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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

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ADMINISTRATIVE AND LEGAL COMMITTEE**Forty-Fourth Session****Geneva, October 22 and 23, 2001****BREEDER'S EXEMPTION IN RELATION TO 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 breeder's exemption in relation to varieties which were not marketed, for example, parent lines of hybrid varieties. It considered documents CAJ/41/6 and CAJ/41/5 Add. (section (b)) in reaching the following conclusion (document CAJ/41/9 Report, paragraph 58):

"The Chairman concluded that the UPOV Convention does not provide any obligation to make plant material available to third parties and that it is a matter to be decided at the national level. The Committee accepted this conclusion."

2. The International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL), in their letter of October 18, 2000, argue that it is not a matter to be decided at national level and that there is no possibility for member States to add such a provision at national level. Their position is based on the wording of the Convention as follows:

- "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.
- “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.”

3. However, the ASSINSEL position, apparently, fails to consider that an authority in possession of a variety would be entitled, under the breeder’s exemption provided in Article 15(iii) of the 1991 Act, to make available any material it wishes for the purpose of breeding other varieties. The only mechanism for preventing such action would be the voluntary agreement of the authority, or the introduction of a condition by the applicant on submission of material, that this would not be distributed to any third party. The authority would be at liberty to decide whether to accept or reject such a condition. The test would be whether rejection of such a condition would have the effect of discouraging applications for breeders’ rights for parent lines and whether this would have a deleterious impact on breeding progress and, therefore, the overall purpose of the Convention. This, as concluded previously by the Committee, would be a matter to be decided at the national level.

4. During discussions on the issue at the forty-first session of the Committee, the Delegation of France also raised a related problem concerning parent lines. It noted (document CAJ/41/9, paragraph 52) that, if protected varieties are not available in the market, other breeders cannot compare their candidate varieties with the unmarketed varieties for the purpose of distinctness and wondered if such varieties were, nonetheless, a matter of common knowledge. It was further considered that this problem also existed for third parties.

5. A complication in this consideration is that the intention of withholding parent lines is to prevent other breeders (third parties) from gaining access to this material for breeding work. However, in at least some UPOV Contracting Parties, the DUS examination is conducted by breeders and in this case their purpose might be, as for any DUS examiner to consider the variety for distinctness and not to use it for breeding.

6. The representative of ASSINSEL stated (document CAJ/41/9 Report, paragraph 56) that variety descriptions but not plant material of protected varieties could be made available to third parties in this connection and that the construction of a variety description database might solve to some extent the problems relating to “common knowledge.”

7. The Committee has recently identified important elements concerning common knowledge and has agreed the following text for inclusion in TC/37/9(a) Working document for a new “Revised General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants”:

“5.2.3 Common Knowledge

“54. Specific aspects which should be considered to establish common knowledge include, among others:

- “(a) commercialization of propagating or harvested material of the variety or publishing a detailed description;
- “(b) the filing of an application for the grant of a breeder’s right or for the entering of a variety in an official register of varieties, in any country, is deemed to render that variety a matter of common knowledge from the date of the application, provided that the application leads to the grant of a breeder’s right or to the entering of the variety in the official register of varieties, as the case may be;
- “(c) existence of living plant material in publicly accessible plant collections.”

Sub-paragraph (b) clarifies that any parent line, which is a protected variety, should be considered to be a matter of common knowledge, regardless of whether the variety is marketed. This criteria is, effectively, the specific provision made in Article 7 (Distinctness) of the 1991 Act.

8. The Committee (documents CAJ/42/7, paragraphs 35 to 43, and CAJ/43/8 Prov., paragraphs 59 to 73) has also recognized the potential importance of the publication of variety descriptions, in the form of a database, for addressing this and other situations regarding the examination of distinctness. This matter is being considered further under agenda item 5 of this session.

9. *In conclusion, the Committee is invited to conclude that:*

(i) the decision on whether to make plant material available is, in accordance with the basis set out in paragraph 3, a matter to be decided at the national level but in making this decision national authorities will need to take into account the overall balance of benefits;

(ii) parent lines which are varieties satisfying the criteria in TC/37/9(a) Working document for a new “Revised General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants”, section 5.2.3 (b), are to be considered to be a matter of common knowledge;

(iii) the availability of plant material of certain protected varieties, including parent lines of hybrid varieties, for DUS examiners may be restricted and this should be taken into account for discussions on the need for the publication of variety descriptions.

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