

PLANT VARIETIES RIGHTS IN NEW ZEALAND

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INTRODUCTION

What return should you expect from the time and effort you put in to producing that new plant? Many of today's new plants are the result of planned breeding programmes as distinct from the fortuitous "finds" of earlier plant explorers or the mutations found from time to time by the discerning horticulturalist or farmer. A scheme of patent rights or royalty payments is the recognition in law that you may expect some payment for your investment in that plant or reward for your "luck" in finding it. Usually there is a term of years prescribed during which you may continue to exercise your rights – mostly 15–18 years in New Zealand. Clearly novelty is fundamental to the granting of rights, but the degree of novelty may be quite small.

NEW ZEALAND LAW

Although we have talked about plant patents in New Zealand for quite a long time (20 years) to my knowledge – and probably a lot longer – the Plant Varieties Act was not passed until November 1973. This Act was modelled on the U.K. Act. It provides for the granting of rights, the establishment of a Plant Varieties Office, the appointment of a registrar and making regulations to operate the intent of the Act.

The kinds of plants to which rights may be granted are specified in a schedule attached to the Regulations (1975) and may be added to from time to time by Order in Council.

To qualify for rights a new plant must be **distinct, uniform and stable**. (DUS) Note that agronomic worth is not one of the criteria.

In this the concept of rights differs altogether from the lists of approved cultivars which is the topic of Mr Thaine's paper. Distinct means distinct in common knowledge. This means the registrar has to have available to him a considerable body of knowledge about the varieties of plants covered by the various schemes.

INTERNATIONAL IMPLICATIONS

There are two approaches used by authorities concerned with granting rights in deciding whether a candidate cultivar satisfies their criterion of distinctness. At this point may I introduce another of those contractions which are a feature of our language today. This one is UPOV. This is a contraction from the French "Union Internationale Pour La Protection Des Obtentions Vegetales".

In the 1950's the French proposed an international approach to plant patent law. Ultimately it is hoped that plant varieties rights granted by one country which is a signatory to this international agreement or convention will be accepted and have legal standing within the boundaries of any other signatory country.

This is still a long way off. However six countries – United Kingdom, Denmark, Sweden, Germany, France and Holland signed the convention and Belgium did so last year. As yet rights have to be granted by the authorities of each UPOV country – they haven't achieved full recognition of the rights of other member countries yet – but that is the aim. Other countries who have sent observers to the annual meetings of the UPOV Council have included New Zealand, Australia, South Africa, Canada, U.S.A., Japan, Poland, Hungary, Italy, Ireland and a number of others including some African states.

Joining UPOV imposes certain obligations on member countries. Firstly they are committed to extending the application of rights to many plants within their countries, secondly member countries must extend the privilege of applying for rights to the citizens of any other member country – that is for all the kinds of plants for which the country has a scheme and thirdly the way in which the responsible authority in a country goes about granting rights should have adequate regard to the principles laid down by UPOV.

INTERNATIONAL DIFFERENCES

At this point we return to the criteria for granting rights – distinctness, uniformity and stability. The UPOV guidelines stipulate growing trials and decisions regarding rights based on results in these trials for the number of years the authority considers necessary – mostly two or three years. So this is the first, or European approach to rights – decisions based on trials.

The second approach is that adopted in U.S.A. The Americans have two schemes operating. The first for vegetatively-propagated plants is run by the U.S. Patent Office – the second for seed plants is the responsibility of the USDA.

While growing trials are an obvious and reasonably reliable method of examining candidate cultivars they are expensive. As agronomic worth does not come into the examination are they necessary? Growing trials in Europe have come to mean growing trials conducted by the responsible authority. The USDA has looked at this matter in a different way. Their scheme is based on written descriptions of varieties in the literature over the last ten years. Using a fairly simple computer-based package called ESITREVE candidate cultivars are compared with descriptions held in computer storage and decisions regarding rights based on the outcome. The Americans claim this method is working perfectly well.

The UPOV countries want to see their scheme accepted internationally and lead ultimately to complete reciprocity and acceptance of rights granted in one member state by all the others. UPOV

countries also operate lists of approved cultivars for which agronomic worth is obviously an important criterion. The UPOV countries have built up authorities to test for and grant rights and also to operate approved cultivar lists, and seed certification schemes. They have seed laws which spell all this out in great detail. In many cases the same authority operates both the rights and approved cultivars schemes. In New Zealand we have no seed law.

The U.S.A. has a very strong private enterprise-orientated seed industry. They say the continuing worth of a variety will be decided by the users. Why should they go to the expense of setting up very expensive trial facilities for plant varieties rights when their computer-based scheme is working satisfactorily?

This different approach is the subject of intense discussion between U.S.A. and UPOV. Both sides can see advantages in one internationally accepted scheme for plant breeders rights. UPOV want U.S.A. to join. U.S.A. asks what real advantage is there to them in joining? New Zealand sees merit in being able to operate either or both methods as circumstances dictate. Currently UPOV have appointed a sub-committee to see whether their convention can be interpreted in such a way that the rules would permit U.S.A to join with little upset to their existing practices. We in New Zealand hope they can find such an interpretation.

PLANTS PROTECTED IN NEW ZEALAND

The New Zealand scheme started in 1975 with only roses appearing on the schedule. It is no secret that Sam McGredy hurried the passage of our legislation by his interest in coming to live in New Zealand.

Since then we have added barley, potatoes, peas, annual and perennial ryegrass, lucerne and lotus to the list. The present range of plants is covered by the Plant Varieties Extension Order No. 2 (1976). So far rights have been granted to four varieties of roses. At the moment the registrar has applications for rights for 42 varieties of roses and 13 varieties of barley.

We have been very fortunate to have an agreement with the U.K. Plant Varieties Office wherein we can receive reports on their trials with roses and also send varieties to them for testing. There is a PQ problem with rose material from New Zealand. We are working with the National Rose Society of New Zealand to see if we can use their expertise and trial grounds to obtain reports as a further means by which the registrar may base decisions.

For agricultural crops and pasture species we are fortunate in having access to the facilities and expertise of Crop Research and Grasslands Divisions of D.S.I.R. New Zealand had started to build up its approved cultivars schemes prior to the Plant Varieties Rights legislation so we had a base on which to start. For pasture species Grasslands Division also provides technical skills to carry out the test programme. With agricultural crops Ministry of Agriculture and Fisheries has appointed Mr G. Sparks as a Plant Varieties Technician. Crop Research Division provide the land and equipment and he does the work.

Rights are available in New Zealand for those kinds of plants which appear on the schedule. A New Zealand cultivar must not have been sold prior to making application and an overseas variety must not have been traded for more than four years. The New Zealand legislation is compatible with the UPOV convention and allows for reciprocity.

Our scale of fees is contained in the Plant Varieties Regulations 1975. If the trials required are carried out by Ministry of Agriculture and Fisheries the present scale would mean about \$120 leading to the grant and \$15 per year for the duration of the grant.

There is provision to apply for a protective direction which means your novel plant is protected while the registrar does his investigations.

Under Section 22 of the Act the rights of the grantee are set out clearly.

In broad terms the grantee has the exclusive right to:

- (a) Reproduce for sale, sell or offer for sale whole plants or reproductive material of the plant variety to which the grant relates.
- (b) License others to reproduce or sell or to both reproduce and sell, plants and reproductive material of that plant variety, subject to such conditions as he may impose including the payment of a royalty.

The Minister has some powers to override these rights in the public interest.

Rights do not prevent people from growing the plants for non-commercial purposes or use patented plants in breeding programmes.

The Act imposes some obligation on the grantee to make reasonable quantities of his plant available at a fair price.

The final sections of the Act deal with appeals against the Registrar's decisions and set up the procedures to be followed. As Plant Varieties Rights are a legal matter you should consult the Act and Regulations or write to the Registrar, Mr T. Norris of the Ministry of Agriculture and Fisheries to make sure how the legislation applies to your particular circumstances.

Basically Mr Norris is concerned with the lack of prior commercialisation of candidate cultivars and with the criteria of distinctness, uniformity and stability. The proposed denomination or name is also important. New Zealand hopes to join the international community interested in Plant Varieties Rights but I have outlined some of the problems. We already know of some examples where we cannot get overseas varieties because we do not offer protection for those plants.

The world seems to be heading towards more of this kind of legislation — on the other hand — as a small country we are very conscious of the high costs of operating the schemes. At the moment we are still assessing the overall interest.

THE LEGISLATION

- The Plant Varieties Act 1973
- The Plant Varieties Act Commencement Order 1974
- The Plant Varieties Regulations 1975
- The Plant Varieties Regulations 1975 Amendment No. 1
- The Plant Varieties Act Extension Order 1976
- The Plant Varieties Act Extension Order (No. 2) 1976