

103<sup>D</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 1406

To amend the Plant Variety Protection Act to make such Act consistent with the International Convention for the Protection of New Varieties of Plants of March 19, 1991, to which the United States is a signatory, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

AUGUST 6 (legislative day, JUNE 30), 1993

Mr. KERREY (for himself, Mr. DASCHLE, Mr. DURENBERGER, Mr. EXON, Mrs. KASSEBAUM, Mr. PRESSLER, Mr. GRASSLEY, Mr. NICKLES, Mr. CRAIG, Mr. KEMPTHORNE, and Mr. COCHRAN) introduced the following bill; which was read twice and referred to the Committee on Agriculture, Nutrition, and Forestry

MAY 25 (legislative day, MAY 16), 1994

Committee discharged

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## A BILL

To amend the Plant Variety Protection Act to make such Act consistent with the International Convention for the Protection of New Varieties of Plants of March 19, 1991, to which the United States is a signatory, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE; REFERENCES.**

2 (a) SHORT TITLE.—This Act may be cited as the  
3 “Plant Variety Protection Act Amendments of 1993”.

4 (b) REFERENCES TO PLANT VARIETY PROTECTION  
5 ACT.—Except as otherwise expressly provided, whenever  
6 in this Act an amendment or repeal is expressed in terms  
7 of an amendment to, or repeal of, a section or other provi-  
8 sion, the reference shall be considered to be made to a  
9 section or other provision of the Plant Variety Protection  
10 Act (7 U.S.C. 2321 et seq.).

11 **SEC. 2. DEFINITIONS AND RULES OF CONSTRUCTION.**

12 Section 41 (7 U.S.C. 2401) is amended to read as  
13 follows:

14 **“SEC. 41. DEFINITIONS AND RULES OF CONSTRUCTION.**

15 “(a) DEFINITIONS.—As used in this Act:

16 “(1) BASIC SEED.—The term ‘basic seed’  
17 means the seed planted to produce certified or com-  
18 mercial seed.

19 “(2) BREEDER.—The term ‘breeder’ means the  
20 person who directs the final breeding creating a vari-  
21 ety or who discovers and develops a variety. If the  
22 actions are conducted by an agent on behalf of a  
23 principal, the principal, rather than the agent, shall  
24 be considered the breeder. The term does not include  
25 a person who redevelops or rediscovers a variety the

1 existence of which is publicly known or a matter of  
2 common knowledge.

3 “(3) ESSENTIALLY DERIVED VARIETY.—

4 “(A) IN GENERAL.—The term ‘essentially  
5 derived variety’ means a variety that—

6 “(i) is predominantly derived from an-  
7 other variety (referred to in this paragraph  
8 as the ‘initial variety’) or from a variety  
9 that is predominantly derived from the ini-  
10 tial variety, while retaining the expression  
11 of the essential characteristics that result  
12 from the genotype or combination of  
13 genotypes of the initial variety;

14 “(ii) is clearly distinguishable from  
15 the initial variety; and

16 “(iii) except for differences that result  
17 from the act of derivation, conforms to the  
18 initial variety in the expression of the es-  
19 sential characteristics that result from the  
20 genotype or combination of genotypes of  
21 the initial variety.

22 “(B) METHODS.—An essentially derived  
23 variety may be obtained by the selection of a  
24 natural or induced mutant or of a somaclonal  
25 variant, the selection of a variant individual

1 from plants of the initial variety, backcrossing,  
2 transformation by genetic engineering, or other  
3 method.

4 “(4) KIND.—The term ‘kind’ means one or  
5 more related species or subspecies singly or collec-  
6 tively known by one common name, such as soybean,  
7 flax, or radish.

8 “(5) SEXUALLY REPRODUCED.—The term ‘sex-  
9 ually reproduced’ includes any production of a vari-  
10 ety by seed.

11 “(6) UNITED STATES.—The terms ‘United  
12 States’ and ‘this country’ mean the United States,  
13 territories and possessions of the United States, and  
14 the Commonwealth of Puerto Rico.

15 “(7) VARIETY.—The term ‘variety’ means a  
16 plant grouping within a single botanical taxon of the  
17 lowest known rank, that, without regard to whether  
18 the conditions for plant variety protection are fully  
19 met, can be defined by the expression of the charac-  
20 teristics resulting from a given genotype or combina-  
21 tion of genotypes, distinguished from any other  
22 plant grouping by the expression of at least one  
23 characteristic and considered as a unit with regard  
24 to the suitability of the plant grouping for being  
25 propagated unchanged. A variety may be rep-

1       resented by seed, transplants, plants, and other  
2       matter.

3       “(b) RULES OF CONSTRUCTION.—For the purposes  
4 of this Act:

5           “(1) SALE OR DISPOSITION FOR  
6 NONREPRODUCTIVE PURPOSES.—The sale or disposi-  
7 tion, for other than reproductive purposes, of har-  
8 vested material produced as a result of experimen-  
9 tation or testing of a variety to ascertain the charac-  
10 teristics of the variety, or as a by-product of increas-  
11 ing a variety, shall not be considered to be a sale or  
12 disposition for purposes of exploitation of the  
13 variety.

14           “(2) SALE OR DISPOSITION FOR REPRODUCTIVE  
15 PURPOSES.—The sale or disposition of a variety for  
16 reproductive purposes shall not be considered to be  
17 a sale or disposition for the purposes of exploitation  
18 of the variety if the sale or disposition is done as an  
19 integral part of a program of experimentation or  
20 testing to ascertain the characteristics of the variety,  
21 or to increase the variety on behalf of the breeder  
22 or the successor in interest of the breeder.

23           “(3) SALE OR DISPOSITION OF HYBRID SEED.—  
24 The sale or disposition of hybrid seed shall be con-  
25 sidered to be a sale or disposition of harvested mate-

1       rial of the varieties from which the seed was pro-  
2       duced.

3           “(4) APPLICATION FOR PROTECTION OR EN-  
4       TERING INTO A REGISTER OF VARIETIES.—The fil-  
5       ing of an application for the protection or for the en-  
6       tering of a variety in an official register of varieties,  
7       in any country, shall be considered to render the va-  
8       riety a matter of common knowledge from the date  
9       of the application, if the application leads to the  
10      granting of protection or to the entering of the vari-  
11      ety in the official register of varieties, as the case  
12      may be.

13          “(5) DISTINCTNESS.—The distinctness of one  
14      variety from another may be based on one or more  
15      identifiable morphological, physiological, or other  
16      characteristics (including any characteristics evi-  
17      denced by processing or product characteristics, such  
18      as milling and baking characteristics in the case of  
19      wheat) with respect to which a difference in geneal-  
20      ogy may contribute evidence.

21          “(6) PUBLICLY KNOWN VARIETIES.—

22           “(A) IN GENERAL.—A variety that is ade-  
23      quately described by a publication reasonably  
24      considered to be a part of the public technical  
25      knowledge in the United States shall be consid-

1           ered to be publicly known and a matter of com-  
2           mon knowledge.

3           “(B) DESCRIPTION.—A description that  
4           meets the requirements of subparagraph (A)  
5           shall include a disclosure of the principal char-  
6           acteristics by which a variety is distinguished.

7           “(C) OTHER MEANS.—A variety may be-  
8           come publicly known and a matter of common  
9           knowledge by other means.”.

10 **SEC. 3. RIGHT TO PLANT VARIETY PROTECTION; PLANT**  
11 **VARIETIES PROTECTABLE.**

12           Section 42 (7 U.S.C. 2402) is amended to read as  
13 follows:

14 **“SEC. 42. RIGHT TO PLANT VARIETY PROTECTION; PLANT**  
15 **VARIETIES PROTECTABLE.**

16           “(a) IN GENERAL.—The breeder of any sexually re-  
17 produced plant variety (other than fungi or bacteria) who  
18 has so reproduced the variety, or the successor in interest  
19 of the breeder, shall be entitled to plant variety protection  
20 for the variety, subject to the conditions and requirements  
21 of this Act, if the variety is—

22           “(1) new, in the sense that, on the date of filing  
23 of the application for plant variety protection, propa-  
24 gating or harvested material of the variety has not  
25 been sold or otherwise disposed of to other persons,

1 by or with the consent of the breeder, or the succes-  
2 sor in interest of the breeder, for purposes of exploi-  
3 tation of the variety—

4 “(A) in the United States, more than 1  
5 year prior to the date of filing; or

6 “(B) in any area outside of the United  
7 States—

8 “(i) more than 4 years prior to the  
9 date of filing; or

10 “(ii) in the case of a tree or vine,  
11 more than 6 years prior to the date of  
12 filing;

13 “(2) distinct, in the sense that the variety is  
14 clearly distinguishable from any other variety the ex-  
15 istence of which is publicly known or a matter of  
16 common knowledge at the time of the filing of the  
17 application;

18 “(3) uniform, in the sense that any variations  
19 are describable, predictable, and commercially ac-  
20 ceptable; and

21 “(4) stable, in the sense that the variety, when  
22 sexually reproduced, will remain unchanged with re-  
23 gard to the essential and distinctive characteristics  
24 of the variety with a reasonable degree of reliability  
25 commensurate with that of varieties of the same

1 category in which the same breeding method is  
2 employed.

3 “(b) MULTIPLE APPLICANTS.—

4 “(1) IN GENERAL.—If 2 or more applicants  
5 submit applications on the same effective filing date  
6 for varieties that cannot be clearly distinguished  
7 from one another, but that fulfill all other require-  
8 ments of subsection (a), the applicant who first com-  
9 plies with all requirements of this Act shall be enti-  
10 tled to a certificate of plant variety protection, to the  
11 exclusion of any other applicant.

12 “(2) REQUIREMENTS COMPLETED ON SAME  
13 DATE.—

14 “(A) IN GENERAL.—Except as provided in  
15 subparagraph (B), if 2 or more applicants com-  
16 ply with all requirements for protection on the  
17 same date, a certificate shall be issued for each  
18 variety.

19 “(B) VARIETIES INDISTINGUISHABLE.—If  
20 the varieties that are the subject of the applica-  
21 tions cannot be distinguished in any manner, a  
22 single certificate shall be issued jointly to the  
23 applicants.”.

24 **SEC. 4. APPLICATIONS.**

25 Section 52 (7 U.S.C. 2422) is amended—

1 (1) in paragraph (1), by adding at the end the  
2 following new sentence: “The variety shall be named  
3 in accordance with regulations issued by the  
4 Secretary.”;

5 (2) in the first sentence of paragraph (2), by  
6 striking “novelty” and inserting “distinctiveness,  
7 uniformity, and stability”;

8 (3) by redesignating paragraphs (3) and (4) as  
9 paragraphs (4) and (5), respectively; and

10 (4) by inserting after paragraph (2) the follow-  
11 ing new paragraph:

12 “(3) A statement of the basis of the claim of  
13 the applicant that the variety is new.”.

14 **SEC. 5. BENEFIT OF EARLIER FILING DATE.**

15 Section 55(a) (7 U.S.C. 2425(a)) is amended—

16 (1) by redesignating the first and second sen-  
17 tences as paragraphs (1) and (2), respectively;

18 (2) in paragraph (1) (as so designated), by in-  
19 serting before the period at the end the following: “,  
20 not including the date on which the application is  
21 filed in the foreign country”; and

22 (3) by adding at the end the following new  
23 paragraph:

24 “(3)(A) An applicant entitled to a right of priority  
25 under this subsection shall be allowed to furnish any nec-

1 essary information, document, or material required for the  
2 purpose of the examination of the application during—

3 “(i) the 2-year period beginning on the date of  
4 the expiration of the period of priority ; or

5 “(ii) if the first application is rejected or with-  
6 drawn, an appropriate period after the rejection or  
7 withdrawal, to be determined by the Secretary.

8 “(B) An event occurring within the period of priority  
9 (such as the filing of another application or use of the  
10 variety that is the subject of the first application) shall  
11 not constitute a ground for rejecting the application or  
12 give rise to any third party right.”.

13 **SEC. 6. CONTENTS AND TERM OF PLANT VARIETY PROTEC-**  
14 **TION.**

15 Section 83 (7 U.S.C. 2483) is amended—

16 (1) in the second sentence of subsection (a), by  
17 striking “by variety name”;

18 (2) in the first sentence of subsection (b)—

19 (A) by striking “eighteen” and inserting  
20 “20”; and

21 (B) by inserting before the period at the  
22 end the following: “, except that, in the case of  
23 a tree or vine, the term of the plant variety pro-  
24 tection shall expire 25 years from the date of  
25 issue of the certificate”; and

1           (3) in subsection (c), by striking “repository:  
2           *Provided, however, That*” and inserting “repository,  
3           or requiring the submission of a different name for  
4           the variety, except that”.

5 **SEC. 7. PRIORITY CONTEST.**

6           (a) PRIORITY CONTEST; EFFECT OF ADVERSE FINAL  
7 JUDGMENT OR INACTION.—Sections 92 and 93 (7 U.S.C.  
8 2502 and 2503) are repealed.

9           (b) INTERFERING PLANT; VARIETY PROTECTION.—

10           (1) REDESIGNATION.—Chapter 9 of title II (7  
11 U.S.C. 2501 et seq.) is amended by redesignating  
12 section 94 (7 U.S.C. 2504) as section 92.

13           (2) AMENDMENTS.—Section 92 (as so redesignig-  
14 nated) is amended—

15           (A) by striking “The owner” and inserting  
16           “(a) The owner”; and

17           (B) by striking the second sentence.

18           (c) APPEAL OR CIVIL ACTION IN CONTESTED  
19 CASES.—

20           (1) TRANSFER.—Section 73 (7 U.S.C. 2463) is  
21 amended by transferring subsection (b) to the end  
22 of section 92 (as redesignated by subsection (b)(1)).

23           (2) REPEAL.—Section 73 (as amended by para-  
24 graph (1)) is repealed.

1 (d) CONFORMING AMENDMENT.—Section 71 (7  
2 U.S.C. 2461) is amended by striking “92,”.

3 **SEC. 8. INFRINGEMENT OF PLANT VARIETY PROTECTION.**

4 Section 111 (7 U.S.C. 2541) is amended—

5 (1) in subsection (a)—

6 (A) by striking “novel” the first two places  
7 it appears and inserting “protected”;

8 (B) in paragraph (1), by striking “the  
9 novel” and inserting “or market the protected”;

10 (C) by striking “novel” each place it ap-  
11 pears in paragraphs (2) through (7);

12 (D) by striking “or” each place it appears  
13 at the end of paragraphs (3) through (6);

14 (E) by redesignating paragraphs (7) and  
15 (8) as paragraphs (9) and (10), respectively;  
16 and

17 (F) by inserting after paragraph (6) the  
18 following new paragraphs:

19 “(7) condition the variety for the purpose of  
20 propagation;

21 “(8) stock the variety for any of the purposes  
22 referred to in paragraphs (1) through (7);”;

23 (2) by redesignating subsection (b) as sub-  
24 section (f); and

1           (3) by inserting after subsection (a) the follow-  
2           ing new subsections:

3           “(b) The owner of a protected variety may authorize  
4           the use of the variety under this section subject to condi-  
5           tions and limitations specified by the owner.

6           “(c) This section shall apply equally to—

7           “(1) any variety that is essentially derived from  
8           a protected variety, unless the protected variety is  
9           an essentially derived variety;

10           “(2) any variety that is not clearly distinguish-  
11           able from a protected variety;

12           “(3) any variety whose production requires the  
13           repeated use of a protected variety; and

14           “(4) harvested material (including entire plants  
15           and parts of plants) obtained through the unauthor-  
16           ized use of propagating material of a protected vari-  
17           ety, unless the owner of the variety has had a rea-  
18           sonable opportunity to exercise the rights provided  
19           by this Act with respect to the propagating material.

20           “(d) It shall not be an infringement of the rights of  
21           the owner of a variety to perform any act concerning prop-  
22           agating material of any kind, or harvested material, in-  
23           cluding entire plants and parts of plants, of a protected  
24           variety that has been sold or otherwise marketed with the  
25           consent of the owner in the United States, unless the act

1 involves further propagation of the variety or involves an  
2 export of material of the variety, that enables the propaga-  
3 tion of the variety, into a country that does not protect  
4 varieties of the plant genus or species to which the variety  
5 belongs, unless the exported material is for final consump-  
6 tion purposes.

7 “(e) It shall not be an infringement of the rights of  
8 the owner of a variety to perform any act done privately  
9 and for noncommercial purposes.”.

10 **SEC. 9. RIGHT TO SAVE SEED; CROP EXEMPTION.**

11 The first sentence of section 113 (7 U.S.C. 2543) is  
12 amended by striking “section: *Provided*, That” and all  
13 that follows through the period and inserting “section.”.

14 **SEC. 10. LIMITATION OF DAMAGES; MARKING AND NOTICE.**

15 Section 127 (7 U.S.C. 2567) is amended by striking  
16 “novel” each place it appears.

17 **SEC. 11. OBLIGATION TO USE VARIETY NAME.**

18 Section 128(a) (7 U.S.C. 2568(a)) is amended by  
19 adding at the end the following new paragraph:

20 “(4) Failure to use the name of a variety for  
21 which a certificate of protection has been issued  
22 under this Act, even after the expiration of the  
23 certificate.”.

1 **SEC. 12. TRANSITIONAL PROVISIONS.**

2 (a) IN GENERAL.—Except as provided in subsection  
3 (b), any variety for which a certificate of plant variety pro-  
4 tection has been issued prior to the effective date of this  
5 Act, and any variety for which an application is pending  
6 on the effective date of this Act, shall continue to be gov-  
7 erned by the Plant Variety Protection Act (7 U.S.C. 2321  
8 et seq.), as in effect on the day before the effective date  
9 of this Act.

10 (b) APPLICATIONS WITHDRAWN AND REFILED.—If  
11 a pending application is withdrawn and refiled after the  
12 effective date of this Act, eligibility for protection and the  
13 terms of protection shall be governed by the Plant Variety  
14 Protection Act, as amended by this Act.

15 **SEC. 13. EFFECTIVE DATE.**

16 This Act and the amendments made by this Act shall  
17 become effective 180 days after the date of enactment of  
18 this Act.

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