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## INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

## ADMINISTRATIVE AND LEGAL COMMITTEE

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SCOPE OF PROTECTION IN THE CASE OF  
ORNAMENTAL PLANTS AND FRUIT TREESDocument prepared by the Office of the UnionIntroduction

1. The Delegation of France has communicated to the Office of the Union a note on the scope of protection for ornamental plants and fruit trees. The note is reproduced in the Annex to this document. This document examines the matter on the basis of that note and of the information available to the Office, particularly as a result of earlier meetings.

2. At the time the Convention was being revised, it was stated on a number of occasions that the minimum protection afforded by Article 5(1) of the Convention was inadequate in certain cases. This fact was acknowledged by the 1978 Diplomatic Conference where a recommendation was adopted on the subject of Article 5, with the following wording:

"The Diplomatic Conference on the Revision of the International Convention for the Protection of New Varieties of Plants, held in 1978,

"Having regard to Article 5(1) and (4) of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, and on October 23, 1978,

"Conscious of the fact that the scope of the protection laid down in Article 5(1) may create special problems with regard to certain genera and species,

"Considering it of great importance that breeders be enabled effectively to safeguard their interests,

"Recognizing at the same time that an equitable balance must be struck between the interests of breeders and those of users of new varieties,

"Recommends that, where, in respect of any genus or species, the granting of more extensive rights than those provided for in Article 5(1) is desirable to safeguard the legitimate interests of the breeders, the Contracting States of the said Convention take adequate measures, pursuant to Article 5(4)."

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3. Three groups of genera or species may create problems for breeders:

- (i) sexually reproduced plants which are the subject of trade in plantlets;
- (ii) ornamental plants, particularly those which are the subject of trade in cut flowers;
- (iii) fruit plants.

The first category of plants will not be dealt with in more detail here in this document. It should simply be remembered that the production and sale of plantlets produced from seed that has been multiplied beforehand escapes the minimum protection and that in this case the holder of the title of protection can charge a fee only on the seed bought for the purpose of multiplication. The problem could be solved by widening either the scope of protection or the definition of "propagating material."

#### Ornamental Plants

4. The Problems. Ornamental varieties may be divided into three groups:

- (i) Varieties which reach the final consumer in the form of propagating material (seed, bulbs, plantlets and the like);
- (ii) Varieties that reach the final consumer as already well-developed, or even adult, plants (pot plants);
- (iii) Varieties that reach the final consumer as cut flowers.

5. Normally, the right afforded by Article 5(1) of the Convention should suffice for the first two groups. The breeder should in fact be able to keep a check on production and marketing of propagating material by virtue of the first sentence and that of well-developed plants by virtue of the second sentence. However, the phrase "reproductive or vegetative propagating material" and the second sentence of Article 5(1) have also been interpreted as applying only to whole plants intended for the production of plants. The third sentence applies then in the case of already well-developed plants being used as initial material for the commercial production of other plants of that type. In such a case, however, there is still a gap since the breeder remains defenseless against imports of such plants.

6. In the case of ornamental varieties whose purpose is the production and marketing of cut flowers, the breeder is again without any means of action against the imports of cut flowers. The problem posed by these imports is increasing all the time since the producers in the majority of the current member States are not at all competitive when compared with producers in countries with a more favorable climate and lower labor costs.

7. A further problem may arise when national legislation does not extend protection to imports of propagating material that is not to be marketed (imports to satisfy the importer's own needs). In such a case, a producer of cut flowers may produce flowers from plants that have been imported without paying royalties. Finally, an interpretation has been recently put forward for the third sentence of Article 5(1) which could create yet another breach. According to that interpretation, a producer of tulips or of roses, for example, could base his production on plants obtained by reproducing bulbs or rose bushes put on the market by the breeder and not pay royalties on the basis of the argument that the bulbs or the rose bushes had not been "normally marketed for purposes other than propagation."

8. From the point of view of the producers of the final product, the existence of these gaps in the protection coverage may be considered a serious drawback since the producer who respects the breeder's rights is at a disadvantage compared with a producer who does not respect them, for his production is subject to an extra charge, that is to say the royalties paid on the basic material. In addition, the national producers together would have a means of pressure, if protection were extended to the final product, on the breeders to ensure that the latter re-establish fair competition with imported products, for example by limiting imports and by charging adequate royalties on imported products, and thus guarantee to the national producers the undisturbed enjoyment of the licenses they have granted to them. Failing such extension, the producers are just as defenseless as the breeders in the face of these products from which only the importers benefit.

9. The Remedies. The problems arising from certain interpretations of the Convention may be resolved by refuting these interpretations, which are in fact not shared by the majority of member States, or, if necessary, by amending the domestic legislation.

10. Of the other problems, the most important is the importing of the final product. The simplest solution is to extend protection to the final product. Some States have already done so (France, Italy, Switzerland) and experience gained may be summarized as follows:

(i) In the case of production licenses for cut flowers, royalties are levied on the material on which production is based, for example on rose bushes or on carnation cuttings.

(ii) In order to keep a check on the market and to identify any infringement, particularly from unlawful importing of cut flowers, the breeder generally requires the licensee producers to place identifying labels on the bunches of cut flowers. Some organizations of producers have protested against this obligation (see documents DC/7, Annex I and DC/10) but it should be noted that labeling is current practice--and often as much, if not more, of a constraint--in the case of whole plants. However that may be, labeling is held necessary due to the lack of "official" means of keeping a check such as that deriving from certification of seed and planting material.

11. As regards the levying of royalties, a possible fear is that, contrary to current practice, they will be levied in cascade, that is to say at the various stages in the "cut-flower" activity. This fear can be overcome by stipulating in domestic legislation the stage at which collection normally takes place. Such a solution should not meet with any objections from the breeders concerned in view of the proposal made by CIOPORA for the revision of the Convention (see document DC/7, Annex V, page 4).

12. A further solution has been put forward recently (see document CAJ/VII/5, paragraph 31). This is to extend protection only to those cut flowers imported from countries where no protection is available. If this is to be effective for the breeder, it requires that he be able to verify the origin of products either at the frontier or on the market, and that the possible loophole constituted by importing material without payment of royalties to serve as a basis for protection of cut flowers within the country be closed. On the other hand, this solution offers no advantages to the national producers. They would continue to suffer competition from countries where protection exists, whether the latter be limited to Article 5(1) of the Convention or extended to the final product.

#### Fruit Plants

13. The Problem. Where protection is limited to Article 5(1) of the Convention, a fruit producer may constitute his orchards by producing himself the plants he needs from a small number of plants bought in trade. In such case, the breeder receives royalties on the latter plants alone.

14. The Remedy. The only solution is to extend protection to the propagation of fruit plants for the purpose of commercial production of fruit or, with the same result, for any propagation unless carried out to satisfy family needs. The United Kingdom and Denmark have already made such an extension in respect of certain species, although the latter has only afforded to the breeders the right to levy royalties and not a "right of prohibition" (see document CAJ/V/2, paragraphs 59 and 64). Moreover, the activity involved could be covered by protection in a certain number of countries by interpreting the statutory provisions (see, in particular, document CAJ/VII/5, paragraph 22).

15. Extension is being examined in a number of countries. According to the Delegation of France, its practical application would be as follows, whereby any idea of controls effected by the body issuing the titles of protection is excluded:

(i) It will be for the breeder to demonstrate that the marketed product derives from material propagated without his knowledge and for which no royalties have been paid.

(ii) It will be for the producer of fruit to prove, by means of his book-keeping, that royalties have already been paid.

(iii) It will be for the courts to decide in the event of disputes.

In this respect, it should be noted that practical application could vary from one country to another, for example depending on the party on which the burden of proof rests. Moreover, in Denmark the user has to supply, at his own initiative, to the breeder all information necessary for calculating and collecting the royalties (Article 14(3) of the Law).

#### Conclusion

16. The real problem is not of extending protection to one product or the other or to one activity or the other, but one of equitable remuneration for the breeder. In the case of ornamental plants, protection of the final product, possibly accompanied by limitations imposed by political considerations, is one solution. In the case of fruit plants, protection should extend to propagation for the purpose of commercial production of fruit. Various member States have already carried out one or the other of these extensions and so far none of them have had any unfavorable comments to make.

17. The Delegation of France suggests that the whole matter be examined within the Administrative and Legal Committee in order to achieve a greater degree of harmonization between domestic laws.

[Annex follows]

NOTE ON THE PROTECTION OF ORNAMENTAL PLANTS AND FRUIT TREES,  
DRAWN UP BY THE FRENCH COMMITTEE FOR THE PROTECTION OF NEW PLANT VARIETIES

Scope of Protection: Ornamental Plants and Fruit Trees

I. Propagation Mode in Ornamental Plants

Most varieties belonging to ornamental species are vegetatively propagated:

- in vivo  
rootstock divisions, bulbs, grafts, cuttings, but also corms, bulb scales, eyes
- in vitro  
tissue culture made from:  
apical meristems  
explants (parts of stems, leaves, bulbs, ovules, and the like)

Thus, it is relatively easy for a specialist to produce thousands of copies of a variety from the initial individual, except for health problems (viroses and other parasites).

This is in fact what happens for certain species such as rose, gerbera and African violet.

II. Scope of Protection

Article 5 of the International Convention for the Protection of New Varieties of Plants, as revised in 1978, stipulates:

"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."

The scope of protection is most frequently set out in national legislations by means of the definition of propagating material.

Four cases may be noted:

- plant variety protection legislation contains no definition of propagating material (example: Sweden)
- the legislation contains a general definition of propagating material (example: Federal Republic of Germany, Netherlands)
- the legislation defines for each category of species those elements of the plant concerned by the breeders' rights (example: France and, to some extent, Belgium)
- the legislation refers to examples (Denmark and the United Kingdom).

III. Protection of the Final Product

The possibility of protecting the final product is contained in the French law. This possibility also exists under Israeli law. It is likewise provided for in the case of ornamental plants by the Swiss law and the Italian law.

In the United Kingdom, the Ministers of Agriculture may, under a section of Schedule 3 to the Act, extend protection of certain species to the production and the propagation of the variety for the purposes of sale of parts or of products of the plants of the variety specified in each case, where it appears that the breeders cannot obtain adequate remuneration as long as they are unable to control the production or propagation of the variety in the United Kingdom for the purposes of selling cut flowers, fruit or other parts or products of the plants of the variety in the country, and that these controls constitute a substantial profit for them. This extension has already been examined for a number of species.

Currently, the final product is protected in the case of ornamental plants in the following countries: France, Italy, Switzerland; the United Kingdom is a case apart.

#### IV. Multiplication of Propagating Material with a View to the Sale of the Final Product

This is the case of a producer who multiplies in turn the propagating material and uses this remultiplied material or has it used with a view to the marketing of the final product.

It is possible that flower producer A buys plants of a protected variety from breeder B, for which he pays a royalty.

We have therefore three hypotheses:

1. The plants are intended for the production of cut flowers; the breeder's right is exhausted.
2. The plants are reproduced on a very small scale for family use involving no commercial act; the breeder's right has also to be considered exhausted.
3. The plants are reproduced, this time however on a large scale unknown to the breeder (following the methods described in Chapter 1) for the purpose of commercially producing the final product; the breeder's right is ignored.

A further example is given using a fruit species; a farmer buys a tree of a protected variety and reproduces it to constitute a commercial orchard. The breeder therefore receives a royalty only on the bought tree.

#### V. Remarks and Suggestions

France is studying an amendment to Article 8 (fruit species) of Decree No. 78.245 of February 23, 1978, fixing the list of plant species for which new plant variety certificates may be issued, as well as the scope and duration of breeders' rights in the case of each plant species.

The aim is to enable breeders to assert their rights in cases of propagation intended for commercial production of fruit.

The application of these provisions is as follows in practice:

1. It is for the breeder to establish that the final product put on the market derives from plant material multiplied without his knowledge and for which no royalty has been paid;
2. it is for the producer to prove that the royalty has already been paid by means of his bookkeeping;
3. it is for the courts to decide in the event of a dispute.

Any idea of controls exercised by the body issuing breeders' certificates is excluded.

A number of actual cases concerning national production that have occurred in the past in France in the ornamentals sector have been solved in this way. They are more difficult to solve where the final product is imported and the exporting country does not protect the final product or does not have any provisions similar to those invoked for fruit trees. For this reason, France is suggesting that the whole matter be examined in Geneva in order to achieve a greater degree of harmonization between national laws.

#### VI. Conclusion

The real problem is not protection of the final product as such but that of equitable remuneration for the breeder for all propagating material used for the commercial production of the final product.

Protection of the final product is a solution in the case of ornamentals.

The facts set out for fruit trees may constitute a further approach to resolving this problem.

The countries willing to introduce similar regulatory provisions to those of France, Italy and Switzerland, could thus be identified.

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