

The Plant Variety Protection Act*

Consolidated Text of the Plant Variety Protection Act of December 11, 1985,
as Amended by the Act to Reinforce the Protection of Intellectual Property
and to Combat the Piracy of Products of March 7, 1990,**
and by the First Amendment Act of March 27, 1992***

CHAPTER ONE CONDITIONS AND CONTENT OF PLANT VARIETY PROTECTION

Article 1 Conditions for Plant Variety Protection

Protection shall be granted for a plant variety (hereinafter referred to as a “variety”), provided such variety is

1. distinct,
2. homogeneous,
3. stable,
4. new and
5. designated by means of a registrable variety denomination.

Article 2 Definitions

For the purposes of this Act:

1. “Species” shall mean species of plants, and also groupings and subdivisions of species of plants,
2. “Propagating material” shall mean plants and parts of plants, including seeds, intended for the production of plants or for any other growing,
3. “Marketing” shall mean offering, keeping available for sale, placing on sale or any kind of disposing of to other parties,
4. “Filing date” shall mean the day on which the application for plant variety protection is received by the Federal Office of Plant Varieties,
5. “Contracting State” shall mean a Contracting State of the Agreement on the European Economic Area,
6. “Union State” shall mean a State that belongs to the International Union for the Protection of New Varieties of Plants set up in accordance with the International Convention for the Protection of New Varieties of Plants of December 2, 1961 (*BGBI.* 1968 II p. 428).

Article 3 Distinctness

(1) A variety shall be distinct when its plants are clearly distinguishable by the expression of at least one important characteristic from the plants of all other varieties that are a matter of common knowledge on the filing date. The Federal Office of Plant Varieties shall communicate on request for every species those

* *German title:* Sortenschutzgesetz; Source: *Bundesgesetzblatt* I, page 2170

** *German title:* Gesetz zur Stärkung des Schutzes des geistigen Eigentums und zur Bekämpfung der Produktpiraterie vom 7. März 1990; Source: *BGBI.* I, page 422

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characteristics it deems important for the distinctness of varieties of that species; the characteristics must be capable of precise recognition and description.

(2) A variety is a matter of common knowledge, in particular, when it has already been entered in an official list of varieties, precisely described in a publication, notoriously cultivated or notoriously included in a reference collection or when propagating material or harvested material of the variety has already been marketed for commercial purposes. Where the grant of variety protection has been applied for in respect of that variety, it shall be deemed to be a matter of common knowledge as from the filing date, subject to acceptance of the application; the same shall apply where approval has been applied for in respect of the variety under the Seed Trade Act.

Article 4 Homogeneity

A variety shall be homogeneous when its plants, apart from a small number of deviations, and taking into account the particularities of their sexual reproduction or vegetative propagation, are sufficiently identical in the expression of those characteristics that are important for distinctness.

Article 5 Stability

A variety shall be stable when the characteristics of its plants that are important for distinctness correspond after each propagation, or, in the case of a propagation cycle, after each such cycle, to the expressions determined for the variety.

Article 6 Novelty

A variety shall be new when propagating material or harvested material of the variety has not been marketed for commercial purposes with the consent of the entitled person or of his predecessor in title prior to the filing date, or has only been marketed for commercial purposes within the following periods of time:

1. inside the country one year,
2. outside the country four years, or, for grapevine (*Vitis* L.) and tree species, six years.

Article 7 Variety Denomination

(1) A variety denomination shall be registrable if no grounds for exclusion under paragraphs (2) or (3) exist.

(2) Grounds for exclusion shall exist when the variety denomination

1. is not suitable to identify the variety, particularly for linguistic reasons,
2. possesses no distinctive nature,
3. consists exclusively of figures,
4. is identical to or may be confused with a variety denomination under which a variety of the same or of a related species is entered in an official list of varieties in a Contracting State or a Union State, or was so entered, or where propagating material of such variety has been marketed, unless the variety is no longer entered and no longer cultivated and its denomination has acquired no special significance,
5. may mislead, particularly when it is likely to cause erroneous conceptions as to the origin, the properties or the value of the variety, or as to the original breeder, discoverer or other entitled person,
6. may cause offence.

The Federal Office of Plant Varieties shall communicate those species it deems to be related within the meaning of item 4.

(3) Where the variety has already been entered in an official list of varieties or entry in such list has been applied for

1. in another Contracting State or Union State or

2. in another State which, according to a declaration in legal acts of organs of the European Communities, to be notified by the Federal Office of Plant Varieties, evaluates varieties in accordance with rules that correspond to the Guidelines for the Common Catalogues of Varieties,

only the variety denomination so entered or declared shall be registrable. This shall not apply where grounds for exclusion under paragraph (2) are opposed thereto or the applicant reasonably establishes that an opposing third party right exists.

Article 8

Entitlement to Variety Protection

(1) The original breeder or discoverer of the variety or his successor in title shall be entitled to variety protection. If more than one person has bred or discovered the variety jointly, the entitlement shall belong to such persons jointly. If more than one person has bred or discovered the variety independently, the entitlement shall belong to the person who files the first application for variety protection.

(2) The applicant shall be considered the entitled person in proceedings before the Federal Office of Plant Varieties unless it comes to the knowledge of the Federal Office of Plant Varieties that he is not entitled to variety protection.

Article 9

Persons not Entitled to Apply

(1) If a person not entitled to protection has filed an application, the entitled person may require that the applicant transfer to him the claim to the grant of variety protection.

(2) If variety protection has been granted to a person not entitled thereto, the entitled person may require that the owner of variety protection transfer variety protection to him. Such claim shall expire five years after notification of the entry in the Plant Variety Protection Register, except where the owner of variety protection was not acting in good faith in obtaining variety protection.

Article 10

Effect of Variety Protection

Variety protection shall have the effect that the owner of variety protection alone shall be entitled

1. to market propagating material of the variety or produce it for such purpose,
2. in the case of varieties of species usually used as woody plants or other fruit or ornamental plants,
 - (a) to produce propagating material of the variety for purposes other than marketing,
 - (b) to market or import therefor plants or parts of plants obtained from propagating material which has been produced without the consent of the owner of variety protection,
3. to use propagating material of the variety to produce propagating material of another variety where propagating material of the protected variety must be used repeatedly to produce the propagating material of the other variety, and
4. to introduce propagating material of the variety originating within the country into an area outside the Contracting States in which German nationals or persons having their place of residence or place of business within the country are not granted corresponding protection for varieties of that species.

The effect of variety protection does not extend to the acts mentioned in items 1 to 3 of the first sentence, which are done privately and for noncommercial purposes. The use of propagating material of a protected variety for the breeding of a new variety shall not require the consent of the owner of variety protection.

Article 11
Legal Succession, Exploitation Rights

(1) The right to variety protection, the claim to granting of variety protection and the variety protection itself shall be transferable. The obligation to have the Plant Variety Protection Register corrected shall be incumbent, in the event of doubt, on the person hitherto entitled.

(2) Variety protection may be the subject of exclusive or nonexclusive exploitation rights.

Article 12
Compulsory Exploitation Rights

(1) The Federal Office of Plant Varieties may on request, insofar as it appears justified in the public interest, taking into account the economic acceptability for the owner of variety protection, grant a compulsory exploitation right in respect of variety protection as regards the rights under Article 10, first sentence, items 1 to 3, under reasonable conditions where the owner of variety protection has granted no exploitation rights or insufficient exploitation rights. When granting the compulsory exploitation right, the Federal Office of Plant Varieties shall determine the conditions thereof, particularly the amount of the remuneration to be paid to the owner of variety protection.

(2) On expiry of one year after the grant of the compulsory exploitation right, any of the parties may request renewed determination of the conditions. The request may be repeated each time on expiry of one year; the sole grounds for such request may be that the circumstances that were decisive for the determination have in the meantime undergone considerable change.

(3) Before taking its decision on the grant of a compulsory exploitation right or on a new determination, the Federal Office of Plant Varieties shall hear the professional associations concerned.

(4) If a compulsory exploitation right has been granted for a variety belonging to a species subject to the Seed Trade Act, the owner of variety protection may require information from the responsible authorities.

1. on the identity of the person who has applied for seed recognition in respect of propagating material of the protected variety,
2. on the size of the propagating surfaces stated in the request for recognition,
3. on the weight or quantity that has been stated in respect of the lots.

Article 13
Duration of Variety Protection

Variety protection shall extend to the end of the twenty-fifth calendar year or, in the case of grapevine, hop, potato and tree species, the end of the thirtieth calendar year following the year of grant.

Article 14
Use of the Variety Denomination

(1) Propagating material of a protected variety may only be marketed—except privately and for noncommercial purposes—if the variety denomination is stated in relation thereto; where it is stated in writing, it shall be readily distinguishable and clearly legible. This shall also apply after expiry of variety protection.

(2) Rights in a designation that is identical with the variety denomination may not be used to prohibit the use of the variety denomination for the variety. Prior rights of third parties shall not be affected.

(3) The variety denomination of a protected variety or of a variety for which breeders' rights have been granted in another Union State or a designation which may be confused with it may not be used for another variety of the same or of a related species.

Article 15
Scope of Application in Respect of Persons

(1) The rights afforded by this Act may only be acquired by

1. German nationals within the meaning of Article 116(1) of the Basic Law as well as natural and legal persons and unincorporated trading companies having their place of residence or registered offices within the country,

2. nationals of another Contracting State as well as natural and legal persons and unincorporated trading companies having their place of residence or registered offices in another Contracting State,
3. nationals of another Union State as well as natural and legal persons and unincorporated trading companies having their place of residence or registered offices in another Union State, and
4. other natural and legal persons and unincorporated trading companies where the State to which they belong or in which they have their place of residence or registered offices affords corresponding protection to German nationals or persons having their place of residence or registered offices within the country according to a notification of the Federal Minister of Food, Agriculture and Forestry in the *Bundesgesetzblatt*.

(2) Any person who has neither his place of residence nor an establishment in a Contracting State may only participate in procedures governed by this Act or claim rights under this Act if he appoints a representative (procedural representative) having his place of residence or business premises within a Contracting State. The latter shall be entitled to act as representative in procedures before the Federal Office of Plant Varieties and in legal disputes concerning variety protection; he may also institute criminal proceedings.

CHAPTER TWO

THE FEDERAL OFFICE OF PLANT VARIETIES

Article 16 Nature and Tasks

(1) The Federal Office of Plant Varieties shall be an autonomous senior federal authority within the purview of the Federal Minister of Food, Agriculture and Forestry.

(2) The Federal Office of Plant Varieties shall be responsible for the granting of variety protection and for related affairs. It shall keep the Plant Variety Protection Register and shall verify the continuing existence of the protected varieties.

Article 17 Members

(1) The Federal Office of Plant Varieties shall consist of a President and other members. They must have special competence in the field of plant varieties (technical members) or be qualified for judicial office under the German Act Relating to Judges (legal members). They shall be appointed by the Federal Minister of Food, Agriculture and Forestry for the duration of their activity with the Federal Office of Plant Varieties.

(2) As a rule, only such person shall be appointed as a technical member who has successfully undergone a State or academic examination following a scientific course in a subject relevant to his activity at the Federal Office of Plant Varieties at a university within the country or a final examination following equivalent studies abroad and has also worked for at least three years in the corresponding technical area and who possesses the necessary legal knowledge.

(3) Where there exists a need that is expected to be limited in time, the President may appoint persons as assistant members to carry out the duties of members of the Federal Office of Plant Varieties. Such appointments may be for a specified period or for as long as needed and may not be terminated during such period. In other respects, the provisions regarding members shall also apply to assistant members.

Article 18 Examining Sections and Opposition Boards

(1) There shall be set up within the Federal Office of Plant Varieties

1. examining sections,
2. opposition boards for variety protection matters.

The President shall determine their number and shall decide on the allocation of duties.

(2) The examining sections shall be responsible for decisions on

1. applications for variety protection,
2. objections under Article 25,
3. annulment of the grant of variety protection in respect of the variety denomination,
4. entry of a different variety denomination and the establishment of a variety denomination under Article 30(3),
5. the grant of a compulsory exploitation right and the determination of the conditions,
6. withdrawal and annulment of the grant of variety protection.

(3) The opposition boards shall be responsible for decisions on opposition against decisions taken by the examining sections.

Article 19

Composition of the Examining Sections

(1) The examining sections shall in each case comprise one technical member of the Federal Office of Plant Varieties designated by the President.

(2) Decisions in the cases under Article 18(2), items 2, 5 and 6, shall be taken by the examining sections composed of three members of the Federal Office of Plant Varieties designated by the President, one of whom shall be a legal member.

Article 20

Composition of the Opposition Boards

(1) The opposition boards shall in each case comprise the President or one member of the Federal Office of Plant Varieties designated by the President as chairman, one legal member and one technical member of the Federal Office of Plant Varieties designated by the President as assessors, and two honorary assessors. The opposition boards shall be empowered to deliberate and make decisions provided that the chairman, the legal assessor and one honorary assessor are present.

(2) The honorary assessors shall be appointed by the Federal Minister of Food, Agriculture and Forestry for a term of six years; they may be reappointed. Where an honorary assessor retires prematurely, his replacement shall be appointed for the remaining term of office. The honorary assessors should possess special technical knowledge in the field of plant varieties. Owners or employees of breeding establishments and employees of breeders' associations shall not be appointed.

(3) An alternate shall be appointed for each honorary assessor. Paragraph (2) shall apply *mutatis mutandis*.

CHAPTER THREE

PROCEEDINGS BEFORE THE FEDERAL OFFICE OF PLANT VARIETIES

Article 21

Formal Administrative Procedure

The provisions of Articles 63 to 69 and 71 of the Act on Administrative Procedure concerning formal administrative procedures shall apply to proceedings before the examining sections and the opposition boards.

Article 22

The Application for Variety Protection

(1) The applicant shall state the name of the original breeder or breeders or discoverer or discoverers of the variety in the application for variety protection and shall certify that, to the best of his knowledge, no further persons have been involved in the breeding or discovery of the variety. If the applicant is not the original breeder or discoverer or is not the only original breeder or discoverer, he shall be required to state how the variety came into his possession. The Federal Office of Plant Varieties shall not be obliged to verify such statements.

(2) The applicant shall state the variety denomination. For the purposes of the procedure for granting variety protection, he may state, with the consent of the Federal Office of Plant Varieties, a provisional designation.

Article 23 Chronological Order of the Application for Variety Protection

(1) The chronological order of the application for variety protection shall be determined, in cases of doubt, by the order of the entries in the register of incoming mail at the Federal Office of Plant Varieties.

(2) If the applicant has already applied for breeders' rights for the variety in another Union State, he shall be entitled within one year of the correct filing of the initial application to claim the date of that application as priority for the application for variety protection. Priority may only be claimed in the application for variety protection. It shall lapse if the applicant does not submit to the Federal Office of Plant Varieties within three months of the date of the application copies of the documents of the initial application that have been certified by the authorities responsible for such application.

(3) If the variety denomination has been entered on behalf of the applicant in the Trademark Register at the Patent Office as a mark, or if entry has been applied for, for goods that comprise the propagating material of the variety, he may claim the date of the mark application as priority for the variety denomination. Priority shall lapse if the applicant does not submit to the Federal Office of Plant Varieties within three months of notifying the variety denomination a certificate issued by the Patent Office concerning the entry or application in respect of the mark. The first and second sentences shall apply *mutatis mutandis* to marks registered under the Madrid Agreement Concerning the International Registration of Marks of April 14, 1891, in its currently applicable version and which enjoy protection within the country.

Article 24 Publication of the Application for Variety Protection

(1) The Federal Office of Plant Varieties shall publish the application for variety protection together with a statement of the species, the proposed variety denomination or provisional designation, the application date and the name and address of the applicant, of the original breeder or discoverer and of a procedural representative.

(2) If the application is withdrawn following publication, it shall be deemed under Article 27(2) not to have been filed on grounds of failure to comply or if the grant of variety protection has been refused, these circumstances shall likewise be published by the Federal Office of Plant Varieties.

Article 25 Objections

(1) Any person may lodge an objection to the grant of variety protection with the Federal Office of Plant Varieties.

(2) Objections may only be based on the allegation that

1. the variety is not distinct, not homogeneous, not stable or not new,
2. the applicant is not entitled or
3. the variety denomination is not registrable.

(3) The time limit for objections shall be

1. the granting of variety protection, in the case of objections under paragraph (2), item 1,
2. three months after publication of the application for variety protection, in the case of objections under paragraph (2), item 2,
3. three months after publication of the proposed variety denomination in the case of objections under paragraph (2), item 3.

(4) The grounds for the objection shall be stated. The facts and elements of proof supporting the allegation under paragraph (2) shall be furnished in detail. Except where already set forth in the declaration of objection, they shall be furnished before the expiry of the time limit for objections.

(5) Where an objection under paragraph (2), item 2, leads to withdrawal of the application for variety protection or to refusal of grant of variety protection and if the objecting party files an application for variety

protection within one month following withdrawal or within one month of the date on which the refusal becomes final in respect of the same variety, he may require that the date of the prior application shall apply to his application as the filing date.

Article 26 Examination

(1) For the purposes of examining whether a variety fulfills the requirements for the grant of variety protection, the Federal Office of Plant Varieties shall grow the variety or shall undertake any other necessary investigations. It may waive examination if it already has earlier examination findings of its own in its possession.

(2) The Federal Office of Plant Varieties may entrust growing or the other necessary investigations to other technically qualified services, even abroad, and take into account the results of growing trials and other investigations carried out by such services.

(3) The Federal Office of Plant Varieties shall require the applicant to submit to the Office or to the service it designates, within a specified time limit, the necessary propagating and other material and the necessary further documents, to provide the necessary information and to permit its verification.

(4) Where the applicant claims priority under Article 23(2), he must submit the necessary propagating and other material and the necessary further documents within four years of the expiry of the priority period. He may not submit further propagating or further other material after such submission. If the first application is withdrawn or if the grant of breeders' rights is refused before the expiry of four years, the Federal Office of Plant Varieties may require the applicant to submit the propagating and other material in time for the following growing period and the other documents within a specified time limit.

(5) The Federal Office of Plant Varieties may supply authorities and services abroad with information on examination results where necessary for mutual information.

(6) The Federal Office of Plant Varieties shall require the applicant to submit in writing within a specified time limit

1. a variety denomination, if he has stated a provisional designation,
2. another variety denomination, if the proposed denomination is not registrable.

Articles 24 and 25 shall apply *mutatis mutandis*.

Article 27 Failure to Comply

(1) If the applicant fails to comply, within the time limit notified to him, with a request of the Federal Office of Plant Varieties,

1. to submit the necessary propagating or other material or the necessary further documents,
2. to propose a variety denomination or
3. to pay the due examination fees,

the Federal Office of Plant Varieties may reject the application for variety protection if it has pointed out the consequences of failure to comply when notifying the time limit.

(2) If the applicant or the appellant does not pay the due fee for a decision on an application for variety protection or on an appeal, the application shall be deemed not to have been filed or the appeal not to have been lodged if the fee is not paid within one month of the Federal Office of Plant Varieties having notified the fee decision and thereby having pointed out the consequences of failure to comply.

Article 28 The Plant Variety Protection Register

(1) There shall be entered in the Plant Variety Protection Register, once the grant of variety protection has become final,

1. the species and the variety denomination,
2. the specified expressions of the characteristics important for distinctness; in the case of varieties whose plants are produced by crossing specific hereditary components, also reference thereto,

3. the name and address
 - (a) of the original breeder or discoverer,
 - (b) of the owner of variety protection,
 - (c) of the procedural representative,
4. the time at which variety protection begins and ends, together with the reasons for the end of protection,
5. any exclusive exploitation right, including the name and address of its owner,
6. any compulsory exploitation right and the conditions laid down.

(2) The entry of the specified expressions of characteristics important for distinctness and the entry of the conditions attaching to a compulsory exploitation right may be replaced by a reference to documents of the Federal Office of Plant Varieties. The entry may be amended *ex officio* in respect of the number and type of characteristics or of the specified expressions of those characteristics, where necessary, in order to render the description of the variety comparable with the descriptions of other varieties.

(3) Amendments to the identity of the owner of variety protection or of a procedural representative shall only be entered if supporting evidence is provided. The registered owner of variety protection or procedural representative remains entitled and committed under this Act until any amendment is entered.

(4) The Federal Office of Plant Varieties shall publish the entries.

Article 29

Access

(1) All persons shall have access to

1. the Plant Variety Protection Register,
2. the documents
 - (a) under Article 28(2), first sentence,
 - (b) of a published application for variety protection and granted variety protection,
3. the growing
 - (a) of a variety for the purpose of its examination,
 - (b) of a variety for the purpose of verifying its continued existence.

(2) In the case of varieties whose plants are produced by crossing certain hereditary components, details of the hereditary components shall be excluded from access at the request of the person who has filed the application for variety protection. Such request may not be filed once the decision on the application for variety protection has been taken.

Article 30

Annulment of Grant of Variety Protection in Respect of the Variety Denomination

(1) The grant of variety protection shall be withdrawn, insofar as it concerns the variety denomination, if grounds for exclusion under Article 7(2) or (3) existed at the time of entry and continue to exist. There shall be no claim to compensation for economic disadvantage under Article 48(3) of the Act on Administrative Procedure. Withdrawal on other grounds shall not be permitted.

(2) The grant of variety protection, insofar as it concerns the variety denomination, shall be cancelled if

1. grounds for exclusion under Article 7(2), items 5 or 6, subsequently occur,
2. a conflicting right can be proved and the owner of variety protection agrees to entry of another variety denomination,
3. the owner of variety protection has been prohibited by a final legal decision from using the variety denomination or
4. any other person required to use the variety denomination under Article 14(1) has been prohibited from using the variety denomination by a final legal decision and the owner of variety protection is a subsidiary party to the litigation or was informed of the proceedings, insofar as he was not prevented from asserting his rights by circumstances named in Article 68, second half-sentence, of the Code of Civil Procedure.

Annulment on other grounds shall not be permissible.

(3) The Federal Office of Plant Varieties shall require the owner of variety protection to propose another variety denomination within a specified period of time. If that period of time expires without result, the Office may lay down a variety denomination *ex officio*. At the request of the owner of variety protection or of a third party, the Federal Office of Plant Varieties shall lay down a variety denomination if the petitioner can prove a justified interest. Articles 24 and 25 shall apply *mutatis mutandis*.

Article 31 Ending of Variety Protection

(1) Variety protection shall expire if the owner of variety protection makes a written denunciation to the Federal Office of Plant Varieties.

(2) The grant of variety protection shall be withdrawn if it transpires that on grant of variety protection the variety was not distinct or was not new. There shall be no claim to compensation for economic disadvantage under Article 48(3) of the Act on Administrative Procedure. Withdrawal on other grounds shall not be permissible.

(3) The grant of variety protection shall be cancelled if it transpires that the variety is not homogeneous or is not stable.

(4) In other cases, the grant of variety protection may only be cancelled if the owner of variety protection

1. has not complied with a request under Article 30(3) to propose another variety denomination,
2. has not fulfilled, despite a reminder, an obligation in respect of verification of the continued existence of the variety in accordance with a statutory order under Article 32(1) or
3. has not paid due annual fees within the additional time limits.

Article 32 Powers to Issue Procedural Regulations

The Federal Minister of Food, Agriculture and Forestry shall be empowered

1. to regulate details of the procedure before the Federal Office of Plant Varieties, including the selection of the characteristics important for distinctness, the determination of the scope of examination and the subsequent verification of the continued existence of the protected variety.
2. to determine the gazette for notification of the Federal Office of Plant Varieties, by way of statutory order.

Article 33 Costs

(1) The Federal Office of Plant Varieties shall charge costs for its official acts under this Act and for the examination of varieties at the request of foreign or supra-national agencies (fees and expenses) and an annual fee for each commenced year of the duration of variety protection (protection year).

(2) The Federal Minister of Food, Agriculture and Forestry shall be empowered, in agreement with the Federal Ministers of Finance and of Economics, to determine by statutory order the acts for which fees are due and the rates of such fees, whereby he may provide for fixed rates or basic rates and may determine the time for payment of fees. The importance, the economic value and any other utility of the official act, including for breeding and for the general public, shall be taken into appropriate account. The expenses to be refunded may be regulated in derogation of the Administrative Cost Act.

(3) (cancelled).

(4) In the case of fees for the examination of a variety and for a negative decision on an application for variety protection, no reduction under Article 15(2) of the Administrative Cost Act shall be granted.

(5) In the case of a successful appeal, the appeals fee shall be refunded. In the case of a successful appeal to the Patent Court or a successful legal appeal, the appeals fee shall be refunded on request. In the case of a partial success, the corresponding part of the appeals fee shall be refunded. However, the refund can be fully or partly refused if the decision is based on facts that could have been asserted or proved at an

earlier date. Sentences 1 to 4 shall apply *mutatis mutandis* for expenditure in appeals procedures. There shall be no claim to refund of costs under Article 80 of the Act on Administrative Procedure.

CHAPTER FOUR COURT PROCEEDINGS

Article 34 Appeals

- (1) Appeals shall lie to the Patent Court from the decisions of the opposition boards.
- (2) Within the time limit prescribed for filing appeals, a fee shall be payable in accordance with the Act on the Fees of the Patent Office and the Patent Court; if the fee is not paid, the appeal shall be deemed not to have been lodged.
- (3) An appeal against the laying-down of a variety denomination under Article 30(3) or against a decision for which immediate enforcement has been ordered shall have no staying effect.
- (4) The President of the Federal Office of Plant Varieties may be a party in appeal proceedings.
- (5) A Chamber of Appeal shall rule on appeals. In the cases referred to in Article 18(2), items 3 and 4, it shall take its decisions with three legal members and in other cases with one legal member as chairman, a further legal member and two technical members.

Article 35 Appeals on Points of Law

- (1) Appeals on points of law from decisions of the Chamber of Appeal shall lie to the Federal Court if the Chamber of Appeal so allows in its decision.
- (2) Article 34(3) shall apply *mutatis mutandis*.

Article 36 Application of the Patent Act

Unless otherwise stipulated by Articles 34 and 35, the provisions of the Patent Act concerning appeals proceedings before the Patent Court and proceedings for appeals on points of law before the Federal Court and concerning assistance with the costs of proceedings shall apply *mutatis mutandis* to such proceedings.

CHAPTER FIVE INFRINGEMENTS

Article 37 Right to Seek Injunctions, Damages and Compensation

- (1) Whosoever without the consent of the owner of variety protection
 1. commits any of the acts referred to in Article 10, first sentence, or
 2. uses the variety denomination of a protected variety or a designation that may be confused with it for a different variety of the same or a related species may be sued by the injured party to enjoin such infringement.
- (2) Whosoever acts intentionally or negligently shall be liable for compensation to the injured party for the damage resulting from the act in question. In the event of slight negligence, the court may fix, in lieu of compensation, an indemnity within the limits of the damage to the injured party and the profit which has accrued to the infringer.
- (3) The owner of variety protection may require equitable remuneration from any person who has performed one of the acts referred to in Article 10, first sentence, in the time between publication of the application and grant of variety protection.
- (4) Claims deriving from other statutory provisions shall remain unaffected.

Article 37a
Right to Seek Destruction

(1) In the cases referred to in Article 37(1), the injured party may request that material which is the subject of the infringing act and which is in the possession or ownership of the infringer be destroyed, unless the situation resulting from the infringement can be removed in some other manner and destruction would be out of proportion for the infringer or owner in the individual case.

(2) The provisions of paragraph (1) shall be applied, *mutatis mutandis*, to any equipment belonging to the infringer and which has been used or is intended exclusively or almost exclusively for the unlawful production of the material.

Article 37b
Right to Seek Information with Regard to Third Parties

(1) Whosoever without the consent of the owner of variety protection commits any of the acts referred to in Article 10 and which are reserved to the owner of variety protection or uses the variety denomination of a protected variety or a denomination that may be confused with such denomination for a different variety of the same or a related species, may be required by the injured party to give information, without delay, on the origin and distribution channels of the material that is the subject of such act, except where disproportionate in the individual case.

(2) The person required to give information under paragraph (1) shall give particulars of the name and address of the producer, the supplier and any other prior owners of the material, of the trade customer or client as also in respect of the quantity of material that has been produced, delivered, received or ordered.

(3) In those cases where infringement is obvious, the obligation to provide information may be imposed by an interim injunction in compliance with the Code of Civil Procedure.

(4) Such information may only be used in criminal proceedings or in proceedings under the Act on Offenses against the person required to give information, or against a dependent person under Article 52(1) of the Code of Criminal Procedure, in respect of an act committed before the information was given, with the consent of the person required to give information.

(5) Further claims to information shall remain unaffected.

Article 37c
Prescription

Claims arising from infringement of a right protected by this Act shall become invalid by prescription three years after the time at which the entitled person gains knowledge of the infringement and of the identity of the infringer or 30 years after the infringement irrespective of such knowledge. Article 852(2) of the Civil Code shall apply *mutatis mutandis*. Where the infringer has made gains at the cost of the entitled person by reason of the infringement, he shall be obliged, even after the claim has expired by prescription, to surrender such gain in accordance with the provisions on the surrender of unjustified gain.

Article 38
Litigation with Respect to Plant Variety Protection

(1) All actions whereby a claim is asserted under a legal relationship governed by this Act (plant variety protection litigation) shall be heard by the *Landgerichte* (provincial courts) irrespective of the value in dispute.

(2) The provincial governments shall have power to allot by statutory order variety protection litigation for the areas of a number of provincial courts to one such court where this serves the technical furtherance or more expeditious settlement of the proceedings. The provincial governments may transfer such powers to the provincial administrations of justice.

(3) If an appeal is lodged against a decision by the court for plant variety protection litigation, the parties may also be represented in the court of appeal by attorneys at law admitted to practice in the higher regional court before which the appeal would have been heard in the absence of an arrangement under paragraph (2). Any additional costs incurred by a party by reason of the fact that it is represented by an attorney at law not admitted to practice in the court hearing the case shall not be refunded.

(4) Of the costs arising from the collaboration of a patent attorney, fees up to the amount of a full fee according to Article 11 of the Federal Regulations on Lawyers' Fees, together with the necessary expenses of the patent attorney, shall be allowed.

(5) If a representative is briefed, the place in which he has his business premises or, if he has no business premises, his place of residence, shall be deemed to be the place at which property is located within the meaning of Article 23 of the Code of Civil Procedure.

Article 39 Penal Provisions

(1) Whosoever without being entitled thereto performs any of the following acts shall be punished by imprisonment not exceeding three years or by a fine:

1. in contravention of Article 10, first sentence, item 1, markets propagating material or produces it for marketing,
2. in contravention of Article 10, first sentence, item 2, produces propagating material or markets plants or parts of plants or imports them therefor,
3. in contravention of Article 10, first sentence, item 3, uses propagating material for the production of propagating material of another variety or
4. in contravention of Article 10, first sentence, item 4, introduces propagating material into an area referred to therein.

(2) Where the person committing the acts does so on a commercial basis the penalty shall be imprisonment not exceeding five years or a fine.

(3) The attempt to commit such an offense shall be punishable.

(4) In the cases referred to in paragraph (1), such acts shall only be prosecuted on request, except where the criminal prosecuting authorities hold *ex officio* intervention to be required due to the special public interest in criminal prosecution.

(5) Objects implicated in an offense may be confiscated. Article 74a of the Penal Code shall apply. Where the claims referred to in Article 37a are upheld in proceedings under the provisions of the Code of Criminal Procedure with regard to the compensation of the injured party (Articles 403 to 406c), the provisions on confiscation shall not be applied.

(6) In the event of a conviction, the sentence shall be published if the injured party so requests and has a justified interest therein. The nature of the publication shall be laid down in the judgment.

Article 40 Fines

(1) Whosoever intentionally or negligently

1. in contravention of Article 14(1) markets propagating material without thereby stating the variety denomination or without stating it in the prescribed manner or
2. in contravention of Article 14(3) uses a variety denomination or a designation that may be confused with it for another variety of the same or of a related species, shall be deemed to have committed an offence.

(2) Such offence may be liable to a fine not exceeding 10,000 Deutschmarks.

(3) Objects implicated in offenses may be confiscated. Article 23 of the Act on Offences shall be applied.

(4) The Federal Office of Plant Varieties shall constitute the administrative authority within the meaning of Article 36(1), item 1, of the Act on Offences.

Article 40a Measures by the Customs Authorities

(1) Material that is the subject of the infringement of variety protection granted within the country shall be subject, at the petition of the owner of variety protection and against his security, to seizure by the customs authorities, on import or export, in those cases where the infringement is obvious. This provision

shall apply in trade with other Contracting States only insofar as controls are carried out by the customs authorities.

(2) Where the customs authorities order a seizure, they shall advise the person entitled to dispose and also the petitioner without delay. The origin, quantity and place of storage of the material, together with the name and address of the person entitled to dispose, shall be communicated to the petitioner; the secrecy of correspondence and mail (Article 10 of the Basic Law) shall be restricted to that extent. The petitioner shall be given the opportunity to inspect the material where such inspection does not constitute a breach of commercial or trade secrecy.

(3) Where no opposition to seizure is made, at the latest, within two weeks of service of the notification under the first sentence of paragraph (2), the customs authorities shall order confiscation of the seized material.

(4) If the person entitled to dispose opposes seizure, the customs authorities shall inform the petitioner thereof without delay. The petitioner shall be required to declare to the customs authorities without delay whether he maintains his request under paragraph (1) in respect of the seized material.

1. If the petitioner withdraws his request, the customs authorities shall lift the seizure without delay.
2. If the petitioner maintains his request and submits an executable court decision ordering the impounding of the seized material or limitation of the right to dispose, the customs authorities shall take the necessary measures.

Where neither of the cases referred to in items 1 and 2 are applicable, the customs authorities shall lift the seizure on the expiry of two weeks after service of the notification to the petitioner under the first sentence; where the petitioner can show that a court decision according to item 2 has been requested, but has not yet been received, the seizure shall be maintained for a further two weeks at the most.

(5) Where the seizure proves to have been unjustified from the beginning and if the petitioner has maintained his request under paragraph (1) in respect of the seized material or has not made a declaration without delay (second sentence of paragraph (4)), he shall be required to compensate the damages that seizure has occasioned to the person entitled to dispose.

(6) The petition under paragraph (1) is to be submitted to the Regional Finance Office and shall be effective for two years unless a shorter period of validity has been requested; it may be repeated. The cost of official acts related to the petition shall be charged to the petitioner in accordance with Article 178 of the Fiscal Code.

(7) Seizure and confiscation may be challenged by the legal remedies allowed for the fixed penalty procedure under the Act on Offenses in respect of seizure and confiscation. The petitioner shall be heard in the review proceedings. An immediate appeal shall lie from the decision of the local court; it shall be heard by the *Oberlandesgericht* (higher provincial court).

CHAPTER SIX FINAL PROVISIONS

Article 41 Transitional Provisions

(1) The provisions of this Act shall apply in respect of varieties for which, on entry into force of this Act, variety protection

1. still exists under the Seed Act as published in a consolidated version in the *Bundesgesetzblatt*, Part III, Section No. 7822–1, and last amended by the Act of December 23, 1966 (*BGBI. I*, page 686), in conjunction with Article 52(1) of the Plant Variety Protection Act of May 20, 1968 (*BGBI. I*, page 429), in the version notified on January 4, 1977 (*BGBI. I*, pages 105, 286), or
2. has been granted or applied for under the Plant Variety Protection Act of May 20, 1968, in the applicable version,

with the provision that, in the case under item 1, a grant of variety protection can only be withdrawn under Article 31(2) if it transpires that the requirements of Article 2(2) of the Seed Act were not fulfilled at the time variety protection was granted.

(2) Where a patent has been granted or applied for in respect of a variety or a process for its breeding prior to the date on which this Act has become applicable to the species concerned, the applicant, or his successor in title, may maintain his application or may apply for grant of variety protection for the variety and the owner of the patent may maintain his patent or may apply for grant of variety protection for the variety. If he applies for the grant of variety protection, he shall be entitled to claim the date of the patent application as priority for the application for variety protection; the third sentence of Article 23(2) shall apply *mutatis mutandis*. The duration of the variety protection granted shall be reduced by the number of full calendar years that have elapsed between the filing of the patent application and the date of the application for variety protection. Once the grant of variety protection has become final, rights deriving from the patent or the patent application may no longer be asserted in respect of the variety; pending patent grant procedures shall not be pursued.

(3) Varieties for which the application for protection has been filed up to one year after the date on which this Act has become applicable to the species concerned shall be deemed to be new if propagating material or harvested material of the variety has not been marketed for commercial purposes with the consent of the entitled person or of his predecessor in title more than four years or, in the case of vine and tree species, more than six years prior to the said date. Where variety protection is granted under the first sentence, the duration of protection shall be reduced by the number of full calendar years that have elapsed between the beginning of marketing and the date of filing.

Article 42 Entry into Force

This Act shall enter into force on the day following its promulgation.
