

Firm Legal Roots

China's new Judicial Interpretation for Plant Variety Rights Cases

By **Andrew Sim** and **Alanna Rennie**

China's Supreme People's Court has released a new judicial interpretation for plant variety rights (PVR) cases, *The Supreme People's Court Provisions on Several Issues Concerning the Application of Law to Cases Involving Plant Variety Rights Infringements (II) (Judicial Interpretation)*. The *Judicial Interpretation* came into effect on 7th July 2021. It provides further and clearer guidance on the application of law in PVR infringement cases, which will encourage more consistent rulings by the People's Court and grant stronger judicial protection to PVR holders in China. **Andrew Sim** and **Alanna Rennie** of **Baker McKenzie** address some of the major developments arising from the *Judicial Interpretation* in this article.

As those familiar with PVR will know, the subject matter of the right is confined to propagating material. The *Judicial Interpretation* confirms a broad reading of the definition of propagating material, being material that possesses propagating ability and can propagate a plant that possesses the same traits and characteristics as the protected variety (i.e., propagate the variety true-to-type). This means that subject to these pre-conditions being satisfied, the protection can cover seeds through to the fruit and flowers, providing a legal basis for PVR holders to defeat infringers in the context of rapid developments in breeding technologies.

The *Judicial Interpretation* further clarifies that where material can be considered as both propagating and harvested, and an alleged infringer claims that the infringing material is harvested material for use in consumption rather than production or propagation, the alleged infringer will carry the burden of proving this. PVR protection does not

currently extend to harvested material in China; however, it is captured under the draft revision to China's *PVR Regulations* (which was released in early 2019).

Another long-debated issue in China—and in other International Union for the Protection of New Plant Varieties (UPOV) countries—is whether the act of growing (for example, growing a tree to produce fruit) constitutes the infringing act of production of propagating material and falls within the scope of the right. The *Judicial Interpretation* confirms that growing is a protected act, providing much needed clarity for the plant-breeding industry, and hopefully a development that can be followed in other UPOV countries. The infringing act of offering for sale is also given a broad interpretation to include advertising, exhibiting and other means of indicating an intent to sell propagating material of a protected variety.

The new regulation also broadens the base of potential infringers, extending to the whole supply chain (rather than

just a producer, propagator or seller), providing that the People's Court may hold a person jointly or severally liable for PVR infringement if that person knew, or should have known, that another person's acts constituted PVR infringement, and provided services or conditions to assist the infringement, such as acquisition, storage, transportation or processing services, or certification materials.

The interaction between PVR and contracts is addressed in the document; that is, whether a breach of the conditions and limitations in a licence relating to a PVR variety also constitutes infringement, or whether it is simply a matter of contractual breach. The *Judicial Interpretation* stipulates that if a licensee produces, propagates or sells propagating material of a PVR variety beyond the scale or area agreed in the licence, 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, taking into consideration the burden of proof, evidence collected, amount of compensation claimed, among other aspects.

Another key clarification is confirmation that the principle of exhaustion applies to PVR. According to the *Judicial Interpretation*, the People's Court should not hold the production, propagation or sale of the propagating material of a PVR variety that has been sold by the PVR holder or with the holder's permission to constitute infringement. However, the following exceptions apply:

- where material is further re-produced or re-propagated; or
- where it is exported to a country or region that does not offer PVR protection for that plant genera or species, for purposes of production or propagation.

Along with these developments, the *Judicial Interpretation* provides a number of measures to enhance effective PVR enforcement, including the provision for advance judgment where the infringement has been established on the facts. The People's

Court may order the destruction of the infringing material or other measures to prevent the propagation and dispersion of the alleged infringing material. These provisions seem to have greater use and effectiveness for cases involving presumptions of infringement.

Further, clearer guidance is provided on some of the technical aspects particular to PVR cases, including use of molecular markers. The *Judicial Interpretation* also shifts the burden of proof to the alleged infringer on a number of matters, including where a PVR protected variety denomination is used in relation to the alleged infringing material, and where the alleged infringer claims that the material is harvested material and not propagating material, providing a framework for easier and more streamlined enforcement.

Lastly, the *Judicial Interpretation* highlights circumstances that will be considered serious PVR infringements and clearer standards for calculating punitive damages, including where propagating material is sold in unmarked or unlabelled packaging. **EB**

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