

**Study note:** This module should take around 2 hours to study.

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## **Module 10: Protection of New Varieties of Plants**

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### **Objectives**

After completing the study of this module you should be able to:

1. Explain the role of the International Union for the Protection of New Varieties of Plants (UPOV).
2. Explain why new varieties of plants should be eligible for protection.
3. List the requirements that have to be met for a plant variety to be protected.
4. Identify the rights afforded to the rights holder.
5. Define the length of time for which protection can be obtained.

## Introduction

The protection of new plant varieties is another aspect of intellectual property rights, and as such seeks to acknowledge the achievements of breeders of new plant varieties by giving them, for a limited period, an exclusive right. To obtain such protection, the new varieties must satisfy specific criteria.

The organization overseeing the protection of new plant varieties is referred to as UPOV, which is an acronym derived from the French name for the organization, *Union internationale pour la protection des obtentions végétales.*

## **Why protect new varieties of plants?**

Protection is available to a new variety of plants to safeguard the interests of plant breeders as an incentive to the development of improved plant varieties for agriculture, horticulture and forestry. Improved varieties are a necessary and a very cost-effective element in the improvement of the performance and quality of plants of all types.

Breeding new varieties of plants requires a substantial investment in terms of skill, labor, material resources, money and time. The possibility to obtain certain exclusive rights in respect of a new variety of plants provides a successful plant breeder with a reasonable opportunity of recovering his costs and accumulating the funds necessary for further investment. In the absence of plant breeders' rights, these aims are more difficult to achieve, since there is nothing to prevent others from multiplying the breeder's seeds or other propagating material and selling the variety on a commercial scale, without providing recompense to the breeder.

## How can new plants be protected?

The TRIPS agreement allows three types of protection:

1. Through the patent mechanism
2. Through a special ("*sui generis*") system related to plants
3. Or through a combination of both

There is a widely held view that most new plant varieties do not satisfy the non-obvious requirement of a system of patent protection, since they result from activities undertaken with known objectives, and using known technology. This means that using the patent laws system could be difficult. Therefore, most countries tend to have a special ("*sui generis* ") system for the protection of plant varieties.

## SELF-ASSESSMENT QUESTION (SAQ)

**SAQ 1: What is the purpose of protecting the rights of plant breeders?**

- 1. To ensure a continuous supply of new varieties by safeguarding the interests of plant breeders.**
- 2. To ensure that the supply of seeds remains pure and uncorrupted.**

Type your answer here:

[Click here for answer](#)

### **SAQ 1 Answer**

1 is correct. Answer2 is related to quality control of the production of the seed and plants.

## **What are the characteristics of a new plant variety that would enable it to be protected?**

Under the 1991 Act of the UPOV Convention the variety should be:

1. New (or novel)
2. Distinct
3. Uniform
4. Stable and
5. Have a satisfactory denomination

The novelty requirement serves to ensure that the variety has not already been exploited commercially. This is strictly a legal assessment and not a technical assessment. The variety is also required to be designated by a denomination, which will be its generic designation. There are three technical assessments: distinctness, uniformity and stability (DUS). Let's look at each one of these in turn.

### ***Distinctness***

The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety, whose existence is a matter of common knowledge, at the time of filing the application. The exact technical definition of distinctness resides in the biological description of the variety and is beyond the scope of this module. It is sufficient to say that a technical expert would be required to give an opinion on this matter.



### ***Uniformity***

The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics.

Briefly, this means that the plants of a variety should all be the same or very similar, with the degree of similarity depending on the nature of the propagation method.

### ***Stability***

The variety shall be deemed to be stable if the characteristics remained unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

What this means in short is that the variety should remain the same over a period of repeated propagation from seeds or other methods.

Of course all of these last three technical criteria have to be examined before the granting of the breeders' rights. Such technical examinations are conducted by authorized examiners.

## What rights does the holder of protection have?

Under the 1991 Act of the UPOV Convention covering the protection afforded to breeders, the following require the prior authorisation of the rights holder:

1. Producing or reproducing (multiplying)
2. Conditioning for the purpose of propagation
3. Offering for sale
4. Selling or other marketing
5. Exporting
6. Importing
7. Stocking for any of the above purposes

It is important to note that the authorization of the rights holder is **not** required for:

- Acts done privately and for non-commercial purposes
- Acts done for experimental purposes
- Acts done for the purpose of breeding and exploiting other varieties. An exception to this is in the case of essentially derived and certain other varieties which may not be exploited without the authorization of the breeder of the original variety.

Taken literally, the protection under (1) would mean that farmers would need the permission of the right holder to save seed from a crop for planting of the next crop.

However, the 1991 Act of the UPOV Convention contains an optional exception which permits States to exclude farm saved seeds from the scope of the breeder's right and to adopt solutions on the question, which are specifically adapted to their national agricultural circumstances. Virtually all countries which have adhered to the 1991 Act have adopted such a "farmer's privilege" in one form or another.

## How long do the breeder's rights last?

The minimum duration described in the 1991 act is:

- 25 years for trees and vines
- 20 years for other plants

### **Audio segment 1** : *Can a breeder obtain worldwide protection for a plant?*

As with other methods of protection, in many cases the right must be granted in each of the States in which the breeder seeks protection. However, there are some supranational systems in place (e.g. Community Plant Variety Office for members of the European Union) or under development. However, the work of UPOV greatly simplifies this process as it encourages members to recognize the technical testing done in other member States. This greatly reduces the cost and effort needed to get protection in several countries.

## Summary

Protection is available to a new variety of plants to safeguard the interests of plant breeders as an incentive to the development of improved plant varieties for agriculture, horticulture and forestry. Improved varieties are a necessary and a very cost-effective element in the improvement of the performance and quality of plants of all types.

Most countries that have introduced plant breeders' rights have done it using special legislation based on the UPOV Convention, which is administered by the Office of the Union based in Geneva.

In order to be protected, the plant must be:

- New or novel
- Distinct\*
- Uniform\* and
- Stable \*
- Have a satisfactory denomination

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\* Subject of technical examination

Once protection is afforded, the holder of the breeder's rights has the right to prevent the following actions without his/her authorization:

- Production or reproduction (multiplication)
- Conditioning for the purpose of propagation
- Offering for sale
- Selling or other marketing
- Exporting
- Importing
- Stocking for any of the above purposes

Many countries have enacted special legislation, which allows farmers to keep seed or propagating material from one crop for planting of the next.

The minimum length of protection is:

- 25 years for trees and vines
- 20 years for other plants

One of the important roles for UPOV is to help breeders obtain protection in several countries. It achieves this, amongst other means, by encouraging countries to accept test results from other countries that are members of UPOV.

**Legislative Texts:**

- UPOV Convention (1991 Act)
- TRIPS Agreement