

English Translation¹
of
Provisions of the Supreme People’s Court on Several
Issues Concerning the Application of Law to the Trial
of Cases Involving Disputes Over Infringement of New
Plant Variety Rights (II)
(Draft for Comments)
(March 23rd, 2021)

These Provisions are formulated for the purpose of correctly hearing cases involving the disputes over infringement upon the new plant variety rights, in accordance with the *Civil Code of the People’s Republic of China*, the *Seed Law of the People’s Republic of China* and the *Civil Procedure Law of the People’s Republic of China*, and by integrating trial practices.

Article 1 [Exercise of co-ownership] Where the co-owners of new plant variety rights (hereinafter referred to as the “variety rights”) have an agreement concerning the exercise of the variety rights, the agreement shall prevail. Where no such agreement is concluded or the agreement is unclear concerning this issue, any co-owner may implement the variety rights independently or license others to implement the variety rights by means of simple license.

Where one of the co-owners implements the variety rights independently, and the other co-owners claim that the proceeds from the implementation be distributed among them, the people’s court shall not support such claim. Where one of the co-owners licenses others to implement the variety rights, and the other co-owners claim that the collected license fee be distributed among them, the people’s court shall support such claim.

¹ THE USPTO IS PROVIDING THIS TRANSLATION SOLELY AS A CONVENIENCE TO THE ENGLISH-READING PUBLIC. WE HAVE ATTEMPTED TO PROVIDE AN ACCURATE ENGLISH TRANSLATION OF THE CHINESE DOCUMENT, BUT DUE TO THE NUANCES IN TRANSLATING FROM CHINESE TO ENGLISH, SLIGHT DIFFERENCES MAY EXIST. WE WILL MAKE EVERY EFFORT TO CORRECT ERRORS BROUGHT TO OUR ATTENTION.

Article 2 [Qualification of assignee plaintiff] Where the assignment of the variety rights is not registered with and gazetted by the competent agricultural or forestry authority under the State Council, and the assignee files a lawsuit in its own name against the infringement on its variety rights, the people's court shall not accept and hear the case.

Article 3 [Propagating materials] The scope of protection of the variety rights includes the propagating materials of the variety. The propagating materials should have propagation ability, and the new individuals that are propagated shall have the same features or characteristics as that of the authorized variety.

Propagating materials as referred to in the preceding paragraph shall not be limited to the propagating materials obtained by the propagation method adopted during the application for the variety rights.

Article 4 [Offering for sale] Where the intention to sell the propagating materials of an authorized variety is expressed by means of advertisement, exhibition, etc., the people's court may determine and handle as a sales act.

Article 5 [Planting act] Where the propagating materials of an authorized variety are planted, the people's court may determine and handle as an act of production and propagation.

Article 6 [Presumption of identical materials and counterfeiting varieties] Where the owner of the variety rights or an interested party (hereinafter collectively referred to as the "right holder") produces evidence to prove that the name of the propagating materials of the allegedly infringing variety is the same as that of the authorized variety, the people's court may presume that the propagating materials of the alleged infringing variety belong to the propagating materials of the authorized variety; if there is contrary evidence proving that the materials do not belong to the propagating materials of the authorized variety, the people's court may determine that the alleged infringer has committed the act of counterfeiting the variety rights, and handle such act with reference to relevant provisions concerning the act of counterfeiting patent.

Article 7 [Concurrence of breach of contract and infringement] Where the trustee or the licensee produces, propagates or sells the propagating materials of an authorized variety beyond the scale or area agreed with the owner of the variety and said owner claims that the above act constitutes an infringement, the people's court shall support such a claim.

Article 8 [Contributory infringement] Where the alleged infringer knows or should have known that the relevant acts committed by another person constitute an infringement of the variety rights, but still provides such services or conditions as acquisition, storage, transportation or processing for the purpose of propagation, or provides relevant certifications, the people's court may determine that the alleged infringer has contributed to the infringement committed by the other person.

Article 9 [Commercial purpose] Where the alleged infringer makes use of the propagating materials of an authorized variety repeatedly for the purpose of producing the propagating materials of another variety, the people's court shall examine and determine whether the act is committed for a commercial purpose by taking into account such factors as whether the act damages the market interests of the owner of the variety, the subjective intention and subsequent acts of the alleged infringer, etc.

Article 10 [Non-productive or non-propagating conduct] Where the alleged infringer claims that the allegedly infringing objects bought and sold by it are used for living consumption as harvest materials rather than for production or propagation, the alleged infringer shall bear the corresponding burden of proof.

Article 11 [Exhaustion of rights] Where the right holder claims that the production, propagation or sale of the propagating materials by another person constitutes an infringement after the propagating materials of an authorized variety are sold by the owner of the variety or with its permission, the people's court generally will not support such claim except under the following circumstances:

(1) Re-producing, re-propagating or re-selling the propagating materials obtained by another person through production or propagation;

(2) Exporting the propagating materials to countries or regions where the plant genus or species that the variety belongs to are not protected for non-final consumption purposes.

Article 12 [Exceptions for scientific research] Where the alleged infringer claims that the following acts of production and propagation were conducted upon an authorized variety should be deemed scientific research activities, the people's court shall support such a claim:

(1) Testing or trial planting of the authorized variety;

(2) Forming any new variety through combination with the authorized variety;

(3) Using the propagating materials of the authorized variety repeatedly to produce the propagating materials of the new variety for the purpose of applying for the variety rights of the new variety or for the need of examining and judging the new variety, after a new variety is formed successfully through combination with the authorized variety.

Article 13 [Self-propagation and self-use by farmers] Where a farmer propagates and uses the propagating materials of an authorized variety on his own within the scope of land stipulated in his household rural land contracted operations agreement, and the right holder claims that the above act constitutes an infringement, the people's court shall not support such a claim.

Article 14 [Non-farmers' act of contracted operations] Where a farmers' professional cooperatives, rural collective economic organizations, other units or an individual other than farmers produces or propagates the propagating materials of an

authorized variety without the permission by the owner of the variety on its own or entrusting farmers to do so, and the owner of the variety claims that the above act constitutes an infringement, the people's court shall support such a claim.

Article 15 [Legal source] Where a seller does not know or should not have known that the propagating materials of the allegedly infringing variety were sold without the permission of the owner of the variety, and the seller produces evidence to prove that the materials had a legal source, the seller may not assume liability for compensation in such case, but the seller shall stop the sale and bear the reasonable expenses paid by the right holder for the purpose of stopping the infringement.

Regarding the legal source as referred to in the preceding paragraph, the seller shall generally produce evidence to prove the legality of the purchase channel, the reasonableness of the purchase price, the presence of actual specific supplier, and the conformity of the sales act to the relevant production and operation license system, etc.

Article 16 [Advance judgment] Where the people's court determines that the infringement is established based on the ascertained facts concerning the infringement upon the variety rights, the people's court may make an advance judgment of stopping the infringement, and order the infringer to take such measures as inactivation to prevent the allegedly infringing objects from proliferation and propagation upon the request of the parties concerned and in accordance with the specific circumstances on the case.

Article 17 [Order for production of documents] For the purpose of determining the amount of damages, the people's court may order the alleged infringer to provide the account books and materials related to the infringement when the right holder has tried its utmost to provide evidence and the account books and materials related to the infringement are mainly in the possession of the alleged infringer; where the alleged infringer fails to provide or provides false account books and materials, the people's court may determine the amount of damages with reference to the claims of the right holder and evidence provided by him.

Article 18 [Obstruction of producing evidence] Where the alleged infringer defies preservation or unseals, transfers or damages the preserved articles without authorization, thus making it impossible to ascertain the facts concerning the infringement, the people's court may presume that the claims of the right holder concerning the matters involved in the evidence are tenable.

Article 19 [Serious circumstances] In addition to the circumstances stipulated by relevant laws and judicial interpretations, the following circumstances can also be regarded as the factors to be considered when determining the seriousness of an infringement:

- (1) Producing and operating authorized varieties without license;

- (2) Forging, leasing or swindling by other improper means seed production and operation licenses;
- (3) Forging certificates of variety rights;
- (4) Refusing to disclose the production and propagation location of the allegedly infringing articles.

Article 20 [Implementation fee during suspension period] Where the variety rights is restored according to law after suspension, and the right holder requests the unit or individual that have implemented the variety rights to pay the fees for the implementation of the variety rights during the suspension period, the fees may be determined reasonably by the people's court subject to the license fee for the implementation of relevant variety rights, and with consideration of such factors as the type, planting time, operation scale, market value at that time of the varieties, etc.

Article 21 [Damages during temporary protection period] Where any other person produces, propagates or sells the propagating materials of the authorized variety without license from the announcement date of the qualification of the preliminary examination of the variety rights to the grant date of the variety rights, and the right holder claims to recover the loss of rights and interests caused by the above acts, the people's court may deal with the matter in accordance with the royalty during the temporary protection period, and determine the amount reasonably with reference to the license fee for the implementation of relevant variety rights, and with consideration of such factors as the type, planting time, operation scale, market value at that time of the varieties, etc.

If the alleged acts referred to in the preceding paragraph continue after the grant of the variety rights and the right holder claims a right to both the royalty during the temporary protection period of the variety rights and infringement damages, the people's court may try them together, but shall calculate and deal with them separately.

Article 22 [Appraiser] Where a specific issue involved in a case of dispute over infringement upon the variety rights requires appraisal, the appraiser shall be affirmed upon negotiation by the parties concerned from the list of appraisers in relevant fields or among the appraisers recommended by the competent agricultural or forestry authorities under the State Council to the people's court; if the negotiation fails, the appraiser shall be appointed by the people's court.

Article 23 [Appraisal methods] Regarding the varieties that are not appraised by molecular marker detection methods such as genetic fingerprint detection, etc., the general methods of the industry can be used to carry out determinations of identicalness between the authorized varieties and the allegedly infringing objects in terms of feature or characteristic.

Article 24 [Re-appraisal] Where one party who disagrees with the appraisal conclusion applies to the people's court for re-examination, supplementary appraisal or

re-appraisal, but fails to provide reasonable reasons and evidence, the people's court shall not approve such application.

Article 25 [Determination of approaching threshold] For the appraisals done by molecular marker detection methods such as genetic fingerprint detection, etc., the alleged infringer claims that the two have different features or characteristics when the discrepancy loci between the sample to be detected and the control sample is less than but close to the threshold, the alleged infringer shall bear the burden of proof; and the people's court may also, upon the application by the parties concerned, take such measures as expanding the detection loci for additional detection or submitting standard samples for detection, etc. to determine the infringement in combination with other factors.

Article 26 [Conflicts between detection conclusions] Where the conclusion of field observation and measurement is different from that of molecular marker detection such as genetic fingerprint detection, etc., the people's court shall take the conclusion of field observation and measurement as the criterion.

Article 27 [Validity] The Provisions shall come into force on X X, 2021. In case of any inconsistency between the relevant judicial interpretations previously issued by the Supreme People's Court and the Provisions, the Provisions shall prevail.