

International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants

USPTO/UPOV TRAIN THE TRAINER COURSE

PLANT VARIETY PROTECTION UNDER THE UPOV
CONVENTION

Current issues of plant breeders

Geneva, 6 May 2015



WHO WE ARE

CIOPORA - International Community of Breeders
of Asexually Reproduced Ornamental and Fruit
Plants

Founded by ornamental breeders in 1961
simultaneously with the establishment of UPOV by the
International Convention for the Protection of New
Varieties of Plants

Specializes in the **IP-protection of ornamental and
fruit plant innovations** by means of Plant
Breeders' Rights, Plant Patents, Patents and
Trademarks



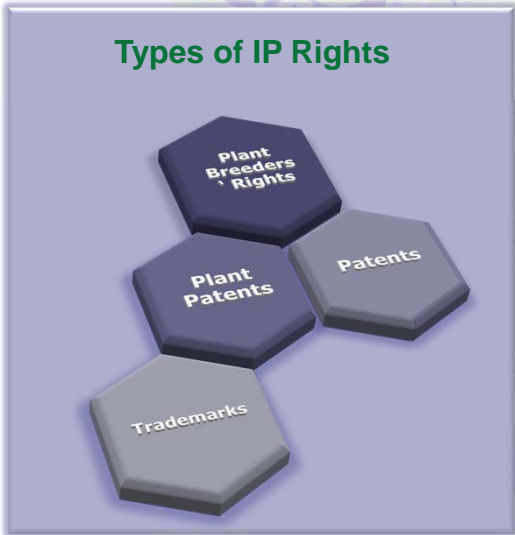
WHAT WE DO

Advisory	Representation, Network & Lobby	Co-ordination & Education
<p>CIOPORA advises on content of IP laws and effective enforcement tools thereof; develops comprehensive positions on various aspects of PBR, incl. EDV, Minimum Distance, Breeders' Exemption, Biodiversity and other important IP-related matters</p>	<p>CIOPORA enjoys observer status at UPOV, CPVO and has a strong global network which includes governments, industry associations and decision-makers</p>	<p>CIOPORA communicates breeders' positions on IP to governments and organizations, co-ordinates enforcement activities of its members and organizes educational events on IP protection</p>



WHAT WE DO

Advisory

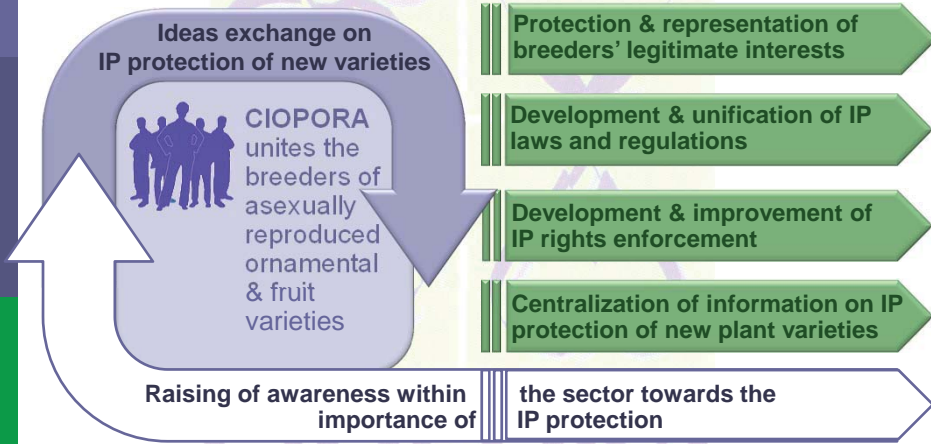


CIOPORA advises governments on the minimum content and requirements of PBR laws and enforcement regulations for the effective protection of the Plant Breeders' Rights, Patents, Plant Patents & Trademarks, their co-existence and interaction.



WHAT WE DO

Representation, networking & lobby



WHAT WE DO

Representation & Lobby - UPOV

For more than 50 years CIOPORA has been an independent observer at

UPOV

- is entitled to participation in the all technical meetings of UPOV, inter alia the **TWO**, the **TWF**, and the **BMT** (Working Group on Biochemical and Molecular Techniques, in particular DNA-profiling)
- comments on compliance of the national Plant Variety Protection laws with the UPOV 1991 Act;
- contributed to the development of explanatory notes on the UPOV 1991 Act, such as:

Propagating material, (Article 14 (1) UPOV 1991)	Conditions for exercising plant breeders' rights on the level of harvested material (Art. 14 (2) UPOV 1991)	EDV (Article 14 (5) UPOV 1991)
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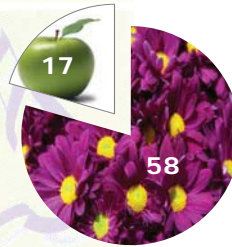
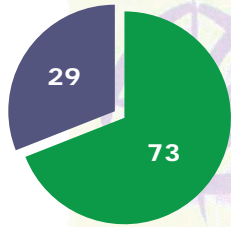


CIOPORA membership*

102 CIOPORA members from 25 countries

CIOPORA Members

Breeder members

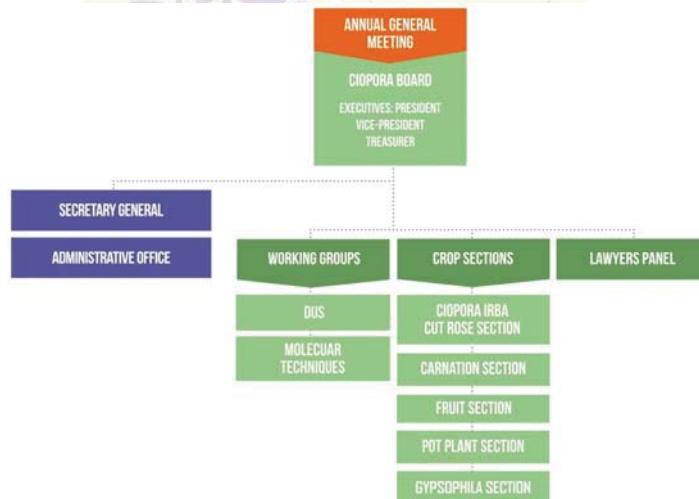


- Breeders
- Ornamental breeders
- Others (IP Lawyers, Associations, Affiliated, Honorary Members)
- Fruit breeders

* August 2014



Organizational set-up





CIOPORA Board



Andrea Mansuino
President

Per Klemm
Vice-president

Dominique Thévenon
Treasurer

Andreas Kientzler
Board

Antonio Villarroel
Board

Bruno Etavard
Board



Dr. Jan de Riek
Board



Lars Henriksen
Board



Maarten Leune
Board



Steve Hutton
Board



Wendy Cashmore
Board



WHAT WE DO

Communication

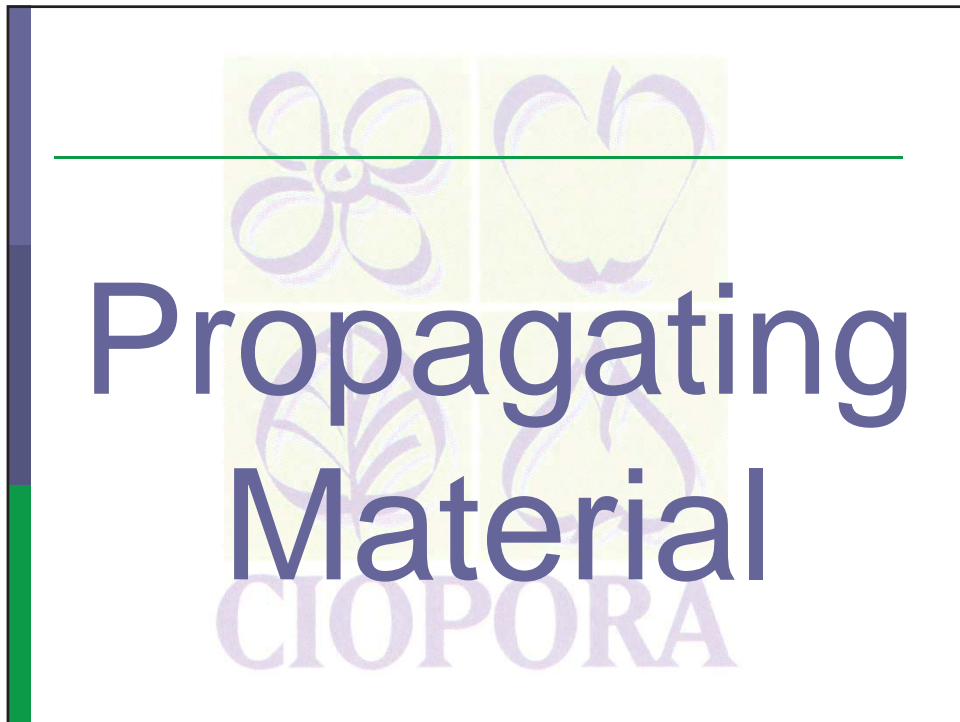
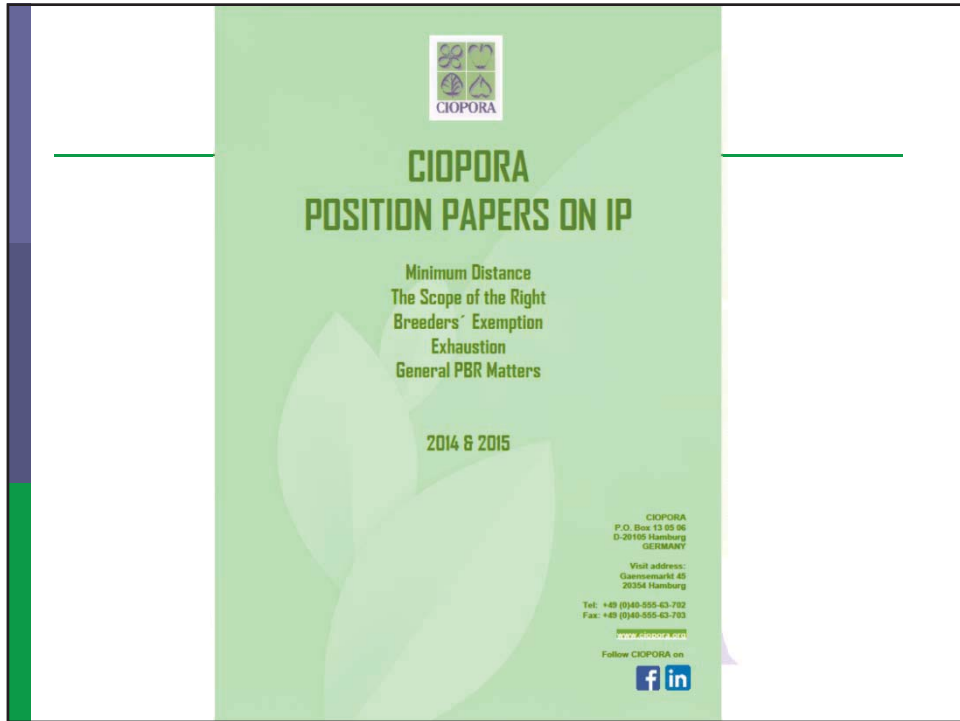
Internal Communication

- Circular letters
- Quarterly Newsletters
- Annual CIOPORA Chronicle
- CIOPORA profiles on LinkedIn & Facebook
- CIOPORA.org: Full Download Library & News

External Communication

- Information materials
- Online media
- Print media
- CIOPORA.org – Open Download Library & News
- Representation at industry events & fairs





Propagating material

The term “propagating material” is the key term in the UPOV system

Article 14, Scope of the Breeder’s Right

(1) [*Acts in respect of the propagating material*] (a) Subject to Articles 15 and 16, the following acts **in respect of the propagating material** of the protected variety shall require the authorization of the breeder:

- (i) production or reproduction (multiplication),
- (ii) conditioning for the purpose of propagation,
- (iii) offering for sale,
- (iv) selling or other marketing,
- (v) exporting,
- (vi) importing,
- (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

Propagating material

- The UPOV Acts do not provide for a definition of the term “propagating material”.
- It is up to the UPOV members to define the term.
- CIOPORA is concerned that this leads to differences in regard to the scope of protection, which does not support the goal of UPOV to harmonise the PBR protection and to set an (effective) minimum level of protection for plant innovations.

Propagating material

- CIOPORA believes that UPOV and its member countries should **harmonize** the definition of propagating material worldwide
- CIOPORA believes that UPOV and its member countries should make the definition of propagating material **objective** (without subjective elements, such as “intention”).
- Propagating material should include any material of a plant from which, whether alone or in combination with other parts or products of that or another plant, another plant with the same characteristics **can** be produced.

Harvested Material

Harvested material

Article 14 (2) UPOV 1991 Act

[Acts in respect of the harvested material]



Subject to Articles 15 and 16, the acts referred to in items (i) to (vii) of paragraph (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

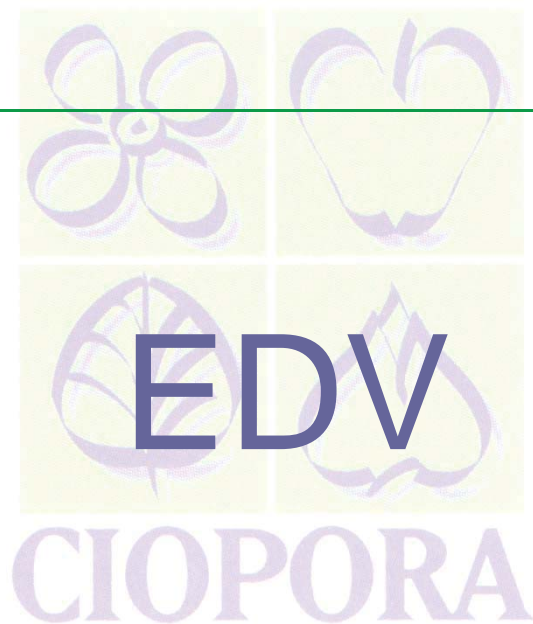
Pictures: Morguefile.com - morgueFile free photo

Harvested material

- Breeders need to be able to control their varieties at least at one stage of the production and trade chain through a globalized market
- Gaps in the protection of harvested material make misuse by infringers easy, to the disadvantage of honest growers, who fulfill their obligations
- CIOPORA, therefore, is of the opinion that harvested material should be **protected directly and per se**.

Processed products

- Advanced technologies allows the processing of plant material all over the world, and the global shipping of the processed products.
- If production and processing takes place in a country with low or no protection, control of the trade should be possible at least at one stage of the production and trade chain.
- CIOPORA is of the opinion that products that are obtained directly from material of a protected variety should be protected directly and per se.



Essentially Derived Varieties

- The breeders of vegetatively reproduced ornamental and fruit varieties wish to have clarity in regard to EDV
- Breeders are concerned that two courts judging about the same varieties come to different results
- For breeders of vegetatively reproduced ornamental and fruit varieties it is of importance that the EDV-concept covers all mutations and GMO (i.e. varieties originating from one variety) of the protected initial variety (see CIOPORA EDV position paper of 2008)
- The main open question is whether there is an upper limit for the differences between an EDV and its Initial Variety? „One or a few“ only?

Essentially Derived Varieties

- Allowing only one or a few differences for a variety to be considered to be an EDV is directed towards preventing plagiarism
- Linking EDV with plagiarism has a logical weakness, because for the holder of a protected variety it makes no difference whether the plagiaristic variety originates from his variety or from other varieties.
- CIOPORA considers plagiarism to be a matter of Minimum Distance and not a matter of EDV.
- UPOV and its members are invited to clarify the EDV concept.

Minimum Distance











Clearly distinguishable / Minimum Distance

The two consequences of Minimum Distance

- A variety, in order to obtain PBR protection, must be *clearly distinguishable* from any existing varieties
- A variety, which is *clearly distinguishable*, falls out of the scope of the [earlier] protected variety
- If the minimum distance is small, it is easy to obtain a PBR, but the exclusive right of the breeder is weakened or *de facto* negated.

Clearly distinguishable / Minimum Distance

„**Variety**“ (Art. 1 (vi) UPOV 1991)

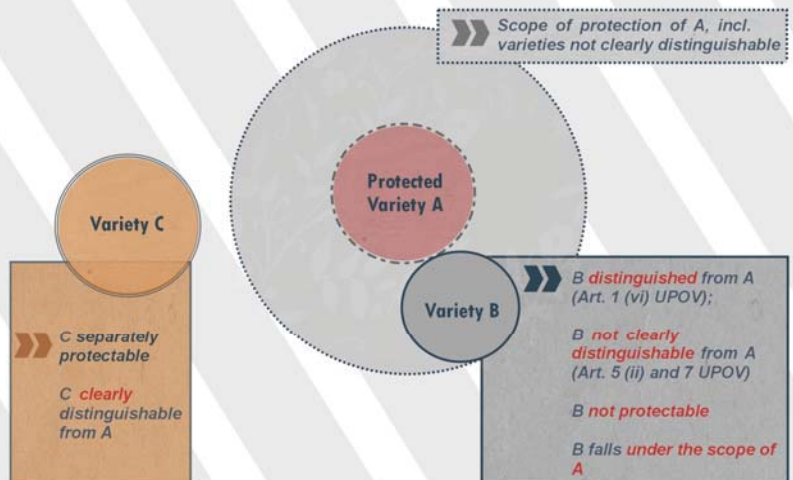
„distinguished from any other plant grouping by the expression of at least one of the said characteristics”

vs.

Protectable Variety, outside the scope of an earlier variety (Art. 5 (ii), 7 and 14 (5) UPOV 1991)

“The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety”

Clearly distinguishable / Minimum Distance



Clearly distinguishable / Minimum Distance

CIOPORA members are concerned that

- currently, the term „clearly“ seems to be interpreted from a purely botanical standpoint, not from a commercial or legal standpoint, or both
- one difference can make a variety „clearly distinguishable“ (5.3.3.2.1 TGP/3)
- as regards Pseudo-qualitative characteristics ... in certain circumstances, varieties described by the same state of expression may be clearly distinguishable (5.3.3.2.3 TGP/3).

CIOPORA Position on Minimum Distance

- Breeders need a sufficient minimum distance between varieties for an effective Plant Variety Right and true exclusivity.
- Since new varieties are bred, selected and introduced mainly for commercial targets, the requirement “clearly” should be seen as a judgemental and evaluative requirement, and should not be limited to a mere search for a botanical difference.

CIOPORA Position on Minimum Distance

- The requirement “clearly distinguishable” should be assessed on characteristics important for the crop concerned; in this regard new important characteristics may be taken into consideration. Accordingly, a new type of characteristics (“relevant for the determination of clearly distinguishable”) should be included into chapter 4.8 of TGP/3 and the test-guidelines should determine for each characteristic whether it is considered relevant for the determination of “clearly distinguishable”.
- Differences in unimportant characteristics only should not lead to a clearly distinguishable variety.

CIOPORA Position on Minimum Distance

- A model case study has been started recently with the aim to test the practical relevance of CIOPORA´s position on Minimum Distance.
- CIOPORA will develop three „mock test protocols“ (on apple, rose and pelargonium) and examiners from Naktuinbouw, Bundessortenamt and NIAB will test them against the last 50 CPVR titles granted for these crops, and see whether the titles would have been granted on the basis of the mock test protocols, too.
- Results are expected in the course of 2015.



Enforcement

Enforcement

In order to be effective, a Plant Breeders' Rights law must be accompanied by effective enforcement tools. A national legislation should include at least the measures as listed in UPOV explanatory note on enforcement in order to fulfill the requirements of Article 30 (1) (i) of the UPOV 1991 Act and of Article 41 of the TRIPS Agreement.

It is advisable to direct Plant Breeders' Rights court cases to selected courts, which are specialized in Plant Breeders' Rights law or at least to courts that already are established for patent infringement cases.



Patents and PBR

Patents and PBR

- CIOPORA and its members in general consider the UPOV PBR system as the most suitable sui generis system for the protection of plant varieties
- CIOPORA and its members are concerned that the current level of protection does not fully serve the needs of breeders of vegetatively reproduced ornamental and fruit varieties
- In various countries plant innovations (varieties, products, processes) can be protected by way of Patent, and more and more breeders (particularly larger ones) resort in Patent protection.

“What all the discussions about the patentability of plants and all its effects show is that the plant variety right system has lost most of its attraction. Intellectual property systems do not live in a vacuum, but are instruments of economic regulation, and also influence economic behavior.

*Sven J.R. Bostyn, Senior lecturer in IP-Law, University of Liverpool: **Patentability of Plants: At the Crossroad between Monopolizing Nature and Protecting Technological Innovation?***

Thank you
for your attention

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