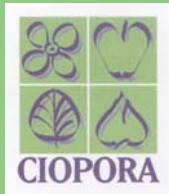# Minimum Distance / Distinctness

Meeting of the UPOV Technical Committee
Geneva, 14-16 March, 2016

Presentation by:

CIOPORA
POSITION PAPERS ON IP

Minimum Distance
The Scope of the Right
Breeders´ Exemption
Exhaustion
General PBR Matters

2014 & 2015

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Clearly distinguishable?

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Red

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Clearly distinguishable?

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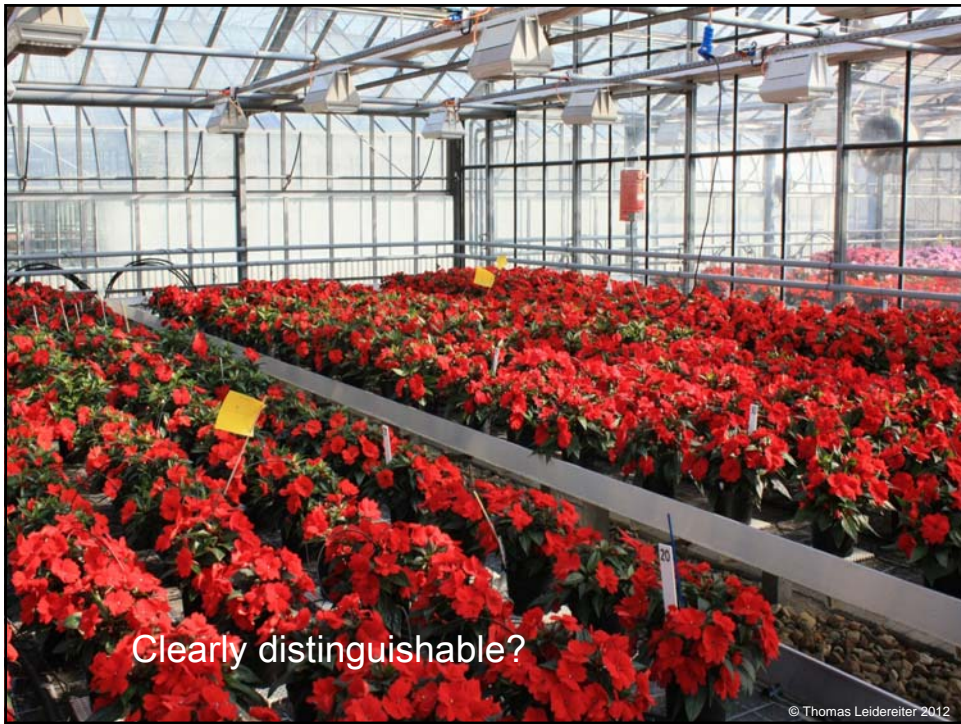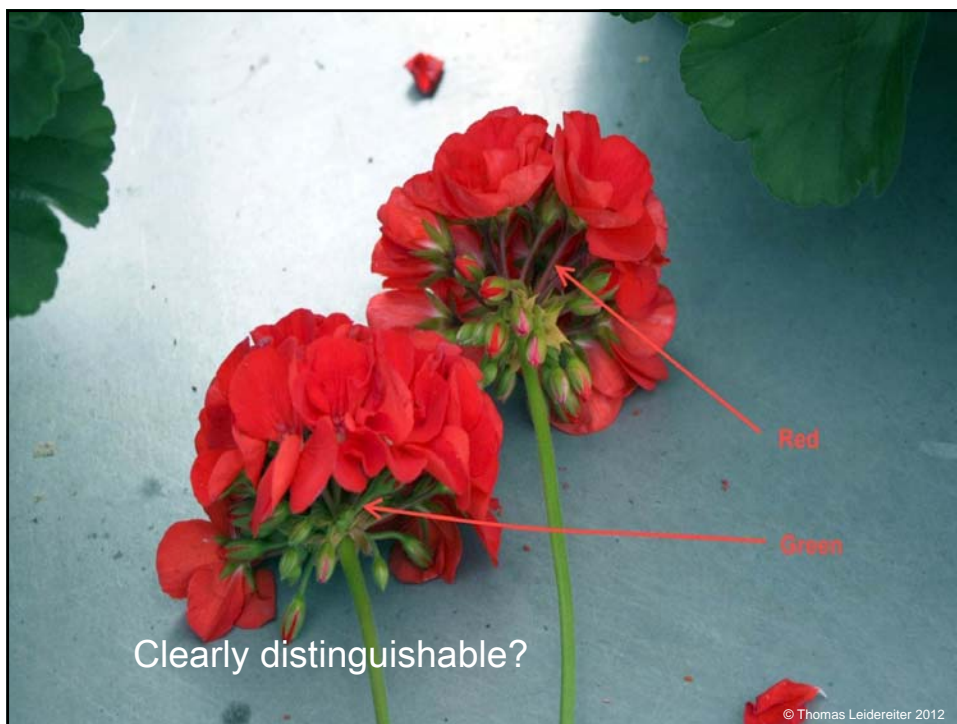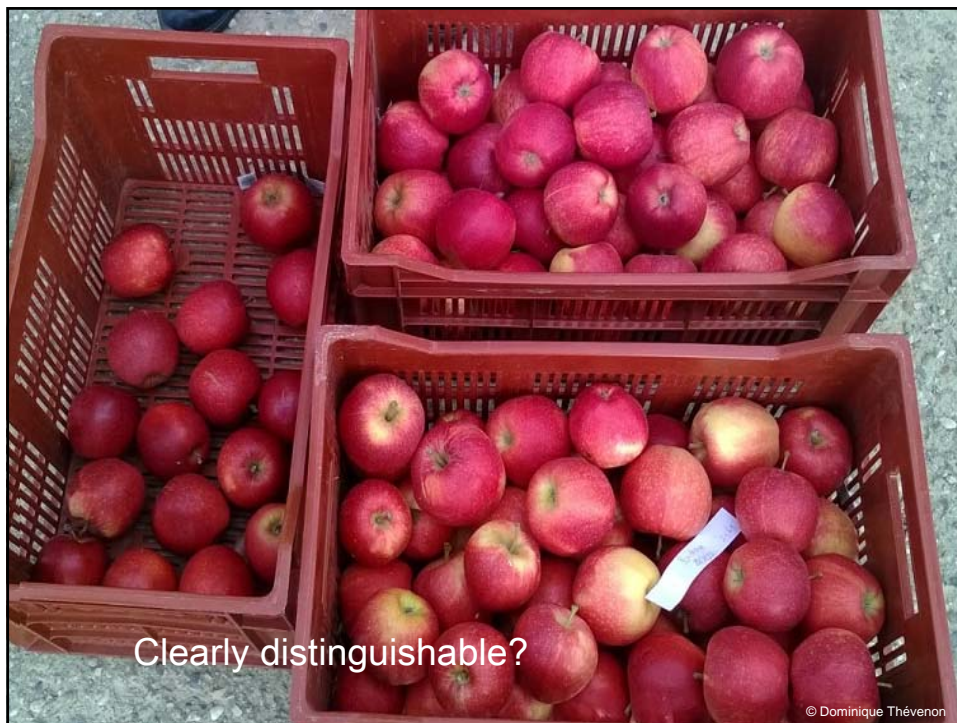
Clearly Distinguishable/Minimum Distance

"Variety" (Art. 1 (vi) UPOV 1991)

"distinguished from any other plant grouping by the expression of at least one of the said characteristics, …"

VS.

Protectable Variety, outside the scope of an earlier variety (Art. 7 UPOV 1991)

"The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge …"

Clearly Distinguishable/Minimum Distance

Clearly Distinguishable/Minimum Distance

The Two Consequences of Minimum Distance

➢ A variety, in order to obtain PBR protection, must be clearly distinguishable from any existing varieties

➢ A variety, which is clearly distinguishable, falls out of the scope of the [earlier] protected variety

➢ If the minimum distance is small, it is easy to obtain a PBR, but the exclusive right of the breeder is weakened or de facto negated.

Position on Minimum Distance

➢ The requirement "clearly distinguishable" should be assessed on characteristics important for the crop concerned; in this regard new important characteristics may be taken into consideration.

➢ Differences in unimportant characteristics only should not lead to a clearly distinguishable variety.

➢ In order to be clearly distinguishable, the distance between two varieties in regard to their important characteristics should be sufficiently broad.

➢ Particularly in regard to pseudo-qualitative characteristics and quantitative characteristics a difference of only one note in general should not be considered as a sufficiently broad distance.

➢ The decision should be made on a crop by crop basis.

Position on Minimum Distance

> Varieties with the same note in the UPOV test-guideline for a given characteristic should not be considered to be clearly distinguishable with respect to that characteristic. The possibility to search for a difference in a subsequent growing trial if such difference was not clear in the first properly performed examination should be eliminated.

> The possibility of randomized "blind" testing in case of doubts over the distinctness of a candidate variety should also be eliminated. In case of a doubt over distinctness, the candidate variety cannot be considered to be clearly distinguishable from the reference variety.

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Position on Minimum Distance

The decision on

> which characteristics are relevant for the determination of "clearly distinguishable",
> how many of such characteristics must differ from each other, and
> the distance between such characteristics

should be made on a crop-by-crop basis by a panel of experts, including representatives of the breeders of the crop concerned.

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Case Study on Minimum Distance

After CIOPORA has introduced its IP Positions to UPOV and some experts from UPOV member states, it was suggested to make a case study on the basis of the Position on Minimum Distance.

Aim is to produce concrete data and examples as a basis for further discussion, and in particular to determine which of the important characteristics lead to clearly distinguishable varieties as well as the desired levels of difference within and between these characteristics.

Selected Crops: **Apple, Rose, Pelargonium**

The case study has begun in the EU as an R&D project of the CPVO, with the assistance of the Examination Offices Naktuinbouw, NIAB, UKZUZ, Bundessortenamt and GEVES, as well as of CIOPORA.

Case Study on Minimum Distance

CIOPORA and its members active in the mentioned species drafted amended protocols ('mock protocols'), based on the CPVO Technical Protocols.

5 steps:

1. General expert made a first selection
2. Board-related breeder of the crop concerned reviewed the selection
3. Consolidation of the selection steps took place
4. CIOPORA members concerned discussed and decided about the final Mock Protocol
5. Mock Protocol has been sent to Naktuinbouw and CPVO

Case Study on Minimum Distance

"Mock protocol" on apples, based on the CPVO-TP/14/2

Out of 57 characteristics, 25 characteristics (44%) have been classified as "unimportant", i.e. irrelevant for the determination of distinctness.

15 *************** asterisked characteristics have been classified as irrelevant for the determination of distinctness

Within the remaining 32 important characteristics the notes have been broadened in 7 characteristics

Case Study on Minimum Distance

"Mock protocol" on roses, based on the CPVO-TP/11/2

Out of 54 characteristics, 22 characteristics (40%) have been classified as "unimportant", i.e. irrelevant for the determination of distinctness.

9 ********* asterisked (UPOV classification) characteristics have been classified as irrelevant for the determination of distinctness

Within the remaining 32 important characteristics the notes have been broadened / changed in 15 characteristics

Case Study on Minimum Distance

"Mock protocol" on pelargonium, based on the CPVO-TP/28/2

Out of 60 characteristics 16 characteristics (= 26%) have been classified as "unimportant", i.e. irrelevant for the determination of distinctness.

3 *** asterisked characteristics have been classified as irrelevant for the determination of distinctness

Within the remaining 44 important characteristics the notes have been broadened in 2 characteristics.

Case Study on Minimum Distance

On the basis of these mock protocols, 50 recently protected varieties per species will be re-examined on paper to determine the possible effect of the mock protocols on the distinctness between these varieties and other already existing varieties (i.e. to re-do the analysis on distinctness).

The results of the case study will have no effect on the rights granted. The single goal of this study is to gather informed data that might lead to a future revision of the technical protocols.

CIOPORA will be pleased to keep UPOV and the TWF updated on the outcome of the case study and to discuss possible adjustments of the concept of Minimum Distance

Thank You for Listening!

On behalf of CIOPORA and AIPH

Dominique Thevenon

Board Member and Treasurer of CIOPORA