



Disclaimer: unless otherwise agreed by the Council of UPOV, only documents that have been adopted by the Council of UPOV and that have not been superseded can represent UPOV policies or guidance.

This document has been scanned from a paper copy and may have some discrepancies from the original document.

---

Avertissement: sauf si le Conseil de l'UPOV en décide autrement, seuls les documents adoptés par le Conseil de l'UPOV n'ayant pas été remplacés peuvent représenter les principes ou les orientations de l'UPOV.

Ce document a été numérisé à partir d'une copie papier et peut contenir des différences avec le document original.

---

Allgemeiner Haftungsausschluß: Sofern nicht anders vom Rat der UPOV vereinbart, geben nur Dokumente, die vom Rat der UPOV angenommen und nicht ersetzt wurden, Grundsätze oder eine Anleitung der UPOV wieder.

Dieses Dokument wurde von einer Papierkopie gescannt und könnte Abweichungen vom Originaldokument aufweisen.

---

Descargo de responsabilidad: salvo que el Consejo de la UPOV decida de otro modo, solo se considerarán documentos de políticas u orientaciones de la UPOV los que hayan sido aprobados por el Consejo de la UPOV y no hayan sido reemplazados.

Este documento ha sido escaneado a partir de una copia en papel y puede que existan divergencias en relación con el documento original.

**UPOV**

IRC/III/10

ORIGINAL: English

DATE: February 10, 1976

**INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**

GENEVA

**COMMITTEE OF EXPERTS ON  
THE INTERPRETATION AND REVISION OF THE CONVENTION**

Third Session

Geneva, February 17 - 20, 1976

## COMMENTS OF PARTICIPANTS

Comments of AIPPI

The International Association for the Protection of Industrial Property (AIPPI) has, under February 6, 1976, transmitted further comments concerning the items for the third session of the Committee of Experts on the Interpretation and Revision of the Convention. These comments are attached as Annex to the present document.

[Annex follows]

## ANNEXE

Comments of AIPPI on the definitive Agenda of the 3rd UPOV Session to be held in Geneva from February 17 to February 20, 1976

---

Ad. 1

This will depend on the opinion of the Expert Commissions of Breeders.

Ad 2

The system would get mixed up if in the same country for one and the same plant variety patent protection as well as plant variety protection could be granted, i.e. two protective rights that are different as regards their effects and their scope of protection.

It is recommended that item 2 not be accepted.

Ad 3

Ad 4

These questions can be answered in the affirmative.

Ad 5

No need can be seen to cancel the respective provision (Article 4, subsections 4 and 5).

Ad 6

The suggestion means that in the future not only in accordance with the present text of sentence 3 of paragraph 1 in Article 5 the breeders of ornamental plants but rather all breeders also of other asexually reproduced plants obtain additional protection extending to growing of the newly bred plants for other purposes than propagation. The present regulation relating to ornamental plants only proved successful in practice because with its aid it could at least be prevented (e.g. with roses) that anyone could propagate a new rose variety and place the flower on the market without having a license from the breeder. Said regulation being part of the national

plant variety protection acts at least could prevent that cut flowers were grown in each individual country without consent of the breeders. It could not be prevented, though, that flowers that were grown in another country not being a UPOV country, were imported by UPOV countries and sold there at dumping prices.

It results that

1. the suggestion in item 6 can be approved of and
2. furthermore it should be urgently suggested that at least concerning ornamental plants Article 5 be amended to the effect that the protection (in particular concerning roses and carnations) is extended to the final product itself. Of all the member states such a regulation exists in France. Switzerland, Italy and Belgium that will become new members to UPOV made provisions for similar regulations. Also aside of the UPOV states there exists matter protection for ornamental plants in the U.S.A. (patent), German Democratic Republic (plant variety protection) and Hungary (patent) covering the final product.

It is remarked that Article 5, paragraph 4 grants each member state the right already now to extend protection for certain species to the final product. However it would be preferable that at least for ornamental plants, particularly roses and carnations, protection be extended to the final product, i. e. the flower itself, by a supplement to the Convention itself at the end of paragraph 1 of Article 5.

Ad 7

This suggestion can be approved of. However, the Expert Commissions of Breeders should have a decisive vote for they must know whether this amendment promises to be of essential

practical value.

Ad 8

In view of the legal safety desired the principle of world-wide novelty should be maintained.

Ad 9

The conditions for the granting of a variety protection right are laid down in Article 6, sub-section (1), letter (a) of the International Convention. Inter alia, a variety has to satisfy the following condition:

The new variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the time when protection is applied for.

According to Article 7, sub-section (1), clause 1, of the International Convention the protection shall only be granted after an examination.

- (a) Partly the view is held that it suffices when the most important characteristic is important only for the distinguishability, in other words, when it allows a clear distinction only. Hence, the most minor differences suffice, in as far as they are clearly recognizable, to be granted a protective right. According to the view held, the protective right is to be granted also when the distinguishing characteristic is totally unimportant for the function of the variety.
- (b) Partly the view is held that a protective right may be granted only if the new distinguishing characteristic has significance also for the function of the variety, in other words, the variety

has to entail advantages with respect to comparable known varieties, as regards its function.

As to (a)

Disadvantages result when the view illustrated under (a) is put into practice. For instance, infringers propagating a protected variety without having any licence, can wriggle themselves out by holding that their variety shows slight distinguishing characteristics (which do not have any functional significance for the variety), and that, on the basis of a variety protection granted on said distinguishing characteristic, the infringing variety is not identical with the variety for the propagation, for which the infringers are to be obliged to obtain a licence.

As to (b)

The view according to (b), in contrast, seems to be more in line with the experience gained in the field of industrial protective rights for decades.

Since the practice of the granting procedure is still in the initial stage in the Member States, it seems advisable, to clarify the meaning of the words "important characteristics".

Ad 10

This suggestion can be approved of. Apparently an extension of the four-year period is meant for plant varieties requiring a long time to grow and for which the four-year period is too short.

The suggestion to delete the four-year term in Article 12, paragraph 3 can be approved of, provided the experts commissions of breeders approve as well. Such a long term delays the initiation of the examination proceedings enormously and on the other hand one can expect from the applicant that he poses the propagating material at disposal for

the examination after having used up the convention period. This would hold true all the more in case the convention period were extended to two years. This suggestion can also be approved of, provided the experts associations of breeders agree, for there is the chance that an official result of the examination in the country where the application was filed first is present within a term of two years as of the filing of a first application. This would make the decision easier to file the application in other countries.

Ad 11

This suggestion can be approved of. However, it should be recommended to the holder of a variety to file an application prior to releasing seed or other propagating material for experimentation purposes (to ceding it to a third party).

Ad 12

It is recommended herewith to delete the growing test as prerequisite for the grant of a plant variety right.

Ad 13

The issue of the duration of protection should be made dependant on the comments and ideas of the interested associations.

Ad 14

The case referred to, no doubt, represents an illegal action. However, such an action can never justify annihilation of the protective right, for the propagation material sold does in fact not have the characteristics protected and has therefore nothing to do with the item under protection. One has to regard the sanction considered as absolutely unjustified. It appears that in such cases both the breeder and the vendor of the false propagation material would have to be sued for having committed a fraudulent action.

It seems that the case described can be considered also under the provision of Article 13, subsection 8, letter a, according to which it is prohibited to use one and the same variety denomination for two different varieties (which is the case here). An unprotected variety is passed as protected.

It is recommended herewith not to embody in the Convention the facts described as a ground for annulment, Article 13, subsection 8, letter a providing sufficient prohibition.

Ad 15

The proposal can be agreed to.

Ad 16

The suggestion points in the same direction as the Convention on the Grant of European Patents. It relates to a development that is worth aspiring after because it is not only the fact that at present the Variety Protection Offices of a plurality of states have unnecessarily to do the same examination work that demands the suggested simplification, but also the very real fact that the costs for the application in a plurality of states are so high that the existence of the protection of plant varieties is endangered as a whole, for the costs exceed by far the financial power of most of the breeders.

The existing convention includes the provision to consider an exchange of examination results between Plant Variety Protection Offices of various states regarding individual plant species. Actually the examinations for individual plant species are carried out in particular individual countries and the results of the examinations are taken over by other countries. The suggestion in item 16 continues said cooperation. AIPPI recommends to further support this development.