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UPOV

CAJ/XI/9

ORIGINAL: French

DATE: April 12, 1983

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

GENEVA

## ADMINISTRATIVE AND LEGAL COMMITTEE

Eleventh Session

Geneva, April 26 and 27, 1983

VARIETIES ORIGINATING FROM NATURAL MUTATIONS

Document prepared by the Office of the Union

1. The Annex to this document contains a letter, dated April 5, 1983, from Mr. M. Simon, Secretary general of the Committee for the Protection of New Varieties of Plants of France, to the Vice Secretary-general and its annexes.
2. The problems raised in that mailing could be considered either under item 6.b ("Minimum distances between varieties - legal questions"), or under item 8 ("Any other business") of the draft agenda.

[Annex follows]

CAJ/XI/9

ANNEX

FRANCE  
MINISTRY OF AGRICULTURE  
PLANT VARIETY PROTECTION COMMITTEE

Dear Dr. Mast,

I enclose herewith, for your information, documentation on the latest conclusions drawn by the Plant Variety Protection Committee on the important problem of breeders' rights and varieties resulting from natural mutation.

This documentation includes the following:

- (1) a summary of the various debates reflecting the views
  - of breeders of ornamental plants;
  - of the Committee;
- (2) arrangements made to:
  - (a) bring mutations to the notice of the public as soon as they are observed without thereby sacrificing the advantage of novelty;
  - (b) introduce a streamlined examination procedure applicable to varieties resulting from mutation determined by very precise criteria.

The problem of the recognition of a droit de suite for the breeder of the original variety in relation to mutants discovered in protected varieties is exceedingly complex.

I should therefore like to have it placed on the agenda of a forthcoming meeting of the Administrative and Legal Committee.

I have no objection to the enclosed French documentation being brought to the notice of all member States of UPOV if you feel that it would make a constructive contribution to subsequent discussion, particularly as I am also sending it today, in French, to the competent bodies of Denmark, the Federal Republic of Germany, the Netherlands and the United Kingdom, who have asked for this information.

I am of course always at your disposal.

Sincerely yours,

M. Simon  
Secretary General

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The following annexes were added to the above letter:

MUTATION AND NOVELTY CONCEPT; BREEDERS' RIGHTS

Views of Breeders of Ornamental Plants

Breeders object to the fact that a plant variety certificate can be granted for a mutation discovered by a third party in an original protected variety without the breeder of the original variety having any "access" to it.

The definition of what is meant by "important characteristic" in defining the novelty concept is inadequate in their opinion, as it does not constitute a barrier to the appropriation of variants of mutational origin obtained without any inventive creation work.

The probability of a rival breeder finding a interesting mutant grows with the commercial popularity of the variety, so that he has only to "buy" the mutant he has discovered from multipliers, and he can do this all the easier for having kept his investment in pure research at a low level.

The breeders propose that the following provisions be adopted in the short term:

- registration of mutants as soon as they appear in a professional register;
- issue of certificates for mutants according to a streamlined procedure.

In the longer term they advocate an amendment of the UPOV Convention to introduce the concept of an additional certificate or complementary certificate reserved for spontaneous variants.

#### Opinion of the French Plant Variety Protection Committee

##### Facts Noted

- The risk of "lifting" through the exploitation of mutants did not escape the attention of the writers of the Paris Convention, but they considered that novelties resulting from natural or induced mutations could not be excluded from the scope of plant variety protection:
- Mutational origin may be readily detectable in certain species but far less in others.
- The risk of "lifting" pointed out by the breeders is indeed a genuine risk.
- Solutions do have to be found to remedy at least partly this "lifting" practice.

##### Possible Short-Term Solutions

Of the solutions put forward one could consider adopting those capable of bringing mutants to the notice of the public without destroying their novelty.

- Mutant variants could be registered in a professional register recognized by the Plant Variety Protection Committee, such registration being effected under the full responsibility of the breeder of the original variety who declares them.
- It could be made mandatory to maintain such mutant variants in the reference collections of the establishment that applied for their registration in the professional register.
- Reference samples should be made available to bodies responsible for conducting novelty and distinctness examinations.
- Provision should be made for an accelerated and streamlined prior examination procedure when the application comes from the breeder of the original variety.

Long-Term Consideration of the Problem

Some very careful thought is called for before any definite plans can be made to amend the Paris Convention so as to grant the breeder of a protected original variety a right to mutants discovered within that variety.

Among other things it has to be ensured that such an amendment is compatible with the originality of certificates granted as compared with that of invention patents.

## PROVISIONS CONCERNING VARIETIES RESULTING FROM MUTATION

1. Recognition of the Public Knowledge of Varieties Resulting from Mutation and Entered in the Lists Approved by the Plant Variety Protection Committee

This approval is given according to the procedure specified in document I, appended hereto.

Public knowledge of the variety may be invoked against third parties only in the absence of any marketing prior to the filing of an application for protection by the breeder who effected the registration.

2. Introduction of a Streamlined Examination Procedure Reserved for Varieties Resulting from Mutation Involving Solely Protected Varieties and Differing from them Only by Certain Mutated Characteristics (Document II)

The characteristics concerned are listed species by species by the Committee, on proposals from experts.

The streamlined examination procedure has to be applied for on form IC BIS. Examination consists in verifying, in one place on French territory (GEVES), and on a single sample, the mutant characteristic or characteristics selected by the Plant Variety Protection Committee that enables or enable the variety resulting from mutation to be distinguished from the original variety, and the distance separating them to be judged.

This examination can under certain circumstances be made on the applicant's premises if all the technical conditions are met for a proper examination to be carried out.

Varieties belonging to species that have been the subject of testing abroad under bilateral agreements may also be included in this procedure, according to conditions to be specified.

The processing of the application in the light of the findings of a streamlined examination ends with the grant of a plant variety certificate embodying no restriction.

The findings of the technical examination and the description may be transferred to any foreign purchaser who so requests.

RECOGNITION OF PUBLIC KNOWLEDGE OF VARIETIES RESULTING FROM  
MUTATION AND ENTERED IN A VARIETY LIST APPROVED  
BY THE PLANT VARIETY PROTECTION COMMITTEEConditions of Approval

- Any organization or association possessing a list specifically of varieties resulting from mutation is invited to declare it to the Plant Variety Protection Committee (CPOV), which judges the validity of such lists.

- The declaration should be accompanied by a copy of the statutes of the organization or association, and where appropriate, by the rules of procedure governing the register.

- Public knowledge of a variety is recognized only in relation to the following, specifically registered references:

- name of species;
- name of variety;
- name of breeder;
- origin of variety;
- date and number of variety registration;
- place in which variety is kept.

For public knowledge to be effective, the breeder must at all times be able:

- to provide a reference sample of the variety;
- to produce as complete a descriptor card as possible, clearly showing the novelty of the variety.

Special Obligation

The list must be available for consultation by any person so requesting, in particular to provide assurance of the public knowledge of varieties resulting from mutation mentioned in it.

STREAMLINED EXAMINATION PROCEDURE RESERVED  
FOR A VARIETY RESULTING FROM MUTATIONI. Procedure

The application must be filed by the breeder of the original variety or by the holder of the plant variety certificate or alternatively by an applicant who has obtained the agreement of the breeder or of the holder of the certificate.

## II. TYPE OF MUTATION ELIGIBLE FOR THE STREAMLINED EXAMINATION PROCEDURE

A list of types is given species by species in Annex 1 to this document.

A mutation does not qualify for the streamlined examination procedure when it relates:

- (a) to any characteristic other than those specified in the annexed list;
- (b) to two or more characteristics, even if they are included in the annexed list, except where such a case has been provided for.

## III. APPLICATION PROCEDURE

In addition to the standard documents required when filing an application for protection, the applicant has to enclose Form IC BIS (Annex 2).

## IV. PROVISION OF SAMPLE

The party making the submission undertakes to provide, at the request of the Committee and within the periods specified, on pain of rejection of the application, such plant material as is necessary for the carrying out of the streamlined examination.

## V. STREAMLINED EXAMINATION

This examination consists in verifying, in one place on French territory and in relation to one sample, the mutant characteristic<sup>1</sup> by which the variety resulting from mutation may be distinguished from the original variety and in judging the distance between them.

The description of the variety resulting from mutation is drawn up on the basis of the description of the original variety, the only alterations being the description of the mutated characteristic or characteristics and the administrative indications, namely denomination, applicant, etc.<sup>2</sup>

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<sup>1</sup> or, where applicable, the mutant characteristics.

<sup>2</sup> An examination consisting in investigating systematically whether all the other characteristics are in conformity with the original variety would not be a streamlined examination.

## VI. DECISION

A certificate is issued when the distance between the variety resulting from mutation and the original variety is considered sufficiently great.

Any observation pointing to failure to observe the above rules causes the streamlined examination procedure to be discontinued<sup>3</sup>. The application is then subjected to the normal examination procedure, with payment of the prescribed fee, except where the applicant withdraws it.

## VII. FEES

The fee for streamlined examination is set at 50% of the figure for the normal examination fee.

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<sup>3</sup> If, in the course of the streamlined examination, a difference or differences other than that or those specified is or are observed by chance, the examination is discontinued.

## STREAMLINED EXAMINATION PROCEDURE RESERVED FOR A MUTANT VARIETY

Appended ListCarnation

Characteristic 37: number of colors of limb     )  
Characteristic 38: distribution of colors        )  
Characteristic 39: base color                    )         petals  
Characteristic 40: secondary color of limb     )

The mutation may relate to one or all of the above characteristics, or alternatively to a set of them.

The streamlined examination has to be carried out at the GEVES la Baronne Unit for a full, normal growing cycle, in order that the following may be judged:

- the distinguishing characteristics mentioned above;
- the homogeneity of the plant material submitted.

The examination must relate to 25 plants.

The homogeneity tolerances are the following:

- (1) Where the material reveals plants that are complete off-types:
  - one complete off-type (one plant);
  - one plant with sectoral mutations.
- (2) Where the material reveals only plants with sectoral mutations:
  - two plants with sectoral mutations.

DECLARATION TO BE FILED IN SUPPORT OF AN APPLICATION FOR A PLANT  
VARIETY CERTIFICATE UNDER THE "STREAMLINED EXAMINATION PROCEDURE"

I, THE UNDERSIGNED:

acting as applicant for a plant variety certificate in respect of a variety  
of:  
designated by the denomination proposed by myself below (or by my provisional  
breeder's reference):

HEREBY CERTIFY:

- that the said variety is a mutation of the protected variety called .....

- that it was discovered under the following circumstances:

date:  
place:  
material observed:

- that it has been registered as follows:

- variety list reference:
- date of registration of the variety:
- name of declarer:
- denomination under which the variety was entered:

- that the said variety differs from the original variety by the following  
characteristic or characteristics:

characteristic	expression of the characteristic	
.....	original variety	mutant variety
.....		
.....		
.....		

HEREBY REQUEST:

the advantages of the streamlined examination procedure reserved for a mutant  
variety

Signature\* of the applicant

Signature\* of the applicant or  
holder of the plant variety  
certificate of the original  
variety<sup>1</sup>

HEREBY ACKNOWLEDGE:

- that the certificate issued will be valueless if the variety submitted  
differs from the original variety by characteristics other than those  
subjected to the streamlined examination procedure.

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\* preceded by the handwritten entry "read and approved."

<sup>1</sup> this signature is mandatory when the present applicant is not the appli-  
cant for or holder of the plant variety certificate of the original  
variety.

[End of document]