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UPOV

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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Eighteenth Session
Geneva, November 18 and 19, 1986

SCOPE OF PROTECTION

Document prepared by the Office of the Union

Introduction

1. Following discussions at its seventeenth session, the Administrative and Legal Committee requested the Office of the Union to draw up a document containing a summary of the various situations in which the protection afforded by plant breeders rights was inadequate or could be considered as such; the document was also to contain a study of the possibility of making recommendations on that question (see paragraph 46 of document CAJ/XVI/3).

2. For more details on the discussion and the background to this matter, reference may be made to paragraphs 37 to 46 of document CAJ/XVII/10 and paragraphs 1 to 4 of document CAJ/XVI/3.

The various situations

3. The basic right afforded by Article 5(1) of the Convention means that prior authorization of the holder of protection is required for :

(i) production for purposes of commercial marketing,

(ii) offering for sale,

(iii) marketing

of reproductive or vegetative propagating material, as such, of the variety.

4. Article 5(4) of the Convention permits member States to grant a more extensive right, which may extend to the marketed product. The 1978 Diplomatic Conference on the Revision of the Convention decided to maintain as it was the

substance of Article 5 of the Convention in order, in particular, not to compromise accession of States that were not yet members of the Union. On the other hand, however, the member States were invited in a Recommendation to take "adequate measures, pursuant to Article 5(4)," "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."

5. Those cases in which the grant of more extensive rights is desirable--or at least deserves to be examined--have been analysed in paragraphs 6 to 19 of document CAJ/XVI/3, to which reference is made. Briefly, the following cases were looked at:

(i) Cases covered by the concept of "production for purposes of commercial marketing" of reproductive or vegetative propagating material.- The common denominator is constituted by the production of seed or seedlings for the producer's own needs. Three cases may be identified:

(a) The production of seed or seedlings of agricultural crops or vegetable species, that is to say by farmers or market gardeners, in order to obtain sowing and planting material for the following growing period. Such production can be incidental (the farmer keeps back part of the harvest to use as seed, with or without cleaning or processing) or intentional (the farmer or market gardener devotes a part of his surface area to producing seed or seedlings). (See paragraphs 6 to 12 of document CAJ/XVI/3).

(b) The production of fruit or forestry seedlings in order to create fruit patches (strawberry, raspberry, and so on), orchards or woodland (see paragraph 9 of document CAJ/XVI/3).

(c) The production of ornamental plants as, for example, by a local authority for the floral decoration of its parks and gardens (see paragraph 12 of document CAJ/XVI/3).

(ii) Cases covered by the concept of "reproductive or vegetative propagating material".- The feature common to these cases is that they involve whole plants that do not always qualify as propagating material:

(a) Production for sale of young seedlings for transplanting, particularly from seed previously multiplied by the producer (see paragraph 13 of document CAJ/XVI/3).

(b) Production for sale of "adult" plants, particularily ornamental pot plants, and especially where the initial material has been imported and such importation is not covered by protection in the country concerned (see paragraph 14 of document CAJ/XVI/3).

(iii) Cases covered by the concept of "marketing".- Such cases have in common that use is made of special forms of distribution that may not necessarily be considered as marketing. The following examples have been given in the past (see paragraphs 16 and 17 of document CAJ/XVI/3):

(a) production of seed and distribution to farmers under contract by an agri-foodstuffs company;

(b) production of seed by a cooperative for distribution to its members; contract cleaning and processing;

(c) hiring or leasing of plants for the production of pot plants or cut flowers;

(d) sale or exchange between farmers.

(iv) Cases covered by extension to the end product (see paragraphs 18 and 19 of document CAJ/XVI/3 and paragraphs 41 and 45 of document CAJ/XVII/10).

Possible improvements

6. The current situation may be summarized as follows:

(i) Article 5 of the Convention sets out the minimum scope of protection that must be afforded by every member State.

(ii) The Recommendation on Article 5 adopted by the 1978 Diplomatic Conference invites the member States to extend protection where desirable to safeguard the legitimate interests of breeders. The need for extension deriving from the legitimate interests of the breeders needs no further justification.

(iii) The majority of the member States have adopted a scope of protection beyond the minimum laid down in Article 5, either in an explicit form by means of specific provisions or in an implicit form by means of a wording that is capable of liberal interpretation. In the latter case, however, there subsist doubts as to the true scope of the rights afforded due to the absence or rarity of case law.

(iv) Some member States have found it impossible to extend protection in certain specific cases--or would certainly have that same problem if they attempted to extend protection.

7. In view of that situation, the Office of the Union considers that a possible recommendation by the UPOV Council should try to propose a model provision which would give a final ruling on the matter of the scope of protection, both as regards its extension and its harmonization. The Office of the Union is therefore submitting a text as a basis for dicussion in the form of a draft recommendation annexed to this document.

8. Briefly, this text would afford to the breeder an exclusive right in the exploitation--in the broadest possible sense--of his variety, subject to exceptions, to limitations and to the principle of exhaustion adapted to various specific constraints. This text has the following advantages;

(i) Defining the scope of protection would be simpler.

(ii) Consequently, discussions on the definition would be far easier at all levels, including governmental and parliamentary bodies.

(iii) The emphasis would be shifted, in particular, from "demands" that protection be extended in specific cases--and from the objections that are sometimes irrational and therefore difficult to counter--towards a discussion on those areas that should be excluded from protection. The "limitations that the requirements of the public interest may impose on the free exercise of such a right" (preamble to the Convention) would be examined in a different light, more favorable to the breeder, but also more objective as regards the public interest.

(iv) By setting out the limitations, the definition would include within the area of protection any activity not subject to the limitations. Interpretation of the definition would therefore generally be to the advantage of the breeder, and not to his disadvantage, particularily in the case of new developments. The definition would therefore make it easier to follow new developments and would be more stable.

(v) In a general manner, the standing of plant breeders' rights would be enhanced since they would no longer appear to be a kind of rudimentary patent. An end would also be put to the unjustified misconceptions as to the true scope of the rights afforded to breeders. Furthermore, the analogy created with patents would make it easier to apply to plant variety protection those principles developed by doctrine and case law under the patent system. However, a careful examination would have to be carried out to ascertain whether such application is desirable and, if not, to take the necessary measures to exclude it.

[Annex follows]

DRAFT RECOMMENDATION ON THE EXTENSION AND HARMONIZATION OF THE RIGHTS AFFORDED TO BREEDERS

proposed by the Office of the Union
on the basis of the foregoing discussions

The Council of the International Union for the Protection of New Varieties of Plants (UPOV),

Considering Article 5 of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, revised at Geneva on November 10, 1972, and October 32, 1978;

Considering the Recommendation on Article 5 adopted at Geneva by the Diplomatic Conference on the Revision of the Convention on October 23, 1978, with the following wording:

> "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)";

Further considering that it is useful and desirable for the member States of the International Union for the Protection of New Varieties of Plants to harmonize the provisions of their domestic legislation that define the rights afforded to breeders;

Recommends that the States should base their provisions, wherever possible, on the following model provisions:

Rights afforded to the breeder

(1) Subject to the following provisions, the effect of the rights granted to the breeder shall be that his prior authorization shall be required for the production, offering for sale, placing on the market, use of any kind, importation or holding for the above mentioned purposes of plant material of the variety;

(2) The rights granted to the breeder shall not extend to:

(i) acts carried out within a private framework and for non-commercial purposes;

(ii) acts carried out for experimental purposes.

(3) Authorization by the breeder shall not be required either for the utilization of the variety as an initial source of variation for the purpose of creating other varieties or for the marketing of such varieties. Such authorization shall be required, however, where repeated use of the variety is necessary for the commercial production of another variety.

(4) The rights granted to the breeder shall not extend to acts, carried out on the territory of the State, in respect of material placed on the market by the owner of the rights or his successor in title, or with their express consent, on condition that they do not concern production for commercial purposes of reproductive or vegetative propagating material of the variety or the offering for sale or placing on the market of such material.

(5) Notwithstanding paragraphs (1) and (4) above, a farmer may hold back without the authorization of the owner of the rights, in the case of agricultural crops, seed that he himself has produced lawfully and use it for the next growing period for producing a crop on his holding on condition that he has not had recourse for the selection and processing of the seed held back to outside assistance or to equipment that does not normally form part of the equipment of a farm whose activities do not include the commercial production of propagating material.

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