From:	Edgar Krieger - CIOPORA
To:	mail, Upov
Subject:	AW: Circular E-14/182 - Comments on draft Explanatory Notes
Date:	Wednesday, July 09, 2014 2:37:30 PM
Attachments:	CIOPORA comments on UPOV_EXN_EDV_2_draft_4_09-07-2014.docx CIOPORA comments to UPOV_EXN_HRV_2_draft_1_08-07-2014.docx CIOPORA comments on UPOV_EXN_PPM_draft_2-09-07-2014.docx

Madam, Sir,
Please find attached the CIOPORA comments to UPOV EXN on EDV, HRV and PPM.
Kind regards,
Edgar Krieger
CIOPORA

Von: mail, Upov [mailto:upov.mail@upov.int]
Gesendet: Mittwoch, 25. Juni 2014 09:33
An: mail, Upov
Betreff: Circular E-14/182 - Comments on draft Explanatory Notes
Distribution: CAJ-AG
Copy to: CAJ
Subject: Comments on draft Explanatory Notes
UPOV Circular E-14/182 June 25, 2014
Madam,
Sir,
The purpose of this circular is to recall that the deadline for comments on the draft explanatory notes posted on the CAJ-AG/13/8 section of the UPOV website has now passed (see circulars E-14/128, of May 12, 2014, E-14/136, of May 20, 2014, and E-14/143, of May 23, 2014, and the list of draft explanatory notes concerned, below).
In order for us to plan the preparation of new drafts of the relevant explanatory notes for consideration by the Administrative and Legal Committee Advisory Group (CAJ-AG) at its ninth session, to be held in Geneva on October 14 and 17, 2014, please could you let us know whether you are still planning to provide comments and, if so, by when (unless you have already done so).

UPOV/EXN/CAN/2 DRAFT 1	Explanatory Notes on the Cancellation of the Breeder's Right under the 1991 Act of the UPOV Convention
UPOV/EXN/EDV/2 DRAFT 4	Explanatory Notes on Essentially Derived Varieties under the 1991 Act of the UPOV Convention
UPOV/EXN/HRV/2 DRAFT 1	Explanatory Notes on Acts in Respect of Harvested Material under the 1991 Act of the UPOV Convention
UPOV/EXN/NUL/2 DRAFT 1	Explanatory Notes on the Nullity of the Breeder's Right under the UPOV Convention
UPOV/EXN/PPM DRAFT 2	Explanatory Notes on Propagation and Propagating Material under the UPOV Convention
UPOV/EXN/PRP/2 DRAFT 1	Explanatory Notes on Provisional Protection under the UPOV Convention
UPOV/INF/12/5 DRAFT 1	Explanatory Notes on Variety Denominations under the UPOV Convention

Yours sincerely,
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UPOV

UPOV/EXN/PPM Draft 2
ORIGINAL: English
DATE: May 12, 2014

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

DRAFT

EXPLANATORY NOTES ON

PROPAGATION AND PROPAGATING MATERIAL

UNDER THE UPOV CONVENTION

Document prepared by the Office of the Union

to be considered by the Administrative and Legal Committee Advisory Group by correspondence

Disclaimer: this document does not represent UPOV policies or guidance

Note for Draft version

~~**Strikethrough**~~ **(highlighted)** indicates deletion from the text of document UPOV/EXN/PPM Draft 1.

Underlining (highlighted) indicates insertion to the text of document UPOV/EXN/PPM/1 Draft 1.

Footnotes will be retained in published document.

Endnotes are background information when considering this draft and will not appear in the final, published document

CONTENTS

EXPLANATORY NOTES ON PROPAGATION AND PROPAGATING MATERIAL UNDER THE 1991 ACT OF THE UPOV CONVENTION

PREAMBLE

The purpose of these Explanatory Notes is to provide guidance on propagation and propagating material under the 1991 Act of the International Convention for the Protection of New Varieties of Plants (UPOV Convention). The only binding obligations on members of the Union are those contained in the text of the UPOV Convention itself, and these Explanatory Notes must not be interpreted in a way that is inconsistent with the relevant Act for the member of the Union concerned.

PROPAGATION AND PROPAGATING MATERIAL

(a) Relevant articles of the 1991 Act of the UPOV Convention

Article 1

For the purposes of this Act:
[…]

(vi) "variety" means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be
- defined by the expression of the characteristics resulting from a given genotype or combination of genotypes,
- distinguished from any other plant grouping by the expression of at least one of the said characteristics and
- considered as a unit with regard to its suitability for being propagated unchanged;

Article 6

(1) [*Criteria*] The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety

(i) in the territory of the Contracting Party in which the application has been filed earlier than one year before that date and

(ii) in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date.

Article 8

The variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics.

Article 9

The variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

Article 14

(1) [Acts in respect of the propagating material] (a) Subject to Articles 15 and 16, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

(i) production or reproduction (multiplication),
(ii) conditioning for the purpose of propagation,
(iii) offering for sale,
(iv) selling or other marketing,
(v) exporting,
(vi) importing,
(vii) stocking for any of the purposes mentioned in (i) to (vi), above.

(b) The breeder may make his authorization subject to conditions and limitations.

(2) [Acts in respect of the harvested material] Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

[…]

Article 15

[…]

(2) [*Optional exception*] Notwithstanding Article 14, each Contracting Party may, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's right in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)*(a)*(i) or (ii).

Article 16

(1) [*Exhaustion of right*] The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 14(5), which has been sold or otherwise marketed by the breeder or with his consent in the territory of the Contracting Party concerned, or any material derived from the said material, unless such acts

(i) involve further propagation of the variety in question or
(ii) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

(2) [*Meaning of "material"*] For the purposes of paragraph (1), "material" means, in relation to a variety,

(i) propagating material of any kind,
(ii) harvested material, including entire plants and parts of plants, and
(iii) any product made directly from the harvested material.

[…]

Article 20

[…]

(7) [*Obligation to use the denomination*] Any person who, within the territory of one of the Contracting Parties, offers for sale or markets propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.

[…]

(b) Factors that might be considered in relation to propagating material [a] [b]

1. Whether material is propagating material is a matter of fact but ~~also of~~ may also include the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user). For example, the intention of the producer, seller or supplier is not the only relevant aspect, but also the intention of the buyer, recipient or user of material. Thus, even though one party might have not anticipated that material would be used for propagation, another concerned party might have the intention to use the material for propagation. ~~In particular, the explanation in Article 14(2) and in Article 16(2)(ii) of the 1991 Act of the UPOV Convention means that harvested material includes entire plants and parts of plants, which is material that can potentially be used for propagating purposes, means that at least some forms of harvested material have the potential to be used as propagating material~~.

Comment [EK1]: CIOPORA invites UPOV to consider that in a legal system definitions can play an important role. As a result UPOV may wish to add that whether material is considered propagating material can also depend on the defintion of propagating material in the PBR law.

2. The 1978 Act of the UPOV Convention, Article 5 (1) (reproduced below for ease of reference) clarifies that material is considered to be propagating material if it used as such, even if it is a type of material that is not normally marketed for the purpose of propagation:

Article 5 (1) of the 1978 Act of the UPOV Convention

"(1) The effect of the right granted to the breeder is that his prior authorisation shall be required for

- the production for purposes of commercial marketing
- the offering for sale
- the marketing

of the reproductive or vegetative propagating material, as such, of the variety.

Vegetative propagating material shall be deemed to include whole plants. The right of the breeder shall extend to ornamental plants or parts thereof normally marketed for purposes other than propagation when they are used commercially as propagating material in the production of ornamental plants or cut flowers."

3.[c and d] The following, non-exhaustive, list of factors, and/or combination of factors, might be considered in deciding whether material is propagating material:

(i) whether the material has been used to propagate the variety;
(ii) whether the material is capable of producing entire plants of the variety;
(iii) whether there has been a custom/practice of using the material for that purpose;
(iv) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user); ~~and~~ or
(v) ~~whether the plant material is suitable for reproducing the variety unchanged~~ if, based on the nature and condition of the material and/or the form of its use, it can be determined that such material is "exclusively propagating material" (for example: if the material is classified according to variety and purity; price and terms of sale; quality of the material, including conditioning, treatment and germination; markets or place of storage and/or destination, etc.).

Comment [EK2]: CIOPORA maintains that intention is a subjective element, which complicates the enforcement of the law. The proof of intention is difficult and the intention in many cases is manifested only in a late stage of the trade chain, which may prevent the breeder from enforcing his right. CIOPORA supports an objective defintion of propagating material, which draws a clear borderline on whether material is propagating material or not.

Comment [EK3]: CIOPORA maintains that if material is defined as propagating material in the PBR law of a UPOV member, it cannot be considered anymore in the legal sense to be harvested material. Therefore, not only by nature and condition or the form of its use material can be considered as "exclusively propagating material", but also by way of legal definition.

[a] The Administrative and Legal Committee Advisory Group (CAJ-AG), at its eighth session, held in Geneva on October 21 and 25, 2013, agreed (see document CAJ-AG/13/8/10 "Report", paragraph 51) to amend paragraph 1 of document UPOV/EXN/PPM Draft 1 to read:

"1. Whether material is propagating material is a matter of fact but ~~also of~~ [may also] include the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user). For example, the intention of the producer, seller or supplier is not the only relevant aspect, but also the intention of the buyer, recipient or user of material. Thus, even though one party might have not anticipated that material would be used for propagation, another concerned party might have the intention to use the material for propagation. In particular, the explanation in Article 14(2) and in Article 16(2)(ii) of the 1991 Act of the UPOV Convention means that harvested material includes entire plants and parts of plants~~, which is material that can potentially be used for propagating purposes, means that at least some forms of harvested material have the potential to be used as propagating material~~."

[b] The CAJ-AG, at its eighth session, noted that the Delegation of Argentina would make a proposal in relation to paragraph 3 and, if appropriate, any corresponding adjustment to paragraph 1 of document UPOV/EXN/PPM Draft 1 (see document CAJ-AG/13/8/10 "Report", paragraph 53). The Delegation of Argentina made the following proposal (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_274003.pdf):

"The following lines in paragraph 1 should be deleted: 'In particular , the explanation in Article 14(2) and Article 16(2) of the 1991 Act of the UPOV Convention means that harvested material includes entire plants and parts of plants.'

"There are two reasons for this proposal.

"1.- The explanatory note focuses exclusively on the analysis of the concept of propagating material and is not to be confused with the product of the harvest, so it makes no sense to include a paragraph referring to the product of the harvest.

"2.- Accordingly, references to Articles 14(2) and 16(2) of the 1991 Act should be deleted given that they refer clearly to the extension of the breeder's right to the product of the harvest and its provenance, both of which are unrelated to the explanatory note on propagating material which is under consideration."

[c] The CAJ-AG, at its eighth session, agreed (see document CAJ-AG/13/8/10 "Report", paragraph 51) to amend paragraph 3 of document UPOV/EXN/PPM Draft 1 to read:

"The following, non-exhaustive, list of factors, or combination of factors, might be considered in deciding whether material is propagating material:

"(i) whether the material has been used to propagate the variety;
"(ii) whether the material is capable of producing entire plants of the variety;
"(iii) whether there has been a custom/practice of using the material for that purpose;
"(iv) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user); ~~and~~ or
"(v) whether the plant material is suitable for reproducing the variety unchanged."

[d] The CAJ-AG, at its eighth session, noted that the Delegation of Argentina would make a proposal in relation to paragraph 3 and, if appropriate, any corresponding adjustment to paragraph 1 of document UPOV/EXN/PPM Draft 1 (see document CAJ-AG/13/8/10 "Report", paragraph 53). The Delegation of Argentina made the following proposal (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_274003.pdf):

- "The example given under (v) should be deleted since it is implicit and has the same scope as the example mentioned at point (ii).
- "To 'the combination of factors' should be added 'AND/OR' and not just 'OR', since, depending on its legislation, each country may take as parameters one or several concepts listed in examples (i) to (iv) jointly to consider material as propagating material, and so the choice should not be limited to only one of them.
- "The following should be included as a criterion for considering material as propagating material: 'if, based on the nature and condition of the material and/or the form of its use, it can be determined that such material is 'exclusively propagating material' (for example: if the material is classified according to variety and purity; price and terms of sale; quality of the material, including conditioning, treatment and germination; markets or place of storage and/or destination, etc.)"

[End of document]