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Associated Document
to the
General Introduction to the Examination
of Distinctness, Uniformity and Stability and the
Development of Harmonized Descriptions of New Varieties of Plants (document TG/1/3)

DOCUMENT TGP/3

“VARIETIES OF COMMON KNOWLEDGE”

**Section TGP/3.2: Developments and Explanations
Regarding Varieties of Common Knowledge**

Document prepared by experts from Germany and the United Kingdom

to be considered by the

*Technical Working Party for Vegetables (TWPV), at its thirty -sixth session to be held in
Tsukuba, Japan, from September 9 to 13, 2002*

*Technical Working Party for Agricultural Crops (TWPAC), at its thirty -first session to be held in
Rio de Janeiro, Brazil, from September 23 to 27, 2002*

*Technical Working Party for Ornamental Plants and Forest Trees (TWPOT), at its thirty -fifth
session to be held in Quito, from November 18 to 22, 2002*

*Technical Working Party for Fruit Crops (TWPFC), at its thirty -third session to be held in
San Carlos de Bariloche, Argentina, from November 25 to 29, 2002*

SECTION TGP/3.2
“DEVELOPMENTS AND EXPLANATIONS REGARDING VARIETIES OF
COMMON KNOWLEDGE”

1. COMMON KNOWLEDGE IS NOT DEFINED IN THE 1991 CONVENTION

1.1 The UPOV Convention of 1961, under Article 6, “Conditions Required for Protection,” states that ‘the variety must be clearly distinguishable ... from any other variety whose existence is a matter of common knowledge at the time protection is applied for.’ It then goes on to indicate how common knowledge may be established: ‘... by reference to various factors such as: cultivation or marketing already in progress, entry in an official register of varieties already made or in the course of being made, inclusion in a reference collection, or precise description in a publication.’

1.2 The 1991 Act of the UPOV Convention states in Article 7, “Distinctness,” “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 at the time of the filing of the application.’ It then goes on to add the single comment that: ‘In particular, the filing of an application for the granting of a breeder’s right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to a granting of a breeder’s right or to the entering of the said other variety in the official register of varieties, as the case may be.’

1.3 The records of the discussions which took place at the UPOV 1991 Diplomatic Conference clarify in paragraphs 474 -494 and 495 -508 that the intention of this sentence was to clarify a particular situation which might exist in the case of two ‘competing’ plant breeders’ rights (PBR) applications in different countries (see paragraph 505 in particular). It was not intended to be an exhaustive definition of what constitutes common knowledge, and the potential need for a much fuller set of examples was, in fact, raised (paragraph 490).

1.4 Unfortunately, this suggestion was not followed up, and, as currently worded, the Article might be taken as a complete definition, thus giving rise to a number of misconceptions as to what constitutes a variety of common knowledge. Clearly, despite the fact that common knowledge is always a legal matter for the Authorities in the territory concerned, there seems to be a need for harmonization and clarification.

1.5 This is particularly important in some crop groups such as Ornamentals and Fruit where, in many States, there are certain very significant differences in the way varieties are marketed compared to many agricultural or vegetable crops:

(a) Often only a small proportion of the total varieties in trade in one species are entered for PBR.

(b) In many countries, varieties are not subject to National Listing or other forms of control and therefore can go on sale without restriction as soon as the breeder is ready.

(c) In States or groupings of countries which have adapted their laws to allow one year’s sale before application, varieties will frequently be very well known in trade before any PBR application is made.

1.6 This means that varieties of such crop groups are subject to much less control than agricultural crops, varieties enter the market without statutory evaluation or before such evaluation is complete, and there is much less clarity over the exact date of introduction.

2. TOWARDS A DEFINITION OF COMMON KNOWLEDGE

2.1 Two important points should be considered before trying to define 'common knowledge':

(i) Definition of 'variety'

DUS work involves the assessment of varieties only. The 1991 Act of the UPOV Convention (Article 1(vi)) defines a variety as:

"... a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be

- defined by the expression of the characteristics resulting from a given genotype or combination of genotypes,
- distinguished from any other plant grouping by the expression of at least one of these characteristics and
- considered as a unit with regard to its suitability for being propagated unchanged;"

2.2 The underlined sentence is important because it confirms that varieties which do not fully meet the criteria for grant of PBR must nevertheless be considered as varieties for the purposes of distinctness, and in particular must be considered as varieties whose existence is a matter of common knowledge if they also meet the criteria for the establishment of common knowledge - even if PBR has been refused.

2.3 The definition also covers cases such as, for example, marketed clonal material which meets all the criteria for definition of a variety even though it has never been named. It also includes known and described variant forms of wild plants which, where they reproduce vegetatively, are effectively clones.

2.4 A single plant does not constitute a variety. Furthermore, the species as a whole, physical mixtures and other groupings which do not fulfil the basic definition are not varieties in terms of the UPOV Convention.

(ii) Novelty

2.5 Novelty and distinctness are two different concepts which should not be confused. Candidates for PBR must be both distinct and sufficiently novel, i.e. the novelty of the candidate must be established with reference to the first date of sale of the candidate, and the distinctness of the candidate must be established by comparison with such other varieties which were found to be in common knowledge at the date of the application. The candidate itself can be in common knowledge at the time of the application (for example by being prominent in a public collection) but sufficiently novel for grant of PBR, so long as it has not been on the market for longer than permitted by the relevant PBR legislation.

3. COMMON KNOWLEDGE: HOW IT IS ESTABLISHED

The following points summarize how varieties whose existence is a matter of common knowledge (“varieties of common knowledge”) may be elaborated in practice:

3.1 ‘Variety’ criteria

3.1.1 To be considered a ‘variety of common knowledge’, the variety must meet the definition of a variety set out in Article 1(vi) of the 1991 Act of the UPOV Convention.

3.1.2 Living plant material must be available to ensure the variety meets the above definition and for direct comparison with the candidate variety.

3.1.3 All those existing varieties, whether named or not, which conform to the basic UPOV definition of a variety, should be considered in the investigation of the distinctness of a new candidate, regardless of their PBR status if they are in common knowledge.

3.2 ‘Common knowledge’ criteria

3.2.1 The concepts of ‘novelty’ of the candidate and ‘common knowledge’ of the existing varieties are not linked.

3.2.2 The “General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development or Harmonized Descriptions of New Varieties of Plants” (document TG/1/3) lists specific aspects which should be considered to establish common knowledge as follows:

Specific aspects which should be considered to establish common knowledge include, among others:

(a) commercialization of propagating or harvested material of the variety, or publishing a detailed description;

(b) the filing of an application for the grant of a breeder’s right or for the entering of a variety in an official register of varieties, in any country, which is deemed to render that variety a matter of common knowledge from the date of the application, provided that the application leads to the grant of a breeder’s right or to the entering of the variety in the official register of varieties, as the case may be;

(c) existence of living plant material in publicly accessible plant collections.

3.2.3 These aspects are elaborated below:

(a) Commercialization of propagating or harvested material of the variety, or publishing a detailed description.

Commercialization includes selling to plant propagators, young plant companies, or others within the horticultural trade, or selling to retailers or the public.

It is emphasized that common knowledge arising from marketing includes the professional world, i.e. once material of a variety has been sold outside a breeding company

to plant propagation companies, it is in common knowledge even if it is not yet available to the general public.

(b) Filing of an application for the grant of a breeder's right or for entering of a variety in an official register of varieties, in any country, which is deemed to render that variety a matter of common knowledge from the date of the application, provided that the application leads to the grant of a breeder's right to the entering of the variety in the official register of varieties, as the case may be.

A variety which is entered for PBR or other registration, where the application fails or is withdrawn, will still be in common knowledge if it has been marketed and fulfils the basic definition of a variety.

(c) Existence of living plant material in publicly accessible plant collections e.g. botanical gardens, provided the material is known and described and constitutes a variety according to the UPOV definition.

3.2.4 Common knowledge is not restricted to national or geographic borders. Notionally it is worldwide although practically it may be limited by what can be established with reasonable effort, and also by climatic zones in the case of field grown crops.

3.2.5 Many types of information may be used as sources to contribute towards establishing varieties which are in common knowledge (PBR and other official registers, catalogues, books, periodicals, internet etc.), but living plant material must always be available for direct comparison with the candidate variety.

3.2.6 Authorities should cooperate as much as possible in the investigation of varieties of common knowledge.

4. ASPECTS CONCERNING THE EXISTENCE OF LIVING PLANT MATERIAL

4.1 According to the UPOV Convention, a variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application, but the Convention does not define the rules on how the distinctness is to be examined.

4.2 General Guidance for the assessment of distinctness is provided in the "General Introduction to the Examination of Distinctness, Uniformity and Stability and the Development of Harmonized Descriptions of New Varieties of Plants" (document TG/1/3). Detailed procedures are described in document TGP/9 "Examining Distinctness".

4.3 The examination of distinctness must be carried out in relation to all varieties of common knowledge. A variety can be declared to be distinct from any other variety of common knowledge on the basis of a wide range of information, for example adaptation to specific climatic or geographic conditions, information about the expression of characteristics received from variety descriptions according to UPOV Test Guidelines, any other variety descriptions, or other appropriate technical information.

4.4 If a candidate variety cannot be clearly distinguished from all varieties of common knowledge in an effective way by such tools, the final decision about distinctness will normally be taken after a direct comparison of living plant material of the candidate variety and the most similar varieties in a growing trial or other appropriate test.

4.5 For this purpose, examination offices may establish a collection of varieties including, for many crops, living plant material of as many appropriate varieties of common knowledge as possible, which may be similar to the varieties which are the subject of applications for breeders' rights in that country. For further information concerning the management of variety collections, see document TGP/4 "Management of Variety Collections".

4.6 Where, for practical reasons, living plant material of a variety of common knowledge is not readily accessible for examination, and a candidate variety cannot be distinguished from this variety by other tools, the experts must decide if the candidate variety must be rejected because of lack of distinctness, or if the other variety does not have to be considered as a matter of common knowledge because living plant material does not exist.

4.7 With the long term storage of variety descriptions in accessible databases, it may increasingly be the case, in future, that variety descriptions are available for varieties for which living material no longer exists.

To determine if a variety is still in existence, the testing authority may consider the following possibilities:

- a request to the breeder
- a request to the authority responsible for protection or listing
- procurement of commercial plant material from the market
- a request to institutions which have published a variety description
- a request to plant collections (e.g. botanical gardens, gene banks)

4.8 If there is no proof for the existence of living plant material, the variety cannot be considered as a matter of common knowledge.

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