



INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS  
GENEVA

DRAFT

**EXPLANATORY NOTES ON THE RIGHT OF PRIORITY**  
**UNDER THE UPOV CONVENTION**

*Document prepared by the Office of the Union  
to be considered by the Council at its forty-third ordinary session  
to be held in Geneva on October 22, 2009*

Note for Draft version

**Endnotes** provide background information when considering the draft version, not to be retained in the approved version of the document.

**Text in square brackets** and **footnotes** to be retained in the published version of the document.

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EXPLANATORY NOTES ON THE RIGHT OF PRIORITY  
UNDER THE UPOV CONVENTION<sup>a</sup>

PREAMBLE

1. The purpose of these Explanatory Notes is to provide guidance on the “Right of Priority” under the International Convention for the Protection of New Varieties of Plants (UPOV Convention). The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.

2. These Explanatory Notes provide guidance on certain aspects of the provisions on the right of priority contained in Article 11 of the 1991 Act of the UPOV Convention and Article 12 of the 1978 Act of the UPOV Convention.

**SECTION I: PROVISIONS ON THE RIGHT OF PRIORITY**

3. The provisions on the Right of Priority contained in Article 11 of the 1991 Act of the UPOV Convention and Article 12 of the 1978 Act of the UPOV Convention are reproduced below:

**1991 Act of the UPOV Convention****Article 11****Right of Priority**

(1) [*The right; its period*] Any breeder who has duly filed an application for the protection of a variety in one of the Contracting Parties (the “first application”) shall, for the purpose of filing an application for the grant of a breeder’s right for the same variety with the authority of any other Contracting Party (the “subsequent application”), enjoy a right of priority for a period of 12 months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in the latter period.

(2) [*Claiming the right*] In order to benefit from the right of priority, the breeder shall, in the subsequent application, claim the priority of the first application. The authority with which the subsequent application has been filed may require the breeder to furnish, within a period of not less than three months from the filing date of the subsequent application, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed, and samples or other evidence that the variety which is the subject matter of both applications is the same.

(3) [*Documents and material*] The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time after such rejection or withdrawal, in which to furnish, to the authority of the Contracting Party with which he has filed the subsequent application, any necessary information, document or material required for the purpose of the examination under Article 12, as required by the laws of that Contracting Party.

(4) [*Events occurring during the period*] Events occurring within the period provided for in paragraph (1), such as the filing of another application or the publication or use of the variety that is the subject of the first application, shall not constitute a ground for rejecting the subsequent application. Such events shall also not give rise to any third-party right.

**1978 Act of the UPOV Convention**

**Article 12**

**Right of Priority**

(1) Any breeder who has duly filed an application for protection in one of the member States of the Union shall, for the purpose of filing in the other member States of the Union, enjoy a right of priority for a period of twelve months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in such period.

(2) To benefit from the provisions of paragraph (1), the further filing must include an application for protection, a claim in respect of the priority of the first application and, within a period of three months, a copy of the documents which constitute that application, certified to be a true copy by the authority which received it.

(3) The breeder shall be allowed a period of four years after the expiration of the period of priority in which to furnish, to the member State of the Union with which he has filed an application for protection in accordance with the terms of paragraph (2), the additional documents and material required by the laws and regulations of that State. Nevertheless, that State may require the additional documents and material to be furnished within an adequate period in the case where the application whose priority is claimed is rejected or withdrawn.

(4) Such matters as the filing of another application of the publication or use of the subject of the application, occurring within the period provided for in paragraph (1), shall not constitute grounds for objection to an application filed in accordance with the foregoing conditions. Such matters may not give rise to any right in favour of a third party or to any right of personal possession.

SECTION II: CERTAIN ASPECTS OF THE PROVISIONS  
ON THE RIGHT OF PRIORITY

4. These Explanatory Notes provide guidance on certain aspects of the provisions on the Right of Priority contained in Article 11 of the 1991 Act of the UPOV Convention. The Explanatory Notes below correspond to the paragraph numbers within Article 11 of the 1991 Act and Article 12 of the 1978 Act, unless indicated otherwise.

**Paragraph (1)**

**(1) [*The right; its period*] Any breeder who has duly filed an application for the protection of a variety in one of the Contracting Parties (the “first application”) shall, for the purpose of filing an application for the grant of a breeder’s right for the same variety with the authority of any other Contracting Party (the “subsequent application”), enjoy a right of priority for a period of 12 months. This period shall be computed from the date of filing of the first application. The day of filing shall not be included in the latter period.**

5. The UPOV Convention provides for a right of priority of 12 months, based upon an earlier application for the protection of the same variety with another UPOV member, whereby a subsequent application is treated as if it were filed on the filing date of the first application. The Annex to these explanatory notes provides an illustration of different scenarios concerning the right of priority.

6. The date of filing of the first application refers to the date of receipt of the first application duly filed as prescribed by the legislation of the member of the Union concerned.

*Novelty and the Right of Priority*

7. The right of priority has the effect that in relation to the periods for selling or disposing of the variety for purposes of exploitation of the variety without affecting the novelty (Article 6(1)(i) and (ii) of the 1991 Act), the date of filing of the first application with the authority of a member of UPOV (“member of UPOV A”) is taken as the date of a subsequent application filed with the authority of another member (“Subsequent application filed in member of UPOV B”). Therefore, the provisions of Article 6(1) of the 1991 Act of the UPOV Convention would have the following effect:

*Subsequent application: Novelty*

*First Application: Member A*

*Submission of a subsequent application: Member B*

*The variety shall be deemed to be new if, at the [date of filing of the first application for protection of the variety in member of UPOV A], propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety*

*(i) in the territory of [member of UPOV B] earlier than one year before the [date of filing in member of UPOV A (first application)] and*

*(ii) in a territory other than that of [member of UPOV B] earlier than four years or, in the case of trees or of vines, earlier than six years before the [date of filing in member of UPOV A (first application)].*

*Distinctness and the Right of Priority*

8. In respect of the compliance with the condition of distinctness, the right of priority has the following effect: the filing of applications for other varieties in any territory after the filing date of the first application in a member of UPOV (“member of UPOV A”) will not render the existence of those varieties a matter of common knowledge for subsequent applications. Therefore, the provisions of Article 7 of the 1991 Act of the UPOV Convention would have the following effect:

*Subsequent application: Distinctness*

*First Application: Member A*

*Submission of a subsequent application: Member B*

*The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application [for protection of the variety in member of UPOV A]. In particular, the filing of an application for the granting of a breeder’s right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder’s right or to the entering of the said other variety in the official register of varieties, as the case may be.*

9. In many cases, the right of priority would not have any different consequences with regard to distinctness because other varieties, which were the subject of applications in any territory after the filing date of the first application, would have to consider the variety which was the subject of the first application as a variety whose existence was a matter of common knowledge from the date of filing of the first application.

10. However, the right of priority has a particular consequence in a case where the first application in a UPOV member A does not lead to the granting of a breeder’s right or to the entering in an official register of varieties (e.g. rejection or withdrawal of the first application). In such a case, and if a right priority has been successfully claimed in a subsequent application, the variety would still be considered to be a variety of common knowledge from the date of filing of the first application. In the absence of a right of priority, the variety would only become a variety of common knowledge at the date of filing of the subsequent application (if the subsequent application led to the granting of a breeder’s right or to the entering in an official register of varieties).

*Variety Denominations and the Right of Priority*

11. If, at the filing date of the first application, the application proposes a variety denomination, that proposed variety denomination will be considered as part of the “prior right” for purposes of the variety denomination requirements (see Article 20(2) and (4) of the 1991 Act and Article 13(2) and (4) of the 1978 Act). Therefore, if in subsequent applications for the same variety, the same denomination is submitted, subsequent applications will be treated, for purposes of the variety denomination requirements, as if they had been filed on the filing date of the first application (see “Explanatory Notes on Variety Denominations under the UPOV Convention” (document UPOV/INF/12/2 - Explanatory Note 4 (b) and (c)) concerning prior rights and the registration of variety denominations).

**Paragraph (2)**

**(2) [*Claiming the right*] In order to benefit from the right of priority, the breeder shall, in the subsequent application, claim the priority of the first application. The authority with which the subsequent application has been filed may require the breeder to furnish, within a period of not less than three months from the filing date of the subsequent application, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed, and samples or other evidence that the variety which is the subject matter of both applications is the same.**

12. In order to benefit from the right of priority, the breeder needs to claim the priority of the first application in the subsequent application. If the breeder does not claim priority, the subsequent application would be considered as filed on the application date of the subsequent application.

13. The UPOV Convention states that the breeder shall have a period of at least three months, computed from the filing date of the subsequent application, to send a copy of the documents which constitute the first application. The exact period (not less than 3 months) is to be specified in the legislation of the member of the Union concerned.

14. The UPOV Model Form for the Application for Plant Breeders' Rights (document TGP/5 "Experience and Cooperation in DUS Testing" Section 2), Item 7, provides the following basis for breeders to claim priority:

7. Priority is claimed in respect of the application filed in (State / Intergovernmental Organization) (first application) \_\_\_\_\_ on (date) \_\_\_\_\_ under the denomination \_\_\_\_\_

An official copy of the first application, including the date of filing, is requested as a certification<sup>4</sup> of priority

<sup>4</sup> Within the prescribed time limit (minimum 3 months)



**Paragraph (3)**

**(3) [Documents and material]** The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time after such rejection or withdrawal, in which to furnish, to the authority of the Contracting Party with which he has filed the subsequent application, any necessary information, document or material required for the purpose of the examination under Article 12, as required by the laws of that Contracting Party.

*Expiration of the period of priority*

15. The breeder shall be allowed a period of two years<sup>1</sup> after the expiration of the period of priority (i.e. two years and 12 months after the filing date of the first application) in which to furnish to the authority any necessary information, document or material required for the purpose of the examination.

UPOV member A	First application Filing date: May 15, 2004	
UPOV member B	Subsequent application Filing date: February 13, 2005 (priority claimed)	For the purpose of the examination under Article 12, the breeder is allowed a period of two years after the expiration of the period of priority to furnish, to the authority any necessary information, document or material: May 15, 2007

*Rejection or withdrawal of the first application*

16. The UPOV Convention provides that, where the first application is rejected or withdrawn, the breeder shall be allowed an “appropriate time” after such rejection or withdrawal to furnish any necessary information, document or material required for the purpose of examination. In deciding on an “appropriate time”, the authority may take into account factors which might have an influence on the time needed by the breeder for the submission of information, document or material. Thus, a particular time might not be fixed in the law.

[Annex follows]

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<sup>1</sup> Article 12(3) of the 1978 Act provides for four years after the expiration of the period of priority.

## ANNEX

The following hypothetical examples provide an illustration of different scenarios concerning the right of priority.

UPOV member A	First application Filing date: May 15, 2004	
UPOV member B	Subsequent application Filing date: February 13, 2005 (priority claimed)	Priority recognized (application date in B within the period for claiming priority and priority was claimed in the application filed in B)  Application in UPOV member B is treated as if it was filed at the filing date in UPOV member A, i.e. May 15, 2004
UPOV member C	Subsequent application Filing date: May 10, 2005 (priority not claimed)	No priority (application date in C within the period for claiming priority, but priority was not claimed in the application filed in C) (see paragraph (2))  Filing date in UPOV member C is May 10, 2005
UPOV member D	Subsequent application Filing date: June 10, 2005 (priority claimed)	No priority (application date in D beyond the period for claiming priority)  Filing date in UPOV member D is June 10, 2005

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<sup>a</sup> Text approved by the CAJ by correspondence (documents CAJ/58/6 and UPOV/EXN/PRI Draft 1)

[End of Annex and of document]