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UPOV

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Sixteenth Session
Geneva, November 14 and 15, 1985

SCOPE OF PROTECTION

Document prepared by the Office of the Union

PURPOSE OF DISCUSSIONS

1. The agenda of the present (sixteenth) session of the Administrative and Legal Committee calls for an evaluation of the results of the second Meeting with International Organizations. The Office of the Union considers that, with regard to the scope of protection, the Committee should undertake a thorough examination of the entire question. The reasons for that are the following:

i) The discussions at the second Meeting with International Organizations showed that the professional organizations had a general desire for an extension of protection. They did not however contribute anything new to the matter under consideration. For instance, the spread of micropropagation techniques does no more than aggravate the old problem of the multiplication of seedlings for the multipliers' own purposes, and make new species subject to it. The same is true of movable seed-grading equipment, which gives new scope to the already known problem of the production of farm seed.

(ii) The most recent detailed discussions of this matter date back to the preparatory work on the 1978 Diplomatic Conference. During the intervening period, the Committee has proceeded with work of more restricted scope: in 1980 it noted a comparative study of national legislation conducted by the Office of the Union, which is to be found in document CAJ/V/2; in 1981 it considered the question of the scope of protection in the case of ornamental plants and fruit trees (see documents CAJ/VIII/5 and CAJ/VIII/11, paragraphs 13 to 16); finally, the discussions on the legal aspects of minimum distances between varieties, which were completed in 1983, also covered the meaning of the variety concept in the context of the definition of the rights of the breeder (see document CAJ/XII/8, Annex III).

(iii) In the discussions on the legal protection of the results of inventive activity in the field of biotechnology, the comparison between the scope of protection afforded by application of the UPOV Convention and the scope of protection conferred by a patent plays a decisive part. It would therefore be as well for UPOV also to formulate its own opinion on the question.

(iv) At the fifteenth session of the Committee, the Delegation of France insisted on the consideration of the possibilities for harmonization of the scope of protection.

2. With regard to the possibilities of extension of protection, the Office of the Union gives an account below of the main areas in which the minimum protection afforded by application of Article 5(1) of the UPOV Convention is considered insufficient by the users of the system.

3. With regard to the comparison between the scope of protection afforded by application of the UPOV Convention and the scope of protection conferred by a patent, the Office of the Union suggests that the matter should be included in the agenda of one of the sessions that the Committee will be holding in 1986.

4. With regard to the harmonization of protection, the Office of the Union also suggests that the matter should be included in the agenda of a future session, in order that full account may be taken of the outcome of the discussions on the possibilities for extension of protection. However, the Committee should immediately entrust the Office of the Union with drawing up definite proposals, which could take the form of model provisions on the scope of protection.

THE POSSIBILITIES FOR EXTENSION OF PROTECTION

5. In 1978 the Diplomatic Conference on the Revision of the Convention adopted a Recommendation on Article 5 which invited member States, "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... [to] take adequate measures, pursuant to Article 5(4)." The past discussions and the action taken by some member States show that steps can envisaged in the cases given below, which have been classified according to the most relevant provision of the Convention.

6. Cases covered by the concept of "production for purposes of commercial marketing".- An examination should be made of whether the right of farmers to produce their own seeds or seedlings should be maintained. The right is limited by technical and economic factors: the species and variety concerned have to lend themselves to such farm production, the farmer has to be technically capable of it and the operation has to be (or seem) financially viable. The effect of these factors is that, in the case of agricultural crops, the production of farm seeds relates solely to self-pollinated species grown in the form of pure line varieties, and mainly straw cereals (and, in the near future, proteogenous plants such as peas).

7. In fact, what is involved here is adaptation to the live character of the subject matter protected, in other words to its ability to reproduce, and above all to an economic and social reality. For it could be considered that this right to produce one's own seed from a lawfully marketed consignment constitutes exhaustion of the breeder's rights, as the purchaser is entitled to make use of all the properties of the seed purchased, including its ability to multiply (these rights revive, however, if the seed so multiplied is marketed).

Moreover it is difficult to impose constraints on the production of farm seed, owing to the diffuse nature of its production (large numbers of producers, and a limited quantity produced by each one of them).

8. The breeder can very easily improve this situation by taking such production into consideration when he sets his license fees. In doing so, however, he creates a vicious circle, as the competitiveness of the farm seed is thereby increased. From the point of view of the public interest, it slows genetic progress and encourages farm production based on inferior seed, which is in any event from a later generation than the certified seed, as the farmers do not always have the required competence and materials for the production of high-quality seed. As for those who do, they engage in an activity out of all proportion to what was initially to have been exempted from protection when the Convention was drafted, namely the storage of a few sacks of grain as seed for the next planting.

9. In the case of cereals, the farmer who produces his own seed is practically obliged to buy commercial seed periodically, so that the breeder of a protected variety is not entirely deprived of the possibility of remuneration for his work and investment. The position is different for horticultural plants and above all for fruit and forest trees. For instance, a fruit grower may establish his orchard by producing the necessary plants himself from a small number of plants bought on the market, or by making cuttings, grafts, etc. from a plantation already in existence. That situation has already been provided for in a certain number of member States.

10. Micropropagation techniques introduce a new, doubly aggravating element: they are becoming routine techniques for seed-propagated species (cabbage, cucurbits, tomatoes, peppers, etc.) and are making extraordinary multiplication rates possible. The techniques are now becoming accessible to major producers, who, by freeing themselves of the seed market, especially the market for the costly hybrid seed, and from the payment of royalties to the breeder, secure an important competitive advantage over small producers. There too the public interest is at stake.

11. The above considerations show that the extension of protection to the production by farmers of their own seed or seedlings benefits not only the interests of the breeder but also the public interest. Nevertheless, owing to political and economic constraints, this production probably calls for special treatment. It would be somewhat unreasonable to make it subject to the breeder's authorization. Such a measure would probably come up against public opinion and also the opinion of the authorities, as it would make the production of basic foodstuffs subject to the will of an individual. It is on the other hand entirely desirable that the breeder should be able to collect a royalty.

12. It is for the Committee to investigate this possibility with respect to its principle, and, if it is adopted, even if only as a basis for work, to specify to what species it would be applicable. It will be noted that ornamental plants are also concerned, as they too may be multiplied for purposes other than "commercial marketing," for instance by a public body for the decoration of the parks and public gardens of a city. Finally it will be noted that, if this possibility is favorably received, it is bound to facilitate the consideration of the other cases listed below.

13. Cases covered by the concept of "reproductive or vegetative propagating material".- The second sentence of Article 5(1) of the Convention ("vegetative propagating material shall be deemed to include whole plants") may be interpreted as meaning that whole plants grown from seed (in other words reproductive material) are not covered by Article 5(1), and hence not protected. The problem that arises in this respect is that in the case of vegetables in particular, the production from seed of young seedlings for transplanting has become a specialized activity. A producer of seedlings could therefore base his activity on seed that he has produced himself without having paid any royalties (other than those payable for the original seed), as the production of seed is not intended for the commercial marketing of reproductive material. This case is covered in a certain number of member States either by a specific provision or by a definition (or absence of definition) of the plant material covered by protection that rules out the above interpretation. It will be noticed incidentally that, if the seedlings are produced by micropropagation, even from a seedling itself grown from seed, protection applies normally by virtue of the first sentence of Article 5(1).

14. In certain States, "adult" plants, notably ornamental pot plants, are not regarded as vegetative propagating material under the second sentence of Article 5(1) of the Convention. The breeder's right therefore stops at the level of the plant material from which the pot plants are produced. In every day practice the breeder enters into license agreements for the production of pot plants, on the basis of Article 5(2) of the Convention, with producers of such plants. The propagating material is not marketed but delivered to the producers under such agreements. It therefore does not escape the breeder's control. If it did escape, lawfully, the purchaser of the material could produce as many pot plants as he wished. The purchaser would then in fact find himself in the same position as the farmer who produces his own seed. As for the breeder, he would be deprived of a substantial part of his income in view of the relatively small number of producers. Such a case could arise where the plant material is imported (without any subsequent marketing) and where the import is not covered by protection.

15. It will be noted that, in those States that assimilate pot plants to vegetative propagating material, no problem arises for the production of such plants is covered there by protection by virtue of the first sentence of Article 5(1). It will also be noted that the import of reproductive or vegetative propagating material, mentioned earlier, is also a separate, general case which deserves special consideration.

16. Cases covered by the concept of "marketing".- There are a certain number of forms of distribution of seed or seedlings regarding which there may be doubt as to whether they constitute marketing. The following cases have been mentioned in previous discussions: a food-industry enterprise produces, or causes to be produced, seeds which it then distributes to farmers under a contract providing that it will purchase their crops--or which provides that the enterprise is the owner of the crop, the farmer being in that case rewarded for his work; a cooperative produces seed or seedlings which it then distributes to its members; to this should be added the case of jobbing work in the sorting and processing of seed. Finally, in the course of a discussion on the novelty concept, a mention was also made of a system of hiring or leasing of plants for the production of pot plants or cut flowers.

17. The previous discussions also related to the "farmer's privilege," a characteristic of the Plant Variety Protection Act of the United States of America. Briefly, Section 113 of that Act allows the person whose primary farming occupation is the growing of crops for other than reproductive purposes

(in other words for consumption) to sell seeds produced by him to other persons whose farming occupation is the same. It is possible that, in other member States too, "over the fence" sales or exchanges between farmers, for instance under mutual aid schemes, may not be regarded as marketing.

18. Cases covered by extension to the end product.- The arguments in favor of the protection of the end product in the case of ornamental plants, mainly put forward by CIOPORA, are well known. It will be remembered that the purpose is not to allow breeders to charge royalties at every imaginable opportunity, at various stages in the exploitation of the variety, but to charge them also in connection with certain types of exploitation that escape protection. The main case aimed at is the import of cut flowers from countries that do not have a plant variety protection system. It also has to be observed that the majority of those countries, owing to their agro-climatic and economic circumstances, allow cut flowers to be produced at prices that defy all competition, even if the cost of transport (by special aircraft) is taken into account. Such distortion of competition produces a situation where, in certain member States, the production of cut flowers has become a secondary activity. Moreover, as has been stressed on many occasions already, extension is also in the interest of the users of the variety who usually pay royalties; they will be better placed to handle the competition of those who do not pay any.

19. While today the discussions have related to ornamental plants and cut flowers only, the time seems to have come to consider also the case of food and industrial plants. In fact breeders and producers, particularly breeders of fruit and vegetables, are in some cases in a position comparable to that prevailing in connection with cut flowers. In other words, their economic circumstances are made difficult by the import of fruit and vegetables from countries without protection and enjoying very favorable production conditions. However, the authorities and public opinion cannot be expected to take kindly to a situation where exclusive rights can limit the production of foodstuffs. Reference is made here to paragraph 11 above. In the case of industrial plants, the competition takes place often at the level of the basic industrial product, for instance essence of rose, and it is therefore down to that level that the extension of protection has to be considered.

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