Overview of UPOV’s guidance on the breeder’s right in relation to harvested material

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Overview of UPOV’s guidance

1. Considerations on harvested material by UPOV’s Administrative and Legal Committee (CAJ)

2. Scope of the plant breeder’s right (PBR)
   • acts covered
   • material covered

3. Explanatory Notes
   • on propagating material
   • on harvested material
   • on provisional protection
1. CONSIDERATIONS ON HARVESTED MATERIAL BY UPOV’S ADMINISTRATIVE AND LEGAL COMMITTEE (CAJ)

2019 request of proposals from UPOV members concerning the term “unauthorized use of propagating material”, in relation to trees to explore the development of guidance

2020 proposals received from:
- European Union
- Japan
- Russian Federation
document CAJ/77/5

Based on CAJ proposals, the UPOV Council approved the organization of a seminar in the first half of 2021, to exchange information on matters concerning harvested material and unauthorized use of propagating material
2. PBR: authorization of breeder required for acts in respect of the propagating material of protected variety

- Production or reproduction (multiplication)
- Conditioning for the purpose of propagation
- Offering for sale
- Selling or marketing
- Exporting
- Importing
- Stocking for any of the above purposes

BREEDERS decide their policy on authorization, including conditions and limitations
PBR: MATERIAL COVERED

• All propagating material

• Harvested material under certain conditions

• Certain products (optional)
• All propagating material

• Harvested material

obtained through unauthorized use of propagating material, unless the breeder has had reasonable opportunity to exercise his right

• Certain products (optional)
2. EXPLANATORY NOTES ON PROPAGATING MATERIAL UNDER THE UPOV CONVENTION (document UPOV/EXN/PPM/1)

non-exhaustive examples of factors

• plant or part of plants used for the variety reproduction
• the material has been or may be used to propagate the variety
• the material is capable of producing entire plants of the variety
• there has been a custom/practice of using the material for propagating purposes or, as a result of new developments, there is a new custom/practice of using the material for that purpose
EXPLANATORY NOTES ON PROPAGATING MATERIAL UNDER THE UPOV CONVENTION
(document UPOV/EXN/PPM/1)

cont. non-exhaustive examples of factors

• the intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user)

• if, based on the nature and condition of the material and/or the form of its use, it can be determined that the material is “propagating material” or

• the variety material where conditions and mode of its production meet the purpose of reproduction of new plants of the variety but not of final consumption
EXPLANATORY NOTES ON
ACTS IN RESPECT OF HARVESTED MATERIAL
UNDER THE 1991 ACT OF THE UPOV CONVENTION
(document UPOV/EXN/HRV/1)

• [Paragraph 3] The explanation that harvested material includes entire plants and parts of plants, which is material that can potentially be used for propagating purposes, means that at least some forms of harvested material have the potential to be used as propagating material.
EXPLANATORY NOTES ON
ACTS IN RESPECT OF HARVESTED MATERIAL
UNDER THE 1991 ACT OF THE UPOV CONVENTION
(document UPOV/EXN/HRV/1)

• [Paragraph 4] “Unauthorized use” refers to the acts in respect of the propagating material that require the authorization of the holder of the breeder’s right in the territory concerned (Article 14(1) of the 1991 Act), but where such authorization was not obtained. Thus, unauthorized acts can only occur in the territory of the member of the Union where a breeder’s right has been granted and is in force.
Reasonable opportunity to exercise his right

• [Paragraph 13] The term “his right”, in Article 14(2) of the 1991 Act, relates to the breeder’s right in the territory concerned (see paragraph 4 above): a breeder can only exercise his right in that territory. Thus, “exercise his right” in relation to the propagating material means to exercise his right in relation to the propagating material in the territory concerned.
ARTICLE 13

Provisional Protection

[(1)] [Period] Provisional protection is provided to safeguard the interests of the breeder during the period between [the filing] / [the publication] of the application for the grant of a breeder’s right and the grant of that right.

[(2)] [Scope] – Example A, Example B
Article [13]
Provisional Protection

Example A

[(2)] The holder of a breeder’s right [shall at least be entitled to equitable remuneration] from any person who, during the period provided in paragraph [(1)], has carried out acts which, once the right is granted, require the breeder’s authorization as provided in Article [14].
Article [13]
Provisional Protection

Example B [(2)] The applicant is considered to be the holder of a breeder’s right in relation to any person who, during the period provided in paragraph [(1)], has carried out acts which, once the right is granted, require the breeder’s authorization as provided in Article [14]. The applicant shall have the same rights to enter into license agreements and to initiate legal proceedings as if on the [filing] / [publication] date the breeder’s right had been granted to the applicant in respect of the variety concerned. The rights conferred under this paragraph shall be deemed never to have been conferred if the right is not granted.
UPOV MISSION STATEMENT

“To provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society”