

Our experience with plant variety rights is solely related to ornamental plants.

We currently hold plant variety rights on a number of ornamental cultivars bred by Mark Jury including Cordyline Red Fountain, Daphne Perfume Princess and several magnolias. We have lapsed various other PVRs and PVR applications because we saw no good reason to continue paying for non-existent protection of our IP. The cultivars still carrying protection are marketed internationally and we hold various international Plant Breeders' Rights and patents on them in Europe, Canada, USA, Japan, Australia and South Africa. Mark would be one of the very few professional, ornamental plant breeders in this country whose main source of income is now from international plant royalties. Our history with PVR goes back to the mid 1980s.

Over the years, we have lost all confidence in the PVR system and now refuse to apply for any plant protection ourselves, leaving it instead to our agents, Anthony Tesselaar International, to apply on our behalf.

In the early days, we felt extreme frustration jumping through bureaucratic hoops and filling out technical questionnaires that might, at best, differentiate between a magnolia and a prunus. It always seemed a very expensive and drawn out process with all requirements for enforcement coming back to the rights' holder. It seemed more of a marketing tool in practice than actual protection of rights.

But it was the complete fiasco over the granting of rights to Cordyline Burgundy when we already held rights on Cordyline Red Fountain that destroyed any confidence we had in the system. Time and again we asked the commissioner to set up a blind test to see if the two cultivars were distinguishable from each other (because they aren't). Time and again he refused to, finding instead that there was a minute and insignificant difference (statistically unsound on the very small number of sample leaves) on the length of the leaf petiole. Even when we provided DNA evidence from an Australian laboratory which showed that the applicant had lied on his application where he claimed he repeated the original cross (which we knew he could not have done because we knew the parents used to produce Red Fountain) and which showed that his cultivar was at best a derived variety with either identical or near identical DNA, the commissioner refused to review his decision to grant the second PVR.

It was a failure of the system at every level. We had spent so much time, money and energy on attempting to challenge the commissioner's poor decision that we decided to walk away. We had zero confidence left in the legislation and the process of administering that legislation.

Trademarking a name is much cheaper, easier and accords more commercial protection in the market.

In our opinion, the review of the legislation needs to consider some of the following aspects:

- 1) The role of DNA in determining uniqueness.
- 2) That when it comes to ornamental cultivars, the applicant must prove that the cultivar has distinctive differences to similar cultivars which are capable of being confirmed by blind testing. Minor variations should not be sufficient.
- 3) The incidence of tissue culture mutations needs careful consideration and whether the holder of PVR should own such mutations as of right. This probably sits within the consideration of derived varieties but the technical nature of micro propagation has brought it to the fore because mutations in production are common.

- 4) The granting of PVR to species needs careful consideration, especially, but not only, when they are species selections of indigenous plants. There are pitfalls in vesting intellectual property rights in an individual or a business who has simply selected a single specimen of a naturally occurring species, especially if they then go on to claim ownership across the species. We have seen this happen recently in this country with Australian lomandras.
- 5) There needs to be some genuine unique element or elements to a PVR plant, not a case of “first in first served” as happened with the above example of the lomandra.
- 6) The ability in the United States of America to patent a gene has huge implications, especially when it relates to genetic material of our indigenous plants.
- 7) New Zealand legislation should be in line with other signatories to the UPOV convention and international plant breeders’ rights – although there may be a case to add an additional layer of regulation related to our indigenous species, based on our obligations under the Treaty of Waitangi. There is little commercial benefit in taking out PVR solely for the New Zealand market. It is international sales and distribution where the real benefits lie but without our legislation being in line with other jurisdictions, it becomes unnecessarily complicated.

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