

Working Group on Variety Denominations

UPOV/WG-DEN/6/2

**Sixth Meeting
Geneva, October 29, 2019**

Original: English
Date: July 24, 2019

REVISION OF DOCUMENT UPOV/INF/12/5 “EXPLANATORY NOTES ON VARIETY DENOMINATIONS UNDER THE UPOV CONVENTION”

Document prepared by the Office of the Union

Disclaimer: this document does not represent UPOV policies or guidance

EXECUTIVE SUMMARY

1. The purpose of this document is to provide background information to assist the Working Group on Variety Denominations (WG-DEN) in its consideration of the proposals for a revision of document UPOV/INF/12/5 “Explanatory Notes on Variety Denominations under the UPOV Convention”, as presented in document UPOV/EXN/DEN/1 Draft 2.

2. The WG-DEN is invited to:

(a) note the matters agreed by the WG-DEN at its fifth meeting, as reported in paragraph 6 of this document; and

(b) consider document UPOV/EXN/DEN/1 Draft 2, as set out in paragraphs 9 and 10 of this document.

3. The structure of this document is as follows:

EXECUTIVE SUMMARY.....	1
BACKGROUND	1
DEVELOPMENTS AT THE FIFTH MEETING OF THE WG-DEN.....	1
PREPARATION OF DOCUMENT UPOV/EXN/DEN/1 DRAFT 2.....	4

4. The following abbreviations are used in this document:

CAJ: Administrative and Legal Committee
WG-DEN: Working Group on Variety Denominations

BACKGROUND

5. The background to this matter prior to the fifth meeting of the WG-DEN is provided in document UPOV/WG-DEN/5/2 “Revision of document UPOV/INF/12/5 ‘Explanatory Notes on Variety Denominations under the UPOV Convention’”.

DEVELOPMENTS AT THE FIFTH MEETING OF THE WG-DEN

6. The WG-DEN, at its fifth meeting, held in Geneva, on October 30, 2018, considered document UPOV/EXN/DEN/1 Draft 1 and agreed the following with regard to a possible revision of document UPOV/INF/12/5 “Explanatory Notes on Variety Denominations under the UPOV Convention”:

Preamble: to add a new paragraph as follows:

"4. The Council recalls the definition of "variety" in Article 1 (iv) of the 1991 Act of the UPOV Convention:

"variety" means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be
- defined by the expression of the characteristics resulting from a given genotype or combination of
genotypes,

- distinguished from any other plant grouping by the expression of at least one of the said characteristics and
- considered as a unit with regard to its suitability for being propagated unchanged [;]";

Paragraph 1 [Designation of varieties by denominations; use of the denomination]: to add a new Section 1.3 to read as follows:

"1.3 If an authority allows a denomination to be registered when the breeder of the variety is also the holder of a trademark that is identical to the variety denomination, the authority should inform the breeder of the obligation to allow the use of the denomination in connection with the variety, even after the expiration of the breeder's right.";

Section 2.2.2 (b): to amend as follows:

"(b) accepted market practices for particular variety types (e.g. hybrids) and particular genera/species (e.g. Medicago, Helianthus);";

Section 2.3.1 (c): to amend as follows:

"(c) convey the impression that the variety has particular characteristics, which in reality it does not have, by similarity or association with another variety denomination derived from, or related to that is not, in fact, the case.";

Example of unsuitable denominations: "Son of Russet Burbank", where "Russet Burbank" potato variety was not used in the breeding of "Son of Russet Burbank".

Examples of suitable denominations: "Koshihikari Niigata BL 1 go" and "Koshihikari Niigata BL 2 go", both of which introduced resistance against rice blight into "Koshihikari".

Example: a denomination which is similar to that of another variety of the same species or closely related species, e.g. "Southern cross 1", "Southern cross 2", etc., giving the impression that these varieties are a series of related varieties with similar characteristics, when, in fact, this is not the case.";

Paragraph 2 [Characteristics of the denomination]: to add a new Section 2.3.1 (d) to read as follows:

"(d) contain the botanical or common name of the genus to which that variety belongs.

Examples of unsuitable denominations:

Carex variety "Sedge". (Carex is the botanical name of the genus, for which the common name is sedge.)
Castanea "Pale Chestnut". (Castanea is the botanical name of the genus, for which the common name is Chestnut.)

Gladiolus "Pink Gladiolus".

Narcissus "Davis Daff". (Narcissus is the botanical name of the genus, for which the common name is Daffodil.)

Narcissus "Granny's Daffodil".

Paeonia "Sussex Peony". (Paeonia is the botanical name of the genus, for which the common name is Peony.)

Phlox "Phlox of Sheep".

Rhododendron "Rhododendron Mad".

Examples of suitable denominations:

Dianthus "Rupert's Pink". ("Pink" is not the common name for all plants in the genus Dianthus.)

Pyrus bretschneideri "Ya Li". (While the word "li" is the Chinese common name for the genus Pyrus, "li" is inseparable from "ya" according to Chinese linguistic custom, and its inclusion in the variety denomination is therefore acceptable.)";

Section 2.3.2: to amend as follows:

"The denomination should not consist of, or contain, comparative or superlative designations that are liable to mislead or to cause confusion concerning the characteristics or value of the variety.

Examples of unsuitable denominations: a denomination which includes terms such as “Best performer”, “Superior taste”, “Sweeter than the rest”.

Examples of suitable denominations: “Lake Superior”, “Best wishes”;

Section 2.3.3 (a): to amend as follows:

“(a) For denominations consisting solely of letters, as a general recommendation, a difference of only one letter ~~or one number~~ may be considered to be liable to mislead or cause confusion concerning the identity of the variety, except where the ~~(i)~~ difference of one letter provides for a clear visual ~~or~~ phonetic difference, e.g. if it concerns a letter at the beginning of a word:

Examples of suitable denominations: in the English language, ‘Harry’ and ‘Larry’, ‘Meagan’ and ‘Reagan’, ‘Kinky’ and ‘Binky’, ‘Hagar’ and ‘Magar’, and ‘Manuela’ and ‘Emanuele’ would not cause confusion; However, ‘Bough’ and ‘Bow’ might cause confusion (in phonetic terms);

Example 2: in the Japanese and Korean languages there is no difference between “L” and “R” sounds, thus “Lion” and “Raion” are exactly the same although these are distinguishable for English mother tongue speakers;

Examples of unsuitable denominations: ‘Helena’ and ‘Elena’, ‘Jozephine’ and ‘Josefin’, ‘Manuela’ and ‘Mannuelle’, ‘Paqou’, ‘Pacou’ and ‘Pakou’, ‘Philip’ and ‘Filip’, and ‘Poge’ and ‘Poje’, and ‘Zophia’ and ‘Sophia’ could cause confusion phonetically but not visually;

~~(ii)(b)~~ For denominations consisting of a combination of letters and figures; and ~~(iii)~~ denominations consisting “solely of figures”, as a general recommendation, a difference of only one letter or one number may be considered not to be liable to mislead or cause confusion concerning the identity of the variety.”;

Section 2.3.3: that the Office of the Union should develop proposals on the basis of the guidance from Brazil on denominations in the form of letters without forming words;

Section 2.3.3: that a new proposal should be developed that would be applicable to denominations consisting of letters and/or numbers and that the Office of the Union should develop a general recommendation that a difference of only one letter or one number may be considered to be liable to mislead or cause confusion concerning the identity of the variety, with examples of exceptions;

new Section 2.3.3 (d) (currently, Section 2.3.3 (c)): to retain the original wording in document UPOV/INF/12/5;

Section 2.3.4 “Identity of the breeder”: to reformulate and elaborate the following text to clarify that a theme would not be allocated to a breeder per se but a theme could become associated with a breeder by custom and practice:

“Breeders may choose a theme to identify their varieties. However, ‘themes’ without a common word, prefix or suffix, could mislead or cause confusion concerning the identity of the breeder. In cases where a breeder uses a theme, the authority may consider that the use of that theme for variety denominations by other breeders may mislead or cause confusion concerning the identity of the breeder.”;

denomination classes in document UPOV/INF/12/5: to propose to the Administrative and Legal Committee (CAJ) to transmit those proposals to the Technical Committee (TC) for consideration by the TC, and if applicable, by the relevant Technical Working Parties (TWPs):

- (a) Proposal to split the current class 205 (*Cichorium* and *Lactuca*) into two new classes:
 - Class: *Lactuca* – *Cichorium endivia* (Endive; Escarole), *Cichorium intybus* var. *foliosum* (Salad Chicory)
 - Class: *Cichorium intybus* var. *sativum* (Industrial Chicory).
- (b) Proposal for genus *Epichloe* (formerly *Neotyphodium*) be added to Class 203 (*Agrostis*, *Dactylis*, *Festuca*, *Festulolium*, *Lolium*, *Phalaris*, *Phleum* and *Poa*.);

new Section 2.6 “UPOV denomination similarity search tool”: to reflect the comments reported in document UPOV/WG-DEN/5/2;

Paragraph 4 [Prior rights of third persons]: to amend Section 4 (a) to read as follows:

“(a) An authority should not accept a variety denomination if a there is an existing prior right, the exercise of which may prevent the use of the proposed denomination, has already been granted to a third party under plant breeder’s right law, trademark law or any other intellectual property legislation. [...]”;

Section 4 (e) (i): to amend as follows:

“(i) [...] In cases of mere similarity or small likelihood of association confusion by users, waivers granted to breeders by prior trademark right holders could be a suitable solution;”;

Paragraph 5 [Same denomination in all members of the Union]: that the Office of the Union should develop a proposal to provide guidance that, in the case of synonyms, authorities should accept the denomination that was submitted and registered with the first application, unless that denomination was unsuitable in their territory;

Section 5.3 (a): to amend as follows:

“(a) it does not conform to the provisions in paragraphs (2) (for example, the proposed denomination is not different from an existing variety of the same plant species or of a closely related species in its territory) and (4) (for example, the proposed denomination is identical to a trademark registered for identical goods).”;

Section 5.5: to amend as follows:

“5.5 [...] In particular, authorities are encouraged to make available any electronic search functions which they use in the examination of denominations in a form which would allow the on-line checking of a proposed variety denomination, against databases of relevant varieties and, in particular, the UPOV Plant Variety PLUTO database. [...]”.

Paragraph 6 [Information among the authorities of members of the Union]: to amend Section 6.2 to read as follows:

“6.2 [...] However, the UPOV Plant Variety PLUTO database is an important mechanism by which to maximize the availability of information for members of the Union concerning variety denominations in a practical form.”

Paragraph 6: to add a new Section 6.8 to read as follows:

“6.8 The contribution of data by members of the Union to the PLUTO database provides support for the examination of variety denominations. Members of the Union are encouraged to provide data as soon as practical after it is published by the authority(ies) concerned. The PLUTO database will be updated with new data as quickly as possible after receipt, in accordance with the uploading procedure. The PLUTO database can, as necessary, be updated with corrected data, in accordance with the uploading procedure.”

7. The WG-DEN agreed that a new draft of the relevant sections of document UPOV/EXN/DEN should be circulated for comments by correspondence to the WG-DEN early in 2019.

8. On the above basis, UPOV Circular E-19/041 was issued on April 18, 2019.

PREPARATION OF DOCUMENT UPOV/EXN/DEN/1 DRAFT 2

9. The WG-DEN agreed, at its fifth meeting, held in Geneva on October 30, 2018, that document UPOV/EXN/DEN/1 Draft 2 should be prepared on the basis of the comments received by correspondence and that document UPOV/EXN/DEN/1 Draft 2 should be presented to the sixth meeting of the WG-DEN and the seventy-sixth session of the CAJ, to be held on October 30, 2019. It further agreed that the comments of the WG-DEN at its sixth meeting would be reported to the CAJ, at its seventy-sixth session (see document UPOV/WG-DEN/5/3 “Report”, paragraph 26). On the above basis, the Office of the Union has prepared document UPOV/EXN/DEN/1 Draft 2 reflecting the comments received in reply to circular E-19/002 of January 2, 2019, concerning the draft report of the fifth meeting of the WG-DEN, and in reply to circular E-19/041 of April 18, 2019. The comments are presented in the endnotes of document UPOV/EXN/DEN/1 Draft 2.

10. The comments made by the WG-DEN on document UPOV/EXN/DEN/1 Draft 2, at its sixth meeting, will be reported to the CAJ, at its seventy-sixth session, in an addendum to document CAJ/76/6 “Variety denominations”.

[End of document]