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Plant Variety Protection Act Now Covers Asexually Reproduced Plants

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The 2018 Farm Bill included changes to the Plant Variety Protection Act (PVPA) that extends the availability of protection to asexually reproduced plants. Previously, asexually reproduced plants could not receive protection under the PVPA. Rather, asexually reproduced varieties were only eligible for protection under the Plant Patent Statute. Applicants can still receive plant patent protection on these varieties, but now have the option of obtaining PVPA protection.

2018 Farm Bill Amendments to the PVPA

The 2018 Farm Bill made the following (underlined) amendments to the PVPA:

7 USC 2401(a)

(a) DEFINITIONS As used in this chapter:

(1) ASEXUALLY REPRODUCED.

The term “asexually reproduced” means produced by a method of plant propagation using vegetative material (other than seed) from a single parent, including cuttings, grafting, tissue culture, and propagation by root division.

(2) ....

7 USC 2402(a)

(a) IN GENERAL The breeder of any sexually reproduced, tuber propagated, or asexually reproduced plant variety (other than fungi or bacteria) who has so reproduced the variety, or the successor in interest of the breeder, shall be entitled to plant variety protection for the variety, subject to the conditions and requirements of this chapter, if the variety is—

(1) new ...
(2) distinct ...
(3) uniform ...
(4) stable ....

7 USC 2541(a)

(a) ACTS CONSTITUTING INFRINGEMENT Except as otherwise provided in this subchapter, it shall be an infringement of the rights of the owner of a protected variety to perform without authority, any of the following acts in the United States, or in commerce which can be regulated by Congress or affecting such commerce, prior to expiration of the right to plant variety protection but after either the issue of the certificate or the distribution of a protected plant variety with the notice under section 2567 of this title: ...

(3) sexually or asexually multiply, or propagate by a tuber or a part of a tuber, the variety as a step in marketing (for growing purposes) the variety(1) ....
....

7 USC 2568(a)

(a) Each of the following acts, if performed in connection with the sale, offering for sale, or advertising of sexually or asexually reproducible plant material or tubers or parts of tubers, is prohibited, and the Secretary may, if the Secretary determines after an opportunity for hearing that the act is being so performed, issue an order to cease and desist, said order being binding unless appealed under section 2461 of this title:

(1) Use of the words “U.S. Protected Variety” or any word or number importing that the material is a variety protected under certificate, when it is not.
(2) Use of any wording importing that the material is a variety for which an application for plant variety protection is pending, when it is not.
(3) Use of either the phrase “Unauthorized Propagation Prohibited” or “Unauthorized Seed Multiplication Prohibited” or similar phrase without reasonable basis. Any reasonable basis expires one year after the first sale of the variety except as justified thereafter by a pending application or a certificate still in force.
(4) Failure to use the name of a variety for which a certificate of protection has been issued under this chapter, even after the expiration of the certificate, except that lawn, turf, or forage grass seed, or alfalfa or clover seed may be sold without a variety name unless use of the name of a variety for which a certificate of protection has been issued under this chapter is required under State law.

These changes went into effect on December 20, 2018.

Closing A Gap In Plant Protection

Prior to these changes, a gap existed in the protection of asexually-reproduced plants in the U.S. Under the Plant Patent Act, a breeder with a U.S. plant patent – the only protection then-available for asexually-reproduced plants other than utility patents – could only exclude others from asexually reproducing the protected variety, and from using, offering for sale, or selling plants or any parts derived therefrom. Thus, others were free to use the protected variety to generate new varieties – even varieties that retained the essential characteristics of the parent variety – so long as they avoided asexual reproduction of the protected variety. This permitted third parties to generate mutations in a protected variety – whether through classic mutagenic techniques, gene-editing technology, or introduction of exogenous genetic material – to create new varieties of a protected asexually-reproduced variety with no recourse for the original breeder.

While the PVPA allows others to use a protected variety for breeding, the new varieties generally remain subject to the rights of the owner of the initial variety if they are predominantly derived from a protected variety, are clearly distinguishable from the protected variety, and conform to the protected variety in the expression of essential characteristics resulting from the genotype or combination of genotypes of the protected variety. This essential derivation framework gives original breeders a metric of similarity that protects against others effectively copying their germplasm and leaves other breeders free to pursue and create wholly new varieties. Prior to enactment of the Farm Bill, sexually-reproduced varieties benefited from this protection while asexually-reproduced varieties did not.

The PVPA requirements for novelty have not changed. The variety must be new in the sense that prior to the application filing "propagating or harvested material of the variety has not been sold or otherwise disposed of to other persons, by or with the consent of the breeder, or the successor in interest of the breeder, for purposes of exploitation of the variety," as set forth in 7 USC § 2402(a). The sale of cut flowers or hybrid seed harvested from a variety may constitute a bar to PVPA protection of that variety. However, the PVPA affords breeders a one-year grace period for sales or disposition by or on behalf of the breeder as an integral part of experimentation or testing or to increase the variety. In addition, the PVPA extends the grace period to four and six years for sale or exploitation outside the U.S. for non-woody and woody species, respectively, under 7 USC § 2402(a)(1) and these grace periods now apply equally to asexually-reproduced plants.

The term of protection stays the same and is 20 and 25 years from date of issue for non-woody and woody species, respectively, under 7 USC § 2483.

The U.S. Plant Variety Protection Office (PVPO) is expected to soon issue proposed changes to the rules to implement the Plant Variety Protection Act. To date, it appears from the PVPO’s public database that only a few breeders have taken advantage of the new legislation and filed applications to asexually-reproduced varieties. This may be due to the fact that breeders are awaiting adoption of the new rules to clarify application requirements, including specimen deposit requirements,

which are certain to differ from those imposed on sexually-reproduced plants.

Why Choose The PVPA?

There may be certain situations where pursuing PVPA protection will benefit those who wish to receive protection on their asexually reproduced varieties. For example, if the variety has been sold outside of the U.S. more than one year ago, an application for a Plant Patent is barred, but one could still file for PVPA protection if the sale was an integral part of a testing program by or on behalf of the breeder of ir the sale is within four years or six years (for trees/vines) of the sale.

Also, PVPA protection is generally longer than Plant Patent protection. The protection extends for 20 years or 25 years (for trees/vines) from the date of issue as opposed to 20 years from the date of filing a plant patent application. Although there are breeders' exceptions on PVPA protection which are not available for Plant Patents, the extension of term and availability of protection when other forms of patent protection are barred will make PVPA protection on asexually reproduced plants attractive to many applicants.

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