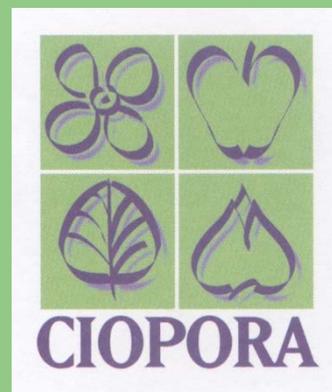


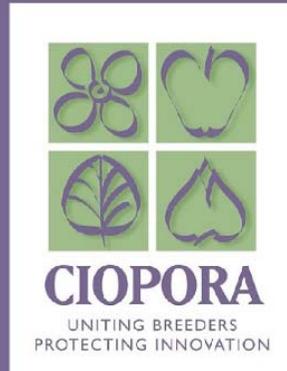
# Minimum Distance / Distinctness

Meeting of the UPOV CAJ  
Geneva, 31 October, 2018

Joint presentation by:



2017



## CIOPORA POSITION PAPERS ON PBR AND PATENTS

Minimum Distance  
The Scope of the Right  
Essentially Derived Varieties  
Breeders' Exemption  
Exhaustion  
General PBR Matters  
Patents for Plant-Related Inventions

INTERNATIONAL COMMUNITY OF BREEDERS OF ASEXUALLY REPRODUCED  
ORNAMENTAL AND FRUIT PLANTS

This is about  
vegetatively  
reproduced  
ornamentals  
and fruits  
only!



# Clearly Distinguishable in UPOV 1991 Act

## Article 5

### Conditions of Protection

(1) [Criteria to be satisfied] The breeder's right shall be granted where the variety is

- (i) new,
- (ii) distinct,
- (iii) uniform and
- (iv) stable.

## Article 7

### Distinctness

The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application.



# Different versus Distinct in UPOV 1991 Act

## Art. 1 Definitions

### (vi) “Variety”

“distinguished from any other plant grouping by the expression of at least one of the said characteristics, ...”

**vs.**

## Article 7 Distinctness

The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application.



# Clearly Distinguishable in UPOV 1991 Act

## Article 14

### Scope of the Breeder's Right

(1) to (4): Acts in respect of the protected variety which shall require the authorization of the breeder.

(5) [Essentially derived and certain other varieties] (a) The provisions of paragraphs (1) to (4) shall also apply in relation to

(i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,

(ii) varieties which are not clearly distinguishable in accordance with Article 7 from the protected variety and

(iii) varieties whose production requires the repeated use of the protected variety.



# Clearly Distinguishable in UPOV 1978 Act

## Article 6

### Conditions Required for Protection

(1) The breeder shall benefit from the protection provided for in this Convention when the following conditions are satisfied:

(a) Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, the variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for.

- UPOV 1978 Act has no definition of “Variety”!
- No coverage of “not clearly distinguishable varieties” by the scope of protection



# Clearly Distinguishable under UPOV 1991 Act

## The two legal Consequences of Minimum Distance

- A variety, in order to obtain PBR protection, must be clearly distinguishable from any existing varieties
- A variety, which is clearly distinguishable, falls out of the scope of the [earlier] protected variety

or the other way round

- A variety, which is not clearly distinguishable from an existing variety, cannot obtain PBR protection
- A variety, which is not clearly distinguishable, falls into the scope of the [earlier] protected variety



Breeders and growers are concerned that there is confusion as regards the understanding of “botanically different varieties” and “legally distinct varieties”

**Different**

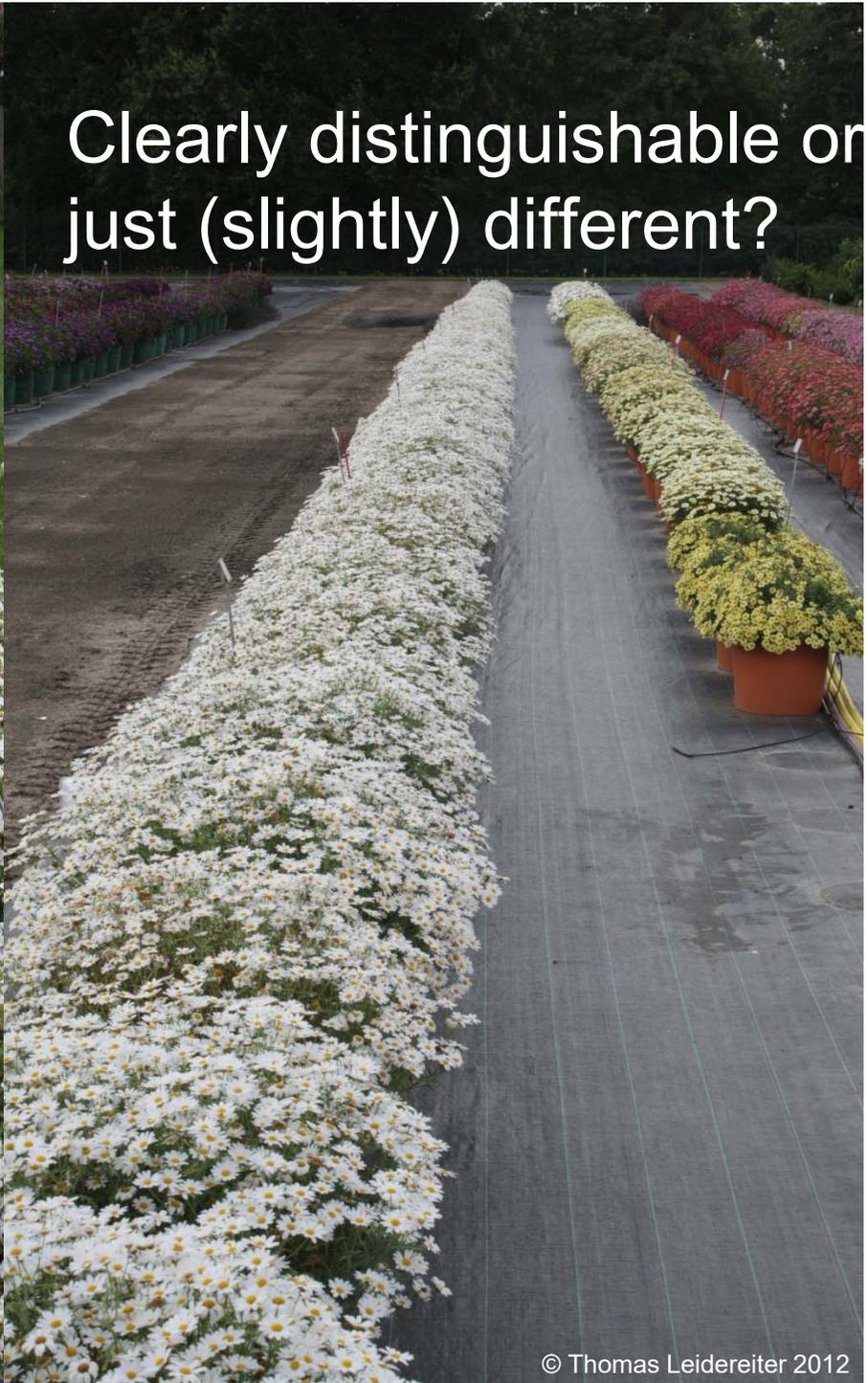
**≠**

**Distinct / Clearly Distinguishable**





Clearly distinguishable or just (slightly) different?



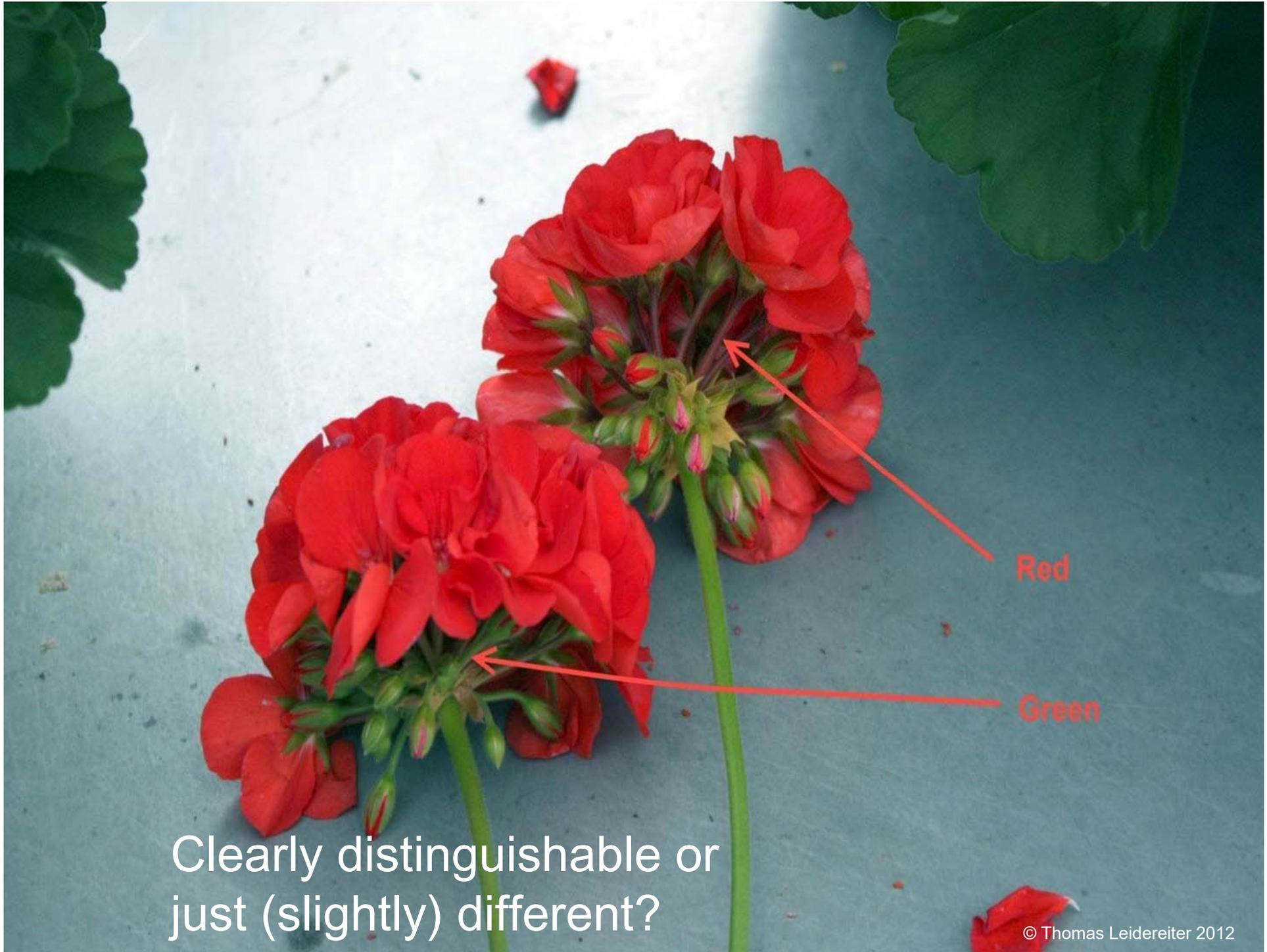
Clearly distinguishable or just (slightly) different?



Clearly distinguishable or  
just (slightly) different?



Clearly distinguishable or  
just (slightly) different?



Clearly distinguishable or just (slightly) different?

# The aims of breeders and growers

- Horticultural Breeders and Growers do not aim at a radical change of the system, but aim at the elimination of shortcomings.
- Each new candidate variety should literally be “new” to be able to get an reasonable share in the market or to even develop its own market.
- The candidate variety should be ‘sufficiently’ unique or ‘original’ compared to the varieties already available on the market.
- While botanists are called in to explain the differences which can be found between two varieties, it is a legal task to define the minimal distance / distinctness between varieties.



# Spec

- CIOPORA and AIPH are concerned that in some ornamental and fruit species the distance between varieties is becoming very small
- This is not (yet) a problem in all species, in many species the varieties are very distinct, this is why we look to it on a crop-by-crop basis
- However, the risk of allowing too small Minimum Distances is inbuilt in the UPOV Technical Paperwork, e.g. TGP/9



# Position on Minimum Distance

- The requirement “clearly distinguishable” should be assessed on characteristics important for the crop concerned; in this regard new important characteristics may be taken into consideration, such as resistances.
- Differences in unimportant characteristics only should not lead to a clearly distinguishable variety.
- In order to be clearly distinguishable, the distance between two varieties in regard to their important characteristics should be sufficiently broad.
- Particularly in regard to pseudo-qualitative characteristics and quantitative characteristics a difference of only one note in general should not be considered as a sufficiently broad distance.
- The decision should be made on a crop by crop basis.



# Position on Minimum Distance

- Varieties with the same note in the UPOV test-guideline for a given characteristic should not be considered to be clearly distinguishable with respect to that characteristic. The possibility to search for a difference in a subsequent growing trial, if such difference was not clear in the first properly performed examination, should be eliminated.
- The possibility of randomized “blind” testing in case of doubts over the distinctness of a candidate variety should also be eliminated. In case of a doubt over distinctness, the candidate variety cannot be considered to be clearly distinguishable from the reference variety.



# Possible first steps for ornamentals and fruits

- Possibility to search for a difference in a subsequent growing trial, if such difference was not clear in the first properly performed examination, should be eliminated.
- The possibility of randomized “blind” testing in case of doubts over the distinctness of a candidate variety should be eliminated.
- The distance within the characteristics should be broadened by reducing the number of notes where appropriate.



# Paper Case Study on Minimum Distance

- Between 2015 and 2017 a paper case study took place in the EU as an R&D project of the CPVO, with the assistance of the Examination Offices Naktuinbouw, NIAB, UKZUZ, Bundessortenamt and GEVES, as well as of CIOPORA.
- Species concerned: Apple, Rose, Pelargonium
- On the basis of mock protocols, 50 recently protected varieties per species have been re-examined on paper to determine the possible effect of the mock protocols on the distinctness between these varieties and other already existing varieties (i.e. re-do the analysis on distinctness).
- Results showed effects of “deleting” unimportant characteristics for examination of Distinctness, but also showed that study of plants is necessary.



# Follow-up Real Case Study on Pelargonium

- 8 pairs of Pelargonium varieties, where the paired varieties have a similar phenotype, shall be grown in a trial at the German Bundessortenamt and the distinctness shall be re-evaluated and discussed on the basis of the mock protocol.
- Results shall have no effect on the titles granted
- The project is funded by the CPVO.
- The results are expected in summer 2019, and will be reported to UPOV.



# CIOPORA's and AIPH's joint interest

- The ornamental and fruit breeding and growing industries (CIOPORA and AIPH) hope to have progress in this matter soon in order to achieve a broader distance between varieties.
- Breeders in particular need to benefit from protection titles that give them true exclusivity and robust and better enforceable rights.
- Growers need to distinguish themselves with their products on the market in order to gain a sufficient return on their production costs and investment.

# Thank You for Listening!

On behalf of CIOPORA and AIPH

Dr. Edgar Krieger

Secretary General of CIOPORA

