

The System of Plant Variety Rights in the European Union

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Plant breeders' rights are a form of intellectual property rights. In the past 2 years protection has been available throughout the European Union by a single application to the Community Plant Variety Office. Applications can be made for varieties of all botanical genera and species as long as the variety is new, distinct, uniform, and stable, and an acceptable denomination is proposed. Since its inception the Office has received more than 5400 applications from breeders all over the world, and granted in excess of 2250 titles. Within these, ornamental species make up more than 50% of applications, *Rosa* being the species most applied for; breeders from the Netherlands have submitted over twice as many applications as those from any other country.

INTRODUCTION

Plant breeders invest time, energy, finance, and facilities to develop a new variety and expect some reward in return. Plant breeders' rights protects the intellectual property which the new variety represents in the same way that a patent protects an invention. In addition, plant breeders' rights enables collection of a royalty payment, whereby the breeder controls the multiplication of his variety, and derives financial benefit from the selling of it.

Plant breeders' rights can be described as an offshoot of both patent law and copyrights (themselves branches of intellectual property), being a system which was established in the International Convention for the Protection of New Varieties of Plants on 2 Dec. 1961, ratified originally by five European countries, thereby providing an effective technical and legal framework through which plant varieties could be protected internationally. The Union pour la Protection des Obtentions Végétales (UPOV) is an intergovernmental organisation based in Geneva which is based on and oversees the Convention. The following 30 years saw many other countries from around the world sign up to the Convention. As a consequence of this and other advances in the industry, the Convention was revised by a 1991 Act to strengthen the scope of protection afforded to plant breeders, as well as to stave-off criticism from patent circles which described the system as inappropriate in the wake of biotechnology.

The regime of Community Plant Variety Rights (CPVR) established by the European Union (under its Council Regulation No 2100/94 of 1 Sept. 1994) was the first regime in the world to be adopted according to the UPOV 1991 Act. This system takes advantage of the fact that the Act of 1991 now allows appropriate intergovernmental organisations to accede to the Convention. By submitting just one application, these rights offer intellectual property protection for plant varieties covering simultaneously all 15 Member States. National protection systems may exist in parallel with the Community system, although it is not possible to protect a variety under both systems at once; Community rights take precedence, with any existing

national right lying dormant. In order to implement the CPVR regulations, a Community Plant Variety Office (CPVO) was established on 27 April 1995, and is based in Angers, France.

HOW COMMUNITY PLANT VARIETY RIGHTS (CPV RIGHTS) WORKS

Varieties of all botanical genera and species, including hybrids between genera or species, may form the object of CPV Rights. To date, more than 5400 applications covering 316 different species have been received from 28 countries at the CPV Office (Tables 1 and 2), the Netherlands making its presence felt particularly in the ornamentals sector, where many family-run, small-scale, firms have been attracted to seek protection under the new CPV Rights system. The applicant must be the person/company which bred or discovered the variety, or his/her successor in title; if applicants are not based within the European Union, then they need to appoint a representative within this territory to act on their behalf.

Table 1. Applications for Community Plant Variety Rights (April 1995 – July 1997).

Applications	Number	%
Ornamentals	2868	53.1
Agricultural crops	1497	27.7
Vegetables	684	12.7
Fruit	344	6.3
Miscellaneous species	9	0.2
Total	5402	100.0

Table 2. Applications listed by main countries of origin (April 1995 – July 1997).

Country	Number
Netherlands	1853
Germany	867
France	856
United States of America	399
Denmark	382
United Kingdom	379
Italy	116
Belgium	111
Sweden	80
Spain	76
Australia	44
Switzerland	43
New Zealand	23
Japan	22

A grant of rights may only be given for a variety if it is new, and is distinct, uniform, stable (abbreviated to DUS), and if an acceptable variety name is given.

Novelty. A variety is considered to be new if it has not been sold or otherwise disposed of by, or with the agreement of, the owner either within the European Union, earlier than 1 year before the date of application; or outside the European Union, earlier than 4 years before that date (6 years in the case of trees and vines).

Certain types of disposal are not deemed to be disposals for the purposes of novelty, for example: to official bodies, or to others in the context of a legal relationship, solely for production, reproduction, multiplication, conditioning or storage, provided there is no further disposal and the owner retains the exclusive right of disposal; between companies in the same ownership; disposal of material resulting from research and development work without revealing the identity of the variety involved; and disposals resulting from the display of the variety at an officially recognised exhibition.

Distinctness. The variety must be clearly distinguishable in the expression of its characteristics from any other variety in common knowledge at the date of application.

Uniformity. The variety must be sufficiently uniform in the relevant characteristics.

Stability. The expression of these characteristics must remain unchanged after repeated propagation of the variety.

Denomination. To serve as its identity card, every applicant for CPV Rights must propose a variety name in relation to the variety he/she is seeking to protect. If the name proposed is not acceptable (e.g., if the name is already being used or if the name could cause offence), the CPV Office will reject it and require the applicant to propose an acceptable alternative.

TESTING AND GRANTING OF RIGHTS

In order to verify the uniqueness of the candidate variety, a DUS technical examination is carried out by a designated testing authority within the European Union in field or glasshouse trials for one or more seasons. This examination may be supplemented by laboratory tests. For fruit and ornamentals centralised testing is normally carried out for a particular species within the Community, e.g., chrysanthemums at NIAB (UK), geraniums at the Bundessortenamt (Germany), carnations at the CPRO-DLO (Netherlands), thereby building up expertise and a reference collection next to which the relevant plant material will be judged. The main fruit and ornamental species tested are shown in Table 3.

Once a variety has passed its DUS test, a technical report and description of its characteristics is issued. Provided there are no impediments, a title of rights is granted soon afterwards by the CPV Office. Rights in an individual variety remain in force for 25 years (or 30 years for trees and vines). More than 2250 CPV Rights have already been issued.

Table 3. CPV Rights applications for ornamental and fruit species (April 1995 – July 1997).

Species	Number of applications
<i>Rosa</i> L. - rose	553
<i>Dendranthema</i> \times <i>grandiflorum</i> Kitam - chrysanthemum	299
<i>Pelargonium</i> L'Hérit ex Ait - geranium	255
<i>Dianthus</i> L. - carnation	135
<i>Gerbera</i> Cass. - gerbera	133
<i>Euphorbia pulcherrima</i> Willd. Ex Klotzsch - poinsettia	113
<i>Tulipa</i> L. - tulip	112
<i>Impatiens</i> L. - busy lizzie	94
<i>Prunus persica</i> (L.) Batsch - peach, nectarine	80
<i>Malus</i> Mill. - apple	74
<i>Petunia</i> Juss. - petunia	74
<i>Fragaria</i> L. - strawberry	71
<i>Alstroemeria</i> L. - alstroemeria	70
<i>Lilium</i> L. - Lily	65
<i>Osteospermum ecklonis</i> (DC) Norl. - osteospermum	53
<i>Gladiolus</i> L. - gladioli	40
<i>Kalanchoe</i> Adans. - kalanchoe	39
<i>Saintpaulia ionantha</i> H. Wendl. - African violet	38
<i>Begonia</i> \times <i>hiemalis</i> - begonia	36
<i>Dahlia</i> Cav. - dahlia	34
<i>Ficus benjamina</i> L. - weeping fig	31

Once a variety is protected by CPV Rights the authorization of the owner is required for the following acts in respect of variety constituents or certain harvested material of the protected variety: production or multiplication; conditioning for the purpose of propagation; offering for sale; selling or other marketing; exporting from the Community; importing to the Community; and stocking for any of these activities. Nonetheless, these rights — unlike patents — do not extend to acts done privately and for “amateur” purposes, as well as those done for research and breeding purposes. If a new variety has been “essentially derived” from— i.e., has depended for its breeding on — a protected variety, then it may be protected by CPV Rights but cannot be exploited without authorisation from the breeder of the initial variety.

In order for the protected variety to reach as wide a commercial market as possible, the owner of the right may conclude licences with third parties for the exploitation of the variety. The holder of the CPV Rights can attach conditions and limitations to the licence, any breach of which, as well as of the rights themselves, will constitute a legal infringement, which can be taken before the courts.