PLANT VARIETY RIGHTS AND PATENTS FOR PLANT-RELATED INVENTIONS

A plant variety right is an intellectual property right for the exclusive exploitation of a named plant variety. As with other IP rights, plant variety rights are intended to promote and protect creativity and investment into research – in this case innovation in producing plant varieties for the development of agriculture and horticulture and to serve market demand.

In Europe, plant varieties can be protected either nationally or at European Community level. Separately, European and national patents can be obtained for plants and plant-related inventions which are not restricted to plant varieties per se, although certain plant breeding methods and plants obtained by those methods are excluded from patentability.

This information sheet summarises the systems for the protection of plant varieties and outlines the scope of patent protection available for plant-related inventions in Europe.

COMMUNITY PLANT VARIETY RIGHTS

The Community Plant Variety Right (CPVR) is a plant variety right valid throughout the European Community. A plant variety can be of any botanical taxon. The variety must meet the following criteria:

- Distinctness - The variety must be clearly distinguishable from any other variety whose existence is of common knowledge on the date of applying for a CPVR.
- Uniformity - The variety must be sufficiently uniform in the expression of those characteristics which are included in the examination for distinctness, as well as any others used for the variety description.
- Stability - The characteristics of the variety must remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each cycle.

REQUIREMENT FOR NOVELTY

In addition to meeting the criteria for distinctness, uniformity and stability, the variety must be new. Novelty requires that variety constituents or harvested material of the variety have not been sold (or otherwise disposed of) with the breeder’s consent for purposes of exploitation of the variety, either:

- within the European Community more than one year before the date of applying for a CPVR; or
- outside the European Community more than four years before that date, or
- in the case of trees or vines more than six years before that date.

WHAT RIGHTS ARE GIVEN?

The following acts relating to the plant variety require authorisation by the holder of the CPVR:

- production or reproduction (multiplication)
- conditioning for the purpose of propagation
- offering for sale
- selling or other marketing
- exporting from the European Community
- importing to the European Community
- stocking for any of the above purposes

In addition, the rights conferred by a CPVR extend to essentially derived varieties, other indistinct varieties and hybrid varieties dependent on the protected variety.

There are important exceptions to the scope of the plant variety right, including:

- a “farm-saved seed” exemption for farmers propagating certain agricultural species
- acts done privately and for non-commercial purposes
- acts done for experimental purposes
- acts done for the purpose of breeding or discovering and developing other varieties
- a “breeders’ exemption” permitting access to protected varieties for the development and exploitation of further plant varieties.

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THE APPLICATION PROCEDURE

To apply for a CPVR, an application form and technical questionnaire must be completed. The application will be officially checked, including verifying whether the variety is novel. If there are no objections, then the CPVO arranges for a technical examination of the candidate variety.

The purpose of the technical examination is to assess whether the candidate variety meets the criteria of distinctness, uniformity and stability. The technical examination is carried out by an authority selected by the CPVO, who will also stipulate the type and amount of any plant material that is to be submitted for examination.

Technical examination takes between one and six years, depending on the variety. One year is normal for most ornamental species. Some tree varieties require examination over a six year period.

The candidate variety must also be designated by a ‘variety denomination’, which is a name or code by which the variety is to be identified.

The applicant’s chosen denomination must be approved by the CPVO. When the CPVO is satisfied that all requirements are met, it grants a CPVR for the variety. A certificate is issued to the titleholder, plus a copy of the official variety description. It is administered by the Community Plant Variety Office (CPVO) based in Angers, France.

PLANT VARIETIES IN THE UK

The CPVR system exists in parallel with national plant variety rights systems in most EU member states.

In the UK, a national plant variety right, the Plant Breeder’s Right (PBR), is available and is valid for the UK only. Like the CPVR, the UK PBR system originates from the 1991 act of the UPOV convention (International Union for the Protection of New Varieties of Plants), and the overall application system and rights are broadly similar.

Independently of IP rights, the introduction of new varieties of major agricultural species is regulated in the UK through “National Listing”, which requires new crops to be an improvement on existing varieties. National Listing is necessary for marketing of plant varieties of the particular crops to which this applies.

HOW LONG DOES THE PLANT VARIETY RIGHT LAST?

The CPVR is granted for 25 years, or 30 years for potatoes, vines and trees. The term is calculated to run to the end of the 25th or 30th calendar year following the year of grant. Annual fees are payable for maintenance of the CPVR.

PATENTS ON PLANT VARIETIES

Under the European Patent Convention (EPC), to which most European countries are contracting states, plant varieties are excluded from patentability. However, the exclusion is interpreted narrowly, and patents can be obtained with claims embracing one or more plant varieties, provided that the invention is not technically restricted to a plant variety, and provided that the plants are not obtained exclusively by essential biological processes.

For example, a patent can validly be granted with a claim to a transgenic plant, which encompasses many plant varieties within the scope of the claim. In contrast, a claim that is specifically directed to one or more particular plant varieties is not allowable.

PATENTS ON PLANT BREEDING METHODS

In Europe, "essentially biological processes for the production of plants" are excluded from patentability. This is interpreted to exclude from patentability any method involving sexual crossing and selection of plants, regardless of the degree of human intervention in the breeding process, unless the crossing and selection steps include an additional technical step that introduces or modifies a genetic trait in the plant.

IMPROVEMENT OF CROP AND ORNAMENTAL SPECIES BY GENETIC MODIFICATION OR MODERN BREEDING TECHNIQUES REMAINS A SIGNIFICANT AREA OF INNOVATION

For example, a method involving plant genetic engineering (such as generating a transgenic plant) may be patentable. However, if the method also encompasses crossing and selection steps, before and/or after the genetic engineering step, then the method as a whole is likely to be rejected as unpatentable at the European Patent Office.