Guide to New Varieties of Plant in China

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New variety of plant (NVP), refers to improved plant varieties, cultivated or developed from wild plants discovered by breeders, which possess novelty, distinctness, uniformity and stability, as well as an adequate denomination. To acknowledge the special efforts and achievements made by the breeders in developing new varieties for agriculture, horticulture and forestry, the protection of NVP entitles the plant breeders the exclusive rights to use the variety for commercial use. Good protection of NVP provides incentive for plant breeders to continuously invest in the creation of new varieties that may have a unique utility in the marketplace. Consequently, NVP plays an important role in promoting a country’s development of agriculture and forestry.

In 1997, China promulgated its first NVP protection law; ‘The Regulations of the People’s Republic of China on the Protection of New Varieties of Plants’ (the China NVP Regulations) and the respective implementation of rules relating to agriculture and forestry. In 1999, China joined the Convention of the International Union for the Protection of New Varieties of Plants (UPOV). As a result, China protects NVPs from foreign countries who are also members of UPOV, this includes most European countries.

In comparison with the European protection for NVPs, for instance the system of the EU Community Plant Variety Office (CPVO)\(^2\), China’s NVP system marks some differences that European breeders with interest in NVP protection and exploitation in China should be aware of. Firstly, China has the national lists of protected plant genera and species that limit the scale of plant varieties under which the application can be filed, not like the Community system which covers all the species. Second, the length of protection in China is generally shorter than it is in Europe, e.g. 20 years for vines, 15 years for potatoes in China, compared to 30 years for both in the EU. The third key difference is that in China, ‘farms’ propagating activity of the protected plant varieties for their own use are exempt from seeking authorisation from the right holder and paying the royalty fee. The ‘farm saved seed’ exemption in the EU relates only to certain agricultural species and farmers are not exempt from those royalties. (This does not apply to small holder farmers).

To enforce the NVP rights in China, many European plant breeders choose to protect their NVP through registration. According to the figures released by the China National Intellectual Property Administration (CNIPA)\(^3\), in the period of 1999 to 2017, 1170 domestic forestry plant applications were filed, accounting for 86.16% of the total numbers. The remaining 3.84% or 188 applications, were filed by applicants from 10 foreign countries. The top three filing countries were Germany (57), Netherlands (46) and France (30). From 1999 to 2018, approximately 12 000 new agricultural plant varieties were granted\(^4\). The majority of the applications were filed by enterprises, while some were filed by individuals and academic institutions.

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\(^{1}\) The full list of the membership can be accessed here: [https://www.upov.int/members/en/](https://www.upov.int/members/en/)

\(^{2}\) There are some special protection on NVP offered by each member state of the European Union, this guide uses the general one i.e. the CPVO system as a reference point in the comparison of the EU and Chinese NVP system.

\(^{3}\) CNIPA: [http://www.sipo.gov.cn/mtsdl/1136722.htm](http://www.sipo.gov.cn/mtsdl/1136722.htm)

2. NVP Registration

Similar to many other IP types, NVP rights are territorial and you should therefore register your NVP to enforce it in China. There are two government authorities responsible for the new variety rights for agricultural plants and forestry plants; namely the Ministry of Agriculture (MOA) and the State Forestry and Grassland Administration (SFGA). Both of them have set up a specific office to take care of the NVP applications, including the examination and approval.

The registration of new varieties of agricultural plants is done by the Ministry of Agriculture (MOA):

Address: No.96 South Road of East 3rd Ring Road, Chaoyang District, Beijing 100122, P.R.China
Tel: +86-10- 59199353
E-mail: cnpvp@agri.gov.cn
Website: http://english.agri.gov.cn/

The registration of new varieties of forestry plants is done by the Office for the Protection of NVP of the State Forestry and Grassland Administration (SFGA):

Address: 12 Futong East Street, Beijing 100102, P.R.China
Tel: +86 10 84239104
Fax: +86 10 84238883
E-mail: webmaster@cnpvp.net
Website: http://www.cnpvp.net/index/index_en.aspx

Apart from registration, both of these authorities are responsible for publishing the national lists of the protected genera and species in China. So far, eleven instalments of agricultural plants covering 191 genera (species) have been published by MOA and five instalments of forestry plants covering 198 genera (species) have been published by SFGA. For more details please see their websites:


Apart from belonging to the aforesaid ‘national lists’, to be approved as NVP in China, your new variety of plant must possess the following characteristics:
Novelty, meaning that the propagating materials of the new variety have not been sold, or sold with the authorisation of the breeder in China more than 1 year before the application date or been sold outside of China within 6 years for vines, forest trees, fruit trees and ornamental plants, and within 4 years for other plants.

Distinctness, meaning that the variety must be clearly distinguishable from any other variety, which is already known before the application date.

Uniformity, meaning that the variety is sufficiently uniform in its relevant features or characteristics after propagation, unless variation can be expected.

Stability, meaning that the variety keeps its relevant features or characteristics unchanged after repeated propagation or at the end of a particular cycle of propagation.

Lastly, you should give an appropriate name to the new variety, one that is not similar to any other known variety of the identical or similar plant genera or species. There are also certain requirements of the denomination, for instance, a purely numerical name is not allowed, neither are names that violate laws or social morals, nor the names of countries. For full details please see the Regulations and the Implementation Rules (check related links).

According to regulations, foreign applicants with no habitual residence in China, shall file the NVP application through an agency designated by the relevant NVP protection offices of MOA or SFGA.

- SFGA publishes its agency list via the website http://www.cnvpv.net/root/DLJG_en.aspx
- MOA does currently not have a published list of agencies, but the legitimacy of an agency can be checked with them via phone: +86 10 59199392 (Beijing time 08:00-11:30, 13:00-17:00, Mon – Fri).

As standard, the application materials should be submitted in Chinese: (two printed and one electronic version) and should include the following documents:

- Application form (http://www.cnvpv.net/root/iitemview.aspx?id=110)
- Specifications of the variety
- Photograph(s) of the variety
- The power of attorney

The general application procedure is as follows:
1. submission;
2. formality examination (only SFGA);
3. payment of application fee;
4. preliminary examination;
5. payment of examination fee;
6. substantial examination;
7. granting of NVP rights.

The application fee is RMB 1,000 (approximately EUR 130) and the examination fee is RMB 2,500 RMB (approximately EUR 325). Once your application is granted, from that year to the sixth year, an annual fee of RMB 1,000 needs to be paid, and from the seventh to the twelfth year, an annual fee of RMB 1,500 (approximately EUR 195) must be paid. The failure to provide these payments on time will result in the invalidation of the NVP.

From the granting date, the protection of the NVP will last for 20 years for vines, forest trees, fruit trees and ornamental plants and 15 years for other plants.
Without authorisation from the NVP right holders, any production or sale, for commercial purpose, of the propagating materials of the NVP constitutes an infringement to the NVP rights.

Similar to the enforcement system applied for other intellectual property rights (IPR) in China including trade mark, patent, copyright etc., there are two main remedies for infringement of NVP. The rights holder can either file a law suit with the people’s courts (civil litigation or in the case of serious counterfeiting criminal proceedings) or commence administrative actions by requesting intervention of agricultural/forestry administration at provincial (or higher) level.

**Administrative actions:**

Administrative actions with the Agriculture Department or the Forestry Department of county-level government (or higher level) are the recommended first step in NVP rights enforcement. Administrative actions are usually less time-consuming, efficient and cost-effective compared to judicial proceedings. The only downside is that administrative authorities do not award damages.

To commence administrative actions you need the following:

- NPV right ownership certificate or license agreement to prove that you own the rights to the NVP in question;
- a plant DNA comparison report provided by a certified test institution recognised by MOA or SFGA;
- evidence of infringement, such as sales agreement (all evidence must be notarised by the Chinese Notary Public)

The provincial or higher level administrations of the MOA or SFGA can order the infringer to cease the infringement, confiscate the propagating materials and illegal incomes and impose a fine of up to five times the value of the goods. Exceeding RMB 50,000, (approximately EUR 6,750) or RMB 250,000 (approximately EUR 33,700) ceiling fee if the value of the goods is under RMB 50,000 or difficult to determine.

For any counterfeited NVP, the agriculture/forestry administration at county (or higher) level can intervene and help assist and provide retribution for an NVP infringement.

**Judicial proceedings:**

In Case of an NVP infringement you can also choose to initiate civil litigation. Civil litigation can also be initiated after administrative actions, which have stopped the infringement, to obtain compensation for the losses suffered, since only courts can award damages. The rights holder can initiate civil litigation at the Beijing Intellectual Property Court or at the competent Intermediate People’s Courts.

The compensation of damages are usually determined based on the actual losses suffered by the rights holder or the illegal profits gained by the infringer. The ceiling for statutory damages is RMB 3 000 000 (EUR 386 768).

Criminal proceedings are available only in the case of serious counterfeiting.

Please refer to the China IPR SME Helpdesk guide on enforcement of IPR in China for more information on the different enforcement avenues available in China: [https://www.china-iprhelpdesk.eu/sites/all/docs/publications/EN_Enforcement_Mar-2016.pdf](https://www.china-iprhelpdesk.eu/sites/all/docs/publications/EN_Enforcement_Mar-2016.pdf)
4. SME Case Study

In September 2003, a natural person Mr. Sun filed a trade mark application for ‘苏啤’ (supi) in class 31 indicating the goods of grains, fresh vegetables and foodstuffs for animals. The registration was later on granted by the China Trade Mark Office (CTMO; now Trade Mark Office of CNIPA) in early 2005. In late 2005, a seed company (A) from Jiangsu Province in Southern China filed a revocation request with the Trademark Re-examination Adjudication Board (TRAB) to revoke the registration of Supi, because their company had already used the name ‘Supi No.1’ and ‘Supi No.3’ on their improved variety of barley seed for brewage usage. Both of them were granted NVP by MOA, and in the meanwhile planting and marketing of these NVP had been widely promoted all around China, gaining certain notoriety. TRAB investigated and found that Mr. Sun, familiar with the seed field, should have been aware of the existence of Supi No.1 and Supi No. 3 but had proceeded to file the application of trade mark Supi, which cannot function in terms of identifying the source of the goods and furthermore hinders the rightful usage of the name by other fellows in the sector. TRAB therefore revoked Mr. Sun’s trade mark registration in the relevant products – grain seeds, plant seeds, unprocessed seeds, and strains but maintained it for the goods of fresh vegetables and foodstuffs for animals etc.

Lesson learnt:
• In accordance with the China NVP regulations, the variety is registered and approved of NVP and the denomination will be regarded as the generic name for that variety. The China Trade Mark Law stipulates that a generic name for that type of product is not eligible for trade mark registration.
• It is highly advisable that the company who obtains NVP in China attach a distinctive trade mark for their plant products rather than just using the NVP name for marketing purposes. The distinctive trade mark of course needs to be registered with the Trade Mark Office of CNIPA.

5. Take-away Messages

• If you see an opportunity for your variety of plants in China, filing an NVP registration is highly advised – registration is most effective before you enter the market.
• Application or registration of NVP can be transferred from a domestic right holder to a foreigner, through the signing of an assignment contract. The assignment needs to be approved by the registration administrations, and be valid from the announcement of the approving authority.
• Using a Chinese agency to file the application is legally required for foreign applicants.
6. Related Links and Additional Resources

Ministry of Agriculture of the People’s Republic of China
http://english.agri.gov.cn/

The State Forestry and Grassland Administration Office for the Protection of New Varieties of Plants
http://www.cnpvp.net/index/index_en.aspx

List of UPVO members
https://www.upov.int/members/en/

UPVO
https://www.upov.int/portal/index.html.en

NVP Regulation:

NVP Rules for the forestry part
http://www.cnpvp.net/root/itemview.aspx?id=3250

The Implementing Rules of the Regulations (Agriculture Part)
Guide to New Varieties of Plant in China

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