

# OVERVIEW OF SEED SAVING LAWS

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Can a farmer plant a crop, and then save harvested seed-to-plant in the next growing season? This question is far more complex than many people might realize. Therefore, the laws regarding saved seed for subsequent planting are essential for farmers to understand. While there are generally three different types of legal protections that may be afforded to a seed company, a multitude of these protections will apply to many products. Thus, it is critical that farmers first determine which protections are applicable, and then determine the limitations imposed by each protection.

## PLANT VARIETY PROTECTION ACT

For nearly a century, seed companies have been afforded statutory protection under federal law. The first such law, the Plant Protection Act (PPA), was passed in 1930 and applied only to discovering and creating distinct varieties of asexually reproducing plants.

In 1970, the Plant Variety Protection Act (PVPA) expanded the reach of statutory protection. The U.S. Department of Agriculture (USDA) administers the PVPA, which expanded upon the PPA, offering broader protection—including protection for asexually reproducing plants. In addition, the PVPA requires that the seed be “new,” “distinct,” “uniform,” and “stable.”

A plant breeder can obtain a PVPA certificate. This certificate provides the holder with the right to exclude others from selling, marketing, offering for sale, reproducing, consigning, exchanging, importing, or using a variety in the production of hybrid or different varieties for 20 years. Seed companies must obtain a PVPA certificate to enjoy these protections, and anyone

selling protected seed must inform the buyer that such seed is protected.

This means that generally, a farmer who purchases PVPA protected seed may not save or sell harvested seed for planting purposes. However, two main exemptions lessen the protections offered by the PVPA. First, one exemption allows the replanting of seeds for research and development of new seed varieties. Second, a seed saving exception exists. Farmers who lawfully purchase PVPA seeds are permitted to save enough harvested seed to replant on their own property (no larger than the area planted initially). Importantly, farmers may not sell or otherwise transfer the saved seed to others for “reproductive purposes.” In other words, a farmer could sell the amount of seed they used to plant the initial acreage to be fed to animals, but the purchaser may not plant the saved seed.

Farmers who violate the PVPA protections are subject to statutory penalties, including an injunction against the farmer from using the seeds, monetary damages to compensate the certificate holder for the infringement (no less than a reasonable royalty), attorney’s fees, and, if intentional, treble damages, which multiply actual damages three-times.

Most frequently, cases under the PVPA involve seed companies selling a PVPA variety without paying required royalties or including proper notices—or, farmers who intentionally sell brown-bagged seed to neighbors.

When purchasing seed, a farmer should look for language on the bag or tag such as: “U.S. Protected Variety – PVPA,” “Unauthorized Propagation Prohibited – U.S. Protected Variety,” or something similar to determine whether PVPA protection exists.

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## UTILITY PATENT

A utility patent is the most stringent form of protection available to seed companies. Utility patents are granted by the U.S. Patent and Trademark Office. These patents prohibit others from making, using, or selling the patented seed without permission for 20 years. Simply put, during the 20-year protected period, a farmer may not save harvested seed for planting. Unlike the PVPA, there is no exception allowing a farmer to replant second-generation seeds or to replant such seeds for research purposes.

Farmers who violate these rules are subject to suit for patent infringement. Damages may include injunctive relief, compensation to the patent holder (often lost profits and/or lost royalties), treble damages, and attorney's fees.

Farmers should look for language providing a U.S. Patent number or for a statement of "Patent Pending" on the bag or tag to identify utility patent protections.

## LICENSING AGREEMENTS

Even if there is no PVPA or patent protection, the seed may still be subject to a contractual licensing agreement. Sometimes these licensing agreements take the form of a written contract, which the farmer must sign. Other times, the licensing requirements are printed on the seed bag itself, providing that by merely opening the bag and using the seed, the farmer agrees to the contractual terms printed on the bag. Other companies may include the terms of the license on the seed tag or could require farmers to visit their website to agree to the terms of the license.

Each license contains its own unique terms, and farmers must carefully read and review these terms to know exactly what limitations and responsibilities they are agreeing to. Generally speaking, license agreements limit the use of the seed to a specified period of time—for example: One growing season or for a single commercial crop. In addition, some licenses may prohibit the sale of the purchased seed if the purchaser will not be the one to use the seed. Furthermore, licenses often prohibit the sale or transfer of the seeds to any other person. Licensing agreements may also include clauses addressing forum selection, choice of law, arbitration requirements, attorney fee recovery, and disclaimer of warranties.

Failure of a farmer to comply with the licensing agreement can result in liability for breach of contract. These would likely be compensatory damages to the seed company and could include lost profits and lost royalties.

## CONCLUSION

Farmers must determine which types of protections apply to any seed they purchase and be careful to abide by these rules. This includes learning whether the seed holds a patent or PVPA certificate, when the protection under the patent or certificate expires, as well as carefully looking over any licensing or contractual agreements, including those on the seed bag or tag.