize plant breeding program of claim 23 wherein plant breeding techniques are selected from the group consisting of: recurrent selection, backcrossing, pedigree breeding, restriction fragment length polymorphism enhanced selection, genetic marker enhanced selection, and transformation.
- 25. A hybrid maize plant according to claim 11, wherein the genetic material of said plant contains one or more genes transferred by backcrossing.
- 26. A maize plant, or its parts, wherein at least one ancestor of said maize plant is the maize plant, or its parts, of claim 25, said maize plant capable of expressing a combination of at least two 33P66 traits selected from the group consisting of: a relative maturity of approximately 113 based on the Comparative Relative Maturity Rating System for harvest moisture of grain, above average test weight, above average Diplodia Ear Rot resistance, strong Southern Leaf Blight resistance, acceptable Gray Leaf Spot resistance, acceptable root lodging resistance, and well suited to the Central Corn Belt, Western Corn Belt and Eastern Corn Belt including the Southeast, Southcentral and Southwest regions of the United States.
- 27. A method for developing a maize plant in a maize plant breeding program using plant breeding techniques, which include employing a maize plant, or its parts, as a source of plant breeding material, comprising: obtaining the maize plant, or its parts, of claim 25 as a source of said breeding material.
- 28. The maize plant breeding program of claim 27 wherein plant breeding techniques are selected from the group consisting of: recurrent selection, backcrossing, pedigree breeding, restriction fragment length polymorphism enhanced selection, genetic marker enhanced selection, and transformation.
- 29. A maize plant, or its parts, wherein at least one ancestor of said maize plant is the maize plant, or its parts, of claim 11, said maize plant capable of expressing a combination of at least two 33P66 traits selected from the group consisting of: a relative maturity of approximately 113 based on the Comparative Relative Maturity Rating System for harvest moisture of grain, above average test weight, above average Diplodia Ear Rot resistance, strong Southern Leaf Blight resistance, acceptable Gray Leaf Spot resistance, acceptable root lodging resistance, and well suited to the Central Corn Belt, Western Corn Belt and Eastern Corn Belt including the Southeast, Southcentral and Southwest regions of the United States.
- 30. A method for developing a maize plant in a maize plant breeding program using plant breeding techniques, which include employing a maize plant, or its parts, as a source of plant breeding material, comprising: obtaining the maize plant, or its parts, of claim 11 as a source of said breeding material.
- 31. The maize plant breeding program of claim 30 wherein plant breeding techniques are selected from the group consisting of: recurrent selection, backcrossing, pedigree breeding,

restriction fragment length polymorphism enhanced selection, genetic marker enhanced selection, and transformation.

附錄三 大豆品種--專利 6,177,619

- 1. A soybean seed designated 9318055217152, wherein a sample of said seed has been deposited under ATCC Accession No. PTA-2353.
- 2. A plant, or its parts, produced by growing the seed of claim 1.
- 3. Pollen of the plant of claim 2.
- 4. An ovule of the plant of claim 2.
- 5. A soybean plant having all the physiological and morphological characteristics of the soybean plant of claim 2, or its parts.
- 6. Tissue culture of the plant of claim 2.
- 7. A soybean plant regenerated from the tissue culture of claim 6, wherein said plant has all of the physiological and morphological characteristics of a plant produced by growing seed designated 9318055217152 and having ATCC Accession No. PTA-2353.
- 8. Tissue culture of regenerable cells of the plant, or its parts, of claim 2.
- 9. The tissue culture of claim 8 selected from the group consisting of protoplasts and calli wherein the regenerable cells are derived from embryos; meristematic cells, pollen, leaves, anthers, roots, root tips, flowers, seeds, stems, or pods.
- 10. A soybean plant regenerated from the tissue culture of claim 9, wherein said plant has all of the physiological and morphological characteristics of a plant produced by growing seed designated 9318055217152 and having ATTC Accession No. PTA-2353.
- 11. A method for producing a soybean seed comprising crossing a first parent soybean plant with a second parent soybean plant and harvesting the resultant hybrid soybean seed, wherein said first or second parent soybean plant is the soybean plant of claim 2.
- 12. A hybrid soybean seed produced by the method of claim 11.
- 13. A hybrid soybean plant, or its parts, produced by growing said hybrid soybean seed of claim 12.
- 14. Soybean seed produced from said hybrid soybean plant of claim 13.
- 15. The soybean plant, or its parts, produced from the soybean seed of claim 14.
- 16. The soybean plant of claim 5, further comprising a single gene conversion.
- 17. The single gene conversion soybean plant of claim 16, wherein the gene is introduced by transgenic means.
- 18. The single gene conversion soybean plant of claim 16, wherein the gene is a dominant allele
- 19. The single gene conversion soybean plant of claim 16, wherein the gene is a recessive allele.

- 20. The single gene conversion soybean plant of claim 16, wherein the gene confers herbicide resistance.
- 21. The single gene conversion soybean plant of claim 16, wherein the gene confers insect resistance.
- 22. The single gene conversion soybean plant of claim 16, wherein the gene confers resistance to bacterial, fungal or viraldisease.
- 23. The single gene conversion soybean plant of claim 16, wherein the gene confers male sterility.
- 24. The single gene conversion soybean plant of claim 16, wherein the gene confers waxy starch

附錄四 香米品系--專利 5,663,484

- 1. A rice plant, which plant when cultivated in North, Central or South America, or Caribbean Islands
 - a) has a mature height of about 80 cm to about 140 cm;
 - b) is substantially photoperiod insensitive; and
 - c) produces rice grains having
 - i) an average starch index of about 27 to about 35,
 - ii) an average 2-acetyl-1-pyrroline content of about 150 ppb to about 2,000 ppb,
 - iii) an average length of about 6.2 mm to about 8.0 mm, an average width of about 1.6 mm to about 1.9 mm, and an average length to width ratio of about 3.5 to about 4.5,
 - iv) an average of about 41% to about 67% whole grains, and
 - v) an average lengthwise increase of about 75% to about 150% when cooked.
- 2. The rice plant of claim 1, wherein said starch index of i) consists of the sum of percent amylose of about 24 to about 29 and of alkali spreading value of about 2.9 to about 7.
- 3. The rice plant of claim 2, wherein said rice grains additionally have an average burst index of about 4 to about 1.
- 4. The rice plant of claim 2, wherein said rice grains consist of less than about 20% chalky, white belly or white center grains.
- 5. The rice plant of claim 1, wherein said plant produces about 3,000 lbs to about 10,000 lbs of seed per acre.
- 6. The rice plant of claim 1, which plant
 - a) has a mature height of about 119 cm; and
 - b) produces rice grains having
 - i) an average starch index of about 29, an average percent amylose of about 24.5, and an average alkali spreading value of about 4.5,

- ii) an average 2-acetyl-1-pyrroline content of about 400 ppb,
- iii) an average length of about 6.75 mm, an average width of about 1.85 mm, and an average length to width ratio of about 3.65,
- iv) an average of about 50% whole grains, and
- v) an average lengthwise increase of about 90% when cooked.
- 7. The rice plant of claim 1, which plant
 - a) has a mature height of about 115 cm; and
 - b) produces rice grains having
 - i) an average starch index of about 29, an average percent amylose of about 26.2, and an average alkali spreading value of about 2.9,
 - ii) an average 2-acetyl-1-pyrroline content of about 150 ppb,
 - iii) an average length of about 7.26 mm, an average width of about 1.85 mm, and an average length to width ratio of about 3.92,
 - iv) an average of about 45% whole grains, and
 - v) an average lengthwise increase of about 75% when cooked.
- 8. A rice plant produced from Bas 867 seed having the accession number ATCC 75941.
- 9. A rice plant produced from RT1117 seed having the accession number ATCC 75939.
- 10. The rice plant of claim 1, which plant
 - a) has a mature height of about 115 cm; and
 - b) produces rice grains having
 - i) an average starch index of about 28.9, and average percent amylose of about 25.8, and an average alkali spreading value of about 3.1,
 - ii) an average 2-acetyl-1-pyrroline content of about 400 to about 450 ppb,
 - iii) an average length of about 6.49 mm, an average width of about 1.77 mm, and an average length to width ratio of about 3.87,
 - iv) an average of about 41% whole grains, and
 - v) an average lengthwise increase of about 90% when cooked.
- 11. A rice plant produced from RT1121 seed having the accession number ATCC 75940.
- 12. A seed produced by the rice plant of any of claims 1 to 11.
- 13. A rice grain derived from the seed of claim 12.
- 14. A progeny plant of the rice plant of any of claims 1 to 11.
- 15. A rice grain, which has
 - i) a starch index of about 27 to about 35,
 - ii) a 2-acetyl-1-pyrroline content of about 150 ppb to about 2,000 ppb,
 - iii) a length of about 6.2 mm to about 8.0 mm, a width of about 1.6 mm to about 1.9 mm, and a length to width ratio of about 3.5 to about 4.5,
 - iv) a whole grain index of about 41 to about 63,

- v) a lengthwise increase of about 75% to about 150% when cooked, and
- vi) a chalk index of less than about 20.
- 16. The rice grain of claim 15, which has a 2-acetyl-1-pyrroline content of about 350 ppb to about 600 ppb.
- 17. The rice grain of claim 15, which has a burst index of about 4 to about 1.
- 18. A method of selecting a rice plant for breeding or propagation, comprising the steps of:
 - a) preparing rice grains from rice seeds;
 - b) determining
 - i) the percent amylose (PA), and
 - ii) the alkali spreading value (ASV) of samples of said grains;
 - c) summing said PA and said ASV to obtain the starch index (SI) of said grains;
 - d) identifying a rice plant which produces grains having an average PA of about 22 to about 29, an average ASV of about 2.9 to about 7, and an average SI of about 27 to about 35;
 - e) selecting a seed from said plant; and
 - f) growing said seed into a plant.
- 19. A method of selecting a rice plant for breeding or propagation, comprising the steps of:
 - a) preparing rice grains from rice seeds;
 - b) determining
 - i) the percent amylose (PA), and
 - ii) the alkali spreading value (ASV) of samples of said grains;
 - c) summing said PA and said ASV to obtain the starch index (SI) of said grains;
 - d) cooking a sample of said grains and determining the percent elongation of cooked grains;
 - e) identifying a rice plant which produces grains having an average PA of about 22 to about 29, an average ASV of about 2.9 to about 7, an average SI of about 27 to about 35, and an average cooked grain elongation of about 75% to about 150%;
 - f) selecting a seed from said plant; and
 - g) growing said seed into a plant.
- 20. A method of selecting a rice plant for breeding or propagation, comprising the steps of:
 - a) preparing rice grains from rice seeds;
 - b) determining
 - i) the percent amylose (PA), and
 - ii) the alkali spreading value (ASV) of samples of said grains;
 - c) summing said PA and said ASV to obtain the starch index (SI) of said grains;
 - d) determining the burst index of a sample of said grains;

- e) identifying a rice plant which produces grains having an average PA of about 22 to about 29, an average ASV of about 2.9 to about 7, an average SI of about 27 to about 35, and an average burst index of about 4 to about 1;
- f) selecting a seed from said plant; and
- g) growing said seed into a plant.