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**ISSUES CONCERNING THE USE OF MATERIALS SUBMITTED FOR
EXAMINATION OF DISTINCTNESS, UNIFORMITY AND STABILITY**

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1. The UPOV Convention establishes that the authority entrusted with the task of granting breeders' rights may require the breeder to furnish all necessary plant material for the examination of distinctness, uniformity and stability (hereinafter referred to as "DUS"). Thus, the 1991 Act of the Convention states in Article 12 "Examination of the Application" that,

"For the purposes of examination, the authority may require the breeder to furnish all the necessary information, documents or material..."

and a similar provision can be found in Article 7(2) of the 1961 and 1978 Acts.

2. This provision establishes that it is the responsibility of the breeder to supply any plant material which is required for the examination of a candidate variety. For example, if the authority considers the examination of distinctness requires a candidate variety to be compared to certain varieties whose existence is a matter of common knowledge at the time of the filing of the application (hereinafter referred to as "varieties of common knowledge"), it could require the breeder to supply plant material of these varieties of common knowledge, for the purposes of examination. However, it is recognized that such a requirement could present substantial difficulties for breeders. In practice, many authorities do not require the breeder to supply plant material of such varieties of common knowledge because they have established a variety collection. Such variety collections are usually based on plant material, of candidate varieties, submitted for the examination of the application.

3. It is clear that a breeder wishing to obtain protection for a new variety will need to submit the appropriate plant material to the appropriate authority, for the examination of this “candidate” variety. The breeder submits plant material of his candidate variety to this authority only for the examination of *his* variety. However, as noted above, it is common practice for the submitted plant material of such varieties to be included in a variety collection to be used in the examination of *other* varieties, both by the authority to which the plant material was submitted and often by other examining authorities supplied with plant material by the first authority.

4. The purpose of this document is to explore the reasons for the practice of including submitted plant material of candidate varieties in variety collections, for the DUS examination of other varieties, and some issues which can arise when this practice cannot be freely undertaken. In particular, it considers the situation where a breeder may wish to attach conditions to the use of plant material for such practices or where the breeder does not permit such a practice at all.

The exchange of plant materials submitted for DUS examination

5. The DUS examination of a variety cannot be conducted without reference to other varieties. The main reason for this is that a variety must be examined for its compliance with the distinctness criterion, namely that it must be clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of filing of the application (see Article 7 of the 1991 Act and Article 6(1)(a) of the 1961 and 1978 Acts of the Convention). In addition, the uniformity requirement for a variety is set according to the particular features of its propagation (see Article 8 of the 1991 Act and Article 6(1)(c) of the 1961 and 1978 Acts of the Convention). This means that, for certain types of variety, the standard is, in practice, calculated on the basis of the uniformity of existing varieties.

6. This need for reference to other varieties in the DUS examination, particularly for the purpose of examining distinctness, means that the authorities need access to plant material of all varieties, or adequate information on these varieties, to allow them to be taken into account for the examination of distinctness of candidate varieties. In practice, many authorities and, in particular, those with a government based testing system, try to establish a collection of plant material of all the relevant varieties of common knowledge to allow their inclusion in growing tests or trials alongside candidate varieties.

7. It is common practice for authorities to exchange plant material of varieties, submitted for DUS examination, after breeders' rights have been granted or the variety has been entered in an official register. The exchange does not generally take place until after the grant of rights or official registration of a variety because it is, at this point, that the Convention establishes that the variety becomes a matter of common knowledge (see Article 7 of the 1991 Act and Article 6(1)(a) of the 1961 and 1978 Acts of the Convention). In most cases, plant material of the varieties is freely available in the market place at this stage. It is common practice for the authorities to seek plant material from the original examining authority because they know the sample will be representative of the variety and it is also more convenient to obtain all varieties from a small number of sources rather than contacting all the individual breeders.

8. In general, the practice of exchanging plant material between authorities, or use of plant material by the original authority after the DUS examination is complete, is tacitly accepted by breeders, although the plant material is not being used for the examination of the variety

but for the examination of *other* candidate varieties. Breeders benefit from the practice because it helps to ensure that their varieties are protected effectively, through an effective examination of distinctness, and that the DUS examination is conducted in an efficient way. Furthermore, in most cases, plant material of the variety is freely available in the market place.

Restrictions on the availability of plant material

9. Having noted that, in general, the practice of exchanging *plant material* between authorities is accepted by breeders, it must also be noted that there are some circumstances where breeders do not wish the exchange of plant material between authorities to take place, or only after consultation on a case-by-case basis and/or on the basis of certain conditions. In particular, these cases arise where the varieties are not generally available in the market place and the authorities may be the only other source of plant material. One example is the case of parent lines of hybrid varieties.

10. During discussions on the issue at the forty-first session of the Administrative and Legal Committee (hereinafter referred to as the "Committee"), the Delegation of France highlighted this 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.

11. The Committee has recently considered important elements concerning common knowledge and agreed the following text for inclusion in document 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) establishes 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 and Article 6(1)(a) of the 1961 and 1978 Acts of the Convention.

12. Clearly, inaccessibility of plant material of a protected variety does not allow authorities to disregard the protected variety in the consideration of distinctness of candidate varieties.

Conditions for the exchange of material

13. As noted above, the breeder may wish to allow plant material, submitted for the examination of DUS, to be distributed to other authorities but subject to certain conditions. It would then be for distributing and receiving authorities to consider how it could ensure that these conditions would be observed, before deciding on whether to proceed on the basis of such conditions.

Situations where no exchange of material can occur

14. In some situations, the breeder may not wish to allow plant material, submitted for the examination of DUS, to be distributed to other authorities at all. In response to the concerns raised by the Delegation of France at the forty-first session of the Committee, regarding the lack of access to certain protected varieties, 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."

15. At the forty-second and forty-third sessions, the Committee (documents CAJ/42/7, paragraphs 35 to 43, and CAJ/43/8, paragraphs 59 to 67) has 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 where varieties are unavailable for comparison in growing tests or other trials.

16. In conclusion, the Committee is invited to note that:

(i) the UPOV Convention establishes that the authority may require the breeder to provide any material it needs for the conduct of the examination, including, for example, plant material of varieties of common knowledge for the purposes of examining distinctness but it is recognized that such a requirement could present substantial difficulties for breeders;

(ii) some authorities have established collections of plant material of varieties of common knowledge for the purposes of examination but need to consider how to manage plant material of candidate varieties provided by the breeder, as a part of the application, if conditions are attached to its use for such a purpose;

(iii) a system of publishing variety descriptions may offer an effective means of examining distinctness to address situations where plant material of varieties is unavailable for comparison in growing tests or other trials.

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