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ADMINISTRATIVE AND LEGAL COMMITTEE**Seventy-First Session
Geneva, March 26, 2015**

VARIETY DENOMINATIONS

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EXECUTIVE SUMMARY

1. The purpose of this document is to report on work concerning the possible development of a UPOV similarity search tool for variety denomination purposes and to consider the possible revision of document UPOV/INF/12/4 "Explanatory Notes on Variety Denominations under the UPOV Convention".
2. The CAJ is invited to:
 - (a) note the work on the possible development of a UPOV similarity search tool for variety denomination purposes by the Working Group for the Development of a UPOV Denomination Similarity Search Tool (WG-DST), including the test study, as set out in paragraphs 6 to 13;
 - (b) consider the proposed revision of document UPOV/INF/12 in relation to changes of registered variety denominations, as set out in paragraph 21, and subject to agreement by the CAJ, to present that guidance for adoption by the Council at its forty-ninth ordinary session, to be held on October 29, 2015;
 - (c) invite the WG-DST to consider the comments by the CAJ-AG, at its ninth session, on the proposals in document UPOV/INF/12/5 Draft 2 concerning Sections 2.2.2 (b), 2.3.1 (c) and (d), and 2.3.3 as set out in paragraph 27; and
 - (d) consider the proposals of the CAJ-AG under Sections 2.2.2 (c), 4(a) and 4(e)(i) at its seventy-second session, as set out in paragraph 28.

3. The structure of this document is as follows:

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4. The following abbreviations are used in this document:

CAJ:	Administrative and Legal Committee
CAJ-AG:	Administrative and Legal Committee Advisory Group
TC:	Technical Committee
WG-DST:	Working Group for Variety Denomination Search Tool

PURPOSE

5. The purpose of this document is to report on the work concerning possible development of a UPOV similarity search tool for variety denomination purposes and to consider a possible revision of the “Explanatory Notes on Variety Denominations under the UPOV Convention” (document UPOV/INF/12/4).

POSSIBLE DEVELOPMENT OF A UPOV SIMILARITY SEARCH TOOL FOR VARIETY DENOMINATION PURPOSES

6. The background to this matter is provided in document CAJ/70/4 “Variety denominations” and CAJ/70/4 Add. “Addendum to Variety Denominations”.

7. The CAJ, at its seventieth session¹, received a report from the Vice Secretary-General on the first meeting of the Working Group for the Development of a UPOV Denomination Similarity Search Tool (WG-DST)². The report of the WG-DST is provided in document UPOV/WG-DST/1/4 “Report” (see http://www.upov.int/meetings/en/details.jsp?meeting_id=34462). The CAJ noted that presentations had been made on the search tools available on the PLUTO database and that the WG-DST members had agreed to share their search tools and procedures with the WG-DST.

8. The CAJ noted that the WG-DST had agreed that the function of a UPOV similarity search tool would be to identify those denominations that were similar to existing denominations to the extent that they would require further, individual consideration before deciding if the denomination was (sufficiently) different from existing denominations. In that regard, the WG-DST had agreed to organize a test study to develop an effective denomination search tool, an overview of which was presented to the CAJ.

9. The CAJ agreed that the WG-DST should agree on the details of the test study before participants were invited to start the study.

10. The CAJ agreed that the possibility to participate in the test study to develop an effective denomination search tool should be offered to all members of the Union.³

11. The members of the WG-DST were invited to submit comments on the details of the test study by February 27, 2015 (see paragraph 9 above). Subject to agreement by the members of the WG-DST, a circular to invite all UPOV members to participate in the study will be issued on March 6, 2015, with a deadline of submitting lists of similar denominations by April 27, 2015. The second meeting of the WG-DST is proposed to be held on June 9, 2015, at which a report of the study will be made.

12. The study is planned to be carried out in the following steps:

Step 1: Select test denominations to cover a broad range of denominations

Test denominations were proposed by members of the WG-DST and 20 were selected for the study.⁴

Step 2: Provide lists of similar denominations

For each of the test denominations, participants will be invited to provide lists of denominations that they consider similar to the extent that further, individual consideration would be required.

Step 3: Development of an effective search tool

A denomination search tool contains two elements: pre-processing of the denominations (e.g. treating double letters, such as “ll”, as a single letter); and an algorithm to provide rank of similarity.

¹ Held in Geneva, October 13, 2014.

² Held in Geneva, September 3, 2014.

³ See document CAJ/70/10 “Report on the Conclusions”, paragraphs 26 to 29.

⁴ See UPOV Circular E-15/018 of February 6, 2015.

Different settings of pre-processing (e.g. treat “ll” as one or two letters) and algorithms (e.g. different combinations of algorithms) will create a broad range of pre-processing/algorithm sets (PPA sets). It is intended to find a PPA set that will provide an improved ranking of denominations compared to PPA sets in existing tools.

The most effective search tool will be identified by repeated testing of different settings of pre-processing and algorithms from the PLUTO database (e.g. Similarity factor [CPVO search tool], Fuzzy, Phonetic, Contains, Starts, Ends), the Global Brand Database and possibly other sources.

The PPA sets will be evaluated by two aspects: precision and recall. “Precision” is the proportion of the correct results (i.e. those considered similar by the participants) in relation to all the returned results, and “recall” is the proportion of the correct results it returns in relation to all the correct results (i.e. including the correct results it did not return).

13. The result of the test study will be reported to the second meeting of the WG-DST. The most effective search tool according to precision and recall will be described and documented.

REVISION OF DOCUMENT UPOV/INF/12 “EXPLANATORY NOTES ON VARIETY DENOMINATIONS UNDER THE UPOV CONVENTION”

14. The CAJ, at its sixty-ninth session⁵, approved the work program for the development of information materials for the ninth session⁶ of the CAJ-AG. The work program included the development of guidance by the CAJ-AG in relation to a request from a breeder to change a registered variety denomination⁷. The key elements to be developed in the guidance were agreed by the CAJ-AG, at its eighth session⁸. The CAJ agreed that a draft revision of the Explanatory Notes on Variety Denominations under the UPOV Convention be provided to the CAJ-AG members by May 9, 2014, and also agreed to invite comments from CAJ members and observers on the draft⁹.

15. The draft was circulated as document UPOV/INF/12/5 Draft 1 and comments on the document were received from Argentina, New Zealand, the Association for Plant Breeding for the Benefit of Society (APBEBES) and the European Seed Association (ESA)¹⁰.

16. On the basis of the comments received, a new draft of the Explanatory Notes on Variety Denominations under the UPOV Convention (document UPOV/INF/12/5 Draft 2) was posted on the CAJ-AG webpage on September 10, 2014, for consideration by the CAJ-AG at its ninth session.¹¹ A copy of document UPOV/INF/12/5 Draft 2 is provided on the CAJ/71 webpage.¹²

17. The CAJ-AG, at its ninth session, considered document UPOV/INF/12/5 Draft 2, including contributions made by APBEBES and ESA.¹³

Proposed guidance on the change of registered variety denominations for consideration by the CAJ at its seventy-first session

18. The CAJ-AG, at its eighth session¹⁴, agreed to the development of guidance in relation to a request from a breeder to change a registered variety denomination in cases other than where the denomination of

⁵ Held on April 10, 2014.

⁶ Held on October 14 and 17, 2014.

⁷ See document CAJ-AG/13/8/10 “Report on the Conclusions”, paragraph 70 and 71.

⁸ Held in Geneva on October 21 and 25, 2013.

⁹ See document CAJ/69/12 “Report on the Conclusions”, paragraph 27.

¹⁰ See CAJ-AG/13 section under “Consideration by Correspondence”: http://www.upov.int/meetings/en/details.jsp?meeting_id=29783.

¹¹ See document CAJ/69/12 “Report on the Conclusions”, paragraph 28.

¹² http://www.upov.int/meetings/en/details.jsp?meeting_id=35055.

¹³ See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraph 15.

¹⁴ Held in Geneva on October 21 and 25, 2013.

the variety was cancelled after the grant of the right, on the basis that such a request should be refused. However, the CAJ-AG agreed that changes would be appropriate in the following situations:¹⁵

(a) if it was discovered that there was a prior right concerning the denomination which would have resulted in the rejection of the denomination (see Article 20(4) and (7) of the 1991 Act, Article 13(4) and (7) of the 1978 Act and document UPOV/INF/12/4, Note 7);

(b) if the denomination was unsuitable because it was contrary to the provisions of Article 20(2) of the 1991 Act and Article 13(2) of the 1978 Act; and

(c) if the denomination was subsequently refused in another member of the Union and, at the request of the breeder, the authority agreed to change the denomination to the one registered in the said other member of the Union.

19. The CAJ-AG, at its eighth session, agreed that the additional guidance should be considered as part of a possible revision of the "Explanatory Notes on Variety Denominations under the UPOV Convention" (document UPOV/INF/12/4).

20. The CAJ, at its sixty-ninth session,¹⁶ agreed that a draft revision of the Explanatory Notes on Variety Denominations under the UPOV Convention be circulated to the CAJ, as document UPOV/INF/12/5 Draft 1. On the basis of the comments received, a new draft, document UPOV/INF/12/5 Draft 2, was prepared for consideration by the CAJ-AG at its ninth session.¹⁷

21. The following guidance was agreed by the CAJ-AG at its ninth session, as provided in document UPOV/INF/12/5 Draft 2:

"7.2 The following items provide guidance in relation to changes of registered variety denominations:

(a) The UPOV Convention requires a change of the registered denomination where the denomination of the variety is cancelled after the grant of the right. The competent authority should cancel a variety denomination if:

(i) by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it (see paragraph (4) "Prior rights of third persons");

(ii) the denomination is unsuitable because it is contrary to the provisions in paragraph (2) "Characteristics of the denomination";

(b) In cases where the registered denomination is subsequently refused in another member of the Union because it is unsuitable in that territory (e.g. prior right), at the request of the breeder, the authority may consider it appropriate to change the denomination to the denomination registered in the said other member of the Union (see provisions in paragraph (5) "Same denomination in all Contracting Parties"); and

(c) In general, subject to (a) and (b) above, it would not be appropriate for the authority to change a registered denomination following a request by the breeder."¹⁸

22. Subject to the agreement by the CAJ, at its seventy-first session¹⁹, it is proposed to revise document UPOV/INF/12 to incorporate the guidance on changes of registered variety denominations, as set out in paragraph 21 above, and to present that guidance for adoption by the Council, at its forty-ninth ordinary session²⁰.

¹⁵ See document CAJ-AG/13/8/10 "Report on the Conclusions", paragraph 70 and 71.

¹⁶ Held on April 10, 2014.

¹⁷ Held in Geneva, on October 14 and 17, 2014.

¹⁸ See document CAJ-AG/14/9/6 "Report on the Conclusions", paragraph 16.

¹⁹ To be held in Geneva, on March 26, 2015.

²⁰ To be held on October 28, 2015.

Proposals for revision of document UPOV/INF/12/4 in which the CAJ-AG made an initial consideration

23. When document UPOV/INF/12/5 Draft 1, incorporating the key elements of the guidance in relation to changes of registered variety denomination agreed by the CAJ-AG at its eighth session, was circulated by correspondence to the CAJ, new comments and proposals were received and incorporated in document UPOV/INF/12/5 Draft 2.

24. The CAJ-AG agreed, at its ninth session, to make an initial consideration of proposals presented in document UPOV/INF/12/5 Draft 2.

25. The following comments were made by the CAJ-AG on document UPOV/INF/12/5 Draft 2²¹:

2.2.2 (b)	<p>To clarify the terminology in 2.2.2 (b). In particular, to consider changing the examples or replacing “species” by “genera” or “taxa” in the following sentence:</p> <p>“(b) accepted market practices for particular variety types (e.g. hybrids) and particular species (e.g. Medicago, Helianthus).</p>
2.2.2 (c)	<p>To add 2.2.2 (c) as follows:</p> <p>“(c) ‘established practice’ is determined to be when registration has been accepted for one species or group, so that it can be used in other species which have not yet registered any variety whose denomination consists solely of figures.”</p>
2.3.1 (c)	<p>To develop further guidance on 2.3.1 (c) and to provide other, more appropriate examples</p> <p>“(c) convey the impression that the variety is derived from, or related to, another variety when that is not, in fact, the case;</p> <p><i>Example:</i> a denomination which is similar to that of another variety of the same species or closely related species, e.g. “Southern cross 1”; “Southern cross 2”; etc., giving the impression that these varieties are a series of related varieties with similar characteristics, when, in fact, this is not the case.”</p>
2.3.1 (d)	<p>To add 2.3.1 (d) as follows:</p> <p>“(d) contain the botanical or common name of the genus to which that variety belongs. The identity of the denomination and that of the genus to which it belongs could become unclear and confusing.”</p> <p>To clarify the following example:</p> <p><i>Example:</i> <i>Carex</i> variety ‘Sedge’. This could possibly be referred to as ‘Sedge’ <i>Carex</i> and without the use of italics or single quotes the identity of the denomination and the genus may not be clear.</p> <p>To develop guidance on possible confusion of the use of the botanical or common name of a genus to which that variety does <u>not</u> belong – case by case</p>
2.3.3	<p>To consider proposals in 2.3.3 of document UPOV/INF/12/5 Draft 2 as an initial step to develop further guidance and appropriate examples in conjunction with the development of an effective UPOV similarity search tool</p>

²¹ See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraph 18.

4(a)	<p>To modify 4(a) as follows:</p> <p>“(a) An authority should not accept a variety denomination if a <u>there is an existing</u> prior right, the exercise of which may prevent the use of the proposed denomination, has already been granted to a third party under plant breeder’s right law, trademark law or any other intellectual property legislation. It is the responsibility of the title holder of a prior right to assert his rights through the available objection or court procedures. However, authorities are encouraged to make prior searches in relevant publications (e.g. official gazettes) and databases (e.g. UPOV Plant Variety Database (PLUTO) http://www.upov.int/pluto/en/) to identify prior rights for variety denominations. They may also make searches in other registers, such as trademark registers, before accepting a variety denomination.”</p>
4(e)(i)	<p>To modify last sentence of 4(e)(i) as follows:</p> <p>“In cases of mere similarity or small likelihood of association <u>confusion</u> by users, waivers granted to breeders by prior trademark right holders could be a suitable solution.”</p>

Proposed approach concerning the work of the WG-DST

26. The CAJ-AG, at its ninth session, suggested “to consider proposals in 2.3.3 of document UPOV/INF/12/5 Draft 2 as an initial step to develop further guidance and appropriate examples in conjunction with the development of an effective UPOV similarity search tool”²².

27. In that regard, the CAJ may wish to invite the WG-DST to consider the following comments by the CAJ-AG, at its ninth session, on the proposals in document UPOV/INF/12/5 Draft 2 concerning Sections 2.2.2 (b), 2.3.1 (c) and (d), and 2.3.3, in conjunction with the development of an effective UPOV similarity search tool, and any conclusions by the WG-DST to revise document UPOV/INF/12, if appropriate.

2.2.2 (b)	<p>To clarify the terminology in 2.2.2 (b). In particular, to consider changing the examples or replacing “species” by “genera” or “taxa” in the following sentence:</p> <p>“(b) accepted market practices for particular variety types (e.g. hybrids) and particular species (e.g. Medicago, Helianthus).</p>
2.3.1 (c)	<p>To develop further guidance on 2.3.1 (c) and to provide other, more appropriate examples</p> <p>“(c) convey the impression that the variety is derived from, or related to, another variety when that is not, in fact, the case;</p> <p>Example: a denomination which is similar to that of another variety of the same species or closely related species, e.g. “Southern cross 1”, “Southern cross 2”; etc., giving the impression that these varieties are a series of related varieties with similar characteristics, when, in fact, this is not the case.”</p>

²² See document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraph 18

2.3.1 (d)	<p>To add 2.3.1 (d) as follows:</p> <p>“(d) contain the botanical or common name of the genus to which that variety belongs. The identity of the denomination and that of the genus to which it belongs could become unclear and confusing.”</p> <p>To clarify the following example:</p> <p>“Example: Carex variety ‘Sedge’. This could possibly be referred to as ‘Sedge’ Carex and without the use of italics or single quotes the identity of the denomination and the genus may not be clear.”</p> <p>To develop guidance on possible confusion of the use of the botanical or common name of a genus to which that variety does not belong – case by case</p>
2.3.3	<p>To consider proposals in 2.3.3 of document UPOV/INF/12/5 Draft 2 as an initial step to develop further guidance and appropriate examples in conjunction with the development of an effective UPOV similarity search tool</p>

Proposed guidance for consideration by the CAJ at its seventy-second session

28. It is suggested that the following proposals concerning Sections 2.2.2 (c), 4(a) and 4(e)(i) be considered by the CAJ at its seventy-second session.²³

2.2.2 (c)	<p>To add 2.2.2 (c) as follows:</p> <p>“(c) ‘established practice’ is determined to be when registration has been accepted for one species or group, so that it can be used in other species which have not yet registered any variety whose denomination consists solely of figures.”</p>
4(a)	<p>To modify 4(a) as follows:</p> <p>“(a) An authority should not accept a variety denomination if a <u>there is an existing</u> prior right, the exercise of which may prevent the use of the proposed denomination, has already been granted to a third party under plant breeder’s right law, trademark law or any other intellectual property legislation. It is the responsibility of the title holder of a prior right to assert his rights through the available objection or court procedures. However, authorities are encouraged to make prior searches in relevant publications (e.g. official gazettes) and databases (e.g. UPOV Plant Variety Database (PLUTO) http://www.upov.int/pluto/en/) to identify prior rights for variety denominations. They may also make searches in other registers, such as trademark registers, before accepting a variety denomination.”</p>
4(e)(i)	<p>To modify last sentence of 4(e)(i) as follows:</p> <p>“In cases of mere similarity or small likelihood of association <u>confusion</u> by users, waivers granted to breeders by prior trademark right holders could be a suitable solution.”</p>

29. *The CAJ is invited to:*

(a) note the work on the possible development of a UPOV similarity search tool for variety denomination purposes by the Working Group for the Development of a UPOV Denomination Similarity Search Tool (WG-DST), including the test study, as set out in paragraphs 6 to 13 above;

(b) consider the proposed revision of document UPOV/INF/12 in relation to changes of registered variety denominations, as set out in

²³ To be held in Geneva on October 26 and 27, 2015.

paragraph 21, and subject to agreement by the CAJ, to present that guidance for adoption by the Council at its forty-ninth ordinary session, to be held on October 29, 2015;

(c) invite the WG-DST to consider the comments by the CAJ-AG, at its ninth session, on the proposals in document UPOV/INF/12/5 Draft 2 concerning Sections 2.2.2 (b), 2.3.1 (c) and (d), and 2.3.3, as set out in paragraph 27 above; and

(d) consider the proposals of the CAJ-AG under Sections 2.2.2 (c), 4(a) and 4(e)(i) at its seventy-second session, as set out in paragraph 28 above.

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