



CAJ/43/6

ORIGINAL: English

DATE: February 19, 2001

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE**Forty-Third Session
Geneva, April 5, 2001**

NOVELTY OF PARENT LINES

Document prepared by the Office of the Union

1. At its forty-first session held in Geneva on April 6, 2000, the Administrative and Legal Committee (hereinafter referred to as "the Committee") discussed the links between a hybrid variety and its components from the point of view of novelty. It considered documents CAJ/41/5 and CAJ/41/5 Add. in reaching the following conclusion:

"The Chairman concluded that, as expressed by several member States, the basic view on this issue seemed to be that the novelty of the inbred lines was lost by the exploitation of the hybrid variety. He also stated, however, that note should be taken of the different positions expressed in the session. He considered that the Committee had exhausted its discussions and could not go further at this stage."

2. In reaching this conclusion, the Committee accepts that different positions have been taken, but concludes that there is a basic view that the novelty of inbred lines can be considered to be lost by the exploitation of the hybrid variety. The reason for adopting such a position would be to ensure that the breeder could not enjoy further *de facto* protection of the hybrid variety, after the expiration of its protection, by subsequently obtaining protection for the inbred lines. In the case of simple hybrids, such an approach could result in *de facto* protection for the hybrid being extended by 20 or 40 years and, in the case of more complex hybrids, even longer, e.g. 80 years in the case of three-way hybrids.

3. The ability of Contracting Parties to take this view was reinforced in document CAJ/41/5 by reference to the UPOV Model Law as follows:

“5. The matter of the novelty of lines comprised in the formula of a hybrid is a subject of the following commentary in the UPOV Model Law:

“Special case of varieties whose production requires the repeated use of one or more other varieties

“6.6 This case can be illustrated by the production of hybrid seed. Such seed is “propagating material” of the hybrid variety concerned. At the same time it can be the “harvested material” of the lines used for the hybrid formula or may be considered such; in the case of an F1 hybrid, for example, the seeds are taken from the female line while the male line has been grown only to pollinate the female line for the purpose of obtaining seeds. It is the view in some countries that the sale or transfer of hybrid seed to third parties for the purposes of exploiting the hybrid variety is a relevant act for the evaluation of the novelty of the lines used in the formula of the hybrid.

“6.7 If this point needs to be developed further, the following provisions can be inserted into the national law:

“(3) Where the production of a variety requires the repeated use of one or more other varieties, the sale or transfer to third parties of the propagating material or the harvested material of that variety shall be relevant to the novelty of the other variety or varieties.

“6. A certain number of States have expressly provided (or intend to provide) that commercial exploitation of a variety requiring the repeated use of another variety for its production destroys the novelty of the other variety (as in the Guide to the 1997 Plant Varieties Act of the United Kingdom and concerns the provisions having the same effect as the provision proposed in the Model Law).”

4. ASSINSEL opposed this view in its position set out in the Annex to document CAJ/41/5 Add. as follows:

“Some offices are arguing that parental lines of hybrids which have already been produced and/or sold are not novel on the ground that the seed of the hybrid variety represents “the harvested material of the parental lines.”

“ASSINSEL considers that interpretation is not correct:

- “• Obviously it is not valid for the male parental line.
- “• It is not valid either for the line used as the female parent of the hybrid as, if we plant the product harvested on the female parental line, the progeny will not be the female parental line itself. That means that the interpretation considering that the hybrid variety represents the harvested material of the parental lines is not consistent with the UPOV definition of a variety, considered as a unit with regard to its suitability to be propagated unchanged.

“Of course parental lines have to fulfil the normal novelty criteria as do any other varieties: they have not been sold or otherwise disposed of to others, by or with consent of the breeder, for purposes of exploitation of the variety.”

5. However, the Committee did not agree with the ASSINSEL position and concluded, as stated above, that there is a basic view that the novelty of inbred lines can be considered to be lost by the exploitation of the hybrid variety.

6. ASSINSEL has now requested that the Committee review its position on the basis of arguments presented in their letter of October 18, 2000 (see Annex), i.e.

- “• It is clear that no disposal of “propagating material of the variety” (a parental line) takes place.
- “• Can it be argued that the hybrid seed harvested as the female parent line is “harvested material of the variety” (the female parent line)? ASSINSEL argues that the answer is no as any consistent interpretation of “material of the variety” must emphasize genetic conformity. The section is not intended to include products which are not conform to the variety. If it were, it would say “material harvested from the variety.”
- “• If, however, contrary to logic, the interpretation that hybrid seed is the “harvested material of the variety” and not the material harvested from the variety, the condition of article 6.1 would not apply as it says “for purposes of exploitation of the (*) variety.” The hybrid seed is sold for the purpose of exploitation of the hybrid, not the female parental line.
- “• This interpretation is also supported because it treats both male and female parent lines alike. No sensible construction of article 6 will make a hybrid “harvested material” of its male parent. It would be paradoxical to have different interpretations of the UPOV Convention for the male parent line and the female one.”

7. The Committee is invited to consider if the arguments presented by ASSINSEL represent a new aspect, which should lead the Committee to review its position that the novelty of inbred lines can be considered to be lost by the exploitation of the hybrid variety

[Annex follows]

ASSINSEL Position on Novelty of Parent Lines

ASSINSEL



Association internationale des sélectionneurs pour la protection des obtentions végétales
International Association of Plant Breeders for the Protection of Plant Varieties
Internationaler Verband der Pflanzenzüchter für den Schutz von Pflanzenzüchtungen

Nyon, October 18, 2000

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Dear Mister Jördens,

At its meeting of October 13th, 2000 the Executive Committee of ASSINSEL has considered very carefully the minutes of the CAJ meeting of April 6, 2000 (41st session). The Executive Committee asked me to forward the following comments to you.

1. Novelty of parental lines.

At the end of the discussion of the CAJ on that subject, the Chairman concluded that, as expressed by several member states, the basic view on this issue seemed to be that the novelty of the inbred lines was lost by the exploitation of the hybrid variety. He also stated, however, that note should be taken of the different positions expressed in the session. He considered that the Committee had exhausted its discussions and could not go further at this stage.

It is the contention of ASSINSEL that parent lines do not lose novelty through the sale of the hybrid using them as parents. This position is firmly based on the wording of the UPOV Convention.

We will use the 1991 Act of the Convention in our argumentation:

- We note that parent lines have no special status in the Convention. ASSINSEL has argued in the past they should have (in particular that hybrids should be defined in terms of their parents) but this argument has not been accepted when the Convention was revised in 1991. A parent line, accordingly, in UPOV Convention, is a variety like any other.
- The condition of novelty is defined by article 6.1 of the 1991 Convention: "The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, 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".
How does this provision apply to parent lines when hybrids obtained from such lines are sold?

(*) Underlined by ASSINSEL

- It is clear that no disposal of "propagating material of the variety" (a parental line) takes place.
- Can it be argued that the hybrid seed harvested as the female parent line is "harvested material of the variety" (the female parent line)? ASSINSEL argues that the answer is no as any consistent interpretation of "material of the variety" must emphasize genetic conformity. The section is not intended to include products which are not conform to the variety. If it were, it would say "material harvested from the variety".
- If however, contrary to logic, the interpretation that hybrid seed is the "harvested material of the variety" and not the material harvested from the variety, the condition of article 6.1 would not apply as it says "for purposes of exploitation of the (*) variety". The hybrid seed is sold for the purpose of exploitation of the hybrid, not the female parental line.
- This interpretation is also supported because it treats both male and female parent lines alike. No sensible construction of article 6 will make a hybrid "harvested material" of its male parent. It would be paradoxical to have different interpretation of the UPOV Convention for the male parent line and the female one.

ASSINSEL would like to have that issue review by the CAJ at the light of these arguments.

2. Breeder's exemption, in particular as regards parent lines.

At the end of the discussion of the 41st CAJ, on April 6th, the Chairman concluded that "the UPOV Convention does not provide any obligation to make parent material available to third parties and that it is a matter to be decided at the national level".

ASSINSEL agrees with the first part of the statement but strongly disagrees with the second part indicating that "it is a matter to be decided at the national level".

This position is based on the wording of the Convention:

- We note that parent lines have not special status in the Convention. A parent line, accordingly, in UPOV Convention is a variety like any other.
- Article 17 (1) provides that "Except where expressly provided in this Convention, no Contracting Party may restrict the free exercise of a breeder's right for reasons other than of public interest". The obligation to make plant material of a protected variety available to third parties would result in a restriction of the breeder's right not expressly provided for in the Convention and therefore would be contrary to it.
- Article 22 provides for reasons for cancellation of the breeder's right. An exhaustive list is given and not rendering material of the variety available to third parties is not listed. Reasons other than those referred in the list are contrary to the Convention.

(*) Underlined by ASSINSEL

- Article 5 (1) gives the criteria to be satisfied for granting protection: the breeder's right shall be granted where the variety is: (i) new, (ii) distinct (iii) uniform and (iv) stable.

Article 5 (2) states that "the grant of the breeder's right shall not be subject to any further conditions, provided that the variety is designated by a denomination...". Addition of a new criteria for granting protection by a Member State would be contrary to the Convention.

To conclude, ASSINSEL considers that the UPOV Convention does not provide any obligation to make plant material available to third parties (including parent material) and that there is no possibility for Member States to add that provision at national level.

It is sometimes argued that material of the variety should be made available to third parties to parallel the "enabling disclosure" of the patent right. But Plant Variety Protection differs from patent protection and it is not acceptable to parallel some criteria for patent and breeder's rights but not others, and in particular in this case the research exemption. The disclosure of "how to make and use" is vital to patent protection of inventions but it forms not part of the plant variety protection system: the breeder must be able to reproduce his variety uniform and stable, but he has no obligation to teach the public how.

3. Marking of protected varieties.

ASSINSEL was requested to report to the CAJ the result of their internal discussion on the interest of having an harmonized mark for variety protected by breeder's right.

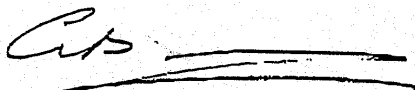
The opinion of the ASSINSEL Executive Committee is such harmonization at global level is not necessary and could even be misleading.

- The protection given by the plant breeder's right is territorial and, as the seed is moving internationally marking could be misleading.
- The scope of the protection differs according to the 1978 and 1991 acts of the Convention. To avoid any misinterpretation it would be probably necessary to have two different marks.

The decision to mark protected varieties should be left to national offices and seed industries.

I am sorry for the lateness of sending you these comments due to the calendar of ASSINSEL meetings, but I hope that it would be possible to discuss them, during the next 42nd CAJ meeting.

With best regards,



Bernard Le Buanec
Secretary General

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End of Annex and of document/
Ende der Anlage und des Dokuments/
Fin del Anexo y del documento]