

**Working group on harvested material and unauthorized use of propagating material (WG-HRV)**

**UPOV/WG-HRV/3/3**

**Third Meeting  
Geneva, March 21, 2023**

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**PERSPECTIVES ON “UNAUTHORIZED USE” UNDER ARTICLE 14(2) OF THE 1991 ACT OF THE UPOV CONVENTION**

*Document prepared by the Office of the Union*

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**EXECUTIVE SUMMARY**

1. The purpose of this document is to present a proposal concerning the different perspectives of “unauthorized use” under Article 14(2) of the 1991 Act and to invite the Working Group on harvested material and unauthorized use of propagating material (WG-HRV) to consider this proposal in conjunction with the examples to be provided by the members of the WG-HRV.

2. The WG-HRV is invited to:

(a) note that the examples in reply to the circular, as set out in paragraph 9 of this document, will be presented as an addendum to this document and will also be made available on the UPOV website: [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=74773](https://www.upov.int/meetings/en/details.jsp?meeting_id=74773); and

(b) consider the proposal in paragraph 8 of this document.

3. The structure of this document is as follows:

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**BACKGROUND**

4. The WG-HRV, at its second meeting, held via electronic means on September 6, 2022, agreed the following (see document WG- HRV/2/6 “Draft Report”, paragraphs 23, 29, 33 and 34, reproduced below):

“23. The Chair noted the different perspectives and interpretations of the notion “unauthorized use” and observed that the current explanatory notes did not reflect those different perspectives and interpretations. He suggested to consider the inclusion of the different understandings in a similar way to the list of factors in the explanatory notes on propagating material.

“29. The Chair noted that that reference to the Diplomatic Conference could be useful to explain the rationale for the introduction of the new perspectives presented by certain members of the Union that were not reflected in the current explanatory notes.

[...]

“33. The WG-HRV requested the Office of the Union to prepare a document that would explain the different perspectives of unauthorized use. The WG-HRV agreed that the members of the WG-HRV would provide examples of their understanding on those provisions and how their understanding would impact the ability of breeders to exercise their rights in the territory.

## INTRODUCTION TO THE DIFFERENT PERSPECTIVES OF “UNAUTHORIZED USE” FOR THE REVISION OF THE EXPLANATORY NOTES ON PROPAGATING MATERIAL, ACTS IN RESPECT OF HARVESTED MATERIAL AND PROVISIONAL PROTECTION UNDER THE UPOV CONVENTION

### Perspective of “unauthorized use” in the current explanatory notes

5. The WG-HRV, at its second meeting, held via electronic means on September 6, 2022, noted the following (see document WG-HRV/2/6 “Draft Report”, paragraphs 18 and 19):

“18. The WG-HRV noted that document WG-HRV/2/2, Annex, contained the history of the cascade principle under the “Scope of the Breeder’s Right”, in Article 14 of the 1991 Act, and its relationship with the provisions on the “Exhaustion of the Breeder’s right”, under Article 16 of the 1991 Act. It also contained the history of the notion of “unauthorized use” under Article 14(2) and the notion of “consent” under Article 16, including the moment where the term “consent” was changed by “authorization” in the scope of the right:

‘74. Several delegations observed that the wording proposed by the Office of the Union now spoke of ‘authorization’ whereas the draft was based on the notion of ‘consent’. It was noted that the intention was not to modify the text in substance [...]’

(see document WG-HRV/2/2, Annex, page 26).

“19. The Chair noted that the concept of consent and the authorization was different in the current explanatory notes.”

6. The current explanatory notes (document UPOV/EXN/HRV/1) provide as follows in relation to the term unauthorized use in Article 14(2) of the 1991 Act:

“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.”

### Other perspectives of “unauthorized use” for consideration by the WG-HRV

7. The WG-HRV, at its second meeting, noted the following (see document WG-HRV/2/6 “Draft Report”, paragraphs 20 to 34, reproduced below):

“20. The Delegations of the European Union and Australia expressed support to the explanation of “unauthorized use” in the current explanatory notes. The Delegations of Spain, Japan and Netherlands preferred a broader understanding of “unauthorized use”.

“21. The Delegation of Argentina explained that, for the domestic market, when a bag of seeds was legally purchased the breeder’s right was exhausted.

“22. The Delegation of Japan referred to situations of unauthorized exports of material of perennial fruit tree plants that, if propagated abroad, could be harvested for a long time without the breeders having an opportunity to obtain remuneration.

“23. The Chair noted the different perspectives and interpretations of the notion “unauthorized use” and observed that the current explanatory notes did not reflect those different perspectives and interpretations. He suggested to consider the inclusion of the different understandings in a similar way to the list of factors in the explanatory notes on propagating material.

“24. The Delegation of the United States of America suggested that it would be useful to have examples on how members of the Working Group understand and implement those provisions.

“25. The Delegations of Australia, Netherlands and the European Union expressed support to the proposal.

“26. The Delegation of Japan highlighted that, during the 1991 Diplomatic Conference for the Revision of the Convention, a proposal was made to consider unauthorized use of propagating material when the use was for the purpose of producing harvested material. It further noted that that proposal was accepted without real opposition, as it was reflected in paragraph 1543 of the Records of the Diplomatic Conference:

‘1529.4 Concerning Article 14(1)(b), the Working Group had been conscious of the fact that the decision had been taken to remove the square brackets from the last clause appearing in the Basic Proposal. It therefore proposed a system in which the harvested material of the protected variety could be the basis of a royalty collection where two conditions were met: (i) that the breeder had not authorized the use of propagating material for the purpose of producing that harvested material; and (ii) that the breeder had had no reasonable opportunities to exercise his right in relation to the propagating material.’

[...]

‘1543. The PRESIDENT noted that there was no real opposition to the proposal. He concluded that it was therefore accepted. He thanked the Working Group and its Chairman, Mr. Harvey (United Kingdom).’

(document WG-HRV/2/2, Annex, pages 59 and 60).

“27. On the above basis, the Delegation of Japan suggested that planting and ongoing cultivation be included in the understanding of “unauthorized use” in the explanatory notes.

“28. The representative of CropLife International expressed support for the intervention by the Delegation of Japan and considered that unauthorized “cultivation” should be understood as unauthorized use in Article 14(2) and part of the notion of “production” under Article 14(1) of the 1991 Act.

“29. The Chair noted that that reference to the Diplomatic Conference could be useful to explain the rationale for the introduction of the new perspectives presented by certain members of the Union that were not reflected in the current explanatory notes.

“30. The Delegation of the Netherlands was in favor that further work included relevant matters concerning the notion of “consent” under exhaustion of the breeder’s right in Article 16 of the 1991 Act.

“31. The Delegation of the Republic of Korea expressed its concern about enlarging the term authorization outside of the territory.

“32. The Delegation of Japan confirmed the understanding that the right was to be exercised within the territory where the right existed.

“33. The WG-HRV requested the Office of the Union to prepare a document that would explain the different perspectives of unauthorized use. The WG-HRV agreed that the members of the WG-HRV would provide examples of their understanding on those provisions and how their understanding would impact the ability of breeders to exercise their rights in the territory.

“34. The WG-HRV agreed to postpone discussions of document WG-HRV/1/4, Annex, section “(d) Reasonable opportunity to exercise his right”, until the work on section (c) “Unauthorized use of propagating material”, as set out above, had been completed.”

8. On the above basis, the WG-HRV may wish to consider the following approach to cover the different perspectives and interpretations of the notion “unauthorized use” under Article 14(2) of the 1991 Act:

(c) Unauthorized use of propagating material

~~*Acts in respect of propagating material*~~

~~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.~~

4. The UPOV Convention does not provide a definition of “unauthorized use” under Article 14(2) of the 1991 Act of the UPOV Convention.

5. The following is a non-exhaustive list of factors that may be considered by members of the Union in relation to the notion of “unauthorized use”.

(a) the breeder did not authorize the acts provided in Article 14(1) of the 1991 Act of the UPOV Convention, in respect of the propagating material of the protected variety. In this context, “unauthorized use” can only occur in the territory of the member of the Union where a breeder’s right has been granted and is in force;

(b) the breeder did not authorize or consent<sup>1</sup> to the use of propagating material of the protected variety for the purpose of producing the harvested material;

(c) the breeder did not authorize or consent<sup>1</sup> to the planting and ongoing cultivation of the propagating material of the protected variety for the purpose of producing harvested material;

(d) the production, selling or marketing of harvested material was in breach of the conditions or limitations set by the breeder as a condition for authorization or consent<sup>1</sup>.

The above factors should be considered in the context of the member of the Union concerned and the particular circumstances.

#### Invitation for the provision of examples agreed at the second meeting of the WG-HRV

9. On the basis of the discussions of the WG-HRV at its second meeting (see above section “Other perspectives of ‘unauthorized use’ for consideration by the WG-HRV”), the WG-HRV agreed that the members of the WG-HRV would provide examples of their understanding on those provisions and how their understanding would impact the ability of breeders to exercise their rights in the territory (see document WG-HRV/2/6 “Draft Report”, paragraph 33). The circular posting this document will also include an invitation to provide the above examples.

10. Examples in reply to the circular, as set out in paragraph 9 of this document, will be presented as an addendum to this document.

11. *The WG-HRV is invited to:*

(a) *note that the examples in reply to the circular, as set out in paragraph 9 of this document, will be presented as an addendum to this document and will also be made available on the UPOV website: [https://www.upov.int/meetings/en/details.jsp?meeting\\_id=74773](https://www.upov.int/meetings/en/details.jsp?meeting_id=74773); and*

(b) *consider the proposal in paragraph 8 of this document.*

[End of document]

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<sup>1</sup> During the preparatory work for the 1991 Diplomatic Conference the term “consent” was changed by “authorization” in the scope of the right: “74. Several delegations observed that the wording proposed by the Office of the Union now spoke of ‘authorization’ whereas the draft was based on the notion of ‘consent’. It was noted that the intention was not to modify the text in substance [...]” (see document CAJ/27/8 “Report”, paragraph 74, and document WG-HRV/2/6 “Draft Report”, paragraph 18).