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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
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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/9 "EXAMINATION OF DISTINCTNESS"

**Section TGP/9.3.1: Consideration of All Varieties of
Common Knowledge in the Examination of Distinctness**

*Document prepared by experts from the Netherlands
to be considered by the*

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

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

SECTION 9.3.1

CONSIDERATION OF ALL VARIETIES OF COMMON KNOWLEDGE IN THE EXAMINATION OF DISTINCTNESS

1. As “Common Knowledge” is not further defined, the notion is difficult to manage for the responsible DUS testing officer. An attempt is made to define a set of criteria for practical application to at least avoid the majority of possible problems. Due to the lack of exchange of information on applications in test, it remains difficult to take priority applications into account unless the DUS test is centralised or the exchange of information is drastically improved.

2. Article 7 of the 1991 Act of the UPOV Convention states that “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. 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 the 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.”

3. From this text of this article the following elements deserve consideration;

- (a) The definition of “Common Knowledge”
- (b) The information on priority applications
- (c) The scope related to any countries.

(a) Definition of “Common Knowledge”

4. Article 6(1)(a) of the 1978 Act of the UPOV Convention gave no definition of “Common Knowledge”, however a non-exhaustive list of examples was given of how a variety could become a matter of common knowledge. When the Convention was revised in 1991 it was considered that “Common Knowledge” had its natural meaning. It is a worldwide test. A variety to be eligible for protection must be clearly distinguishable from any variety whose existence is a matter of common knowledge at the date of the application for protection anywhere in the world (C(Extr)/19/2, paragraph 22).

5. “Common Knowledge”, by definition, will therefore play a role, not only during the application phase, but also at the moment of granting, or even after granting the right. It may in cases of dispute have to be taken into account if it can be credibly substantiated so as to satisfy the standard of proof of the civil law court. (C(Extr.)/19/2, paragraph 23).

6. In practice, the official responsible for the DUS test, should as far as practically possible, take into account the notion of “Common Knowledge”, knowing that even after maximum efforts a right may be disputed on the basis of this “Common Knowledge”.

7. In the framework of this document, some guidance is developed, for the practical application of the notion of “Common Knowledge”. This may establish a basis for the level of effort that may be expected from the official responsible for the DUS test.
8. Two key elements in the development of a practical approach are:
- minimal information and
 - availability of the information.
9. It is proposed that in the UPOV concept of “Common Knowledge”, varieties will only be taken into consideration if, as a minimum, the characteristics in a description are those included in the relevant Technical Questionnaire (TQ) and if this information is publicly available.
10. Elements that could be considered are those included as a non-exhaustive list in the 1978 Act of the UPOV Convention:
- (i) varieties in cultivation or commercialization;
 - (ii) inclusion in an official register or the subject of an application for inclusion in such a register;
 - (iii) presence in a reference collection;
 - (iv) accurate description in a publication.
11. In considering the non-exhaustive list, there could be problems with varieties in commercial cultivation if TQ type information is not available. Similarly, with varieties in reference collections if information of this material is not publicly available.
12. In applying the two key elements, mentioned in paragraph 8 above, the following is a (non) exhaustive list of items that are expected to be taken into account in the light of the application of the notion “Common Knowledge” by the official responsible for the DUS test.

Varieties:

- which are entered in a plant breeder's right register;
 - which are the subject of an application for a plant breeder's right;
 - which are entered in an official register of varieties;
 - which are the subject of an application for inclusion in an official register of varieties;
 - which are entered in the OECD list;
 - which are entered in the list of an International Registration Authority on the basis of the ICNCP;
 - of which a description, containing at least the TQ characteristics, has been published;
 - which are present in a reference collection provided the description on at least TQ level is publicly available;
 - which are grown or commercialized in the area where the DUS test station is based.
13. The former paragraph also applies to varieties which are not protectable e.g. landraces, conservation varieties. Both ‘living’ varieties and varieties which no longer exist but fulfil the requirements of description and publication must be taken into account.

(b) Information on priority applications

14. Also, in this case, there is a dual approach.

(i) Cases that become evident during or after the DUS test. Unfortunately, due to the low level of exchange of information on applications applied, information on apparent priority cases is usually gained too late. If it is established that a candidate variety "A" was not clearly distinct because another candidate variety "B" had priority, but variety "A" was granted a right or included in the official register, measures must be taken to nullify the candidate's right. In this case priority is only taken into account if it concerns plant breeders' right or an official register of varieties.

(ii) Cases that are known at the time of application. As a minimum, priority applications in their own DUS system will have to be taken into account by the authorities.

(c) Scope related to any countries

15. From the text it is clear that "Common Knowledge" is a world-wide concept, which is not limited to areas or organizations.

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