

Via e-mail

INTERNATIONAL UNION FOR THE PROTECTION OF NEW
VARIETIES OF PLANTS (UPOV)
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Hamburg, 04 November 2009

**Explanatory notes on Acts in respect of harvested material under the UPOV
Convention, UPOV/EXN/HRV Draft 4**

Dear members of the CAJ-AG,

CIOPORA is pleased to submit the following comments and proposals to the UPOV document UPOV/EXN/HRV Draft 4, while repeating the comments of 19 October 2007 to UPOV/EXN/HRV Draft 1 and of 10 October 2008 to UPOV/EXN/HRV Draft 2.

1.1 Definition of “harvested material”

Article 14 (2) of the UPOV 1991 Act [*Acts in respect of the harvested material*] refers to harvested material as ... *in respect of harvested material, including entire plants and parts of plants, ...*

In fact, no definition of harvested material exists.

The German Supreme Court had to deal with the term “harvested material” in its decision X ZR 93/04 of 14 February 2006 (the court decision is attached in German language). Legal basis of the decision was the European Community Plant Variety Regulation 2100/94. Plant material in dispute were entire *Calluna* plants, sold in pots. The Supreme Court found: „*Die von der Beklagten vertriebenen vollständigen Pflanzen sind jedoch nicht aus einem auch nur im weitesten Sinne als Ernte qualifizierbaren Vorgang hervorgegangen und daher kein Erntegut.*“ [The entire plants, which have been distributed by the defendant, did - even in the broadest sense – not arise from an act that could be qualified as “harvest” and, therefore, are no harvested material.]

As the term “harvested material” is the key term in this explanatory note, some thoughts should be given to this issue.

CIOPORA does not agree to the explanation of the CAJ-AG in its meeting of 26 October 2008, that it would not be possible to provide a “legal” definition of “harvested material”. CIOPORA had not asked for a legal definition, but for some

exemplifications, in order to give some indications on what has to be considered as “harvest”. The example of the German Supreme Court shows that it is especially important for the ornamental and fruit varieties to have such indications.

1.2 “Unauthorized use”

The current explanation to the term “unauthorised use”, in particular the first sentence of paragraph 4 is not complete and too restrictive and leads to unacceptable loopholes in the UPOV 1991 Act.

The following example illustrates a case that would lead to an unacceptable loophole, if the restricted interpretation of the current draft would prevail. The case also shows that the notions of “unauthorized use” and “exhaustion” are related to each other and cannot be looked at separately.

A Dutch breeder of a cut-rose variety delivers to a German propagator 500 elite plants of his variety and grants a license to him to produce 50,000 rose plants from this elite material and to sell them within the European Community. The cut-rose variety is protected by a Community Plant Variety Right. He receives license fees for the production of the 50,000 plants. In the contract between the two parties the export out of the European Community is explicitly forbidden.

The German propagator produces 50,000 plants and sells all of them to a grower in France. This French grower plants 25,000 plants in his nursery and sells 25,000 plants to a grower in Brazil, who ensures him that he wants to use the plants only for producing cut-roses.

Although Brazil grants PBR for roses since some years, the variety concerned could not obtain protection in Brazil because it did not meet the novelty criterion any more when PBR protection for roses was available in Brazil.

Receiving the rose plants the Brazilian grower changes his mind and propagates another 45,000 rose plants and starts to export the cut-roses harvested from the 25,000 plants received from the French grower and from the 45,000 plants propagated by himself to the European Community.

According to Article 16 (1) of the UPOV 1991 Act the PBR is exhausted for the 50,000 rose plants (= propagating material) produced by the German propagator, because the plants have been sold with the consent of the breeder in the European Community. Article 16 (1) (ii) is not applicable, because Brazil provides for PBR for roses. Article 16 (1) (i) is also not applicable at the moment of the export, because no further propagation is involved when the export takes place.

Because of the exhaustion of the PBR no authorisation is required for these acts. According to the wording of paragraphs 3 and 4 of the EXN/HRV Draft 4 this would prevent the title holder to exert his right on the cut-roses harvested from the newly propagated 45,000 rose plants.

This restrictive interpretation of the 1991 Act does not reflect the intention of the 1991 Act to strengthen the rights of the breeders.

In order to provide an acceptable solution for such cases the exemplary note must clarify that the subsequent self-propagation (in Brazil) retroactively repeals the

exhaustion, so that the export of the 25,000 rose plants from France to Brazil required the authorisation of the breeder.

- 1.3 The headline of section II is misleading as it suggests that the section deals with the relationship between Article 14.2 and 16 of the UPOV 1991 Act. In fact, the section II only provides a rough explanation of the notion of “exhaustion”. CIOPORA proposes either to delete the entire section or to add explanations on the relationship between Article 14.2 and 16.

CIOPORA will be pleased to further contribute to this important explanatory note.

With kind regards,

CIOPORA



Dr. Edgar Krieger
Secretary General