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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

Observations of the Delegation of the United States of America

The Vice Secretary-General of UPOV has, on February 14, 1977, received a letter of Mr. S.D. Schlosser, US Patent and Trademark Office, containing some observations of the prospective delegation of the United States of America to the fifth session of the Committee of Experts on the Interpretation and Revision of the Convention. A copy of this letter is attached.

[Annex follows]

LETTER OF THE U.S. PATENT AND TRADEMARK OFFICE TO THE VICE SECRETARY-GENERAL OF UPOV dated February 9, 1977

1. Thank you for forwarding the proposals of the Committee of Experts for revising the UPOV Convention (Document IRC/V/2). Harold Loden, Stanley Rollin, Leo Donahue and I read the document with great interest. We are in agreement with the proposed solutions, except for possible and probably easily resolved misunderstandings over two provisions of the Convention.

2. The first of these misunderstandings concerns the second paragraph of Article 6(1)(b). I am sure you recall our statements at past UPOV meetings that our grace period serves the same purpose as the four-year period of this provision. Both periods provide the breeder with an opportunity to test and evaluate the commercial potential of his variety by selling it or offering it for sale before going to the trouble and expense of applying for breeders' rights.

3. Under our laws, selling the variety or offering it for sale in the United States during the year of grace has no effect on the right to legal protection, whether a patent or plant variety certificate is sought. However, the carrying out of these acts in the United States more than one year before applying for legal rights here is a bar to obtaining these rights. But selling the variety or offering it for sale in a foreign country has no adverse effect on obtaining rights in our country, no matter how long before the beginning of the year of grace these acts took place.

4. Of course, the publication of an offer to sell a variety or failure to comply with section 42(a)(2) of the Plant Variety Protection Act may bar the grant of legal rights, but these involve considerations different from sales or offers to sell.

5. During our discussions, we understood that acceptance of our grace period would mean that only the one-year bar on sales or offers to sell in the United States would apply to persons seeking protection in our country. As we pointed out, our breeders would probably not need to test abroad the commercial potential of a variety intended mainly for the United States market.

6. Paragraph 41 of the document indicates, however, that our understanding may be incorrect. According to this paragraph, the Committee is deliberating only over how long a grace period should be allowed for foreign commercialization. The proposals under consideration would not provide for a grace period solely for sales or offers to sell in the country where protection will be applied for.

7. Foreign breeders will encounter no difficulty with our grace period because of prior foreign commercialization. On the other hand, an American breeder applying for protection in other UPOV member States would be adversely affected by commercialization in the United States for longer than four years before applying for that protection. Thus, our grace period may, at times, actually favor foreign breeders.

8. Our other misunderstanding concerns the four-year period of Article 12(3). As we understand this provision, it permits applicants entitled to the right of priority to delay the submission of certain documents and materials for four years following the expiration of the priority period. As explained in paragraph 27 of Document IRC/III/3, this four-year period is needed for breeders to provide enough seed or propagating material to meet the testing requirements of the States where they have applied for breeders' rights.

9. When a breeder applies for legal protection in the United States, however, he will not be asked to supply seed in the quantities needed for testing. Nor will he be required to provide propagating material, except occasionally when the examiner requires a specimen. Our reliance on privately-conducted tests means that the variety has already been developed and tested by the breeder before breeders' rights are applied for. Our two Offices will ordinarily only ask for the breeder's test results. We presumed, therefore, that this four-year period would not apply in the United States. Of course, the breeder may be required at times to conduct further tests, or have them conducted, for which we would allow a reasonable time.

10. At this time, we cannot be sure of the membership of our delegation to the Committee of Experts meeting this March, but we four expect to attend. We look forward to resolving our few remaining differences, including Article 13. There is certainly nothing confidential about this letter, and you should feel free to discuss its contents with officials of the member States.

Sincerely,

Stanley D. Schlosser
Office of Legislation and
International Affairs

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