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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Nineteenth Session
Geneva, March 31 and April 1, 1987

UPOV RECOMMENDATIONS ON VARIETY DENOMINATIONS

Document prepared by the Office of the Union

1. At its eighteenth session, the Administrative and Legal Committee invited the member States to communicate to the Office of the Union their proposals for amendment of the UPOV Recommendations on Variety Denominations (see paragraph 39 of document CAJ/XVIII/7).
2. By letter of December 17, 1986, the delegation of the Federal Republic of Germany submitted a proposed new text for Recommendations 1 to 7, together with explanations. The text and the explanations are reproduced in Annex I.
3. By letter of January 16, 1987, the delegation of Denmark communicated some views on the question of recommendations on variety denominations. An extract from the letter is reproduced in Annex II.
4. By letter of January 28, 1987, the delegation of Japan proposed some amendments to Recommendation 2 as approved by the Council. These amendments are shown in Annex III on an annotated text of Recommendation 2.
5. By letter of February 23, 1987, the delegation of New Zealand communicated its views on the recommendations as adopted by the Council and on the new text proposed by the delegation of the Federal Republic of Germany. The letter is reproduced in Annex IV.
6. By letter of February 26, 1987, the delegation of South Africa communicated its opinion that Recommendation 2 as approved by the Council should be deleted.

7. By letter of March 6, 1987, the delegation of the United States of America communicated its views on the recommendations as adopted by the Council. The letter is reproduced in Annex V.

8. By letter of January 7, 1987, the Secretary-General of ASSINSEL submitted again, for consideration, a motion on variety denominations adopted by the ASSINSEL Congress held in San Francisco (United States of America) on May 29, 1986. The letter is reproduced in Annex VI.

[Annexes follow]

EXPLANATIONS TO THE NEW TEXT
PROPOSED BY THE DELEGATION OF THE FEDERAL REPUBLIC OF GERMANY

Ad Recommendation 1

As already discussed at a previous session of the Administrative and Legal Committee, the list of cases is also dispensable in Recommendation 1.

Ad Recommendation 2

Here too the list of cases may be dispensed of to the benefit of a general principle. The objections raised from various quarters against the requirement (applying to the whole UPOV scope) that the variety denomination be easy to remember or pronounce appear to us worthy of consideration. But the requirement that the variety denomination be sufficiently easy to handle for the user should be maintained. In the proposed new text therefore, the first-mentioned requirement has been replaced by the requirement that the variety denomination be such that the user may recognize it again or reproduce it again in speech or writing. Our experience shows that this requirement cannot be assessed on the basis of a certain number of components of the variety denomination (words, letters, figures) and that therefore a general statement on the unsuitability of excessively long designations would suffice.

The reference to the special circumstances prevailing in the case of variety denominations in use in a limited circle of knowledgeable persons relates to the above principle in its entirety. It should therefore be taken up as an exception in a separate paragraph and not, as in the former version of the Recommendations, inserted in the text of the general rule on unsuitability.

Ad Recommendation 3

The wording of this recommendation has been adjusted to the proposed new text of Recommendations 1 and 2; there is no change on substance.

Ad Recommendation 4

Like that of Recommendation 3, the wording of this recommendation has been adjusted. [Cont'd, page 3]

CAJ/XIX/3
Annex I, page 2

NEW TEXT
PROPOSED BY THE DELEGATION OF THE FEDERAL REPUBLIC OF GERMANY

Recommendation 1

Designations that do not show clearly enough their status of variety denomination are not suitable as generic designations and thus also as variety denominations. This may be the case in particular with:

(i) designations that are identical or may be confused with other indications, in particular those that are commonly used in trade;

(ii) combinations that are not made up according to an established system in which words, if present in the combination, always appear first and figures, if present in the combination, always appear last.

Recommendation 2

(1) Designations that may cause difficulties to the average user in respect of recognizing again or reproducing again in speech or writing are not suitable as generic designations and thus also as variety denominations. This may be the case in particular with excessively long words or combinations, and also with scripts which cannot be reproduced for instance by telex.

(2) In the case of varieties that are exclusively marketed within a limited circle of knowledgeable persons, as in the case of parent varieties for the production of hybrids, the average user should be taken to mean the average knowledgeable person in that circle.

Recommendation 3

Designations whose use is to remain free are not suitable as generic designations and thus also as variety denominations. This may be the case in particular with designations which consist exclusively or predominantly of terms in everyday language whose recognition as variety denominations would prevent others from using them when marketing reproductive or propagating material of other varieties.

Recommendation 4

Designations whose use may be forbidden in the marketing of propagating material of the variety are not suitable as generic designations and thus also as variety denominations. This may be the case in particular with:

[Explanations]

On substance, there is a change in respect of subparagraph (2)(ii) of the former text; the reason is that, according to experience, it is neither useful nor in general possible to examine each denomination against prior rights of third parties. It is sufficient to react only in those cases where such prior rights are effectively asserted.

Ad Recommendation 5

This recommendation remains unchanged on substance, with adjustment of its wording only.

Ad Recommendation 6

The former subparagraph (iv) has been deleted for experience indicates that it may be omitted because of its being of little relevance. In addition, the wording of the recommendation has been adjusted.

Ad Recommendation 7

This recommendation remains unchanged on substance, with adjustment of its wording only.

[Proposed New Text]

(i) designations in which the applicant himself has some other right (for instance a right in the name or a trademark) which he could assert under the legislation of the member State concerned to oppose use of the--registered--variety denomination, either at any time or at least after the expiration of protection;

(ii) designations in which third parties have asserted a prior right;

(iii) designations that are contrary to public policy in the member State concerned.

Recommendation 5

Names and abbreviations of international organizations which are excluded by international conventions from use as trademarks or parts of trademarks are not suitable as generic designations and thus also as variety denominations.

Recommendation 6

A designation is not suitable as variety denomination on the ground of liability to mislead if there is a risk of it giving rise to misconceptions concerning the characteristics or value of the variety. This may be the case in particular with:

(i) designations that convey the impression that the variety has particular characteristics which in reality it does not have;

(ii) designations that refer to specific characteristics of the variety in such a way that the impression is created that only the variety possesses them, whereas in fact other varieties of the species in question also have or may have the same characteristics;

(iii) comparative and superlative designations;

(iv) designations that convey the impression that the variety is derived from or related to another variety when that is not in fact the case.

Recommendation 7

A designation is not suitable as variety denomination on the ground of liability to mislead if there is a risk of it giving rise to misconceptions concerning the identity of the breeder.

[Recommendations 8 to 12 unchanged]

[Annex II follows]

OBSERVATIONS FROM THE DELEGATION OF DENMARK
ON THE QUESTION OF RECOMMENDATIONS ON VARIETY DENOMINATIONS

... Our Naming Committee only had the possibility to meet yesterday [January 15, 1987].

[Since] ... a proposal for changing the recommendations ... had been presented as a set of revised recommendations, our committee decided that it might be more suitable to work on this new draft ...

However, I think it appropriate to inform [the Committee] on the general aspects of our discussion.

The general viewpoints emerging from the comments of our national organizations were that the recommendations and their implementation did not really create problems as regards approval of variety denominations in Denmark. From the agricultural organizations, including the vegetable sector, there was a wish to support the ASSINSEL statement presented at the information meeting with international organizations on variety denominations on April 18, 1986.

From the horticultural organizations, excluding the vegetable sector, satisfaction was expressed with the present recommendations, and it was stated that the main cause for the difficulties in having names approved was probably to be found in differences of interpretation and implementation of the recommendations.

Naturally, this summary does not cover every detail; it does, however, give the impression that the recommendations might be more balanced than some of the international organizations think they are.

Our committee stressed the importance of having some recommendations to give guidance to breeders proposing variety denominations and offer a common basis for adopting these.

Our committee also stressed the importance of having as far as possible a common interpretation of the recommendations to avoid any inconveniences for breeders proposing variety denominations. We did not find it inappropriate to have certain restrictions in respect of the kind of denominations which should be allowed. In view of the considerable amount of time spent by the authorities on variety denominations, it seemed fair that they did not have an unlimited system of denominations to be checked. We therefore thought that the breeders organizations also should bear practical aspects in mind.

Without going into the details of the text of the recommendations, I can further inform you that our committee discussed the conflict which could arise from the wish to have the same variety denomination in all countries and--as stated in recommendation 2--the requirement that the designation be easy to remember and to pronounce. To avoid this dilemma we considered the possibility of changing the requirement in such a way that a designation should be usable in trade and enable the variety to be distinguished. At the same time, we considered that recommendation 2(2)(viii) should be maintained.

[Annex III follows]

ANNEX III

AMENDMENTS PROPOSED BY THE DELEGATION
OF JAPANRecommendation 2

[Text adopted by the Council]

(1) Designations that are difficult to remember or pronounce for the average user are unsuitable as generic designations and therefore are not suitable as variety denominations. In the case of varieties that are exclusively marketed within a limited circle of knowledgeable persons, as in the case of parent varieties for the production of hybrids, the average user should be taken to mean the average knowledgeable person in that circle.

(2) In particular, the following would be unsuitable under paragraph (1):

~~(i) Designations consisting of a combination of more than three letters if the combination is not pronounceable in syllables and does not obviously form a sequence of letters familiar to the general public. The syllables do not need to have a meaning.~~

(ii) A number (where allowed at all, either alone or as an adjunct) consisting of more than four figures, unless the number has a meaning for the general public that is particularly easy to remember.

~~(iii) A designation consisting of more than three independent words, unless special circumstances make it easy to remember.~~

(iv) Excessively long words, ~~particularly those composed of more than three syllables without pre-existing meaning or of more than three different terms,~~ unless the word has a meaning for the general public that is particularly easy to remember.

~~(v) Combinations of letters and figures, unless they are used in that order and refer to species for which that type of denomination is established practice.~~

~~(vi) Combinations of words and figures, unless they are used in that order.~~

~~(vii) Combinations containing words, letters and figures.~~

(viii) Designations containing elements that would cause difficulties when expressed in speech or transmitted by telex, for instance special signs such as hyphens, subscript or superscript figures, or alternating upper and lower cases.

Explanations

Ad subparagraphs (i) and (iv): these rules are meaningless because of the specific features of the Japanese language.

Ad subparagraphs (v), (vi) and (vii): there is no room for confusion from the point of view of Japanese language.

Ad subparagraph (viii): the use of hyphens is permitted in Japan.

[Annex IV follows]



Plant Varieties Office

MINISTRY OF AGRICULTURE & FISHERIES

CH 252021

23 February 1987

The Vice Secretary-General
Office of UPOV
POB 18
1211 Geneva 20
SWITZERLAND

Dear Dr Gfeller

UPOV RECOMMENDATIONS ON VARIETY DENOMINATIONS

I reply to your letter CU 1166/-08.4. The latter was late in reaching me and I hope my reply is received by you in time for consideration.

Firstly a general comment on the present UPOV Recommendations on Variety Denominations. Breeders and PVR authorities in this country have been reasonably satisfied with recommendations 1, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 although we would welcome any possible simplification. We do however, generally agree that some relaxation of recommendation 2 is needed. For example:

- recommendation 2(1) requires a PVR authority to make a subjective decision as to whether or not a proposed denomination is difficult to remember or pronounce which may not necessarily reflect the opinion of the public. We believe that the onus should be put on the breeder ie if a denomination is proposed which is questionable in this regard, the authority should accept it and if the public does indeed find it difficult to remember or pronounce, it is the breeder who will suffer the likely consequence of the confusion. - lost sales.

- If letters and figures are acceptable for some kinds of plants why not for all?

- If letters and figures are acceptable in that order why not in the reverse?

- We believe 2(2)(iv) to be of doubtful benefit - again we believe it reasonable to let the applicant suffer the consequence if the denomination is indeed too long a word.

I now refer to document 2411V - the provisional draft Recommendations. Firstly we congratulate the delegation of the Federal Republic of Germany on the draft.

Recommendation 1. We believe the draft version represents an improvement but do not necessarily agree with 1(ii).

Recommendation 2. As indicated earlier we dislike this recommendation in the present Recommendations and for the same reason we disagree with the new draft version. We believe that all of Recommendation 2 in the present Recommendations could be eliminated except 2(2)(viii).

Recommendation 3-7. We agree with the draft.

Yours sincerely



FW Whitmore
Registrar of Plant Varieties

[Annex V follows]

ANNEX V



UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
ASSISTANT SECRETARY AND COMMISSIONER
OF PATENTS AND TRADEMARKS
Washington, D.C. 20231

MAR 6 1987

Dr. Walter Gfeller
Vice Secretary General
International Union for the Protection of
New Varieties of Plants
34, chemin des Colombettes
1211 Geneva 20, Switzerland

Dear Dr. Gfeller:

I am pleased to provide the views of the United States regarding the UPOV Recommendations on Variety Denominations, as the member States agreed to do at the last session of the Administrative and Legal Committee.

There are public policy considerations involved in the use of variety denominations in connection with the marketing of plant varieties. A breeder should not be permitted to mislead or confuse the public as to the characteristics or identity of a variety. Breeders' rights or patent offices in the member States certainly should not exacerbate the situation by permitting the use of confusing or misleading denominations. These Offices, however, should not be the agencies primarily responsible for regulating these matters. We believe that disputes over variety denominations should be left as far as possible to private resolution. This is the basis of our already-expressed concern about the inclusion of Article 13 in the Convention.

To the extent variety denominations need to be regulated by national examining authorities, however, the Recommendations are not called for. Article 13 is quite detailed and capable of being applied as it is written, consistent with each national law. The Recommendations, in striving for uniformity, only confuse and complicate application of the Article.

Questions of interpretation, inherent in any set of rules as complicated as the Recommendations, are inevitable. Different States applying the same Recommendation can readily come to different conclusions about the registrability of a particular denomination, even though the Recommendations are directed toward the harmonization of naming practices. We have particular concerns about Recommendation 2.

Recommendation 2 begins by precluding the registration of variety denominations that are difficult to remember or pronounce for the average user. Given the diversity of languages spoken in the member States, it is immediately obvious that a fanciful denomination (which the Recommendations encourage) may be easy to remember and pronounce in one or a few of the Union's languages and easy to forget in other languages.

The natural consequence of this requirement is the encouragement of synonyms in order to provide to the public in each member State a name it can pronounce and remember. This ignores or contradicts the Convention requirement that a protected variety, if at all possible, bear the same denomination in each member State. Finding a suitable denomination can be still more complicated when the plant variety is originally marketed in a State not belonging to the Convention. Even more languages may need to be dealt with, and that State may have naming regulations of its own.

Recommendation 2 seems built on the erroneous assumption that a breeder, unless prohibited by a regulation, might be tempted to register a name that is hard to pronounce or difficult to remember, or both. We question this assumption. A breeder, as a business-man, naturally seeks profit-making sales of his variety. Accordingly, it is in his best interests to identify the variety in a way that attracts purchasers. A businessman will therefore, ordinarily provide an easily pronounced and easily remembered name, whether or not a regulation makes him do so.

There is a further assumption that letters, figures (numbers) and excessively long words in various combinations are not easy to remember. As far as the United States is concerned, we are unaware of any purchaser confusion over these kinds of denominations. If these denominations confused the average customer, seed companies would not risk sales by using them. On the contrary, seed purchasers readily accept these denominations. Instead of being confused, they even rely on the technical information sometimes contained in code-like numerical and letter-number denominations. We have every reason to feel that these kinds of denominations would work just as satisfactorily in other member States.

Recommendation 3, is too broadly worded to be of real use in judging the registrability of a particular denomination.

Recommendation 4 prohibits the use of variety denominations that might or do interfere with the exercise of trademarks or other proprietary rights. Inclusion of this principle in a Recommendation, however, suggests that a member State is free to implement it or not. In fact, the preservation of third party proprietary rights is an obligation spelled out in the Convention.

Please let me know if you have any questions about these remarks or need any further explanations.

Sincerely,



Michael K. Kirk
Assistant Commissioner for
External Affairs

[Annex VI follows]

ASSINSEL MOTION ON VARIETY DENOMINATIONS

Subject: Variety denominations

I have the honor to submit again to your Organization, in the name of ASSINSEL and following the decisions taken at our congress in San Francisco, in particular at the closing meeting of May 29, 1986 of the Maize Section of our Association, the following motion on the above subject.

MOTION: "Based on the motion submitted by the Maize Section at Budapest on June 9, 1983, ASSINSEL requests:

- that the UPOV Recommendations do not lead member States to a restrictive interpretation of Article 13 of the Paris Convention;
- that there be no restriction on the choice of the variety denomination as respects all figures, letters and words;
- that the same freedom be given in variety denomination matters to the old member States as is given to new member States."

That motion was first drafted in the Maize Section on June 3, 1983, at the Budapest congress. It was then adopted at the closing meeting of the Copenhagen congress of our Association on June 1, 1984. It was transmitted to UPOV by letter of July 10, 1984.

We would therefore appreciate it if the motion could be the subject of an in-depth examination in UPOV for the present rules are unsatisfactory and constitute a real obstacle to international trade.

[End of document]