

Plant variety rights and patents

Exclusive rights in plants and their limits for conservation

Identifier	SAMEN-PROV0001-P10
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Version and date	3.0 · 2026-09-28
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Abstract

Alongside access and market admission (paper P03) stands a third body of law: exclusive rights in plants. Plant variety protection protects a variety as a whole, a patent protects an invention that may be contained in many varieties. Both grant exceptions, and precisely these exceptions decide what conservation, breeding and farm-saved seed may do. This paper describes both rights, their exceptions and the shift brought about by the new regulation on plants obtained by new genomic techniques. It is the basis for chapter 12 of the book.

1. Two rights, two subject matters

	Plant variety rights	Patent
Subject matter	a variety as a whole	a technical invention, such as a trait or a process
Requirements	new, distinct, uniform, stable, with a variety denomination	new, inventive, industrially applicable
Legal basis	UPOV Convention 1991; Regulation (EC) No 2100/94; Austrian Plant Variety Protection Act 2001	European Patent Convention; Biotech Directive 98/44/EC; national patent law
Authority	Community Plant Variety Office (Angers); nationally the Federal Office for Food Safety	European Patent Office; national patent offices
Breeding with the material	free (breeder's exemption)	free in Austria and under the Unitary Patent system (section 22(1a) Austrian Patent Act; Art. 27(c) UPCA)
Exploiting the result	new variety free, except essentially derived varieties	licence needed as long as the new variety contains the patented trait
Farm-saved seed	permitted for certain species against payment	to the same extent as under plant variety rights (Art. 11 Directive 98/44/EC; section 22a Austrian Patent Act)

The difference lies not in breeding itself but in its result. Plant variety protection is built so that a protected variety may immediately become the starting material for the next and the new variety may be exploited freely. In Austria, patent law likewise permits breeding with patented material; but whoever markets a new variety that

contains the patented trait needs a licence. The breeding exemption in patent law is not uniform across Europe: Austria, Germany and the Unitary Patent system provide for it, not every contracting state of the European Patent Convention.

2. Plant variety rights

2.1 Requirements and duration

A variety is protectable if it is new, distinct, uniform and stable and carries a registrable variety denomination. Community plant variety protection lasts until the end of the 25th calendar year after grant; for vine, tree species and potato, and since 2021 also for asparagus, flower bulbs, woody small fruits and woody ornamentals, until the end of the 30th year.

2.2 What protection covers

Production and reproduction, conditioning for propagation, offering, sale, export, import and stocking for these purposes require the holder's authorisation. Protection also extends to **essentially derived varieties** — varieties that are predominantly derived from the protected variety and, apart from the differences resulting from the derivation, essentially conform to it. Similarity alone is not sufficient. This is intended to prevent a protected variety from being circumvented by minor modification.

2.3 The exceptions

Exception	Content	Significance for conservation
Private, non-commercial	acts done privately for non-commercial purposes	home garden, private multiplication
Experimental purposes	acts done for experimental purposes	tests, variety comparisons
Breeder's exemption	breeding new varieties with the protected variety	open breeding, conservation breeding
Farm-saved seed	re-sowing on the own holding for certain species against equitable remuneration	fodder plants, cereals, potato, oil and fibre plants

Under the farm-saved seed rules, small farmers are exempt from remuneration: decisive is a cultivated area no larger than that needed to produce 92 tonnes of cereals, or, for potatoes, 185 tonnes of potatoes per harvest. Passing propagating material to third parties is not covered.

For varieties with national Austrian protection, § 4(4) of the Sortenschutzgesetz 2001 (Plant Variety Protection Act) frames farm-saved seed more broadly: without a list of species and without an exception for hybrids or synthetic varieties; conditions are set by an agreement between the representatives of the holders and of the farmers, and small farmers are to be exempted.

2.4 What this means for conservation networks

An old landrace is as a rule not protected — either it was never protected, or protection has expired. Plant variety rights therefore touch conservation mainly at two points:

1. **Younger varieties in the holding.** If a network takes in a protected variety, for instance an open-pollinated new breed, it may maintain it privately, test it for experimental purposes and use it for breeding, but may not

pass it on to third parties without consent.

2. **Identical names.** A variety denomination is part of the protection. Passing on a conservation variety under the name of a protected variety may be an infringement, even if the material is different.

3. Patents on plants

3.1 What is not patentable

The European Patent Convention excludes plant varieties as such and **essentially biological processes** for the production of plants — crossing and selection — from patent protection. In opinion G 3/19 of 14 May 2020, the Enlarged Board of Appeal of the European Patent Office held that plants obtained exclusively by such processes are not patentable either. This does not apply to patents granted before 1 July 2017 or to applications filed before that date. In Austria, moreover, a patent on plants does not extend to plants with the same characteristics obtained independently of the patented material by essentially biological processes (section 22(1b) Austrian Patent Act).

3.2 What remains patentable

Technically produced traits — for example through mutagenesis, genetic engineering or new genomic techniques — remain patentable, independently of the variety in which they are contained. A patented trait can thus occur in many varieties of different breeders, and each of these varieties falls under the patent.

3.3 The regulation on new genomic techniques

The European Parliament adopted the regulation on plants obtained by new genomic techniques on 17 June 2026. It was published as Regulation (EU) 2026/1388 in the Official Journal on 26 June 2026 and entered into force on 16 July 2026. As a regulation it is not transposed but directly applicable; after a transition period of two years it applies from July 2028. Until then, such plants remain subject to GMO law.

It distinguishes two categories: category 1 plants are considered equivalent to conventionally bred ones and are not labelled — with the exception of seed and other reproductive material; category 2 plants remain under GMO law. Plants with herbicide tolerance or insecticidal properties are excluded from category 1; organic farming remains free of both categories.

On patents, the regulation contains no substantive rule but three measures:

1. Whoever applies for verification of category 1 status must declare existing and pending patents; they are published in a publicly accessible database, and the applicant may voluntarily indicate on what terms licences are granted.
2. An expert group of representatives of the member states and the relevant offices monitors the effects.
3. Within one year, the Commission presents a study on the effects of patents on innovation, access to seed and competitiveness of plant breeding.

3.4 Consequences for conservation

For a genebank or conservation network holding old varieties, little changes directly: landraces are as a rule not affected by patent protection; older patents on naturally occurring traits from before 2017 may, however, still exist. Indirectly, two things shift. First, it becomes more important to document that a trait was already present in

a landrace — passport data and variety descriptions thus become evidence of the state of the art. Second, the labelling obligation for category 1 reproductive material can become a tool for keeping GMO-free conservation verifiable.

4. Overview of exceptions

Act	Plant variety rights	Patent
Private cultivation without passing on	permitted	usually permitted
Experiment and testing	permitted	permitted, insofar as directed at the subject matter
Breeding a new variety	permitted	permitted in Austria (section 22(1a) Patent Act)
Marketing the new variety	permitted, except essentially derived variety	licence needed if it contains the patented trait
Farm-saved seed	for certain species against remuneration	to the same extent as under plant variety rights
Passing on to third parties	consent needed	licence needed
Supplying an unprotected landrace	not affected	not affected, unless a patented trait is contained

Limits of this paper

The paper provides orientation and does not replace legal advice. The account of patent law is abbreviated; the breeding exemption under patent law is presented for Austria and is in part regulated differently in other states. On the regulation on new genomic techniques, the paper relies on communications of the Council, the Austrian Ministry of Agriculture and specialist reporting, not on its own analysis of the regulation text. The implementing acts of the transition period up to 2028 are outstanding. Version 1.1 corrects, following an independent review, the account of the breeding exemption and farm-saved seed under patent law.

References

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13. Sortenschutzgesetz 2001 (Austrian Plant Variety Protection Act), § 4. <https://www.jusline.at/gesetz/sortsg/paragraf/4>
14. Paper P03 of this strand.