

# China: Supreme People's Court judicial interpretation provides guidance for consistent hearings in new plant variety rights infringement cases

## In brief

On 7 July 2021, the Supreme People's Court Provisions on Several Issues Concerning the Application of Law to Cases Involving Plant Variety Rights Infringements (II) ("**New Provisions**") came into effect.

The New Provisions provide further and clearer guidance on the application of law in infringement cases of plant variety rights (PVR), which will encourage more consistent rulings by the People's Court and grant stronger judicial protection to PVR holders in China. In this article, we will briefly review and discuss the key provisions of the New Provisions, with reference to the current law applicable to PVR in China.

## Contact information

**Andrew Sim**  
Partner  
Hong Kong

**Alanna Rennie**  
Associate  
Sydney

## Comments

Compared with the Supreme People's Court Provisions on Several Issues Concerning the Application of Law to Plant Variety Rights Infringements, which were promulgated by the Supreme People's Court (SPC) in 2007 and revised in 2020 ("**Old Provisions**"), the New Provisions provide more detailed and practical regulations that address some long-standing problems in the judicial practice related to PVR infringement cases. Significantly, the New Provisions provide for a broad interpretation of the scope of the right, clarifies that protection is not limited to propagation (but also growing), clarifies the definition of 'propagating material,' provides for contributory liability, raises the effectiveness and timeliness of judicial protection and enhances the convenience for breeders in enforcement.

The New Provisions will enable PVR holders to commercialize their new plant varieties in a more secured way and defeat infringers more effectively. This is a welcomed development, while the industry eagerly awaits the revision of the Regulation of the People's Republic of China on Protection of New Plant Variety ("**Regulation**").

## In more detail

### 1. Exercise of PVR co-ownership

Unlike the PRC Patent Law which stipulates specific provisions regarding co-ownership, the PRC Seed Law and the Regulations do not provide much guidance for PVR co-owners in practice. The New Provisions set out the following rules governing the exercise of co-ownership of PVR:

- Agreements between co-owners concerning the exercise of PVR will prevail.
- Where no such agreement is concluded or the agreement is unclear, any co-owner may exercise the PVR independently, or grant a third party a simple license to exercise the PVR.

**Baker  
McKenzie.**

© 2021 Baker & McKenzie. **Ownership:** This site (Site) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms, including Baker & McKenzie LLP). Use of this site does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion:** All information on this Site is of general comment and for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulation and practice are subject to change. The information on this Site is not offered as legal or any other advice on any particular matter, whether it be legal, procedural or otherwise. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any information provided in this Site. Baker McKenzie, the editors and the contributing authors do not guarantee the accuracy of the contents and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this Site. **Attorney Advertising:** This Site may qualify as "Attorney Advertising" requiring notice in some jurisdictions. To the extent that this Site may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. All rights reserved. The content of the this Site is protected under international copyright conventions. Reproduction of the content of this Site without express written authorization is strictly prohibited.

However, neither an exclusive license nor a sole license can be granted by a co-owner in the absence of a prior agreement with other co-owners or where the agreement is unclear.

In cases where one of the co-owners exercises PVR independently, a claim by other co-owners to distribute proceeds from such exercise will not be supported by the People's Court. However, there are exceptions where a co-owner can prove that it does not possess the ability or conditions to carry out the PVR. **On the other hand, the People's Court will support a co-owner's claim to distribute license fees from a license granted by one of the co-owners.**

## 2. Right to sue by PVR assignees

Both PVR holders and any interested party have a right to sue under Article 73 of the PRC Seed Law and Article 39 of the Regulation. The Old Provisions confirmed that a licensee is an interested party with certain rights to launch PVR infringement lawsuits, depending on the type of license.

The New Provisions address the situation of PVR assignees taking infringement action. In order to be able to take PVR infringement action, an assignee of a PVR must be registered with and published by the competent agricultural or forestry authority under the State Council. This highlights the importance of formalizing PVR assignments through written agreements and recording the same with a responsible authority as required under Article 9 of the Regulation.

## 3. Propagating material

There has been a long-standing debate as to the breadth of the definition of 'propagating material' in China, and thereby the scope of PVR protection in the country. In December 2019, the Intellectual Property Division of the SPC clarified the definition of 'propagating material' in the PVR infringement case of *Cai Xin Guang (Appellant) v. Guangzhou Runping Company Limited (Defendant)*, otherwise known as the **Pomelo Case**. In this case, the Court noted the current broad definition of 'propagating material' under the relevant Regulations and Implementing Rules, being "planting or propagating material or another part of the plant that can be used to propagate a plant, including seeds, fruit, roots, stems, seedlings, buds, leaves, etc." The Court determined that to be 'propagating material,' the following requirements must also be satisfied, the material must: (1) be living; (2) possess propagating ability; and (3) be able to propagate a plant which possesses the same traits and characteristics as the protected variety (i.e., propagate the variety true-to-type). We have published a client alert discussing the SPC's decision and its implications, which can be accessed [here](#).

**The New Provisions confirm the above broad concept of propagating material, providing a legal basis for PVR holders to defeat infringers in the context of rapid developments in breeding technologies.**

## 4. Infringement

### Growing

Another issue that has long been debated in China and other International Union for the Protection of New Varieties of Plants (UPOV) countries, is whether the act of growing (for example growing a tree for production of fruit) constitutes the infringing act of production of propagating material and falls within the scope of the right.

The SPC in the Pomelo Case also clarified this issue, providing that the act of growing constitutes the infringing act of producing propagating material. The New Provisions confirm this and provide the much needed clarity for the plant breeding industry. Hopefully this will be a development followed in other UPOV countries.

### Offering for sale

The New Provisions also provide that the People's Court can deem advertising, exhibiting and other means of indicating an intent to sell as the infringing act of selling propagating material.

## Shifting burdens of proof

The New Provisions shift the burden of proof to the defendant (the alleged infringer) in a number of circumstances, which reduces the significant evidentiary burden on the PVR holder in infringement disputes. These include:

- Where the alleged infringing material can be regarded as both propagating material and harvested material, and an alleged infringer claims that the infringing material is harvested material for use in consumption rather than production or propagation, the New Provisions provide that the alleged infringer will carry the burden to prove this.
- Where a registered variety denomination is used in relation to propagating material, it will be presumed that the propagating material belongs to that variety, in the absence of contrary evidence. Otherwise, the People's Court may hold that the alleged infringer has committed the act of counterfeiting PVR and determine liability by reference to the regulations on counterfeiting trademarks.

## 5. Concurrence of breach of contract and infringement

A recurring issue in PVR disputes worldwide is the interaction between PVR and contracts, that is whether breach of the conditions and limitations in a license relating to a PVR variety also constitutes infringement of the PVR, or it is simply a matter of contractual breach. The New Provisions provide that where a licensee produces, propagates or sells propagating material of a PVR variety beyond the scale or area agreed in the license, the People's Court is to deem this an infringement. **This allows plaintiffs to choose either PVR infringement or breach of contract as their cause of action by taking factors such as the burden of proof, evidence collected, and amount of compensation claimed into consideration.**

## 6. Contributory infringement liability

The New Provisions extend the scope of potential infringers across the supply chain. The People's Court may hold a person joint and severally liable for PVR infringement if that person knew or should have known that another person's acts constituted PVR infringement, but still provided such services or conditions as acquisition, storage, transportation or processing.

## 7. Farmers' Exemption

The farmers' exemption is unclear under the current Regulation and the Seed Law, in particular as to what constitutes a 'nongmin,' the subject of its application, and the extent to which nongmin may self-use and self-propagate propagating material of a protected variety. The draft revision to the Regulation released in early 2019 ("**Draft Regulation**") provides clarity with a narrow concept of 'nongmin' and a narrow application of the exemption. A 'nongmin' is defined under the Draft Regulation as a member of a rural collective economic organization who has signed a rural land contract under the household contract responsibility system, and the 'nongmin exemption' from infringement only applies to self-use or self-propagation by the 'nongmin' of an amount which does not exceed the reasonable amount needed for the household contracted land. Nevertheless, the draft revision of the Regulation is still under legislative review, and has not been promulgated yet.

The New Provisions provide some clarity, but do not go as far as it is hoped to clarify the 'nongmin exemption.' The New Provisions provide that where a 'nongmin' self-propagates or self-uses propagating material of a PVR variety within the limits of its household contract responsibility land, the People's Court shall not support a claim to PVR infringement. However, no definition of 'nongmin' is provided, in particular, it remains unclear how farmer professional cooperatives and large family farms will be dealt with.

The New Provisions leave other circumstances in which the farmers' exemption may apply open, providing that where there is conduct other than the aforementioned (i.e., other than the self-use or self-propagation by 'nongmin' within the limits of their household contract responsibility land), and an alleged infringer claims that the 'nongmin exemption' applies, the People's Court shall comprehensively consider

the alleged infringer's motive, scale, whether or not profit has been derived and other factors. While these factors will assist in preventing abuse of the 'nongmin exemption,' this still leaves open the circumstances in which the 'nongmin exemption' may be applied and within the discretion of the People's Court.

**Notably, no exclusions of crops from the application of the farmers' exemption have yet been made under the current or Draft Regulations.**

We will see whether the final version of the amended Regulations will provide a more definitive and narrow exemption, including clarification as to whether farmer professional cooperatives and large family farms will fall outside the exemption.

## 8. Factors for determining serious circumstances

Punitive damages are awarded under the PRC Civil Code in deliberate intellectual property infringement cases with serious circumstances. **The New Provisions provide that the following circumstances can be considered in determining the seriousness of an infringement in PVR cases:**

- i. Where a person is held responsible for infringing conduct (administratively or judicially) and again carries out the same or similar infringing conduct
- ii. Where PVR infringement is carried out as a business
- iii. Where the alleged infringer sells a PVR variety in an unmarked and unlabeled packaging
- iv. Where the alleged infringer produces PVR varieties and runs the relevant business without a seed production and operation license or fakes, leases or obtains by other improper means a seed production and operation license
- v. Where the alleged infringer fakes a PVR registration certificate
- vi. Where the alleged infringer refuses to disclose the production, propagation and/or sales location of the allegedly infringing material

In cases of (i) to (v) above, the People's Court may double the amount of punitive damages.

## 9. Exhaustion of rights

The New Provisions confirm that the concept of exhaustion of rights applies to PVR. According to the New Provisions, the People's Court should not hold the production, propagation or sale of the propagating material of a PVR variety by another person to constitute an infringing act, where that propagating material has been sold by the PVR holder or with its permission, except in the following circumstances:

- Where the material in question is further reproduced or re-propagated
- Where the propagating material is exported, for purposes of production or propagation, to a country or region that does not offer PVR protection for that plant genus or species to which the variety belongs

## 10. Breeding and scientific research activities exemption

The New Provisions also clarify the breeding and scientific research exemption to infringement. The following acts of production and propagation constitute scientific research activities and are exempt from PVR infringement:

- Breeding a new variety from registered varieties
- Using the propagating material of a registered variety repeatedly to produce the propagating material of a new variety for the purpose of making a PVR application, registration or recording

## 11. Advance judgement against infringement

The People's Court may make advance judgement to restrain infringing acts where the infringement of PVR has been established based on ascertained facts. The People's Court may order the infringer to take measures, such as destruction of the plant material and other measures to prevent the propagation and dispersion of the alleged infringing material upon request and in accordance with the specific circumstances. **These provisions seem to be more applicable to infringement cases where the presumption of infringements arises from the use of registered denominations, but are more difficult to be applied in cases where infringement is to be judged by identification of propagating materials.**

## 12. Molecular marker verification

If variety verification is carried out through genetic fingerprinting and other molecular marker examination methods, and the difference between the sample to be tested and the reference sample is less than but close to the critical value, the alleged infringer will bear the burden of proving that the varieties are otherwise different. On application by a party, the People's Court may expand the testing sites and carry out additional testing and adopt other methods, as well as gathering other relevant factors to make a determination.

Where the results of field test observations and genetic fingerprinting and other molecular marker tests differ, the People's Court shall apply the results of the field test observations.

\* \* \* \* \*

For further information or a discussion of what the New Provisions may mean to you, please get in touch with the Baker McKenzie team.

---

### Keywords

Plant Variety Rights; PVR; PVR infringement