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DRAFT

EXPLANATORY NOTES ON
~~PROPAGATION AND~~^a PROPAGATING MATERIAL
UNDER THE UPOV CONVENTION

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Note for Draft version

~~Strikethrough~~ (highlighted) indicates deletion from the text of document UPOV/EXN/PPM Draft 2.

Underlining (highlighted) indicates insertion to the text of document UPOV/EXN/PPM/1 Draft 2.

Footnotes will be retained in published document.

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

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EXPLANATORY NOTES ON ~~PROPAGATION AND~~^a 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^a 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.

[...]

1. The UPOV Convention does not provide a definition of "propagating material". The following section provides guidance on factors that might be considered in relation to whether material is propagating material.^b

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

4-2. Whether material is propagating material is a matter of fact but may also include the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user) and the definition of propagating material in the law of the member of the Union concerned^c. 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.

2-3. 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.”

3.4. 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) whether the material is subject to recent developments in propagation technology or change in custom/practice^d
- [(iv) the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user);]^e
or
- (vi) 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.)
- or
- (vii) the definition of propagating material in the law of the member of the Union concerned^f.

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- a The European Seed Association (ESA) stated that “The title of the explanatory note is ‘on Propagation and Propagating Material’ however the text of the note is only dealing with the notion of propagating material. This may lead to some confusion or misunderstandings therefore we propose either to develop also some guidance equally on the definition of ‘propagation’ or to change the title accordingly.”
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285391.pdf)
- b ESA commented that “As a general remark, the whole context of this explanatory note would be much clearer with some kind of an introductory paragraph before paragraph 1 under point (b) to recall that there is no definition of propagating material under UPOV 1991 although this term is of crucial importance for breeders as it determines the scope of material on which a breeder can directly (unconditionally) exercise his right. The preamble on page 3 does not provide sufficient information on this aspect therefore we propose to include some further explanation to this regard.”
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285391.pdf)
- c The International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA) invited 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 definition of propagating material in the PBR law”.
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285390.pdf)
- d New Zealand commented as follows:
“Propagation technology continues to change rapidly and techniques not previously applied to the propagation of a genus or species are now being applied. Paragraph 3. (i) and (iii) cover what has been done with respect to tradition and accepted practice but the current text does not cover recent developments and the future practice.
“An example. A variegated foliage plant was traditionally propagated by division. To do this you need whole plants or plantlets. With the development of in vitro technology it is now possible to propagate from cut leaves. Working through 3 (i) – (v) we may come to the conclusion that a leaf is not propagating material but considering very recent developments now is.
“The paragraph could be improved by adding:
“(vi) whether the material is subject to recent developments in propagation technology or change in custom/practice.”
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285381.pdf)
- e 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 definition of propagating material, which draws a clear borderline on whether material is propagating material or not.”
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285390.pdf)
- f 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”.
(see http://www.upov.int/edocs/mdocs/upov/en/caj_ag_13_8/caj_ag_13_8_www_285390.pdf)

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