Naming and labelling protected varieties

It is important that you identify your variety as protected in the marketplace by stating this on all labels and promotional material.

If you have applied for, or been granted, Plant Variety Rights, it is very much in your interest to make this known to the public when you sell or offer propagating material or whole plants for sale. Plant and seed labels and any advertising material should clearly show that the variety is protected under the Plant Variety Rights Act. If you do not take all reasonable steps to ensure that this is done, then you will not be entitled to receive damages through legal proceedings against anyone infringing your Rights.

However, take care with the wording of advertising material and seed or plant labels because it is an offence under the Plant Variety Rights Act to falsely represent that a variety is protected or subject to an application for a grant.

In your own interest as a Rights holder, as well as to comply with the Act, make sure you always use the approved variety denomination when you or your agents or licensees sell reproductive material from the protected variety.

Here are some guidelines for wording that should protect your interests as a Rights holder while avoiding the possibility of committing an offence:

**If you have not made a Rights application and you don't hold a current grant of Rights:**

**DO NOT** use the word "Protected" or any wording that might imply that the variety is protected under the Plant Variety Rights Act 1987.

**If you have made a Rights application, but the Commissioner has not reached a decision:**

Suggested wording - "Provisional PVR protection", "Provisional Plant Variety Rights Protection" or "Provisionally protected under NZ Plant Variety Rights Act 1987".

**DO NOT** use the wording "Plant Variety Rights pending" or words implying that Rights will be granted. Such wording is misleading because it anticipates a decision favourable to the applicant.

**If the variety is protected by a grant of Plant Variety Rights:**

Suggested wording - "Protected by NZ Plant Variety Rights"; "Protected under NZ Plant Variety Rights Act 1987"; "NZ Plant Variety Rights Protection"; or words to that effect.
Requirements of the Plant Variety Rights Act 1987 Section 22 (a) and (b)

- Any person who sells plants or propagating material of a protected variety must use the variety denomination, which is also referred to as the variety or cultivar name. The variety denomination is the only legal identifier for that protected variety.

- Use of commercial or trade names, in addition to the variety denomination, is acceptable when the denomination is present on the label and clearly recognisable. You cannot sell plants of a protected variety or a variety for which protection has expired using an associated trade or commercial name without indicating the denomination.

- Any person who represents that a plant variety is protected or protection has been applied for when this is not the case commits an offence against the PVR Act and may also breach the Fair Trading Act. If a variety is not protected in NZ, do not claim that it is. Protection in other countries has no validity here, so variety protection information on foreign sourced labels may be misleading.

Trade marks and plant variety names

What is a variety denomination?

The denomination is the name of a plant variety as legally recognised under the New Zealand Plant Variety Rights Act. Every application for a Plant Variety Right must propose a denomination for the new variety. The denomination should conform to internationally accepted guidelines. The name cannot be directly descriptive of any characteristic the new variety possesses and should not include comparatives or superlatives like 'increased' or 'best'. If the proposed denomination is not acceptable, the Commissioner will reject it and require the applicant to propose an acceptable alternative.

What is a trade mark?

A trade mark is a unique identifier, often referred to as a "brand" or "logo", used to distinguish one trader's products or services from a competitor's products or services. Trade marks can include words, logos, colours, sounds, smells – or any combination of these, so long as they can be graphically represented. Once a trade mark is registered, the ® symbol can be legally used against the trade mark. A ™ symbol indicates that a trader is using a sign as a trade mark but does not indicate whether a sign is registered.

Can a trade mark be accepted as a variety denomination or vice versa?

No, a denomination cannot be registered as a trade mark or a denomination used as a trade mark for plants or plant material. The Intellectual Property Office of New Zealand (IPONZ) will search the New Zealand Plant
Variety Rights Register, and the New Zealand Plant Variety Rights Office (NZPVRO) will search the New Zealand Register of Trade Marks (Class 31 which includes agricultural, horticultural and forestry products, grains, seeds, live plants and flowers) before accepting a trade mark application in class 31 or a proposed variety denomination.

Can a trade mark be added to the denomination of a protected variety?

Yes. Under the New Zealand Plant Variety Rights Act anyone selling seeds or plants of a protected variety may associate a trade mark with the denomination, provided the denomination is always used and clearly recognisable. For example, Rose variety 'Macrexy', protected under the PVR Act, grant number 318, is sold using the trademark Sexy Rexy™

Can the name of a variety not protected by a PVR be registered as a trade mark?

A trade mark will not be eligible if it merely indicates the kind, quality, origin, intended purpose or dollar value of the goods for which registration is sought. A recognised plant cultivar name may not be acceptable as a trade mark due to common usage. A colloquial or taxonomic term used to describe a botanical characteristic of plants or plant material may also not able to be registered. For example, the terms bloom or creeper or the name of a plant genus such as Hebe.

What are the rights of a registered trade mark owner?

The registration of a trade mark gives the owner the exclusive right to use the trade mark within New Zealand. The initial registration period lasts for ten years and the right is renewable every ten years thereafter. Trade marks can be bought, sold or licensed like other intellectual property assets.

What are the rights of a registered plant variety rights owner?

The grant of a Plant Variety Right (PVR) gives the owner the exclusive right to produce for sale and to sell propagating material of the variety within New Zealand. The full term of a PVR is 20 years for non-woody plant varieties and 23 years for woody plant varieties. Payment of the annual grant fee is due each year on the anniversary of grant. PVRs can be bought, sold and licensed like other intellectual property assets.

Who enforces trade mark or plant variety rights?

A PVR or a trade mark is personal property and it is the responsibility of the owner to pursue any remedies for infringement. It is recommended that you seek legal advice.

How do I find out more about plant variety rights and trade marks?

For more information please contact us.
Sales of the variety before a PVR application is made

- It is permitted to sell a variety in New Zealand up to 12 months before making an application without affecting the variety’s eligibility for PVR. Variety owners may wish to indicate that the owner of the variety intends to apply for PVR, but labels indicating this intention displayed after the time limit for eligibility for application has expired, are likely to be misleading. The label must not indicate that the variety is protected or imply that any protection or restriction on use or propagation applies unless an application for protection has been made.
- A variety is not protected until an application for protection is made. So, making commercial sales before the protection application runs the risk that a competitor could commercially exploit the variety, without restriction, prior to application. Once an application is made, the variety is protected and the applicant has the right to take proceedings against competitors from the date of the application.

Naming and trading for cultivars

Commercial horticulture and agriculture is reliant on the production of new cultivars. In order that these cultivars, and products from them, can be effectively traded their accurate identification and naming in the market place is important. This is particularly important if the cultivar is subject to or associated with intellectual property such as Plant Variety Rights (PVR) or Plant Breeders Rights (PBR).

Offences against the Plant Variety Rights Act 1987 Section 37 (3) and (4)

The PVRO can prosecute those who:

- falsely represents that the plants or parts of plants they are selling are a protected variety or one for which an application for protection has been made,
- falsely represents that the plants or parts of plants they are selling are a protected variety or one for which an application for protection has been made when the plants are of another variety, and
- wilfully or negligently sells plants or propagating material from a protected variety or a variety for which protection has expired without using the variety's denomination or ensuring that the denomination is clearly recognisable on the plant label or elsewhere.

More information

- Technical guidance
Infringements