

Intellectual Property Rights for New Plant Varieties

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Abstract:

Intellectual property has witnessed many developments that have broadened its subjects. Among the new fields related to it are plant varieties, which represent an intellectual creation that must be protected from any infringement, so that the efforts of their innovators are not lost. Based on this, international efforts to establish such protection crystallized with the emergence of the International Convention for the Protection of New Varieties of Plants dated December 2, 1961, and subsequent agreements. At the national level, this was reflected by the enactment of the law relating to seeds, seedlings, and the protection of plant holdings on February 6, 2005. All these aims to strengthen the legal protection of these new plant varieties and encourage and promote intellectual creativity.

Keywords: Intellectual property, plant variety, innovator, legal protection

Introduction:

It is known that intellectual property rights apply to creativity, meaning the invention of something new that was not previously known. The creative idea forms in the mind of the innovator and then is embodied in a tangible material form. Amidst the transformations witnessed by the contemporary world in various fields, intellectual property has not been exempt from this development. Among the topics that have emerged due to these transformations is the major revolution in agricultural production, accompanied by large investments aimed at creating new plant varieties. Since this invention is a mental creation, it is closely related to intellectual property.

Since we are talking here about a new variety different from all previous plants that serve as the origin for this creative plant, it must be protected. This means that the new plant variety is the material vessel in which the creative idea subject to protection appears. It is noticeable that comparative legislation has only recently paid attention to providing protection for newly invented plant varieties, especially in light of the revolution caused by biotechnology in the agricultural field. This was accompanied by spending considerable time and money to develop new plant varieties with desired quality and quantity traits. All these factors led various countries to seek sufficient protection for new plant varieties. What encouraged the commitment to protect

plant varieties is that they represent the lifeblood of life, providing environmental, economic, and social benefits.

Therefore, various countries have sought to generalize the protection of new plant varieties and guarantee the rights of their innovators. These efforts culminated in establishing an international legal framework ensuring the legal protection of new plant varieties, manifested by the signing of the International Convention for the Protection of New Varieties of Plants, known as the UPOV Convention, dated December 2, 1961, and amended on March 19, 1991. This convention recognized, for the first time, that new plant varieties are subjects of intellectual property by acknowledging the rights of their innovators to obtain protection rights in return for their intellectual effort. The Algerian legislator did not deviate from this convention, as it issued Law No. 05-03 dated February 6, 2005, relating to seeds, seedlings, and the protection of plant holdings. Accordingly, the question posed here is: What does the legal protection of new plant varieties consist of? To answer this question, this research is divided into two sections:

- **Chapter One: The conceptual framework of new plant varieties.**
- **Chapter Two: Protection of the rights of the innovator of the new plant variety.**

Chapter One: The Conceptual Framework of New Plant Varieties

First: Definition of New Plant Varieties:

A plant variety is a group of plants within the scope of a single taxonomic classification at the lowest known rank, distinguished by its specific genetic characteristics¹. For example, the citrus family is divided into several genera, including orange and lemon. The orange tree is a genus within the citrus family, which is divided into species. Among the orange species are Baladi, Sukari, and Abu Sirah. Each species is divided into several varieties, such as the Thompson and Washington varieties of orange. Article 1, paragraph 6, of the International Convention for the Protection of New Varieties of Plants ²defines “variety” as a group of plants distinguished by characteristics resulting from a particular genetic makeup or a set of genetic compositions and distinguished from any other group of plants by at least one of these characteristics, considered as a unit due to its ability to reproduce unchanged.

From the above definition, it is noted that the International Convention for the Protection of New Varieties of Plants does not specify the method of producing the variety, whether by biological means or genetic engineering techniques. Meanwhile, paragraph three of Article 3 of Law No. 05-03 related to seeds, seedlings, and the protection of plant holdings ³defines a plant variety as any crop, clone, pure strain, or hybrid origin, sometimes an original or selected origin, cultivated or capable of cultivation, with distinct, uniform, and stable traits. Article 24 of the same law adds that a plant variety is described as a plant holding that is new, created, discovered, or bred,

¹ Reda Abdel Halim Abdel Majid, *The Legal Regime of Disasters Affecting Animal and Plant Species*, Dar Al Nahda, Egypt, 2005, p. 147

² The International Convention for the Protection of New Varieties of Plants dated December 2, 1961, amended on March 19, 1991, known as the UPOV Convention (International Union for the Protection of New Varieties of Plants).

³ Law No. 05-03 dated February 6, 2005, relating to seeds, seedlings, and the protection of plant holdings.

resulting from a distinct genetic stage or a special combination of genetic phases, distinguished from all other plant groups forming an independent entity due to its ability to reproduce.

A genetically modified plant variety is also defined as a variety whose genetic composition is altered by humans through genetic engineering technology by changing its original genetic traits or some of these traits, or by introducing one or more new traits transferred from another organism, to obtain a new variety carrying the traits of another plant variety that could only be obtained by using genetic engineering technology.⁴

Therefore, protection cannot, under any circumstances, extend to cover an entire family or genus, nor extend to a species, but is limited to the new plant variety. Thus, the plant family is divided into genera, genera into species, species into varieties, and the variety is the lowest known rank in plant classification.⁵

Second: Conditions Required for the New Plant Variety:

To protect a new plant variety, several conditions must be met:

- **Objective Conditions:**

- **Novelty:** This means that the new plant variety has not been previously marketed or distributed by any means. Novelty has two aspects: a positive aspect where the plant variety is new and was not previously known, and a negative aspect which is the non-disclosure of the secret of this new plant variety. Here, there is an obligation on employees of companies and institutions working on breeding new types of seeds and plant varieties not to disclose trade secrets⁶. The International Convention for the Protection of New Varieties of Plants⁷, in Article 6 and subsequent articles, states that a variety is considered new if its innovator has neither sold nor authorized others to sell the reproductive or propagation material of the variety or its harvest, nor has these materials or harvest been otherwise exploited for commercial purposes:
 - a) In the state where the application was filed for more than one year before the filing date.

- b) In the territory of any other state than the filing state for more than four years, or six years if the protection request concerns trees or vines.**

The burden of proof lies on the innovator of the new plant variety, as they have the interest in proving that the prescribed time period has not expired, using all means of proof, most

⁴ Abderrahmane Rabah, Al-Mawsous Atou, *Requirements for the Clearance of Genetically Modified Plant Varieties in Algerian Legislation*, International Journal of Legal and Political Research, University of El Oued, Vol. 8, No. 1, May 2024, p. 381.

⁵ Essam Ahmed El-Bahgy, *Intellectual Property Rights of Genetically Modified Plant Varieties*, New University Publishing House, Egypt, 2007, p. 43.

⁶ Ibid., p. 92.

⁷ The International Convention for the Protection of New Varieties of Plants dated December 2, 1961, amended on March 19, 1991, known as the UPOV Convention (International Union for the Protection of New Varieties of Plants).

importantly presenting evidence proving the date of marketing, distribution, or exploitation of the variety.⁸

Article 24 of the law on seeds, seedlings, and the protection of plant holdings⁹ stipulates that the novelty condition must be met for the plant variety to be protected. According to Article 28 of the same law, novelty means that the new plant variety has not been marketed or distributed either by the holder or any of their affiliates with their consent for commercial purposes before the date of filing the protection application. It also means that no prior application for protection of the plant variety¹⁰ has been submitted to the competent authority. Novelty may relate to new morphological or physiological traits or a new combination of known traits.¹¹

Regarding the specificity of the novelty requirement that must be met by the new plant variety, the mere existence of the variety initially in nature does not constitute a precedence that removes the novelty condition, provided that the innovator presents all that may prove and demonstrate that the technical intervention is credited for this new form of the product, which was not previously known or existing¹². Considering that the modification of plant varieties originally relies on elements pre-existing in nature, however, due to the significant role of human intervention in this process through the use of genetic engineering techniques, it can be said that these hybrid varieties leave the scope of natural products to be considered among human-made products—that is, those products that nature cannot produce on its own but are achieved through human intervention and influence on natural activity.¹³

- **Distinctness:** This means the variation and difference between the new plant variety and the other previously known plant varieties, so that there is no complete agreement between the new variety and the other known varieties. This is what the International

⁸ Nasr Abu Al-Futouh Farid Hassan, *Protection of Intellectual Property in the Field of Medicine*, New University Publishing House, Egypt, 2007, p. 155.

⁹ Law No. 05-03 dated February 6, 2005, relating to seeds, seedlings, and the protection of plant holdings.

¹⁰ Adli Mohamed Abdel Karim, Jedi Najat, *The System of Protection for New Plant Varieties under the Intellectual Property Regime*, Al-Mi'yar Journal, Tissemsilt University Center, Vol. 12, No. 1, 2021, p. 215.

¹¹ Mariam Farhat, *Protection of Plant Varieties within the Framework of Algerian Legislation and International Conventions*, Master's Thesis in Law, Faculty of Law Ben Aknoun, University of Algiers, 2014, p. 13.

¹² Mohyawfi Fatima, *Protection of Genetically Modified Products*, Master's Thesis in Private Law, University of Algiers 1, Saïd Hamdine Faculty of Law, 2014, p. 85.

¹³ Houria Souiki, *Specificity of the Provisions for Obtaining a Biotechnological Patent*, Journal of International Law and Development, University of Mostaganem, Vol. 10, No. 2, 2023, p. 302.

Convention for the Protection of New Varieties of Plants¹⁴ indicated in Article 7, which requires that for a variety to be considered distinct, this distinctness must be clear compared to any other known variety that was publicly known at the date of filing the application. Another variety is considered publicly known if a specific action was taken against that variety, such as the innovator having filed a protection application in any country or registered it in the official plant variety registry there from the filing date, provided that the application was accepted and protection granted or the variety registered in the official registry, as the case may be.¹⁵

The Algerian legislator affirmed this condition in Article 3 of Law No. 05-03 relating to seeds, seedlings¹⁶, and the protection of plant holdings, which states: the variety must be distinguished from other varieties registered in the official catalog by different characteristics that may be morphological or physiological in nature.

Thus, the new plant variety must be different from the other known plant varieties, and this difference must be clear and apparent and easily detectable. However, in many cases, it is difficult to detect this distinctness described as clarity and appearance due to its connection with technical and scientific issues. Here, it is necessary to resort to experts and specialists to determine whether the new variety to be protected is distinct from other varieties or not.

It is worth noting that for a variety to be considered distinct, it must retain those traits during propagation and reproduction, even though the Algerian legislator did not explicitly mention this condition. The inability of the plant variety to maintain its characteristics during propagation or reproduction causes it to lose its distinctness, thus nullifying the distinctness condition and consequently making protection unattainable.¹⁷

- **Uniformity:** Uniformity of the plant variety means the consistency and uniformity of its traits and characteristics without variation or difference in these traits. In other words, there is a kind of conformity in these new traits, which form the basis for considering it a new variety, while taking into account the expected variations in the essential characteristics of the variety inherent to its reproduction process. This means absolute

¹⁴ The International Convention for the Protection of New Varieties of Plants dated December 2, 1961, amended on March 19, 1991, known as the UPOV Convention (International Union for the Protection of New Varieties of Plants).

¹⁵ Abdel Rahim Antar Abdel Rahman, *Patent and Its Protection Standards*, Dar Al Fikr Al Jami'i, Egypt, 2009, p. 344.

¹⁶ Law No. 05-03 dated February 6, 2005, relating to seeds, seedlings, and the protection of plant holdings.

¹⁷ Adli Mohamed Abdel Karim, Jedi Najat, *The System of Protection for New Plant Varieties under the Intellectual Property Regime*, 2021, p. 217

uniformity is not required, as the expected variations in characteristics accompanying reproduction do not negate the existence of uniformity.¹⁸

Article 8 of the International Convention for the Protection of New Varieties of Plants¹⁹ stipulates this condition, stating that a variety is considered uniform if its essential characteristics are sufficiently uniform, taking into account the expected variation in traits during reproduction. The Algerian legislator also stipulated this condition in Article 3 of the law relating to seeds, seedlings, and the protection of plant holdings, which states that the plant variety²⁰ submitted for registration must be uniform in the totality of its known traits.

- **Stability:** Stability of the plant variety means the ability of the variety to retain its distinctive characteristics upon repeated cultivation and reproduction, as the stability of the plant's characteristics leads to the stability of its yield and production. Some specialists emphasize that stability must relate to the yield itself. For example, a new wheat plant that produces a specific amount of yield should maintain this yield amount consistently without change²¹. Article 3 of the law on seeds, seedlings²², and the protection of plant holdings addresses this condition, stating: A variety is any distinguished, uniform, and stable crop. Paragraph 12 of the same article adds that the variety must be stable in all its known traits during reproduction.
- **Formal Conditions:** To protect the new variety, it must meet certain formal conditions, including:
- **Name:** Each new plant variety must have a name that identifies it and distinguishes it from other varieties²³. Article 20 of the International Convention for the Protection of New Varieties²⁴ of Plants requires that the variety be designated by a name considered a

¹⁸ Nasr Abu Al-Futouh Farid Hassan, *Protection of Intellectual Property in the Field of Medicine*, *ibid.*, p. 156.

¹⁹ The International Convention for the Protection of New Varieties of Plants dated December 2, 1961, amended on March 19, 1991, known as the UPOV Convention (International Union for the Protection of New Varieties of Plants).

²⁰ Law No. 05-03 dated February 6, 2005, relating to seeds, seedlings, and the protection of plant holdings.

²¹ Nasr Abu Al-Futouh Farid Hassan, *Ibid.*, p. 157.

²² Law No. 05-03 dated February 6, 2005, relating to seeds, seedlings, and the protection of plant holdings.

²³ Essam Ahmed El-Bahgy, *Intellectual Property Rights of Genetically Modified Plant Varieties*, *Ibid.*, p. 110.

²⁴ The International Convention for the Protection of New Varieties of Plants dated December 2, 1961, amended on March 19, 1991, known as the UPOV Convention (International Union for the Protection of New Varieties of Plants).

definition of the variety's genus, and the chosen name must differ from any other name. This is similarly stipulated in Article 27 of the law on seeds, seedlings, and the protection of plant holdings²⁵, which also requires that the name not be composed solely of numbers and not cause confusion regarding the characteristics, value, or identity of the plant variety.

- **Legitimacy of Source:** This condition requires that the plant source from which the innovator obtained the new plant variety be legitimate, not stolen or acquired in a manner contrary to legal provisions.²⁶
- Also, according to the International Convention for the Protection of New Varieties of Plants²⁷, procedures for obtaining protection for genetically modified plant varieties must be followed, as detailed in Articles 10, 11, and 12 of the convention, which are as follows:
- **Filing the Application:** The concerned party submits an application to the administrative authority responsible for receiving applications, as designated by national legislation in the relevant countries. Subsequently, the applications are examined to ensure they meet the protection requirements. The competent administrative authority may subject the plant variety to necessary tests or assign others to cultivate the variety or conduct those tests, or it may rely on previous test results already conducted. It may also require the innovator to provide all necessary information, documents, and materials for examination. Once the conditions for granting protection are confirmed, the new plant variety is granted protection.

In Algeria, the National Technical Plant Authority, whose establishment is stipulated under Article 4 of the Law on Seeds, Seedlings, and Protection of Plant Holdings²⁸, is the specialized body responsible for examining applications for the protection of new plant varieties. It operates under the supervision of the Minister in charge of Agriculture and consists of a National Committee for Seeds and Seedlings that includes inspectors, technicians, and technical committees, represented by:

- The technical committee responsible for the protection of plant holdings, i.e., the protection of new plant varieties.
- The national committee responsible for the certification of varieties.
- The technical committee responsible for granting production and sales authorizations for seeds and seedlings.

²⁵ Law No. 05-03 dated February 6, 2005, relating to seeds, seedlings, and the protection of plant holdings.

²⁶ Essam Ahmed El-Bahgy, *Ibid.*, p. 119.

²⁷ The International Convention for the Protection of New Varieties of Plants dated December 2, 1961, amended on March 19, 1991, known as the UPOV Convention (International Union for the Protection of New Varieties of Plants).

²⁸ Law No. 05-03 dated February 6, 2005, relating to seeds, seedlings, and the protection of plant holdings.

Also, a sample of the new plant variety must be deposited so that the National Technical Plant Authority can verify the innovation in the new plant variety. This sample is subjected to the required tests and examinations, as description through documents and written certificates alone is insufficient, due to the specificity of botany. Payment of fees for the new plant variety is also required, with the amount and collection method determined by the Finance Law. Failure to pay these fees results in the forfeiture of the right to protection.²⁹

Chapter Two: Protection of the Rights of the Innovator of the New Plant Variety

Innovation in the field of plants was not previously subject to any rights. However, this position has changed with increasing interest in granting intellectual property rights protection to creativity and innovation in the plant field, especially after the expanded role of private companies in advanced countries' agricultural research, particularly in agricultural biotechnology research³⁰. New plant varieties increase farmers' ability to raise productivity and improve product quality, which is not easily achieved and requires substantial material and financial resources. This necessitates protecting these investments against any unauthorized use of these plant varieties.³¹

First – Moral Rights of the Innovator of the New Plant Variety

Intellectual property grants the creator important moral rights, considering that the honor and reputation that distinguish the creator from others are the ultimate goal for many innovators. When discussing the moral right of the innovator of the new plant variety, we start from linking the innovator as a creator with the intellectual work done. Creativity is the product of the creator's mental effort, and this link leads to the logical conclusion that the innovator of the new plant variety must enjoy all moral rights related to the protected plant variety.

The moral right expresses a set of features that prove the person's connection to their intellectual output, granting them full authority over this production as it originates from them and reflects their personality. Thus, this right is related to personality rights. The personal scope of legal protection means determining the right holder, i.e., the beneficiary of protection, who here is the holder of the plant variety certificate according to Article 32 of Law 05-03³². Accordingly, the innovator has the eternal right to attribute this innovation to themselves by registering their name

²⁹ Farhat Hamo, *The Legislative Regulation of Industrial Property Rights and Its Role in Development*, Egyptian Publishing and Distribution, Egypt, 2018, p. 169.

³⁰ Islam Belil, *New Plant Varieties Between Genetic Use Restriction Technology and Intellectual Property Mechanisms*, Journal of Comparative Legal Studies, University of Chlef, Vol. 7, No. 2, 2021, p. 1544.

³¹ Farha Zarawi Saleh, *Al-Kamil fi al-Qanun al-Tijari* (The Complete in Commercial Law), Ibn Khaldoun Publishing House, Algeria, 2006, p. 42.

³² Law No. 05-03 dated February 6, 2005, relating to seeds, seedlings, and the protection of plant holdings.

on it, and this right cannot be subject to seizure or disposition. Any action involving the moral right is null and void by law.³³

Second – Financial Rights of the Innovator of the New Plant Variety

It is known that intellectual property rights grant their holder, the creator and right owner, financial rights allowing them to monopolize and exclusively enjoy the financial benefits arising from the commercial exploitation of their new intellectual creation. Since the essence of the financial right is control, exclusivity, and commercial exploitation, this exploitation pertains to the subject of exploitation, which is the new plant variety. Thus, the innovator enjoys an exclusive right allowing them commercial exploitation of the protected plant variety in any form.³⁴

Since the financial right in intellectual property is generally temporary, limited by a time period, unlike the moral right which is perpetual, the temporal scope of protection for the new plant variety under Law 05-03³⁵ relating to seeds, seedlings, and protection of plant holdings is defined in Article 38 of this law as twenty-five years for varieties belonging to tree and vine species. For varieties belonging to annual species, the legal protection duration is twenty years. The article adds that the protection period starts from the date of granting the plant variety certificate, not from the date of filing the protection application.

Third – Legal Mechanisms for Protecting New Plant Varieties

When the innovator of the new plant variety acquires the right to monopolize their innovation and exclusively exploit it commercially, legal protection must be established to enforce these exclusive rights over the new plant variety. This protection consists of: civil protection and criminal protection.

- **Civil Protection:** The Algerian legislator did not specifically regulate this form of civil protection in the law relating to seeds, seedlings, and protection of plant holdings but left it to general rules. However, general rules may fail to protect the rights of the new plant variety owner in extraordinary circumstances that require rapid protection and simplified procedures. Therefore, special rules should have been dedicated to this form of protection, as was done with various elements of intellectual property. In general, referring to general rules, civil protection is a general protection granted to all rights, whether personal, real, or intellectual, based on civil liability principles, whereby any damage to others obliges the perpetrator to compensate³⁶ the injured party fairly. Accordingly, civil protection is based on unlawful competition (the fault element),

³³ Aja Al-Jilali, *Intellectual Property Rights and Related Rights*, Zain Legal Publications, Beirut, 2015, p. 34.

³⁴ Essam Ahmed El-Bahgy, *Ibid.*, p. 129.

³⁵ Law No. 05-03 dated February 6, 2005, relating to seeds, seedlings, and the protection of plant holdings.

³⁶ Moufiqi Rabah, *Legal Protection of New Plant Varieties in Algerian Legislation*, Journal of Law and Humanities, University of Djelfa, Vol. 14, No. 2, 2021, p. 246.

damage caused to the plant variety owner (the damage element), and a causal link between fault and damage.³⁷

- **Criminal Protection:** Since the innovator of the new plant variety enjoys exclusive rights over their innovation, they are guaranteed protection against any infringement. This is based on general rules in civil and administrative procedures law or intellectual property law. Thus, they have criminal protection for their innovation through the offense of counterfeiting, which involves the intentional violation of exclusive rights related to the new plant variety. For criminal liability to arise, the three elements of the crime of counterfeiting must be present.

Conclusion:

The new plant variety is considered an innovation resulting from intellectual activity and must be granted protection like other innovations. Accordingly, these plant varieties received legal protection internationally through the International Convention for the Protection of New Varieties of Plants, known as the UPOV Convention, due to the great importance of this subject within intellectual property topics. At the national level, Law 05-03 relating to seeds, seedlings, and protection of plant holdings was issued, through which Algeria has kept pace with legislative developments by providing protection for new plant varieties. All this aims to encourage innovation in this field. Protection is granted to the new plant variety if a set of formal and substantive conditions are met, after which the innovator becomes its holder and has the freedom to exploit and protect it against any infringement according to the law.

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³⁷ Jedi Najat, *Legal Protection of Intellectual Property According to the Requirements of Sustainable Development*, PhD Thesis in Private Law, Saïd Hamdine Faculty of Law, University of Algiers 1, 2018, p. 494.

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