

Plant Variety Rights and Plant Production—Help or Hindrance?

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INTRODUCTION AND BENEFITS

A plant variety right (PVR) is an intellectual property right. It is available to the breeder of a new plant variety and gives such a breeder the following rights or powers:

- The exclusive right to sell reproductive material or whole plants of the variety and collect royalties on the sales.
- The exclusive right to propagate the variety for sale. This enables the breeder to control the quality of the reproductive material or plants and assists in the orderly marketing of the variety.
- The exclusive right to propagate the variety for the purpose of the commercial production of fruit or flowers. This means that orchardists and cut-flower growers who wish to propagate new plants of a protected variety themselves, can only do so with the permission of the variety owner. In most cases permission will be given provided royalties are paid.

Where breeders of protected varieties have these exclusive rights they can, if they choose, licence others to do various things. The licensing of propagators and nurserymen reduces the risks involved in commercialisation and is a mechanism that enables control over propagation and a better return on that investment and effort in breeding.

A protected variety may be a valuable saleable asset. The PVR document, by clearly establishing that the breeder is the legal owner of the variety, may assist the breeder in obtaining the best price should he or she wish to sell the variety on its own or as part of a business.

In the various ways indicated PVR provides breeders the opportunity they would not otherwise have to profit from their breeding activities. In the absence of legal protection afforded by PVR, new varieties could easily fall into the hands of others who could carry out pirate propagation and reap rewards that rightly should go to the breeder. By assisting breeders to recover their breeding costs and earn a profit, PVR provides an incentive for investment and effort in the breeding and selection of new improved plant varieties.

PVR also provides an incentive for the introduction and release of improved new varieties from overseas. This effect is particularly evident when a country first implements a PVR scheme. It was noticed in both New Zealand and Australia that North American and European varieties that were previously unavailable, suddenly became available. Many overseas breeders would not allow their varieties to be propagated in New Zealand if PVR were not available here. Plant variety protection has added to the range of plant material available and plant propagators

now have access to overseas varieties that would probably be denied them without a PVR scheme.

OBTAINING AND HOLDING RIGHTS

PVR is available for varieties of any kind of plant. The term variety is used in the sense of a cultivated variety or cultivar—not a botanical variety. To be eligible for PVR a variety must be new, have an acceptable denomination, be distinct from all known varieties, and be uniform and stable (PVR Office, 1990). Distinctness, uniformity, and stability of a candidate variety are determined in a field trial where the candidate variety is botanically described and compared if necessary with similar varieties. The results of the evaluation are often refereed by a designated independent expert. The horticultural or commercial merit of the variety is irrelevant to PVR and not taken into account.

Variety protection does not only affect owners of varieties. PVR has an impact on the plant production system generally. With respect to protected varieties, plant propagators are restricted in some of their activities, e.g. they cannot carry out commercial propagation without a licence, contract, or consent from the variety owner. Plant propagators used to the complete freedom to propagate unprotected varieties may be unhappy when they first face the restrictions applied to protected varieties. However they must accept these restrictions if they wish to have an involvement with improved protected varieties.

At the present time there are some 600 fruit and ornamental varieties that are fully protected under a grant of PVR or provisionally protected, i.e. an application has been made but a decision not yet reached. Of the total number of protected varieties, roses comprise over a third. There are also many varieties of deciduous fruit and cut-flower crops such as carnation and alstroemeria. A recent development has been the protection of a large number of impatiens varieties. The number of other categories of protected ornamental varieties is comparatively low but does show growth.

If a protected variety is propagated without the owner's consent then those doing so risk legal prosecution by the owner and may be liable for payment of damages to the owner. It is up to variety owners, not the PVR Office, to oversee a variety's production. It is not the role of the PVR Office to become involved in infringement problems and disputes concerning non-payment of royalties. A variety owner should in his or her own interest let it be known that the variety is protected. It is up to the owner to determine and collect royalties. The owner can do this on an individual basis or through an organisation for central royalty collection.

Plant propagators should make efforts to keep themselves informed and updated on variety protection matters to ensure they do not infringe the rights of variety owners. There does seem to be some lack of knowledge as to which varieties are protected. A paper on plant variety rights given in the United Kingdom mentioned problems of lack of awareness and understanding of PVR (Costin, 1990). In this country information is available in the quarterly Plant Variety Rights Journal. A full list of fully protected varieties is included in each January issue and a list of provisionally protected varieties in each July issue. More general information is contained in the handbook 'Guide to Plant Variety Rights'.

SOME WIDER EFFECTS

PVR has implications beyond plant propagation and nursery production. It affects all horticultural producers and those who wholesale or retail plants. Protected varieties must be labelled, listed, and advertised with the correct PVR denomination. This is required under the Plant Variety Rights Act 1987 (New Zealand Government, 1987). False claims of protection or failure to use the PVR denominations can result in prosecution and a fine up to \$1,000. The PVR Office has recently brought this to the attention of several rose nurseries following denomination errors in their catalogues. A variety can have a commercial name in addition to the PVR denomination. This is very common for rose varieties. In such cases, while it is quite acceptable to label, sell, and advertise protected varieties under the commercial name, the PVR denomination must always be used as well. Variety owners would have difficulty enforcing their rights if they had not been using the correct denomination.

As well as PVR denominations and commercial names, trademarks are sometimes used when varieties are sold. It is important not to confuse PVR protection with trademark protection. A trademark in itself gives no protection to the variety. A trademark is correctly used to apply to the products produced by a particular enterprise. For example, a nursery might register a trademark and apply it to all the plants produced from that nursery. A trademark should not be used as a varietal denomination—indeed it is a condition of trademark registration that this not be done. A person who does use a trademark as a varietal denomination would invalidate that trademark.

COSTS, EXPORTS, AND CONCLUSION

Plant breeding and importing are expensive and involve a long term commitment. Comment is sometimes made about the cost of variety protection. The cost of protecting a variety could be looked at this way. Individuals and businesses routinely pay insurance premiums to protect themselves and their belongings from a variety of disasters. PVR could be looked upon as a form of insurance that protects the investment in a new variety. The total cost of importing and commercially releasing a variety could well be many thousands of dollars. The cost of PVR protection as part of the overall investment is comparatively small. Breeding a new variety can also involve high cost especially if inputs such as time and labour were properly taken into account. The cost of PVR protection as part of total breeding costs would again be comparatively small. Some may argue that selectors of sports or chance seedlings are just lucky and less deserving. However, the successful identification, recognition, and development of a new variety derived in this way depends upon certain skills and requires investment. It seems only fair that the *skills of all breeders, selectors, and importers should be rewarded.*

The holding of rights in New Zealand may assist in obtaining rights for the new variety overseas where the variety is exported. A New Zealand right is only valid in this country but protection in other countries may be easier to obtain if the variety has a New Zealand PVR. Overseas PVR authorities may accept PVR testing, and the resulting report, carried out in this country. There is a formal New Zealand-United Kingdom cooperative agreement under which, should application for PVR be made in the United Kingdom for varieties of many New Zealand indigenous plant taxa, the New Zealand PVR Office will carry out the PVR testing

for the U.K. PVR Office (New Zealand PVR Office, 1992).

PVR provides justice to breeders, selectors, and importers by enabling them to obtain some financial reward for their effort involved in commercially introducing their variety. This is achieved by allowing the owner of the new variety control of the variety's propagation, production, and release. Variety protection gives some orderliness to the production and marketing of plants. The incidence of pirate propagation is less likely. The marketing of protected varieties is aided by the requirements of labelling and some benefits are passed on to the consumers of plants. The scheme encourages investment in breeding and selection activities and allows New Zealanders access to overseas varieties which may not be available here without the protection that PVR provides. The combined effects of increased breeding and importing give growers, nurserymen, and home gardeners access to a greater range and number of improved varieties. PVR is a help, and not a hindrance to planned commercial plant production.

LITERATURE CITED

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