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TECHNICAL WORKING PARTY FOR ORNAMENTAL PLANTS AND FOREST TREES**Forty-Ninth Session****Gimcheon City, Republic of Korea, June 13 to 17, 2016**

VARIETY DENOMINATIONS

*Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance*

EXECUTIVE SUMMARY

1. The purpose of this document is to report on work concerning the possible development of a UPOV similarity search tool for variety denomination purposes and the possible revision of document UPOV/INF/12 "Explanatory Notes on Variety Denominations under the UPOV Convention".

2. The TWO is invited to note:

(a) the work on the possible development of a UPOV similarity search tool for variety denomination purposes by the WG-DST, as set out in paragraphs 5 to 13 of this document;

(b) that a revision of document UPOV/INF/12/4 (document UPOV/INF/12/5), in relation to changes of registered variety denominations was adopted by the Council, at its forty-ninth ordinary session (see paragraph 14);

(c) that the mandate and the composition of the WG-DST has been expanded to prepare recommendations for the CAJ concerning a possible revision of document UPOV/INF/12 (to become the WG-DEN); and

(d) that the first meeting of the WG-DEN was held in Geneva, on March 18, 2016.

3. The following abbreviations are used in this document:

CAJ: Administrative and Legal Committee

CAJ-AG: Administrative and Legal Committee Advisory Group

TC: Technical Committee

WG-DST: Working Group for the Development of a UPOV Denomination Similarity Search Tool

WG-DEN: Working Group on Variety Denominations

4. The structure of this document is as follows:

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POSSIBLE DEVELOPMENT OF A UPOV SIMILARITY SEARCH TOOL FOR VARIETY DENOMINATION PURPOSES

5. The background to this matter is provided in document TWO/48/4 “Variety denominations”.

6. The CAJ, at its seventy-second session, held in Geneva, on October 26 and 27, 2015, considered document CAJ/72/3 “Variety denominations” (see document CAJ/72/9 “Report on the Conclusions”, paragraph 19).

7. The CAJ, at its seventy-second session, noted the work by the WG-DST concerning the possible development of a UPOV similarity search tool for variety denomination purposes (see document CAJ/72/9 “Report on the Conclusions”, paragraph 21 and 22).

8. The CAJ, at its seventy-second session, noted the oral report by the Vice Secretary-General on the third meeting of the WG-DST, held in Geneva on October 2, 2015, that the members of the Union had been invited, by means of a circular E-15/237 of October 21, 2015, to participate in the second step of the Test Study for the development of an effective denomination similarity search tool. The objective of the second step was to refine the algorithm that had been identified as the best algorithm in the first step of the Test Study. On the basis of the results of the second step, the Office of the Union would refine the algorithm during November/December 2015 and would customize the algorithm by December 2015. The revised algorithm would be reviewed by the WG-DST at its fourth meeting, to be held on February 4, 2016 (see document CAJ/72/9 “Report on the Conclusions”, paragraph 22).

9. A summary of the responses to the second step of the Test Study showed there was considerable diversity in the number of denominations that were selected as similar and further investigations revealed that there was not a very high coincidence in the denominations selected as similar. On that basis, an additional exercise was arranged (see document TC/52/12 “Variety Denominations”, paragraph 12).

10. In order to seek to develop a list of denominations that could be accepted as similar by the participating experts, a further exercise was proposed by the Circular E-15/291, on December 21, 2015, to WG-DST and respondents to the exercise of the second step of the Test Study (see document TC/52/12 “Variety Denominations”, paragraph 13).

11. All the contributors to the second step of the Test Study contributed to the additional exercise. In addition, a further three experts contributed to the additional exercise (see document TC/52/12 “Variety Denominations”, paragraph 14).

12. The TC, at its fifty-second session, held in Geneva, from March 14 to 16, 2016, noted the work on the possible development of a UPOV similarity search tool for variety denomination purposes by the WG-DST, including the test study, as set out in paragraphs 5 to 14 of document TC/52/12 (see document TC/52/29 “Report”, paragraph 155).

13. The TC, at its fifty-second session, noted the intervention by the European Union that welcomed the development of a UPOV similarity search tool for variety denomination, highlighting the importance of comparing results of the new algorithm with other existing algorithms to ensure that it would provide an improvement in terms of precision and recall¹. The Office of the Union confirmed that the new algorithm would be available for testing in the PLUTO database and confirmed that the testing and evaluation of the

¹ Precision is the proportion of the correct results (i.e. those considered similar by the participants) in relation to all the returned results, and recall is the proportion of the correct results it returns in relation to all the correct results (i.e. including the correct results it did not return).

new algorithm, as mentioned by the European Union, was an integral part of the work (see document TC/52/29 "Report", paragraph 159).

GUIDANCE IN RELATION TO CHANGES OF REGISTERED VARIETY DENOMINATIONS

14. The Council, at its forty-ninth ordinary session, held in Geneva, on October 29, 2015, adopted a revision of document UPOV/INF/12/4 "Explanatory Notes on Variety Denominations under the UPOV Convention" (document UPOV/INF/12/5), on the basis of the amendments proposed in document C/49/14, Annex III "Proposed Amendments to document UPOV/INF/12/4 'Explanatory Notes on Variety Denominations under the UPOV Convention'" as follows (see document C/49/19 "Report", paragraph 30):

"7.2 The following items provide guidance in relation to changes of registered variety denominations:

- "(a) The UPOV Convention requires a change of the registered denomination where the denomination of the variety is cancelled after the grant of the right. The competent authority should cancel a variety denomination if:
 - "(i) by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph (7), is obliged to use it (see paragraph (4) 'Prior rights of third persons');
 - "(ii) the denomination is unsuitable because it is contrary to the provisions in paragraph (2) 'Characteristics of the denomination';
- "(b) In cases where the registered denomination is subsequently refused in another member of the Union because it is unsuitable in that territory (e.g. prior right), at the request of the breeder, the authority may consider it appropriate to change the denomination to the denomination registered in the said other member of the Union (see provisions in paragraph (5) 'Same denomination in all Contracting Parties'); and
- "(c) In general, subject to (a) and (b) above, it would not be appropriate for the authority to change a registered denomination following a request by the breeder."

POSSIBLE REVISION OF DOCUMENT UPOV/INF/12 "EXPLANATORY NOTES ON VARIETY DENOMINATIONS UNDER THE UPOV CONVENTION"

15. The CAJ, at its seventy-first session, decided to invite the WG-DST to consider the comments by the CAJ-AG on the proposals in document UPOV/INF/12/5 Draft 2 concerning Sections 2.2.2 (b), 2.3.1 (c) and (d), and 2.3.3, as set out in document CAJ/71/3 "Variety denominations", paragraph 27 (see document CAJ/71/10 "Report on the Conclusions", paragraph 35). The comments of the CAJ-AG are reproduced as follows:

2.2.2 (b)	To clarify the terminology in 2.2.2 (b). In particular, to consider changing the examples or replacing "species" by "genera" or "taxa" in the following sentence: "(b) accepted market practices for particular variety types (e.g. hybrids) and particular species (e.g. Medicago, Helianthus).
2.2.2 (c)	To add 2.2.2 (c) as follows: "(c) 'established practice' is determined to be when registration has been accepted for one species or group, so that it can be used in other species which have not yet registered any variety whose denomination consists solely of figures."
2.3.1 (c)	To develop further guidance on 2.3.1 (c) and to provide other, more appropriate examples "(c) convey the impression that the variety is derived from, or related to, another variety when that is not, in fact, the case; <i>Example:</i> a denomination which is similar to that of another variety of the same species or closely related species, e.g. "Southern cross 1", "Southern cross 2"; etc., giving the impression that these varieties are a series of related varieties with similar characteristics, when, in fact, this is not the case."

2.3.1 (d)	<p>To add 2.3.1 (d) as follows:</p> <p>“(d) contain the botanical or common name of the genus to which that variety belongs. The identity of the denomination and that of the genus to which it belongs could become unclear and confusing.”</p> <p>To clarify the following example:</p> <p><i>Example: Carex</i> variety ‘Sedge’. This could possibly be referred to as ‘Sedge’ <i>Carex</i> and without the use of italics or single quotes the identity of the denomination and the genus may not be clear.</p> <p>To develop guidance on possible confusion of the use of the botanical or common name of a genus to which that variety does <u>not</u> belong – case by case</p>
2.3.3	<p>To consider proposals in 2.3.3 of document UPOV/INF/12/5 Draft 2 as an initial step to develop further guidance and appropriate examples in conjunction with the development of an effective UPOV similarity search tool</p>
4(a)	<p>To modify 4(a) as follows:</p> <p>“(a) An authority should not accept a variety denomination if a <u>there is an existing</u> prior right, the exercise of which may prevent the use of the proposed denomination, has already been granted to a third party under plant breeder’s right law, trademark law or any other intellectual property legislation. It is the responsibility of the title holder of a prior right to assert his rights through the available objection or court procedures. However, authorities are encouraged to make prior searches in relevant publications (e.g. official gazettes) and databases (e.g. UPOV Plant Variety Database (PLUTO) http://www.upov.int/pluto/en/) to identify prior rights for variety denominations. They may also make searches in other registers, such as trademark registers, before accepting a variety denomination.”</p>
4(e)(i)	<p>To modify last sentence of 4(e)(i) as follows:</p> <p>“In cases of mere similarity or small likelihood of association <u>confusion</u> by users, waivers granted to breeders by prior trademark right holders could be a suitable solution.”</p>

16. The CAJ agreed to consider the proposals of the CAJ-AG under Sections 2.2.2 (c), 4(a) and 4(e)(i), at its seventy-second session, as set out in document CAJ/71/3, paragraph 28 (see document CAJ/71/10 “Report on the Conclusions”, paragraph 37).

17. The CAJ, at its seventy-second session, noted the presentation of Argentina on variety denominations, a copy of which was provided in an addendum to document CAJ/72/3 “Variety denominations” (http://www.upov.int/edocs/mdocs/upov/en/caj_72/caj_72_3_add.pdf), (see document CAJ/72/9 “Report on the Conclusions”, paragraph 20).

18. The CAJ, at its seventy-second session, agreed the following next steps for the revision of the “Explanatory Notes on Variety Denominations under the UPOV Convention” (see document CAJ/72/9 “Report on the Conclusions”, paragraph 23):

- (a) to expand the mandate and the composition of the Working Group for the Development of a UPOV Denomination Similarity Search Tool (WG-DST) to prepare recommendations for the CAJ concerning the revision of document UPOV/INF/12 “Explanatory Notes on Variety Denominations under the UPOV Convention” (Working Group on Variety Denominations (WG-DEN));
- (b) the Office of the Union to issue a circular with a request to CAJ members and observers to express their interest in participating in the WG-DEN and, if appropriate, to present proposals for revisions of document UPOV/INF/12, by January 20, 2016;
- (c) the WG-DEN to meet during the week of the UPOV sessions in March 2016;

(d) the WG-DEN to take the proposals received in response to the circular in paragraph (b) above and the proposals in paragraphs 28 to 37 and 41 of document CAJ/72/3 in conjunction with the work on the development of an effective UPOV similarity search tool;

(e) the WG-DEN to consider proposals for the expansion of the content of PLUTO database to include all recognized varieties, including those that had not been, or were no longer, registered/protected (see document CAJ/72/6 "UPOV Information Databases", paragraph 38).

19. The Council, at its forty-ninth ordinary session, received a report of the recommendations of the Consultative Committee concerning the calendar of meetings in 2016 (see document C/49/16 "Report by the President on the work of the ninetieth session of the Consultative Committee; adoption of recommendations, if any, prepared by that Committee", paragraphs 64 to 66), in which it was reported that the CAJ, at its seventy-second session, had agreed to expand the mandate and the composition of the WG-DST to prepare recommendations for the CAJ concerning the revision of document UPOV/INF/12 "Explanatory Notes on Variety Denominations under the UPOV Convention" (to become the WG-DEN) and proposed that the WG-DEN meet during the week of the UPOV sessions in March 2016 (see document C/49/18 "Report on the Decisions", paragraph 53).

20. The Council, at its forty-ninth ordinary session, approved the calendar of meetings in 2016, including WG-DEN to meet in Geneva, on March 18, 2016 (see document C/49/18 "Report on the Decisions", paragraph 54).

21. The TC, at its fifty-second session, noted that the mandate and the composition of the WG-DST had been expanded to prepare recommendations for the CAJ concerning a possible revision of document UPOV/INF/12 "Explanatory Notes on Variety Denominations under the UPOV Convention" (to become the WG-DEN) and that the WG-DEN would meet on March 18, 2016 (see document TC/52/29 "Report", paragraph 157).

22. The TC, at its fifty-second session, noted that the Office of the Union had issued a circular inviting CAJ members and observers, and WG-DST members, to express their interest in participating in the WG-DEN and to provide comments on document UPOV/INF/12/5 (see document TC/52/29 "Report", paragraph 158).

23. The first meeting of the WG-DEN was held in Geneva, on March 18, 2016.

24. *The TWO is invited to note:*

(a) the work on the possible development of a UPOV similarity search tool for variety denomination purposes by the WG-DST, as set out in paragraphs 5 to 13 of this document;

(b) that a revision of document UPOV/INF/12/4 (document UPOV/INF/12/5), in relation to changes of registered variety denominations was adopted by the Council, at its forty-ninth ordinary session (see paragraph 14);

(c) that the mandate and the composition of the WG-DST has been expanded to prepare recommendations for the CAJ concerning a possible revision of document UPOV/INF/12 (to become the WG-DEN); and

(d) that the first meeting of the WG-DEN was held in Geneva, on March 18, 2016.

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