



QUESTIONS & ANSWERS

ON INFRINGEMENTS AND ENFORCEMENT IN VEGETABLES

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1. My variety is listed in the National or in the EU Common Catalogue. Is my variety now protected against propagation by others? Can seeds of this variety which are propagated by others be freely sold? If yes, under what conditions?

By being accepted for listing the variety does not become protected. Variety listing and variety protection are two different issues. Listing on the national or the EU Common catalogue is a prerequisite for marketing a variety on the national or the EU level so it provides access to the market. However, if a variety fulfills the criteria for being marketed and is accepted for listing does not mean that the variety also meets the criteria for protection (and vice versa). For getting protection for a variety an application for plant variety protection has to be submitted at the national plant variety office or the [CPVO](#) and the related fees have to be paid. In order to get protected the variety has to be distinct, uniform, stable and new and has to have an acceptable denomination. Plant variety protection at EU level is governed by [Regulation 2100/94](#).

Seeds of an unprotected variety propagated by someone else than the party who listed it can be sold according to the rules of the seed marketing legislation. In case of vegetables it means in practical terms that the seeds can be sold under a suppliers' label if it meets the requirements laid down in [Directive 2002/55/EC](#).

2. My variety is not protected. Someone else is selling the same variety using his own company name and logo. Is this legal?

Yes it is legal until the sales are done according to the rules of the seed marketing legislation. See also the answer for question 1.

3. My variety is not protected. Someone else is selling the same variety using my company's name and logo. Is that legal?

No, it is not. Such an act is against fair commercial practices so in any event such an act gives rise to an action on the grounds of unfair competition.

Furthermore, company logos are usually protected by companies as trademarks or under copyright law and therefore the unauthorized use of your company's logo is trademark or copyright infringement. Similarly, in many cases the company name is also protected via trademarks or copyright.

4. My variety is not protected. It is listed in the national / EU catalogue. Someone else is using my variety name while offering a different seed. Is this permitted?

In case your variety name is used for another variety of a completely different species it is permitted.

However, within the same species from a seed marketing legislation point of view it is not allowed. A variety name is attached to a specific product, a specific plant variety and under the same name it is not possible to sell different genetics. Such an action would be an infringement of public law. On the other hand, such an act would also amount to unfair competition since the party selling a different variety under your variety's name would draw profit from the reputation of your variety or possibly could damage your variety's/company's image and reputation.

5. What steps can I take if someone propagates my unprotected variety by taking cuttings?

6. What steps can I take if someone propagates my unprotected variety by reproducing seeds?

In order to prepare for such situations it is advisable to use some contractual clauses and say in there that propagation is not allowed. It however does not substitute IP rights, it will "only" constitute a legal base for action under contract law the enforcement of which might not be evident.

In case no preventive step as described in the above paragraph was taken the possible actions rather depend on what is then done with the propagated material. If the material is sold on the market and the sales is not conform to the seed marketing legislation action can be taken on the basis of infringement of public law. If one of the cases presented under questions 3 and 4 also occur action under unfair competition is also possible.

7. How do I protect an F1 hybrid variety? Protect the parent lines? Is it sufficient to protect only the F1 hybrid?

In order to have protection on an F1 hybrid protecting the hybrid variety itself for sure is sufficient. According to the UPOV Convention a hybrid can also enjoy protection via the protection of its parent lines. However, concerning the scope of the protection of the hybrid via its parent lines there are some legal uncertainties. For more information on ESA's position on this question please contact the [ESA Secretariat](#).

8. My variety has been granted protection by the CPVO. Does this by itself give me adequate 'security' against infringement? If not, what other preventive steps should I take?

The fact that a variety enjoys protection gives a good basis to fight against infringements. However it is suggested to combine the protection with further preventive elements which – in the end – serve the interest of the right holder as they reinforce the basis for action against infringements. An extensive list of such additional tools can be found in the “enforcement toolkit”.

9. What is a bag tag? What does it look like?

A bag tag is an indication which is intended to provide information to the buyer of the seed. For instance, in case of protected varieties a bag tag can serve as a reminder for the users giving an indication of the acts which constitute infringement of the plant variety right. The bag tag can be a print on the seed bag or a label / document accompanying the seed bag.

NB: a bag tag does not replace protection and you should not indicate more acts as illegal on your bag tag as forbidden by the legislation.

You can find an example of a bag tag in the “enforcement toolkit”.

10. What should I do if I have suspicions of someone propagating my protected variety?

In case you have a suspicion that your protected variety might be propagated without your authorization you should immediately try to gather evidence of this infringing act. The most straightforward ways of getting evidence can be either buying the infringing material on the market or collecting evidence in the premises of the infringer (if such access is allowed under the national law). It is important to legally (i.e. against an invoice) collect the necessary evidence as soon as possible and test it. However it has to be underlined that in most cases evidence collected by companies involved in a case has no value in court proceedings. Therefore, you always have to check in the applicable national legislation how evidence has to be presented in official proceedings so that it is accepted by the courts.

On the other hand, you should also contact AIB immediately when you have such suspicion to get help and advice.

11. How should I let my customers know that they are buying a protected variety?

Provide information to them on the protected status of the variety. There are several ways of providing such information: you can indicate if the variety is protected in your catalogue, among the information you provide on your products on your website or in any other communication towards customers. It is a decision of the company if and how such information is provided.

However, in most national laws, in case the infringer is a professional (a grower for instance) his claim that he did not have information about the protected status of the variety is not accepted by courts.

12. How can I monitor that my customer is not propagating my protected variety?

First of all, as a precaution, always put certain clauses into the contract you sign with your customer where you specify that the variety is protected and that propagation of the variety is not allowed (or is only allowed in respect of a defined amount). Furthermore, make sure that you have the possibility to enter the premises of your customer in order to be able to check whether the contractual obligations are respected.

You can find model clauses for this purpose as well as further suggestions in the “enforcement toolkit”.

13. What should I do if I have proof that someone is infringing my PVR?

First of all assess the circumstances of the infringement and the infringer, in particular because the steps you should take depend on the situation. It may happen that the infringer committed the infringement with good intentions and in such cases a warning letter may be enough to make him aware of your rights and to make sure that he does not do such acts in the future. However, in cases where the infringer is a professional and notorious infringer you should not try to settle the case amicably but rather go for official proceedings.

You should also contact AIB for advice.

14. Can the Customs stop any imports of harvested products at the border which originate from infringement actions on my PVR?

Yes. The scope of PVR (in countries bound by UPOV 1991) extends to the harvested material which has been obtained via the unauthorized use of the propagating material of the protected variety. However, you can only take action on the basis of the harvested material if you did not have a reasonable opportunity to act on the propagating material.

Example:

Variety 'X' is protected in Country A. Propagating material of variety 'X' is exported without the breeder's authorization to Country B. The breeder did not have a reasonable opportunity to exercise his right on the propagating material exported from Country A. Country B does not grant and protect breeders' rights. Variety 'X' is then propagated in Country B and the harvested material is imported into Country A.

In this example, the breeder can exercise his right on the imported harvested material (i.e. customs can stop the material) in Country A because:

- (i) there was unauthorized use (i.e. export) of propagating material; and
- (ii) the breeder did not have a reasonable opportunity to exercise his right in Country A in relation to the propagating material exported to Country B.

For more information on actions by Customs authorities please refer to the 'enforcement toolkit'.

15. If I have a non-protected variety can I still claim rights on it by contract?

In case you sell material of your non-protected variety to growers in the contract you sign with them you can include conditions and obligations the buyer is supposed to respect. Among these you can state that the buyer cannot do certain acts with the material. Such contractual stipulations however do not replace IP protection and will "only" constitute a legal base under contract law to act against the grower should he not respect his contractual obligations. The enforceability of such contractual provisions largely depends on national law and may vary from country to country. Therefore you should check the applicable national legislation.

16. What countries are covered by CPVR?

A protection title granted by the CPVO covers the 28 Member States of the European Union. This means that by obtaining CPVR protection you have a title which grants your variety protected status on the territory of the whole EU.

Novelty criterion: does the one year period to seek protection also apply to parent lines? In other words, if an F1 hybrid has been brought to market, without seeking protection, can the parent lines still be protected 2 years after that moment? Would it be different if the F1 is protected?

If the F1 was marketed but the parent lines were not the fact that the F1 is on the market since 2 years should not destroy the novelty of the parent lines because it is a different variety. The novelty criterion refers to the variety you want to protect which in this case is the parent line and not the F1.

For this purpose see the text of the CPVR Regulation: Article 10: "A variety shall be deemed to be new if, at the date of application determined pursuant to Article 51, variety constituents or harvested material of the variety have not been sold or otherwise disposed of to others, by or with the consent of the breeder within the meaning of Article 11, for purposes of exploitation of the variety: (a) earlier than one year before the abovementioned date, within the territory of the Community;". The same provision can also be found in Article 6 of UPOV 1991.

The fact if the F1 is protected or not does not change anything to the question.

18. How about PVP in third countries?

If the third country you are looking at is a member of UPOV it means that the third country in question has a UPOV-type national PVP law. However the fact that a country is not a UPOV member does not automatically mean that it has no national PVP law. This is the case for India and Thailand which are not UPOV members but have their own national PVP legislation.

You can check on the [UPOV website](#) whether the country you are looking for is a member of UPOV and by which version of the Convention is it bound. You can also access the English version of the [national PVP laws](#) of UPOV members.