

Coexistence of rights – plant variety and patent rights

Agribusiness – and in particular the agricultural input industry – plays an important role in the economic development of a country. This sector has been rapidly developing thanks to large investments in technology. As a result, it is essential that innovations are properly protected.

A patent is a valuable strategic instrument as it ensures investment security by conferring to the patent holder the right to prevent third parties from manufacturing, using, offering for sale, selling or importing a patented product or process – even a product directly obtained by a patented process – without its consent.

Articles 10 (IX) and 18 (III) of the Industrial Property Law (9279/96) do not consider inventions, and therefore expressly exclude from patenting:

natural living beings, in whole or in part, and biological material, including the genome or germ plasm of any natural living being, when found in nature or isolated therefrom, and natural biological processes.

However, the exception applies to transgenic microorganisms, provided that they:

- are genetically modified under direct human intervention;
- are sufficiently described, therefore allowing a person skilled in the art to reproduce them without undue experimentation; and
- meet the three patentability requirements – novelty, inventive step and industrial application.

For example, the insertion process and a gene inserted into a seed are subject to patent protection.

Although plant varieties are not patentable in Brazil, plant breeders' rights may be ensured through a *sui generis* protection mechanism provided by the Plant Variety Protection Law (9459/97), which offers protection to new plant varieties or an essentially derived plant variety of any genus or species.

Plant variety protection is granted by the Ministry of Agriculture, Livestock and Supply and remains in force for 15 years from the granting of the provisional protection certificate, except for vines, fruit, forest and ornamental trees, where protection is 18 years.

To be eligible for plant variety protection, a new plant or an essentially derived plant variety must:

- be a product of genetic improvement;
- belong to a species that is eligible for protection in Brazil;
- satisfy the following requirements:
 - novelty – it has not been offered for sale or marketed abroad for more than four years (more than six years for vines and trees) by the date of the application for protection. Also, it has not been offered for sale or marketed in Brazil for more than 12 months, by the date of the application for protection;

- distinctiveness;
 - homogeneity;
 - stability (DUS); and
- have appropriate denominations.

The protection of plant varieties benefits the reproductive or vegetative propagating material of the whole plant (ie, material is eligible for protection only). Moreover, it affords the holder the right to commercialise reproduction within Brazilian territory and prohibits third parties from producing for commercial purposes, offering for sale or marketing propagating material of the plant variety without the holder's authorisation.

Article 10 of the Plant Variety Protection Law establishes certain exemptions. The breeder's rights in the plant variety will not be considered to be infringed by a person who:

- stores and plants seeds for their own use on their premises;
- uses or sells as food or raw material the product of their planting, except for reproduction purposes;
- uses the plant variety as a source of variation in genetic improvement or in scientific research; and
- being a small rural producer, multiplies seed for donation or exchange in dealings exclusively with other small rural producers.

Accordingly, a plant variety may indirectly be protected via patent rights even if the variety is not protected under the Industrial Property Law. These different protection systems, which are compatible and equal in value, deal with complementary protection regimes and may peacefully coexist. This encourages innovation and allows for future improvements.