

**Administrative and Legal Committee**

**CAJ/80/3**

**Eightieth Session  
Geneva, October 25, 2023**

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**REPORT ON THE WORKING GROUP ON HARVESTED MATERIAL AND UNAUTHORIZED USE OF PROPAGATING MATERIAL (WG-HRV)**

*Document prepared by the Office of the Union*

*Disclaimer: this document does not represent UPOV policies or guidance*

**EXECUTIVE SUMMARY**

1. The Administrative and Legal Committee (CAJ) is invited to note the developments concerning the work of the Working Group on Harvested Material and Unauthorized use of Propagating Material (WG-HRV), as reported in this document.

2. The structure of this document is as follows:

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**BACKGROUND**

3. The CAJ, at its seventy-ninth session, held in Geneva on October 26, 2022, noted the report on the WG-HRV, as provided in document CAJ/79/8 “Report on the Working Group on Harvested Material and Unauthorized use of Propagating Material (WG HRV)”. The CAJ expressed support for the ongoing work of the WG-HRV, which included the need for clarification on the notions of propagating and harvested materials and exhaustion of the breeder’s right, the scope of provisional protection, the notion of “unauthorized use” and “reasonable opportunity” under Article 14(2) and the role of contracts and plant breeders’ rights, including that the authorization of the breeder might be subject to conditions and limitations (see document CAJ/79/11 “Report”, paragraphs 37 and 38).

**THIRD MEETING OF THE WG-HRV (MARCH 21, 2023)**

4. The WG-HRV held its third meeting in Geneva on March 21, 2023 by hybrid means. The WG-HRV/3 documents and report are available at: [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=74773](https://www.upov.int/meetings/en/details.jsp?meeting_id=74773).

Proposals concerning the Explanatory Notes on Propagating Material under the UPOV Convention

5. The WG-HRV/3 considered document WG-HRV/3/2 "Proposals concerning the Explanatory Notes on Propagating Material under the UPOV Convention".

6. The WG-HRV/3 agreed to modify the section "Factors that have been considered in relation to propagating material", as presented below. The changes agreed at the meeting are presented in manual revision mode and highlighted in yellow and previously agreed changes are highlighted in grey, for ease of reference.

FACTORS THAT HAVE BEEN CONSIDERED IN RELATION TO PROPAGATING MATERIAL

The UPOV Convention does not provide a definition of "propagating material". Propagating material encompasses reproductive and vegetative propagating material. The following are non-exhaustive examples of factors, ~~that have been considered by members of the Union in relation to~~ one or more of which could be used to decide whether material is propagating material. Those factors should be considered in the context of each member of the Union and the particular circumstances.

- (i) plant or part of plants used for the variety reproduction;
- (ii) whether the material has been ~~or may be~~ used to propagate the variety;
- (iii) whether the material ~~is capable~~ has an innate capability of producing entire plants of the variety (e.g. seed, tubers);
- (iv) ~~(vii) when harvested whether the material, has the potential, including harvested material, could be used as propagating material, it can be considered as through the use of propagating techniques material (e.g. cuttings, tissue culture);~~
- (v) ~~(iv)~~ whether there has been a custom/practice of using the material for propagating purposes or, as a result of new developments, there is a new custom/practice of using the material for that purpose;
- ~~(vi) (v) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user);~~
- (vii) ~~(vi)~~ if, based on the nature and condition of the material and/or the form of its use, it can be determined that the material is "propagating material"; ~~or~~
- ~~(viii)~~ the variety material where conditions and mode of its production meet the purpose of reproduction of new plants of the variety but not of final consumption.

The above text is not intended as a definition of "propagating material".

(see document WG-HRV/3/4 "Report", paragraph 7)

Perspectives on "unauthorized use" under Article 14(2) of the 1991 Act of the UPOV Convention

7. The WG-HRV/3 considered documents WG-HRV/3/3 and WG-HRV/3/3 Add. "Perspectives on "unauthorized use" under Article 14(2) of the 1991 Act of the UPOV Convention" and agreed the following (see document WG-HRV/3/4 "Report", paragraphs 11, 17 and 18, reproduced below):

"11. The WG-HRV agreed to organize a study to assist its deliberations on the "Scope of the Breeder's Right" in Article 14(1) and (2) of the 1991 Act, including the notions of "unauthorized use" and "reasonable opportunity" and the relationship with the "Exhaustion of the Breeder's Right" in Article 16 of the 1991 Act.

[...]

"17. The WG-HRV agreed to invite the members of the WG-HRV to propose issues and/or suggest authors for a study on the "Scope of the Breeder's Right" which would consider Article 14(1) and (2) of the 1991 Act, including the notions of "unauthorized use" and "reasonable opportunity", and the relationship with the "Exhaustion of the Breeder's Right" in Article 16 of the 1991 Act, based on an analysis of the Records of the 1991 Act Diplomatic Conference and its preparatory work.

"18. The WG-HRV agreed that, based on the replies received, the Office of the Union would propose the terms of reference for a study, timeline and author (s), if appropriate, for consideration by the WG-HRV at its fourth meeting."

Proposals concerning the Explanatory Notes on Provisional Protection under the UPOV Convention

8. The WG-HRV/3 did not have time to discuss document WG-HRV/2/5 “Proposals concerning the Explanatory Notes on Provisional Protection under the UPOV Convention”.

FOURTH MEETING OF THE WG-HRV (OCTOBER 25, 2023)

9. The fourth meeting of the WG-HRV will be held in hybrid format, on the evening of October 25, 2023.

10. The WG-HRV/4 documents are available at: [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=77809](https://www.upov.int/meetings/en/details.jsp?meeting_id=77809)

*11. The CAJ is invited to note the developments concerning the work of the WG-HRV, as reported in this document.*

[Annex follows]

TERMS OF REFERENCE OF THE WORKING GROUP ON  
HARVESTED MATERIAL AND UNAUTHORIZED USE OF PROPAGATING MATERIAL  
(WG-HRV)

*approved by the Administrative and Legal Committee on September 21, 2021*

PURPOSE:

The purpose of the WG-HRV is to draft a revision of the “Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention” (document UPOV/EXN/HRV/1), “Explanatory Notes on Propagating Material under the UPOV Convention” (UPOV/EXN/PPM/1), and “Explanatory Notes on Provisional Protection under the UPOV Convention” (UPOV/EXN/PRP/2), for consideration by the Administrative and Legal Committee (CAJ).

COMPOSITION:

- (a) to be composed of the members of the Union and the observers agreed by the CAJ;
- (b) other members of the Union would be free to participate at any meeting of the WG-HRV and make comments, where so desired;
- (c) the WG-HRV would revert back to the CAJ if the WG-HRV recommended to invite other observers or experts to any of its meetings; and
- (d) meetings to be chaired by the Vice Secretary-General.

MODUS OPERANDI:

(a) in drafting the revision of documents UPOV/EXN/HRV/1, UPOV/EXN/PPM/1, and UPOV/EXN/PRP/2, the WG-HRV to consider the matters identified in the replies to UPOV Circular E-19/232 and, in particular, the concluding remarks at the 2021 Seminar on the breeder’s right in relation to harvested material:

- *“How does the lack of effective protection on harvested material impact on growers and consumers?”*

“Evidence was presented at the Seminar that the lack of effective protection for new varieties of fruit trees, prior to the grant of breeders’ rights, could inhibit the early introduction of new and improved varieties, thus reducing the benefits of those varieties for growers and consumers and, therefore, society as a whole. Furthermore, if breeders do not have effective protection to recover the investment in breeding, improved varieties might not be developed at all.

- *“What are the main challenges in the exercise of the breeder’s right in relation to the harvested material?”*

“A common area of concern is lack of predictability concerning the breeder’s right in relation to the harvested material.

“For certain species, trees, once planted, can produce fruits for many years. Therefore, a minimum scope of provisional protection and/or a narrow interpretation of “unauthorized use of propagating material” may not provide the means for the breeder to exercise and enforce their right in relation to the growing of the plants and producing and selling of the fruit.

- *“At the level of UPOV: what solutions do you see for those challenges in the exercise of the breeder’s right in relation to the harvested material?”*

“Clear indication from presentations and discussions that guidance in the explanatory notes on harvested material would benefit from further clarification.

“To help to encourage the development of new varieties of plants, further guidance would be helpful on:

- “propagating material
- “harvested material
- “effective provisional protection
- “notion of ‘unauthorized use of propagating material’
- “the doctrine of exhaustion of rights in relation to the reversal of the burden of proof”.

(b) the WG-HRV to meet at a time and frequency to address its mandate, by physical and/or virtual means, as agreed by the WG-HRV;

(c) the WG-HRV to report to the CAJ on progress of its work and to seek further guidance from the CAJ, as appropriate;

(d) WG-HRV documents to be made available to the CAJ.

[End of Annex and of document]