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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
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ADMINISTRATIVE AND LEGAL COMMITTEE

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PUBLICATION OF VARIETY DESCRIPTIONS

Document prepared by the Office of the Union

Introduction

1. At its forty-second session held in Geneva on October 23 and 24, 2000, the Administrative and Legal Committee (hereinafter referred to as “the Committee”) discussed whether there is a need for international publication of new variety descriptions. It was agreed that the Office of the Union should, with the help of an *ad hoc* working group of those experts with experience, prepare a summary of the legal and technical issues and formulate a possible approach for consideration by the Committee.

2. This initial paper, prepared by the Office of the Union after consultation with some of the possible members of the *ad hoc* working group, has been developed to identify the background to this issue and to identify certain issues to be considered by the *ad hoc* working group.

Background

3. The UPOV Convention criterion for “distinctness” requires that a variety must be clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. It requires an examination for compliance with this criterion, as well as for the uniformity, stability, novelty and the variety denomination criteria. The 1991 Act of the UPOV Convention notes that:

“In the course of the examination, the authority may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of other necessary tests, or take into account the results of growing tests or other trials which have already been carried out. For the purposes of examination, the authority may require the breeder to furnish all the necessary information, documents or material.”

4. The specific reference to tests and trials reflects the fact that the examination of Distinctness, Uniformity and Stability (DUS) is based on a technical examination predominantly conducted on growing trials with some additional tests where appropriate. The principles for conducting this examination are set out in document TG/1/2 “Revised General Introduction to the Guidelines for the Conduct of Tests for Distinctness, Homogeneity and Stability of New Varieties of Plants,” which is currently being revised. The General Introduction seeks to ensure that the technical examination is conducted in an effective way. However, the latest draft (document TC/37/5) of the revised version of this document, to be considered in the thirty-seventh session of the Technical Committee to be held in Geneva from April 2 to 4, 2001, notes that:

“5.3 Clearly Distinguishing a New Variety

“5.3.1 Comparing Varieties

“It is necessary to examine distinctness against all varieties of common knowledge. However, a systematic individual comparison may not be required against those varieties of common knowledge which are within a group known to have specific expressions of characteristics reliably ensuring that such varieties will be distinct from the candidate variety. In addition, certain procedures (e.g. publication of variety descriptions) may be developed to allow such an approach in some circumstances where there cannot be absolute certainty that all the varieties within such a group will be distinct from the candidate variety but where these supplementary procedures provide an effective examination of Distinctness overall. Such procedures may also be developed to address the lack of availability or accessibility of some varieties of common knowledge. Any such procedures will be set out in TGP/9 “Examining Distinctness.”

5. This wording is intended to clarify that, in general, the procedures for conducting the technical examination of varieties in a growing trial or other test (which includes the process of “grouping” or “pre-screening” by variety descriptions) are designed to be very effective but that, in some situations, the technical examination alone may not guarantee certainty in the determination of distinctness. In particular, it identifies two general areas where this situation may arise, i.e. where certain varieties of common knowledge are unavailable or inaccessible and therefore cannot be included in the technical examination and where the grouping of varieties to facilitate efficient testing introduces a small risk that a very similar variety of common knowledge may, nevertheless, be allocated to a different group. These aspects are elaborated below.

Availability of Varieties of Common Knowledge

6. On the assumption that variety descriptions are unavailable or are insufficient for an examination of DUS, there are potential situations in which a variety of common knowledge, i.e. one satisfying the criteria developed by UPOV, cannot be included in the technical examination of distinctness, even though there is a theoretical possibility that it may not be clearly distinguishable from a candidate variety. These situations include the possibility that:

(a) the variety is only known locally (of particular consideration for ecotypes and land-races) or regionally;

(b) seed or suitable planting material cannot be obtained because, for example:

(i) the breeder is unwilling to supply material (e.g. in the case of hybrid parent lines) and the original testing authority is equally unwilling to supply material because of legal concerns, or

(ii) quarantine restrictions prohibit the introduction of material into the DUS testing region;

(c) the cost and difficulty of obtaining, growing and maintaining a complete physical collection of varieties of common knowledge may be prohibitive. This aspect may be of increasing relevance with respect to:

(i) the need (under the 1991 Act of the UPOV Convention) to offer protection for all genera and species, particularly when there are already a large number of unprotected varieties in commerce for a species where protection is sought for the first time,

(ii) Contracting Parties introducing a plant variety protection system for the first time,

(iii) the increasing numbers of varieties, on a global scale, as plant variety protection systems are introduced into more countries.

Distinctness of Variety Groupings

7. Within Test Guidelines, suitable “grouping” characteristics are identified which can be used, either alone (e.g. red or blue flower groups) or in combination with other such characteristics (red flower/variegated foliage; red flower/normal foliage; blue flower/variegated foliage; blue flower/normal foliage), to group varieties for the efficient organization of distinctness, uniformity and stability (DUS) tests on the basis of documented descriptions. These provide an effective means of identifying the “similar” varieties (i.e. those in the same group) of common knowledge. Under the current approach, the consideration of Test Guidelines should ensure that suitable grouping characteristics are selected to provide a reliable conclusion on distinctness between varieties in different groups.

8. However, some Contracting Parties use more than the Test Guidelines’ grouping characteristics to undertake this process of grouping with the aim of identifying only a very small number of similar varieties. This approach carries an increased risk that there may be

varieties which are not distinct from a candidate variety even though they are not identified in this small group of similar varieties. The clear advantage for the cost of testing is that there are only a few varieties of common knowledge which need to be included in the DUS growing test alongside the candidate variety.

9. The potential benefit in publishing variety descriptions is to provide an additional element of examination to address the aspects above which cannot, with absolute certainty, be dealt with in the technical examination by the DUS examiner. This element of the examination works by providing other DUS examiners and interested parties in the international community (e.g. breeders, local communities), in addition to the original DUS examiner, with an opportunity to review the description of the variety and decide if there are any varieties of common knowledge against which the new variety appears not to be distinct.

10. At the same time, the publication of variety descriptions has the potential to improve the effectiveness of the technical examination by providing information on varieties of common knowledge, for which seed or planting material may not be accessible to a particular DUS examiner. This is particularly applicable for the situations outlined in paragraph 6.(b) above but, with improved harmonization in descriptors with organizations, such as IPGRI, may also address some aspects considered in paragraph 6.(a), where such varieties are held in recognized gene banks.

Issues to be Considered for the Publication of Variety Descriptions

11. The following issues will need to be considered in relation to the publication of variety descriptions:

(a) Legal Impediments: It will be necessary to consider if there are any possible legal impediments to Contracting Parties who wish to publish variety descriptions.

(b) Method of Publication: Consideration will need to be given to the way in which a description should be published to provide an effective characterization for any interested parties and the need for global consideration of all varieties of common knowledge. In particular, consideration should be given to the potential role, if any, for the Office of the Union in such publication e.g. through the UPOV-ROM or Web site.

(c) Nature of Variety Description: In order to provide the opportunity for an effective examination against all varieties of common knowledge it would be most appropriate to publish variety descriptions in an internationally harmonized way. However, consideration will need to be given to whether the characteristics published should only be those whose state of expression will be identical in all environments (i.e. only qualitative characteristics), of which there are very few, or whether a broader range of characteristics should be used (e.g. asterisked, grouping or even all Test Guidelines characteristics) with appropriate guidance for interpretation of the information and how this might be developed within UPOV. It may also be appropriate to consider relating the description to one of a small number of standard or reference varieties to calibrate the description.

In addition, consideration should also be given to the importance of harmonization of variety descriptors with organizations, such as IPGRI, to cover the widest possible range of varieties of common knowledge.

(d) Other Relevant Information: In addition to the publication of the variety description, it may also be appropriate to consider providing other relevant information, such as the criteria used for variety grouping / selecting the most similar varieties, together with the most similar variety(ies) and basis for distinctness.

(e) Model Study – Aspects for Prioritization: The potential benefit for publishing variety descriptions differs significantly between species, and it will be important to identify those with the greatest need for the development of any possible model study. It would then seem appropriate to identify the most appropriate characteristics to be included in the description for those species.

(f) Access Charge: It is recognized that there is significant cost in the development of variety descriptions and, as a result, it has been suggested that a fee might be charged to obtain a UPOV description. It would be appropriate to consider all the issues involved in such an approach.

12. The Committee is invited to consider if these issues are appropriate for consideration by the Office of the Union in conjunction with the ad hoc working group.

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