The Latest In Plant Variety Rights: Part I

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GROWTH IN PLANT VARIETY RIGHTS

Interest in obtaining plant variety rights (PVR) has grown rapidly in recent years. Back in mid-1990 there were 588 plant varieties protected under the Plant Variety Rights Act 1987. By the middle of 1995 the number of protected varieties had grown to 1035. With numbers of this order, those of you who are working in the horticultural industry are probably unavoidably involved with protected varieties. In saying this I am not trying to paint a picture of plant variety rights being an unavoidable evil. It is quite the contrary. I believe that the growing interest in plant variety rights is an indication that people in the industry see plant variety rights in a positive light, as a means of obtaining constructive investment in horticulture.

GROWTH IN THE INTERNATIONAL PLANT VARIETY RIGHTS ORGANISATION

UPOV, the InternationalUnion for the Protection of new Varieties of Plants, is also growing steadily. Six years ago there were 17 member States, now there are 27.

This growth is likely to continue for some time as a result of the finalisation of the Uruguay Round of the GATT Agreement in 1994. Most, if not all, countries in the world have signed the agreement and have become members of the World Trade Organisation. Countries that are members of the World Trade Organisation are required, if they have not already done so, to provide for a national system of plant variety protection. The logical thing for any such country is to introduce a system of plant variety protection following the UPOV model.

The more countries that belong to UPOV, the more opportunities there will be for New Zealand breeders to protect their varieties abroad.

A particular problem that has faced New Zealand breeders in the past is gradually lessening. While many countries such as those in Western Europe or Japan have had plant variety protection schemes for many years, they offered protection only for certain specified genera. They have not offered protection for the whole plant kingdom as New Zealand has done for the last 15 years. These countries are now moving to extend their schemes. Some, such as Germany and The Netherlands, have already opened up their schemes to the whole plant kingdom, while others are moving in this direction.

WHAT CHANGES CAN BE EXPECTED IN THE FUTURE?

The Plant Variety Rights Act 1987 is to be amended at some time in the future. We had hoped this would have occurred by now but for various reasons it has not.

New Zealand must amend the Act in order to bring it into conformity with the UPOV Convention as rewritten in 1991. There will be some significant changes made. Some of the more important are the following.

Terms of Grants Are to Be Extended. Presently a PVR grant can remain in force for 23 years for a woody plant and 20 years for a non-woody plant. In future the term will be 25 years for any kind of plant.

Breeders to Have More Comprehensive Rights. At present the holder of a PVR has the limited exclusive right to propagate the variety for sale and to sell reproductive material.

Under the amended Act a holder of a PVR will be able to prohibit others from the following acts: production and reproduction (multiplication), conditioning for the purpose of propagation, offering for sale, exporting, importing, stocking for any of the purposes above.

One interesting change concerns varieties propagated by a municipal authority, such as a parks and reserves department. At present such an authority can buy a few bushes of a protected rose variety and then in its own nursery is free to propagate, from those few bushes, new bushes in large numbers, perhaps in the thousands. These could then be planted out for public display in parks or traffic islands. Such large scale propagation could be done quite legally without getting the approval of the PVR holder, or without paying him or her any royalties.

At present a PVR gives the holder rights over the propagating material only. Under the amended Act, if the breeder is unable to exercise his right over the propagating material, he will be able to exercise his right over the material harvested from the propagating material. If, for example, a rose breeder is unable for some reason to exercise his right over the propagation of his/her protected rose variety, he/she will be able to exercise his/her right over the sale of cut flowers of the variety.

Essential Derivation. A significant change will be the introduction of the entirely new concept of "essential derivation". It is being introduced to meet a specific concern raised by certain breeders in the past. It can happen that a breeder follows a long and costly breeding programme which results in a superior variety with considerable commercial potential. He protects it by PVR and releases it onto the market. However, soon after its release a mutation appears in a grower's crop that differs from the original variety in some characteristic which, while it might be commercially unimportant, is sufficient to make the mutation a distinct variety for PVR purposes. Despite the fact that the grower has put in only a minimal breeding effort compared with that of the original breeder, he is able to obtain a PVR for the mutation and is free to sell the mutation in competition with the original variety. The original breeder's returns can be greatly reduced. Under the amended Act, such a mutation would be regarded as an essentially derived variety and its discoverer would be unable to sell material of it without the approval of the original breeder. When such a situation arises in the future under the new law, one would expect that it would be in the mutual interest of the two persons to get together and reach an agreement to sell the variety, perhaps under a royalty-sharing arrangement.