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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Eleventh Session
Geneva, April 26 and 27, 1983

MINIMUM DISTANCES BETWEEN VARIETIES

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LEGAL QUESTIONS

Document prepared by the Office of the Union

1. The annex to this document contains, as requested by the Administrative and Legal Committee at its eleventh session (see paragraph 22 of document CAJ/XI/11), a recapitulation of the conclusions reached at that session on the basis of the replies given by the member States to the questionnaire distributed by the Office of the Union, given at Annex I of document CAJ/XI/6. These replies are given in Annexes II to IX of that document and in its two addenda.

2. The annex to this document will be examined at the twelfth session of the Committee.

[Annex follows]

CAJ/XI/12

ANNEX

LEGAL ASPECTS OF THE QUESTION OF MINIMUM DISTANCES BETWEEN VARIETIES

Conclusions Reached by the Administrative and Legal Committee at its Eleventh Session

I. DISTINCTNESS

Article 6 (1)(a) of the UPOV Convention:

> "Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, the variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for. Common knowledge may be established by reference to various factors such as: cultivation or marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection, or precise description in a publication. The characteristics which permit a variety to be defined and distinguished must be capable of precise recognition and description."

1. When is a variety "another variety" in the meaning of the above provision? Does a variety that is identical or almost identical with the variety the subject of an application for protection, but that has been bred independently by someone else ("parallel breeder"), belong to the variety the subject of an application for protection or is it "another variety"?

In Article 6, variety is taken to mean the plant material, bred by the applicant for protection, on which the application is based. Identical or almost identical material produced by another breeder--independently of the applicant--certainly constitutes material of the same variety in a botanical sense but nevertheless represents an "other variety" for the purposes of Article 6(1)(a) of the Convention. If the "existence" of the material representing the "other variety" is already "common knowledge" at the time protection is applied for, the application must be refused for lack of distinctness. Similarly, the notion of "variety" is also to be interpreted in the same way in the other subparagraphs of Article 6: the question whether the "variety" has already been offered for sale or marketed, and whether it is homogeneous and stable, is examined solely on the basis of the plant material bred by the applicant for protection.

2. What conditions must be fulfilled by the "other variety"? Must the "other variety" with which the variety the subject of an application for protection has to be compared when the latter is tested for distinctness be a "finished" variety, that means a variety that is sufficiently homogeneous, or can it be a plant population that does not--yet--fulfill the requirements for homogeneity (a so-called "quasi-variety", as for instance are most of the varieties distributed by CIMMYT)?

The "other variety" must not necessarily be "finished," that is to say meet the standards set for the protection of new plant varieties in the member State of the Union concerned (these standards are often identical with those set in other fields of law such as the regulations on production and trade in seed and seedlings). In the case of the "other variety," this must be material which already fulfills the usual criteria accepted by the trade for the notion of variety; in particular, the variety must at least be able to be described as such.

3. What conditions must be fulfilled by the "other variety" for it to be able to be considered as a matter of common knowledge on the basis of a "precise description in a publication"? Is a description by the breeder, published or submitted to the plant variety protection office, sufficient? In the case of a hybrid variety, is it sufficient to indicate the formula if the parent lines are a matter of common knowledge, or are there additional conditions that have to be fulfilled? If so, what are they (must it be certain that the "other variety" does not only exist on paper)?

The Convention requires the "existence" of the other variety to be a matter of common knowledge. A breeder's description published or handed to the plant variety protection office or a statement of the formula for a hybrid are not sufficient to make the existence of the variety in question a matter of common knowledge.

4. What conditions have to be fulfilled by a characteristic for it to be used in testing for distinctness?

(a) Should the decision be taken species by species, account being taken of the development of plant breeding? If not, what common rules can be established?

(b) Should characteristics be considered that are not "capable of precise recognition" without means that are not normally available to:

(i) breeders

(ii) plant variety protection authorities?

(c) Before taking into account a new characteristic (i.e. a characteristic that is not yet included in the list of characteristics), must it be assured that to do so will not lead to a disturbance of the system of plant variety protection for the species in question, for instance by encouraging grants of plant breeders' rights that would prejudice rights already granted? What criteria are to be taken into account?

(a) The decision can only be taken on a species-by-species basis.

(b) Generally speaking, a characteristic may be used once the following conditions are met:

(i) It must be adapted to the needs of distinctness testing, that is to say meet the requirements of Article 6(1)(a) of the Convention (it must be important, it must enable the varieties to be defined and distinguished, and must be capable of being precisely recognized and described);

(ii) It must be known to science, to the plant variety protection office and to plant breeding circles;

(iii) It must be reliable;

(iv) It must be usable under reasonable economic conditions;

(v) It must give a result within a reasonable period of time (compatible with the aims pursued by plant variety protection).

(c) As a principle, no breeder holding protection of a variety may claim that the list of characters examined for the purpose of distinctness be frozen at that used in deciding on the grant of his title.

II. NOVELTY

Article 6 (1) (b) of the UPOV Convention:

"At the date on which the application for protection in a member State of the Union is filed, the variety

(i) must not - or, where the law of that State so provides, must not for longer than one year - have been offered for sale or marketed, with the agreement of the breeder, in the territory of that State, and

(ii) must not have been offered for sale or marketed, with the agreement of the breeder, in the territory of any other State for longer than six years in the case of vines, forest trees, fruit trees and ornamental trees, including, in each case, their rootstocks, or for longer than four years in the case of all other plants.

Trials of the variety not involving offering for sale or marketing shall not affect the right to protection. The fact that the variety has become a matter of common knowledge in ways other than through offering for sale or marketing shall also not affect the right of the breeder to protection."

1. What is covered by the expression "the variety" in the meaning of the above provision? Is it detrimental to novelty in the meaning of the above provision if material that is identical with the variety, but that has been developed independently by someone other than the breeder/applicant ("a parallel breeder"), is offered for sale or marketed (please note the connection with question I.1 above)? If the answer to this question is positive, whose agreement must have been given for the activity to be detrimental to novelty; that of the breeder of the variety the subject of an application for protection or that of the "parallel breeder"?

The fact that, at the time of filing an application for protection, someone else has already offered for sale or marketed material he has bred himself and which is identical to the material on which the application for protection is based has to be examined from the point of view of distinctness under Article 6(1)(a) of the Convention and not from that of novelty under subparagraph (b). If, as should be the rule, the "existence" of someone else's material has become "common knowledge" through offering for sale or marketing, the application that is later than that event and is based on identical material must be refused for lack of distinctness in relation to the "other variety."

The second question above does not apply.

2. Is offering for sale or marketing detrimental to novelty if it takes place at a time at which the variety is not yet "finished" and is thus still a "quasi variety" (see question I.2 above), not yet completely fulfilling the conditions for homogeneity?

Yes, where the material offered for sale or marketed can be defined as a variety. An important consequence of this event is the fact that the breeder who has marketed the material during the time between filing the application for protection and the refusal of the application for lack of homogeneity, foregoes the possibility of protection of the variety derived from such material by "purification."

3. Is the offering for sale or marketing of a hybrid variety detrimental at the same time to the novelty of the parent lines?

No. The case in which possession of lines is transferred (for example, under a growing contract) must be analyzed from the point of view of offering for sale or marketing of such lines.

III. SCOPE OF PROTECTION

Article 5(1) of the UPOV Convention:

"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."

1. What is meant by "propagating material of the variety" in this context?

(a) Only material corresponding to the variety description and deriving from material of the breeder (the owner of the plant breeder's right)?

(b) Also material identical with that referred to in (a) above, but originating from a "parallel breeder"?

(c) Also material that may only be distinguished from material of the breeder to such a small extent that it cannot constitute another variety eligible for protection? In other words, material that is only distinguishable from material of the breeder by unimportant characteristics or by an important characteristic for which the difference is not clear?

(d) Also material that is clearly distinguishable by one or more important characteristics from material of the breeder, but that has been developed manifestly to by-pass a breeders' right and that constitutes a slavish imitation of the protected variety?

The term "propagating material of the variety" covers the material referred to in items (a), (b) and (c) above. It does not cover the material referred to in item (d).

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