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UPOV

IRC/V/10
ORIGINAL: English
DATE: March 7, 1977

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COMMITTEE OF EXPERTS ON THE INTERPRETATION AND REVISION OF THE CONVENTION

Fifth Session

Geneva, March 8 - 10, 1977

COMMENTS OF PARTICIPANTS

Comments of FIS

The Office of the Union received on March 7, 1977, FIS publication No. 77-020 of February 26, 1977, to which FIS publication No. 75-021 of March 14, 1975, was attached. Both publications are reproduced in the Annex to this document.

[Annexes follow]

0256

IRC/V/10
ANNEX I

Nr. 77-020

FEDERATION INTERNATIONALE DU COMMERCE DES SEMENCES

REVISION OF THE CONVENTION OF PARIS FOR THE PROTECTION OF NEW PLANT VARIETIES

Our organisation welcomes the opportunity of expressing its views on the various problems connected with the interpretation and revision of the Convention of Paris for the protection of new plant varieties.
As we will be represented at the fifth session of the Committee of Experts we will do so orally on most points.
There are however some basic questions in document IRC/V/2 about which we prefer to express our views in writing.
These questions mainly concern Part IV of document IRC/V/2 (Scope of protection) and Part X (Variety denominations).

Farmer's privilege

Our organisation is disappointed at the fact that the Committee of Experts saw no objection to interpreting article 5 (i) as meaning that Member-States are not obliged to extend the scope of protection to sales of seed between farmers.
The reasons why we are disappointed and why we feel that this question needs reconsideration by the Committee are the following:

1. When a farmer buys seed of a protected variety he pays a price for this seed, which includes a remuneration for successful breeding work by a breeder. Generally speaking, only by selling seed the breeder or his successor in title can collect this remuneration.
   If therefore a farmer produces seed from the seed he has bought and sows this on his farm, the effect is that the breeder does not get the remuneration for the use of his variety.
   In practice the question whether or not the average farmer is in a position to save seed for his own use largely depends on the technique of seed multiplication.
   If this is simple, as is the case for instance for the self pollinating cereals, he is in a position to save seed, if this is complicated, for example for beet seed, he is not.
   The technique of multiplying therefore largely determines the scope of protection of a species and therefore of a variety of that species.
2. Although we do not feel that the practical result of plant variety protection should depend on the technique of multiplication and farming or market gardening is just as much a type of economic activity as any other type, we have an open eye for the practical and political difficulties of declaring plant variety protection applicable to seed saved by an individual farmer for use on his own farm.
3. We do however seriously object to farm to farm trading of seed of protected varieties without payment of royalties, as this means that not only no justice is done to the breeder, but also that a form of unfair competition is maintained or introduced that is unacceptable to the seed industry and particularly to that segment of the seed industry supplying seed to farmers, seedsmen who have to pay royalties and even may under some legislations become liable to prosecution if they infringe plant variety rights.
4. Although strictly speaking these are not plant variety arguments we wish to point out that there are some other valid arguments not to stimulate farm to farm trade by exempting this from plant variety protection.
   a. It is a generally known fact that the quality of farm saved seed is generally poor.
   b. Although this seed has not been supplied by the breeder this poor quality can damage the image of a variety.
   c. The regular seed industry has to satisfy quite a number of quality(and other) requirements. Also in this respect farm to farm trade is a form of unfair competition.
5. We are aware of the fact that it is often very difficult to detect farm to farm trade in protected varieties. Sometimes however farmers openly advertise farm saved seed of protected varieties in local papers at prices below what the regular seed industry must charge.

These offerings for sale alone can cause serious damages to seedsmen.
The fact that farm to farm trade of protected varieties is sometimes difficult to detect is not a reason to exempt it from plant variety protection.
It would be highly unfair if the regular seed trade, loyally paying their royalties had to accept this situation.

7. Conclusions

We are of the opinion that offering for sale and selling of seed produced by farmers to other farmers or any other buyer without the breeder's permission must under the Convention constitute an infringement on plant variety protection rights.
In fact the legislations of most of the present U.P.O.V. Member-States unambiguously recognise this,
We refer to the relevant articles in the legislations concerned.
Belgium (article 21 jo 35)
Denmark (article 14)
France (article 3)
Sweden (article 4)
U.K. (article 4)
Only the legislations of the Federal Republic of Germany (article 15) and the Netherlands (article 40) recognise an exemption for releases of farm saved seed of a protected variety if this is not done for commercial purposes.
From this it may appear that it is not very likely that the new interpretation of article 5 of the Convention referring to sales of seed, corresponds with the interpretation of the authors of the Convention, a conclusion which is supported by the text of the Acts itself, which text is joined to document IRC/V/2.
We understand that the U.S.A. position as laid down in the U.S. Plant Variety Protection Act, in combination with the Federal Seed Act is rather similar to that in the Federal Republic of Germany and the Netherlands.
Besides, the farmer's privilege does not apply to varieties required to be sold as a class of certified seed.
Therefore, we feel that it is not necessary to change the interpretation of Article 5 (i) of the Convention to make it possible for this country to join U.P.O.V. . We consider the interpretation given in document IRC/V/2 under 32 too broad and feel that the statement in the last sentence under 32 needs to be amended.
We finally wish to draw your attention to the fact that the text of Article 5 of the Convention is in so far ambiguous that "ce matériel" (such material) in the first sentence can also be understood to refer back to "production à des fins d'écoulement commercial" (production for purposes of commercial marketing).

8. Sale of plantlets

Most of what has been said before applies to the sale of plantlets.
When our organisation raised this question for the first time at the third session of the Committee of Experts we have probably given too little background information on the rapidly changing technics in vegetable production.
We are therefore very pleased that a paper on this subject has been submitted to the Committee by the delegation of the Netherlands, the conclusions of which we fully endorse.
We only wish to add that if protection of young plants for vegetable and other growing would not be included in the protection envisaged by the Convention this could not only be most harmful to the breeders but also to that segment of the seed industry that on a royalty or other basis sells seed to the market gardner.
We feel that this subject should not be left to individual Member-States, as it pertains to basic principles of plant variety protection.

9. Protection of the marketed product

After having heard and examined this problem we fully endorse the standpoint of CIOPORA in this question, although it is not a seed industry problem.

10. Commercial multiplications

It is our wish that also the case mentioned in item 35 of document IRC/V/2 should be more adequatly covered by the text of the Convention.
We do not feel that the effort to clarify this when the Convention was worded was very successful as in the case cited the production of seed peas is not done "à des fins d'écoulement commercial" (for purposes of commercial marketing) of pea seed, but for the cheap production (by others without paying a royalty) of peas for a cannery. It is therefore correcter to say that this production of pea seed is done for commercial purposes (cf. the Belgian law; art. 21 jo 35a).

11. Variety denominations

Much has been written and many discussions have been held on the subject of variety denominations.
As our Federation has explained in a note to the Secretariat of U.P.O.V. of 15th March 1975, copy of which we attach to this document, the present requirements in this field are particularly onerous to breeders of varieties of species for which plant variety protection is available in only a few Member-States of the Union.
We would suggest to the Committee to study the following amendments in the Convention:
Art. 13 (3) to insert after the words Member-States of the Union "applying the Convention to the genus or species concerned".
Art. 13 (7) to insert after Member-State of the Union "applying the Convention to the genus or species concerned"
Art. 13 (8b) starting to read: "the denomination of the new variety shall in any Member-State applying the Convention to the genus or species concerned, be considered .... etc.".

We feel that the Convention should not give directly or indirectly binding prescriptions on the naming of varieties or the use of trade marks in respect of countries in which no protection is available to the breeders of varieties of the genus or species concerned.
We believe that some of the undesirable side-effects of the present Convention text on denominations will disappear if the suggested changes were to be adopted and introduced in the national legislations of the U.P.O.V. Member-States.

26th February 1977

Encl. Doc. Nr. 75-021 of 15th March 1975.

[Annex II follows]

0259

No. 75-021

VARIETAL DENOMINATIONS AND TRADE MARKS

The international professional organisations have several times expressed their views on the U.P.O.V. Directives for Varietal Denominations.
They have always maintained that these guidelines are going beyond the requirements of the Convention.
They have also maintained that the seed industry should not be unduly hampered in their right of using trade marks.
Finally they maintain that once a breeders' rights legislation has entred into force in any country, the granting of breeders' rights is, if all conditions laid down in the law have been met, not a favour but a right, which is independent of the measures taken by each State to regulate the production, certification and marketing of seed and propagating material.
That these fundamental statements are not merely of a theoretical nature has been adequately demonstrated by both Assinsel, Ciopora and F.I.S. .
Assinsel and F.I.S. have pointed to the standing practice in the seed maize industry, but have at no time limitated their objections to varieties of that species only.
Ciopora has adequately explained the shortcomings of the guidelines for rose varieties.
The fact that other species than maize and roses are concerned is clearly demonstrated by the actual situation in the vegetable sector.
A careful study of U.P.O.V. document ICE III/3 (List of species or genera eligible for protection in one or more Member-States) shows that for most vegetable species plant variety rights exist only to a very limited extent.
Yet, breeders of vegetable varieties export seed of their varieties all over the world. They have done so before the Convention of Paris for the Protection of New Varieties of Plants came into operation and they are doing so now.
It should be noted that breeders have always tried to avoid that others would produce and sell seed of their varieties without their authorisation.
One of the possibilities to do so is to add a protected trade name to their variety denomination, although this results only in a limited amount of protection.
In the past even identical trade names were used successfully, but under the influence of article 13 of the Convention, which by the way contains in our opinion a rather arbitrary decision, today nearly always non-identical trade names are used to this end. Considering the world wide distribution of seed of vegetable varieties and the expectation that it will take a considerable amount of time until plant variety rights will have taken root in as many countries as industrial property rights have, it may be expected that vegetable breeders will for several decades to come need trade name protection as a substitute for plant variety rights.
The international seed industry feels that as long as the position is as described above the U.P.O.V. Member-States would work against the interest of plant breeders if this way of using trade marks would be made more difficult than necessary and than agreed between States in the Convention x).
The U.P.O.V. Guidelines however do make this more difficult than strictly necessary.
It is not difficult to undertsand that to successfully use a trade mark the variety denomination should not have a trade mark character.
If a breeder wants to add a trade mark to his variety denomination the best solution (not only for the breeder, but also for the user) is that the variety denomination consists of figures or a figure and letter combination.
The U.P.O.V. Guidelines prohibiting this as they do, unduly restrict the breeder

x) The situation has rather aggravated lately by the fact that in the European Economic Community varieties entered on a national list of any EEC Member-State, allowing the marketing of seed of that variety are as a rule automatically (so even against the wishes of the breeder) listed on the EEC Common Variety Lists, so that the breeder must tolerate that in EEC countries that do not at all grant breeders' rights or do not grant breeders' rights for the species concerned, his varieties are marketable under an officially approved system by anyone who chooses to do so and without payment of any royalty.

~~in his legitimate efforts~~ to get a ~~(limited) amount of protection the Convention~~ itself cannot (yet) provide him.
The vegetable breeders problem has been accentuated in this paper, because the position is very clear.
The maize and roses position has been fully and more than once presented to the U.P.O.V. and the national representatives in U.P.O.V.
The vegetable position is however by no means unique. For many agricultural crops including amenity grasses, the position is identical, once a variety has been protected in one U.P.O.V. Member-State applying the Guidelines.

It has been suggested that breeders would opt for the trade mark, because they would in this way have the possibility to extend (to a certain degree) the period of protection of their varieties.
This is not a very convincing argument. On the one hand, the speed with which new varieties take the place of existing ones is such that in the majority of cases varieties have become obsolete before the term of protection elapses, on the other hand in the few cases that a variety is still of importance after the rights granted have elapsed, the variety falls into the public domain and every one can produce and market it, just as everyone can produce and market powder coffee since the Nescafé patent has elapsed. That others do not profit from the publicity made by the holder of the trade mark is just fair. Those who wish to market the free variety should do their own publicity.
There are still a number of other considerations which speak for the use of letter and figure combinations as variety denominations, for instance that they are easy to pronounce in any language and easier to remember and note down than words in many languages for those who do not know these languages (very important aspect once the membership of the Convention expands), but most of these have been discussed at the many meetings devoted to this subject.
We therefore limit ourselves to these few practical and important points in the hope of having contributed to a better insight into this problem.

Amsterdam, 14th March 1975

[End of Annex and of document]