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RELATIONSHIP BETWEEN VARIETIES OF COMMON KNOWLEDGE AND
(REFERENCE) VARIETY COLLECTIONS

Document presented by experts from France

RELATIONSHIP BETWEEN VARIETIES OF COMMON KNOWLEDGE AND (REFERENCE) VARIETY COLLECTIONS

THE NEW GENERAL INTRODUCTION TO THE EXAMINATION OF DISTINCTNESS UNIFORMITY AND STABILITY AND THE DEVELOPMENT OF HARMONIZED DESCRIPTIONS OF NEW VARIETIES OF PLANTS (UPOV DOCUMENT TG/1/3) LISTS THE MAIN ASPECTS WHICH HAVE TO BE CONSIDERED TO ESTABLISH THE LIST OF VARIETIES OF COMMON KNOWLEDGE FOR A GIVEN SPECIES. CHAPTER 5-2-3, PARAGRAPH 54:

“5.2.3 Common Knowledge

54. 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.”

Although the text is not elaborated in detail, given that these aspects must be considered on a worldwide basis, it is clear that the list of varieties of common knowledge for a given species includes a very large number of entries.

In addition, even if each aspect seems to be clear enough, their interpretation in each UPOV member State could be different depending on the national regulation applicable on varieties, the definition of the term « commercialization » and the legal statement on genetic resources.

Considering the candidate varieties where an application has been made for plant protection or national listing (paragraph 54(b), the establishment of such a list at a given time is more or less impossible, due to the permanent evolution of this list and the difficulty to have a clear identification of each candidate variety.

Besides the difficulties mentioned above, the introduction of such large lists of varieties in the technical examination for distinctness of new varieties would generate an unacceptable practical and financial burden for the examination authorities.

Keeping the definition of varieties of common knowledge as stated in TG/1/3, it is necessary to provide guidance for the examining offices on how to develop a variety collection to conduct the Distinctness test in practice.

In other words, the aim is to define a set of criteria to be considered in a given country or region of the world in order to establish a list of varieties of common knowledge against which the examining authority will need to check distinctness of any candidate varieties.

These criteria must be developed to limit, as far as possible, the risk of declaring an application for an existing variety as distinct just because it is missing in the collection.

To establish a variety collection for a given species, the examining authority of a member State should consider:

At the level of the member State:

- The national list and the list of protected varieties. The variety collection must include the varieties currently on, or previously included in, these lists.
- Any commercial document in which varieties are offered for marketing on its territory as propagating or harvested material, especially if there is no compulsory registration system.
- The list of candidate varieties applying for national listing or protection.
- Any list which includes varieties which are publicly available within plant collections (genetic resources, collection of old varieties, ...)

In the case of an inter-governmental organization (e.g. the European Union), the same items must be considered, but depending on the climatic conditions where the examination authority is located, the variety collection can be limited, taking into account some physiological traits of the varieties (earliness, day length susceptibility, frost resistance, ...)

At the level of other countries

- As already underlined above, in the case of an inter-governmental organization, a selection of varieties of common knowledge should be done in order to consider only varieties which can have a normal growth in the member State establishing the variety collection.

This selection must firstly consider those countries with which the member State has related breeding activities, seed trade or any plant products exchange, and which have similar climatic and growing conditions. Depending on the species, the geographic area concerned could be different ; in the case of field crops, similar outdoor growing conditions are more pertinent than for those vegetable or ornamental crops grown in greenhouse conditions and for which seed and plant product trade is on a more worldwide basis.

A variety collection is never established definitively. It must be updated permanently taking into account the evolution of the lists of varieties, the development of new types of varieties and the introduction of new genetic plant material.

It is necessary to establish contacts with competent services in different countries to obtain the information, descriptions and seed samples.

It is also important to complete the variety collection on a case by case basis considering the information provided by the applicant in the application form, in particular concerning the genetic origin of the candidate variety.

Having defined the general basis on how to establish a variety collection, it is important to consider some practical points:

A variety collection to conduct DUS examination should include:

- **a description of each variety,**
- **a sample of plant material representing the variety.**

Regarding the description, different situations can be observed:

- A short description produced by the country where the variety is registered. Generally such a description is not very helpful, except for grouping similar varieties in the growing trial, and then only if it is based on characteristics which are not too influenced by the environment.
- A full description according to the UPOV Test Guidelines produced by the country where the variety is registered. This may be a sufficient basis to establish distinctness without conducting a direct growing comparison if the differences are sufficiently important. In the case of similar varieties, it is not, in general, a sufficient basis, due to environmental effect on the expression of characteristics.
- In some cases, a comparison is only possible on the basis of descriptions because no living plant material is available and in the absence of expertise from persons with a good knowledge of the species (“walking reference collection”), no other solution exists.

If, on this basis, a candidate variety cannot be clearly distinguished, it must be declared not distinct in order to limit the risk to deliver a right on a variety of common knowledge.

- A full description produced by the member State establishing the variety collection in accordance with the UPOV guidelines. This is a more efficient solution but rather expensive. Where possible, it provides the opportunity to detect the most similar varieties on the basis of data incorporated in a database. In the case of very similar varieties, it is still necessary to have a direct, side by side growing comparison of the varieties.

Regarding the sample of plant material, different provisions can be made:

- Maintenance of seed samples in a cold chamber with monitoring of seed quality and a renewal of seed as necessary.

This is the best solution, but not always practical due to the workload and the difficulties in obtaining representative seed samples.

Where possible, this solution must be chosen even if only for a part of the variety collection.

- Request to the owner or maintainer of the variety for material when necessary to conduct a specific comparison. This solution is often used for vegetatively propagated varieties because the cost of a living plant collection is too high.
- It is sometimes difficult to obtain plant material due to phytosanitary regulations or other reasons (different hemispheres, quality of plant material, no maintenance of the variety, ...)

For some species, or when very similar varieties need to be compared, it is necessary to use plant material produced under the same conditions, of the different varieties concerned.

- Collection of digitalized images of some parts of plants to represent each variety.

This solution is presently being considered within UPOV.

It is an interesting way to obtain information for grouping of varieties. The interest is limited to when comparison between similar varieties needs to be done because of the difficulty in illustrating each characteristic and to establish a harmonized procedure to record the characteristics.

- No collection of plant material.

In this situation, distinctness is only based on comparison of data with the limits already mentioned about the descriptions.

In conclusion, it is important to underline that whatever the situation adopted to establish a variety collection, it is impossible and not necessary to have a full collection of all varieties of common knowledge, but to have a working variety collection with all varieties which should be included.

It means that each time a variety is declared distinct as according to the UPOV Convention, there is a risk of a wrong decision due to the absence of an existing variety of common knowledge in the reference collection.

The risk to make a wrong decision should be minimized and the criteria described above might help each examining office to limit this risk which will never be nil.

Under Article 21 of the 1991 Act of the UPOV Convention, it is possible to declare the nullity of a right if it has been wrongly granted in relation to distinctness or novelty of a candidate variety, but to keep a good quality of the protection such a case should remain an exception.

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