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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
 Geneva

**WORKING GROUP FOR THE DEVELOPMENT OF A UPOV DENOMINATION
 SIMILARITY SEARCH TOOL**

**Second Session
 Geneva, June 9, 2015**

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

prepared by the Office of the Union

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EXECUTIVE SUMMARY

1. The purpose of this document is to invite the Working Group for Variety Denomination Search Tool (WG-DST) to consider a possible revision of document UPOV/INF/12 “Explanatory Notes on Variety Denominations under the UPOV Convention”.
2. The WG-DST is invited to consider the request by the CAJ, at its seventy-first session, to consider the comments by the CAJ-AG 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..
3. The structure of this document is as follows:

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- ANNEX I: Extract Of Document UPOV/INF/12/4 “Explanatory Notes on Variety Denominations Under the UPOV Convention”, Section 2.2.
- ANNEX II: Extract Of Document UPOV/INF/12/4 “Explanatory Notes on Variety Denominations Under the UPOV Convention”, Section 2.3.1.
- ANNEX III: Extract Of Document UPOV/INF/12/5 Draft 2 “Explanatory Notes on Variety Denominations Under the UPOV Convention”, Section 2.3.3.

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

BACKGROUND

5. The CAJ, at its sixty-ninth session, held in Geneva, on April 10, 2014, approved the work program for the development of information materials for the ninth session of the CAJ-AG, held on October 14 and 17, 2014. The key elements to be developed in the guidance were agreed by the CAJ-AG, at its eighth session, held in Geneva on October 21 and 25, 2013. 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 draft (see document CAJ/69/12 “Report on the Conclusions”, paragraph 27).

6. 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 (APBREBES) and the European Seed Association (ESA) (see CAJ-AG/13 section under “Consideration by Correspondence”: http://www.upov.int/meetings/en/details.jsp?meeting_id=29783).

7. 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 see document CAJ/69/12 “Report on the Conclusions”, paragraph 28). A copy of document UPOV/INF/12/5 Draft 2 is provided on the CAJ/71 webpage (see http://www.upov.int/meetings/en/details.jsp?meeting_id=35055) and reproduced as Annex to this document.

8. The CAJ-AG, at its ninth session, considered document UPOV/INF/12/5 Draft 2, including contributions made by APBREBES and ESA (see document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraph 15).

9. The following comments were made by the CAJ-AG on document UPOV/INF/12/5 Draft 2 (see document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraph 18):

2.2.2 (b)	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: “(b) accepted market practices for particular variety types (e.g. hybrids) and particular species (e.g. Medicago, Helianthus). ”</td
2.2.2 (c)	To add 2.2.2 (c) as follows: “(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.”
2.3.1 (c)	To develop further guidance on 2.3.1 (c) and to provide other, more appropriate examples “(c) convey the impression that the variety is derived from, or related to, another variety when that is not, in fact, the case; <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.”

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: 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	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
4(a)	<p>To modify 4(a) as follows:</p> <p>“(a) An authority should not accept a variety denomination if <u>a 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>

10. The CAJ, at its seventy-first session, held in Geneva, on March 26, 2015, agreed to consider the proposals of the CAJ-AG under Sections 2.2.2 (c), 4(a) and 4(e)(i), at its seventy-second session in October 2015 (see document CAJ/71/10 “Report on the Conclusions”, paragraph 37).

MATTERS TO BE CONSIDERED BY THE WG-DST

11. 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” (see document CAJ-AG/14/9/6 “Report on the Conclusions”, paragraph 18).

12. The CAJ, at its seventy-first session, held in Geneva, on March 26, 2015, decided to invite the WG-DST to consider the comments by the CAJ-AG 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 (see document CAJ/71/10 “Report on the Conclusions”, paragraph 35). The relevant comments of the CAJ-AG are reproduced below.

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>
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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>
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>

13. To facilitate consideration by the WG-DST, relevant extracts of document UPOV/INF/12/4 concerning Sections 2.2 and 2.3.1 are reproduced as Annex I and II, respectively. To facilitate consideration by the WG-DST, relevant extracts concerning Section 2.3.3. of document UPOV/INF/12/5 Draft 2 are reproduced in Annex III to this document.

14. The WG-DST is invited to consider the request by the CAJ, at its seventy-first session, to consider the comments by the CAJ-AG 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 9 above.

[Annex follows]

ANNEX I

EXTRACT FROM DOCUMENT UPOV/INF/12/4 "EXPLANATORY NOTES ON VARIETY DENOMINATIONS UNDER THE UPOV CONVENTION", SECTION 2.2

Paragraph 2

[Characteristics of the denomination] The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any member of the Union, an existing variety of the same plant species or of a closely related species.

"Explanatory Notes – Paragraph (2)

2.2. Solely of figures

2.2.1 Paragraph (2) states that the denomination may not consist "solely of figures" except where this is an "established practice" for designating varieties. The expression "solely of figures" refers to variety denominations consisting of numbers only (e.g. 91150). Thus, denominations containing both letters and figures are not subject to the "established practice" requirement (e.g. AX350).

2.2.2 In the case of denominations consisting "solely of figures," the following non-exhaustive elements may assist the authorities to understand what might be considered to be "established practice":

(a) for varieties used within a limited circle of specialists, the established practice should reflect that specialist circle (e.g. inbred lines);

(b) accepted market practices for particular variety types (e.g. hybrids) and particular species (e.g. Medicago, Helianthus)."

[Annex II follows]

ANNEX II

EXTRACT FROM DOCUMENT UPOV/INF/12/4 "EXPLANATORY NOTES ON VARIETY DENOMINATIONS UNDER THE UPOV CONVENTION", SECTION 2.3.1

Paragraph 2

[Characteristics of the denomination] The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any member of the Union, an existing variety of the same plant species or of a closely related species.

"Explanatory Notes – Paragraph (2)

2.3. Liable to mislead or to cause confusion

Paragraph (2) states that the denomination must not be liable to "mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder." These aspects are considered below:

(c) convey the impression that the variety is derived from, or related to, another variety when that is not, in fact, the case;

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.

2.3.1 Characteristics of the variety

The denomination should not:

(a) convey the impression that the variety has particular characteristics which, in reality, it does not have;

Example: a variety denomination "dwarf" for a variety which is of normal height, when a dwarfness trait exists within the species, but is not possessed by the variety.

(b) refer to specific characteristics of the variety in such a way that the impression is created that only the variety possesses them, whereas in fact other varieties of the species in question also have or may have the same characteristics; for example where the denomination consists solely of descriptive words that describe attributes of the variety that other varieties in the species may also possess.

Example 1: "Sweet" for a fruit variety;

Example 2: "Large white" for a variety of chrysanthemum."

(c) convey the impression that the variety is derived from, or related to, another variety when that is not, in fact, the case;

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."

[Annex III follows]

ANNEX III

EXTRACT FROM DOCUMENT UPOV/INF/12/5 DRAFT 2 “EXPLANATORY NOTES ON VARIETY DENOMINATIONS UNDER THE UPOV CONVENTION”, SECTION 2.3.3

Note for Draft version

~~Strikethrough~~ (highlighted) indicates deletion from the text of document UPOV/INF/12/4.

Underlining (highlighted) indicates insertion to the text of document UPOV/INF/12/4.

~~Double-strikethrough~~ and double underlining indicate changes to document UPOV/INF/12/5 Draft 1 according to comments received by correspondence

Footnotes are background information to help in the consideration of this draft and will not appear in the final, published document.

Paragraph 2

[Characteristics of the denomination] The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any member of the Union, an existing variety of the same plant species or of a closely related species.

“Explanatory Notes – Paragraph (2)

2.3. Liable to mislead or to cause confusion

Paragraph (2) states that the denomination must not be liable to “mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder.” These aspects are considered below:

2.3.3 Identity of the variety

(a) For denominations consisting of a combination of letters and figures or “solely of figures”, As as a general recommendation, a difference of only one letter or one number may be considered not to be liable to mislead or cause confusion concerning the identity of the variety, ~~except where the:~~

Proposal by Argentina¹

Paragraph 2.3.3 (a)

“The recommendation that for denomination with a combination of letters and figures or solely of figures, changing only ONE letter or figure may be considered not to cause confusion concerning the identity of the breeder is confusing. It implies that confusion may or may not be caused, seeming to leave it to the interpretation of Member States, which may lead to a variety of solutions. The recommendation should follow a clear pattern.”

“One way to provide clarity would be to adduce examples to this paragraph.”

¹ Comments from Argentina (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285383.pdf): Paragraph 2.3.3 “(a) The recommendation that for denomination with a combination of letters and figures or solely of figures, changing only ONE letter or figure may be considered not to cause confusion concerning the identity of the breeder is confusing. It implies that confusion may or may not be caused, seeming to leave it to the interpretation of Member States, which may lead to a variety of solutions. The recommendation should follow a clear pattern. One way to provide clarity would be to adduce examples to this paragraph.”

“(b) For denominations not consisting of a combination of letters and figures, or “solely of figures”, as a general recommendation, differences of one or more letters should provide a clear visual and phonetic difference in order for the denomination not to be liable to mislead or cause confusion concerning the identity of the variety.”

Proposal by Argentina²

Paragraph 2.3.3 (b) “It is suggested that ‘denominations not consisting of a combination of letters and figures, or ‘solely of figures’ be changed to ‘all other denominations’”.

“On this point, in our country it has been established that when the denomination consists of two or more “bodies” or “terms” – usually one body consists of letters and the other of figures – a letter or figure should be changed in each body. The difference is analyzed independently IN EVERY body or term of the denomination.”

~~“(i) — difference of one letter provides for a clear visual or phonetic difference (e.g. if it concerns a letter at the beginning of a word);~~

~~(i) In some cases a clear visual difference may not provide a clear phonetic difference~~

~~Example 1: in the English language ‘Bough’ and ‘Bow’ provides a clear visual difference but does not provide a clear phonetic difference.”~~

Proposal by Argentina³

Paragraph 2.3.3 (b) (i) “It is proposed that an example in Spanish be added, such as “Helena” and “Elena” to address a situation in which there is a clear visual difference but not a phonetic one, since the letter “H” is mute in Spanish.”

~~“(ii) In some cases, a difference of one letter at the beginning of a word may provide a clear visual and phonetic difference~~

~~Example 1-2: in the English language, ‘Harry’ and ‘Larry’ provides a clear visual and phonetic difference would not cause confusion. However, ‘Bough’ and ‘Bow’ might cause confusion (in phonetic terms);~~

~~(iii) In some cases, a difference of one letter at the beginning of a word may not provide a clear visual and phonetic difference~~

~~Example 2-3: in the Japanese and Korean languages there is no difference between “L” and “R” sounds, thus “Lion” and “Raion” are exactly the same although these are distinguishable for English mother tongue speakers;~~

~~- in the Japanese and Korean languages “Lion” and “Raion” provides a clear visual difference but does not provide for a clear phonetic difference because “L” and “R” have the same pronunciation;~~

² Comments from Argentina (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285383.pdf): Paragraph 2.3.3 (b) “It is suggested that “denominations not consisting of a combination of letters and figures, or “solely of figures” be changed “all other denominations”.” On this point, in our country it has been established that when the denomination consists of two or more “bodies” or “terms” – usually one body consists of letters and the other of figures – a letter or figure should be changed in each body. The difference is analyzed independently IN EVERY body or term of the denomination.”

³ Comments from Argentina (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285383.pdf): Paragraph 2.3.3 (b) (i) “It is proposed that an example in Spanish be added, such as “Helena” and “Elena” to address a situation in which there is a clear visual difference but not a phonetic one, since the letter “H” is mute in Spanish.”

Proposal by ESA⁴ “the example given in the first bullet does not have a difference of one letter in the beginning but of two letters”

- in the English language “Lion” and “Raion” provides a clear visual and phonetic difference.
 - ~~(ii) — denominations consist of a combination of letters and figures;~~
 - ~~(iii) — denominations consist “solely of figures”.~~

Proposal by ESA⁵ “the example in the second bullet [of (iii)] should not be here since it is a counter example belonging to sub (ii).”

~~(b)(c)~~ The use of a denomination which is similar to that used for a variety of another species or genera in the same denomination class (see section 2.5) may cause confusion.

~~(e)(d)~~ In order to provide clarity and certainty in relation to variety denominations, the re-use of denominations is, in general, discouraged, since the re-use of a denomination, even where that relates to a variety which no longer exists (see section 2.4.2) may, nevertheless, cause confusion. In some limited cases an exception may be acceptable, for example a variety which was never commercialized, or was only commercialized in a limited way for a very short time. In those cases, a suitable period of time after discontinued commercialization of the variety (e.g. 10 years)⁶ would be required before the re-use of the denomination in order to avoid causing confusion in relation to the identity and/or the characteristics of the variety.”

[End of Annexes and of document]

⁴ Comments from ESA (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285391.pdf): “Point 2.3.3 (b) (iii) refers to a case where a difference of one letter at the beginning may not provide a clear visual and phonetic difference. [...] Further on, the example given in the first bullet does not have a difference of one letter in the beginning but of two letters.”

⁵ Comments from ESA (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285391.pdf): “ [...] The example in the second bullet under this sub point should not be here since it is a counter example belonging to sub (ii).”

⁶ Comments from ESA (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285391.pdf): “In point 2.3.3 (d) we propose to mention 10 years as an example of suitable period. This is what is indicated in the CPVO guidelines on variety denominations.”