

since all of these tissues provide food sources for fungal and bacterial growth.

Profitable production depends heavily on good seed and careful attention to the propagation phase.

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### **1987 NEW ZEALAND PLANT VARIETY RIGHTS ACT**

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Recent legislation has been introduced in New Zealand for the further protection of new plant varieties. The legislation, under the name of the 1987 PLANT VARIETY RIGHTS ACT, is along similar lines of other intellectual property acts for patents, designs, and trade marks.

That Plant Variety Rights are viewed in the same manner (in legislation at least) as patents, is important in a commercial atmosphere. New plant varieties should be viewed as any other product, the development of which incorporates a large amount of time, effort and money. As with new products it is essential that the developer recovers his investment by obtaining sole rights to the production, marketing, and licencing of the product and, perhaps, obtaining a trade mark for the product.

There are of course differences between plants and "standard inventions". Standard inventions do not reproduce themselves, nor do they continually produce saleable merchandise (e.g. fruit, flowers). It is because of these differences that a separate act was

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devised to give protection to new plant varieties.

A successful applicant under 1987 Plant Variety Rights Act will gain the exclusive right to:

- 1) Produce for sale any reproductive material
- 2) Sell any reproductive material
- 3) Propagate for commercial production produce
- 4) Authorise anyone to do the above.

These rights last for 23 years for woody plants and 20 years for other plants.

The above rights allow the applicant to commercially exploit the new variety; however, anyone can propagate, grow, or use the new variety for non-commercial purposes. This means the person can propagate a protected variety for his or her own use but cannot sell the propagated plant or produce, such as fruit or flowers, from the propagated plant.

Furthermore, provided the protected variety is not used repeatedly, anyone can hybridise, produce or sell a new variety derived from the protected variety. The term "used repeatedly" has not yet been tried in the courts in New Zealand, therefore, there is no legal definition of this term.

There are certain criteria to be met before anyone can apply for Plant Variety Rights. The first criteria is that the applicant has to be either the owner, assignee, agent, or personal representative of the owner.

The variety for which protection is applied for must be "new". The definition of "new" is two-fold.

- 1) The variety must not have been for sale in New Zealand for more than 12 months before the application is made.
- 2) For woody plants the variety must not have been for sale overseas for more than six years before application. For non-woody plants this period is 4 years.

As with all criteria there are exceptions to the above rules, therefore if a potential applicant for Plant Variety Rights is concerned about the newness or novelty of his variety he should first contact a patent attorney who could advise him.

The variety applied for must be distinct, that is distinguishable by one or more characteristics over any other variety. This is generally ascertained by the applicant filling out a questionnaire relating to the particular characteristics of the plant species.

The variety must be homogeneous and regard is made to the sexual or vegetative propagation of the variety.

Finally the variety must be stable, that is true to description for reproductive cycles after repeated propagation or reproduction.

Once the plant breeder has a variety that meets the above criteria he then has a choice whether to file the application himself or obtain the services of a patent attorney. There are advantages and disadvantages for both these options. The main advantage of the

applicant prosecuting the application himself is that he does not have to pay the additional costs of patent attorney fees. The advantage of having a patent attorney prosecuting the application is that they have the system set up for preparing documents, sending reminders for paying annual fees, plus knowledge of licencing and the Plant Varieties Act if any problem arises.

A number of forms are required to be filled out for the application, namely an application form, a questionnaire on the variety's characteristics and an authorization of agent if the patent attorney prepares the application. Evidence of ownership is sometimes required and details of any prior applications for rights with respect to that variety. The applicant may also deem it necessary to supply further details of the variety, perhaps giving a history of its selection and evidence by way of graphs and tables for such characteristics as fruit size and the time of crop production.

Once all the above has been filed at the Plant Varieties Office a filing date and an application number are issued. Associated with the filing date are a number of important features.

Firstly, the filing date establishes the applicant's rights, that is, the filing date gives a date from which the claims to ownership and development are based. Therefore, if a plant breeder in New Zealand files after another plant breeder's application for the same variety then the first applicant has precedence and the second applicant has no rights under the act unless it can be shown that the first breeder wasn't legally entitled.

The second important feature of the filing date is that, in contrast to most intellectual property law, legal action can be taken from this date even if rights have not been granted. However, if for some reason rights are not eventually granted, the applicant could be held for damages resulting from the legal action taken.

The third important feature is a convention period within which the applicant may file overseas. There is an international agreement, UPOV, which states despite any criteria as to novelty or newness in member countries, an application overseas within 12 months of the first application is actually back-dated to the first application date. For instance if the New Zealand filing date is in February and the New Zealand applicant files in December in the United States, then his application is actually back-dated to the New Zealand date in February that year. Therefore this convention period forestalls others from taking a protected variety from one country and exploiting it in another that the applicant wishes to eventually file in.

In order to determine whether the variety complies with the criteria discussed before, the variety must be examined. Examination is conducted over a growing season and for this purpose viable seeds should be supplied for agricultural, vegetable and herbage crops and access to ornamentals, forest and fruit trees by MAF

(Ministry of Agriculture and Fisheries) Officers is required. Therefore, depending on the variety being protected, the examination period can be from as little as six months up to 18 months.

If the results of the examination are satisfactory and the application is accepted then details of the application are published in the Plant Variety Rights Journal. If after three months from publication, there are no objections, then a grant of rights is given.

The grant of rights is no use to the plant breeder unless he can attain commercial advantage from it. There are a number of ways that the breeder can attain commercial benefits, one being to register a trade mark for the variety. Therefore anyone wanting to sell produce under the name given to the breeder's variety (not the biological name) will have to come to an agreement with the breeder and become a registered user for that trademark. This agreement can be by way of a licencing agreement wherein the user of the trade mark will have to pay a royalty or an up-front payment for use thereof. If a person wishes to sell the produce from plants he had bought and was not a registered user then he could not use the trademark commonly associated with that variety.

The plant breeder should always consider obtaining rights overseas for his variety as markets in New Zealand are comparatively small.

For growers of a particular plant, it may be advantageous to form a co-operative. Thus arrangements with respect to trade marks and plant rights may be made more easily in the co-operative setup instead of on an individual basis.

Unless a breeder has the resources to propagate sufficient quantities of the plant material to satisfy the market he is best advised to licence his rights. Intellectual property (plant rights included) is like any other property and a licence can be viewed as being a renewable lease, whereby once the lease runs out, the owner/breeder still owns the property or rights. The licenced plant rights are similar to most licences, there can be a sign-on fee as well as royalties granted. Sign-on fees encourage the licensee to promote the variety well so as to recover the initial cost.

Despite the similarities mentioned above there are still some special factors particular to Plant Variety Rights that should be incorporated into the licence. One should ensure that a royalty is paid for all material that the variety can be easily reproduced from, cuttings, seed, and the like. There should be an inspection clause to allow the licensor to inspect facilities such as seed dressing stations, glasshouses and orchards to ensure that royalties are being paid on all reproductive matter. On termination of the agreement there should be a royalty given for each plant left with the licensee. The reason for this is that although plant variety rights prohibit people propagating for commercial production, it does not stop them from producing commercial produce for plants they already

have. As with most licences it is essential to have on termination, the licenced rights remaining in the breeder's name. Furthermore most licences have a force majeure or an "acts of God" clause, and genetic mutation should be included within this. Often companies have a standard licence which they wish to employ but it is advisable for the breeder to have this inspected by an agent such as a patent attorney who knows the rights granted under the Plant Variety Rights Act and can also determine whether the licence contravenes the Fair Trading and Commerce Acts.

An applicant should be aware that there can be obstacles to obtaining a grant of rights. Four such obstacles are convention applications, opposition, infringement, and compulsory licences.

If someone overseas developed independently the same variety as a breeder in New Zealand, and filed a convention application that back-dated before the New Zealand breeder's application, then they have precedence over the New Zealand breeder. This is a similar situation to that discussed previously with a New Zealander filing a convention application in the United States.

The 1987 Plant Variety Rights Act has similar sections as those in the Patent Act whereby third parties can oppose granting of plant variety rights to an applicant. The grounds of opposition can be that the applicant is not the owner of the variety, or that the variety is not new, distinct, stable or homogeneous. Publication of the application after acceptance in the Plant Variety Rights Journal is a means of notifying the public so that they can have the opportunity to object to the grant being made. In some cases objections may be made after grant on the same grounds.

If after three years from the date of grant, the breeder who has rights and has not ensured that the variety had been supplied in reasonable quality, quantity or price to the public, then anyone else can apply for a compulsory licence. This means that the breeder has to licence rights to that person at a royalty that is considered reasonable by the Commissioner, the person in charge of administering the act.

The final thing that can go wrong is infringement of your rights. An act of infringement is any act that breaches the exclusive rights granted and this includes importation and selling other plants under the protected variety's name. However the variety must be indicated to be protected or have protection applied for, so that the applicant may retrieve damages caused by the infringement. To decide the remedies available to the plaintiff (i.e. the applicant), the court takes into account the damages incurred, profits gained by the defendant and the flagrancy of the act. Being able to legally protect a variety against acts of infringement is the main reason for obtaining Plant Variety Rights.

In conclusion the 1987 Plant Varieties Act is a comprehensive act and, if used properly, can be a valuable commercial tool.