



UPOV/EXN/CAN/2 Draft 1

ORIGINAL: English

DATE: May 20, 2014

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

DRAFT

EXPLANATORY NOTES ON
THE CANCELLATION OF THE BREEDER'S RIGHT
UNDER THE 1991 ACT OF 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/CAN/1.

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

Endnotes provide background information when considering the draft version, not to be retained in the approved version of the document.

Footnotes to be retained in the published version of the document.

TABLE OF CONTENT

PREAMBLE..... 3
SECTION I: PROVISIONS ON THE CANCELLATION OF THE BREEDER'S RIGHT 4
SECTION II: CERTAIN ASPECTS OF THE PROVISIONS ON THE CANCELLATION OF THE BREEDER'S RIGHT 5

EXPLANATORY NOTES ON THE CANCELLATION
OF THE BREEDER'S RIGHT
UNDER THE UPOV CONVENTION

PREAMBLE

1. The purpose of these Explanatory Notes is to provide guidance on the "Cancellation of the Breeder's Right" under 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.

2. Section II of these Explanatory Notes provides guidance on certain aspects of the provisions of cancellation of the breeder's right contained in Article 22 of the 1991 Act of the UPOV Convention and Article 10(2) to (4) of the 1978 Act of the UPOV Convention.

SECTION I: PROVISIONS ON THE CANCELLATION OF THE BREEDER'S RIGHT

3. The provisions on the cancellation of the breeder's right contained in Article 22 of the 1991 Act of the UPOV Convention and Article 10(2) to (4) of the 1978 Act of the UPOV Convention are reproduced below:

1991 Act of the UPOV Convention

Article 22

Cancellation of the Breeder's Right

(1) [*Reasons for cancellation*] (a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Articles 8 or 9 are no longer fulfilled.

(b) Furthermore, each Contracting Party may cancel a breeder's right granted by it if, after being requested to do so and within a prescribed period,

- (i) the breeder does not provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety,
- (ii) the breeder fails to pay such fees as may be payable to keep his right in force, or
- (iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.

(2) [*Exclusion of other reasons*] No breeder's right shall be cancelled for reasons other than those referred to in paragraph (1).

1978 Act of the UPOV Convention

Article 10

[Nullity and] Forfeiture of the Rights Protected

[...]^[1]

(2) The right of the breeder shall become forfeit when he is no longer in a position to provide the competent authority with reproductive or propagating material capable of producing the variety with its characteristics as defined when the protection was granted.

(3) The right of the breeder may become forfeit if:

- (a) after being requested to do so and within a prescribed period, he does not provide the competent authority with the reproductive or propagating material, the documents and the information deemed necessary for checking the variety, or he does not allow inspection of the measures which have been taken for the maintenance of the variety; or
- (b) he has failed to pay within the prescribed period such fees as may be payable to keep his rights in force.

(4) The right of the breeder may not [be annulled or] become forfeit except on the grounds set out in this Article.

¹ Provisions in paragraph 1 of Article 10 of the 1978 Act concern nullity of the rights protected (see Explanatory Notes on the Nullity of the Breeder's Right under the UPOV Convention (document UPOV/EXN/NUL/1)).

SECTION II: CERTAIN ASPECTS OF THE PROVISIONS
ON THE CANCELLATION OF THE BREEDER'S RIGHT¹

4. These explanatory notes provide guidance on certain aspects of the provisions on the cancellation of the breeder's right contained in Article 22 of the 1991 Act of the UPOV Convention and Article 10(2) to (4) of the 1978 Act of the UPOV Convention.

Explanatory notes - Paragraph (1)

(1) [Reasons for cancellation] (a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Articles 8 or 9 are no longer fulfilled.

(b) Furthermore, each Contracting Party may cancel a breeder's right granted by it if, after being requested to do so and within a prescribed period,

(i) the breeder does not provide the authority with the information, documents or material² deemed necessary for verifying the maintenance of the variety,

(ii) the breeder fails to pay such fees as may be payable to keep his right in force,

(iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.³

5.ⁱⁱ The cancellation of a breeder's right means that, from a given date, the breeder's right is no longer valid and the authorization of the breeder of the variety is no longer required for any of the acts which are covered by the scope of the breeder's right. A breeder's right which has been cancelled was valid until the date of cancellation and was, in particular, valid at the time of granting. ~~In~~ **By** contrast, when a breeder's right is declared null and void, it is equivalent to pronouncing that it was an invalid right and should not have been granted in the first instance (see Explanatory Notes on the Nullity of the Breeder's Right under the UPOV Convention (document UPOV/EXN/NUL/1)).

6. The cancellation of a breeder's right is different from the surrender or renunciation of the breeder's right. Surrender or renunciation of the breeder's right is a unilateral decision of the holder of the breeder's right that is not linked to compliance with any obligation under the UPOV Convention. The holder of the breeder's right decides on an early termination by giving notice to the authority granting breeders' rights.ⁱⁱⁱ

Cancellation proceedings and decisions

7. Cancellation proceedings may be initiated in response to a request made by a third party, or ex officio by the competent authority of the member of the Union concerned.^{iv}

8. The authority, or authorities, with competence to decide on matters concerning cancellation of breeders' rights (e.g. authorities granting breeders' rights, judicial authorities) will be determined by the relevant legislation of the member of the Union concerned. The relevant legislation might, in addition to the legislation governing breeders' rights, include other legislation on substantive and procedural matters.^v

9. The UPOV Convention requires that decisions concerning the cancellation of breeders' rights be published (see Article 30(1)(iii) of the 1991 Act and Article 30(1)(c) of the 1978 Act.).

Contracting Party "may" cancel a breeder's right

² The corresponding provision in the 1978 Act (Article 10(2)) is mandatory and provides as follows: " The right of the breeder shall become forfeit when he is no longer in a position to provide the competent authority with reproductive or propagating material capable of producing the variety with its characteristics as defined when the protection was granted."

³ There is no corresponding provision to Article 22(1)(b)(iii) of the 1991 Act in the 1978 Act.

10.6 The UPOV Convention does not require members of the Union to introduce provisions for the cancellation of the breeder's right. Under the 1991 Act of the UPOV Convention, if the reasons for cancellation apply, the competent authority "may" cancel the breeder's right, i.e. there is no automatic obligation to cancel.^{vi} Therefore, § subject to applicable legislation, the competent authority may take into account the particular circumstances. and may decide to cancel a breeder's right or may, For example, the competent authority may provide additional time to remedy the situation.^{vii, viii}

Cancellation of variety denominations

11.7 Article 22(1)(b)(iii) of the 1991 Act of the UPOV Convention provides that the breeder's right may be cancelled if "the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination". The explanatory notes corresponding to paragraph (4) of Article 20 of the 1991 Act and of Article 13 of the 1978 Act ("Explanatory Notes on Variety Denominations under the UPOV Convention" (document UPOV/INF/12/2)) provide guidance on situations in which the variety denomination might be cancelled.

Verifying the maintenance of the variety

The CAJ-AG agreed to consider the development of guidance on the use of information, documents or material provided by the breeder for verifying the maintenance of the variety, as set out in paragraph 15 of document CAJ-AG/13/8/4, and guidance on the use of Test Guidelines for verifying the maintenance of the variety that were different from the Test Guidelines used for the examination of Distinctness, Uniformity and Stability ("DUS"), in conjunction with document CAJ-AG/13/8/7 "Matters concerning Variety Descriptions".^{ix}

It is proposed to consider guidance on this matter in conjunction with document CAJ-AG/14/9/4 "Matters concerning variety descriptions" to be considered by the CAJ-AG at its ninth session to be held in Geneva, on October 14 and 17, 2014.]

-
- i The Administrative and Legal Committee Advisory Group (CAJ-AG), at its eighth session, held in Geneva on October 21 and 25, 2013, considered document [CAJ-AG/13/8/4](#) "Matters concerning cancellation of the breeder's right" and agreed to the development of guidance on nullity of the breeder's right (see document CAJ AG/13/8/10 "Report", paragraphs 59 to 64).
- ii The text of paragraph 5 was placed before the box in document UPOV/EXN/CAN/1.
- iii "The CAJ-AG agreed to provide an explanation that the surrender or the renunciation of the breeder's rights was different from the cancellation of the breeder's right." (see document CAJ AG/13/8/10 "Report", paragraph 63).
- iv "The CAJ-AG agreed to the development of guidance to explain that cancellation proceedings might result from a request from a third party or ex officio by the competent authority of the member of the Union concerned." (see document CAJ AG/13/8/10 "Report", paragraph 62).
- v "The CAJ-AG agreed to the development of guidance to explain that it was a matter for the member of the Union concerned to decide which authority was competent to decide on cancellation." (see document CAJ AG/13/8/10 "Report", paragraph 61).
- vi See comments from the Russian Federation of March 9, 2010 received after the adoption of document UPOV/EXN/CAN/1 (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_274756.pdf). Relevant extract is reproduced below:
"It should be explained in the Explanatory Notes that the UPOV Convention provision written in Article 22(1)(a) as '...Contracting Party **may** cancel a breeder's right...' is a facultative (optional) measure and depends on national legislation provision."
- vii See comments from the Russian Federation of March 9, 2010 received after the adoption of document UPOV/EXN/CAN/1 (see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_274756.pdf). Relevant extract is reproduced below:
"Additional time granting for the breeder to implement necessary requirements will be lawful even in the case where reasons for cancellation are not facultative but compulsory."
- viii See comment from the Netherlands in document [CAJ-AG/13/8/4](#) "Matters concerning cancellation of the breeder's right", Annex V. Relevant extract is reproduced below:
"a. In many cases (in particular in the case of lack of homogeneity) the breeder may be able to correct the situation."
- ix "The CAJ-AG agreed to consider the development of guidance on the use of information, documents or material provided by the breeder for verifying the maintenance of the variety, as set out in paragraph 15 of document CAJ-AG/13/8/4 [...]"(see document CAJ-AG/13/8/10 "Report", paragraph 64). Paragraph 15 of document [CAJ-AG/13/8/4](#) "Matters concerning cancellation of the breeder's right" provides as follows:
"15. Annexes I, II and III to this document provide examples of cases in which members of the Union have considered the cancellation of a breeder's right on the basis of information, documents or material provided by the breeder for verifying the maintenance of the variety. In that regard, the CAJ-AG may wish to consider the development of guidance according to the aspects raised by the European Union in Annex IV to this document:
"If the Uniformity or Stability requirement is being questioned, it may be necessary to make a technical verification. In order for the examination office to be able to compare the results of a technical verification for Stability purposes with the plant material once protected, it is important that the authority keeps plant material of protected varieties in a living reference collection, or, that documents such as the variety description, photos of the variety from the DUS test, notes from the field test etc .. are kept by the authority."
- It is proposed to consider guidance on this matter in conjunction with document CAJ-AG/14/9/4 "Matters concerning variety descriptions" to be considered by the CAJ-AG at its ninth session to be held in Geneva, on October 14 and 17, 2014.

[End of document]