



## **Joint statement of breeders on WG-HRV/3/1 documents**

- UPOV WG-HRV -

- March 2023 -

Dear UPOV office,

With great interest we, the global and regional breeders' organizations, have reviewed UPOV Circular E-23/022 and related documents. With this letter we would like to express our comments on the documents that are on the agenda of the next meeting of the UPOV WG-HRV (WG-HRV/3/1).

You will find in **yellow highlight** additions, and in **blue highlight** deletions.

### **WG-HRV/3/2 - Proposals concerning the Explanatory Notes on Propagating Material under the UPOV Convention**

Under the heading 'FACTORS THAT HAVE BEEN CONSIDERED IN RELATION TO PROPAGATING MATERIAL', we consider it a missed opportunity to continue forward with a diverging list of factors. We feel it more opportune for an organization such as UPOV to provide guidance that leads towards more alignment between countries, rather than leaving all options open in a diverging list. A diverging list that includes various interpretations will lead to more legal uncertainty and diverging decisions by courts and arbitrators.

We would like to reiterate that the proposed wording by the breeders' associations in WG-HRV/1/3 of 11 Feb. 2022 (Annex, page 5) would provide more clarity to courts and arbitrators.

In case the Factors remain in the document, we have the following proposals for improvement and clarification:

### **FACTORS THAT HAVE BEEN CONSIDERED IN RELATION TO PROPAGATING MATERIAL**

*The UPOV Convention does not provide a definition of “propagating material”. Propagating material encompasses reproductive and vegetative propagating material. The following are non-exhaustive examples of factors **to conclude that material is propagating material.** ~~that have been considered by members of the Union in relation to whether material is propagating material. Those factors should be considered in the context of each member of the Union and the particular circumstances.~~*

- (i) *plant or part of plants used for the variety reproduction; **or***
- (ii) *whether the material has been or may be used to propagate the variety; **or***
- (iii) *whether the material ~~is capable~~ **has an innate capability** of producing entire plants of the variety (e.g. seed, tubers); **or***
- (iv) ~~(vii)~~ *~~when harvested whether the material has the potential including harvested material, could be used as propagating material, it can be considered as through the use of propagating techniques material (e.g. cuttings, tissue culture);~~ **or***
- (v) ~~(iv)~~ *whether 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; **or***
- (vi) ~~(v)~~ *the **discernible** intention on the part of those concerned (producer, seller, supplier, buyer, recipient, user) **for the material to be used as propagating material; or***
- (vii) ~~(vi)~~ *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***
- (viii) *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.*

*The above text is not intended as a definition of “propagating material”.*

Explanation:

The addition of ‘or’ after each ‘factor’ makes it clear that the list should not be construed in a cumulative manner. In other words, in case only one of the factors applies, then the material shall be considered as propagating material.

The various ‘factors’ are all objective factors, except for factor (vi) about ‘intention’. This concept of ‘intention’ is the hardest to prove in court and could be easily misconstrued. Therefore, (vi) appears strange in the list of examples. In our eyes, there is a risk that the "intention" could be understood as an additional factor or even as a precondition in addition

to the other examples. The addition of 'discernible' makes it clear that objective factors can indicate an intention, which in turn would constitute a separate set of facts (example: conditioning of the seed for propagation).

### **WG-HRV/3/3 - Perspectives on “unauthorized use” under Article 14(2) of the 1991 Act of the UPOV Convention**

Under the heading ‘Unauthorized use of propagating material’ (8.c point 5 on page 4) we consider it a pity to introduce a diverging list of factors. We feel it more opportune for an organization such as UPOV to provide guidance that leads towards more alignment between countries, rather than leaving all options open in a diverging list. A diverging list that includes various interpretations will lead to more legal uncertainty and to diverging decisions by courts and arbitrators. Since the subject of this Explanatory Note concerns Harvested Material, a more aligned wording would not only benefit plant breeders, but also benefit farmers and growers.

In case the Factors remain in the document, we have the following proposals for improvement and clarification:

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 or consent 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; or

(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 of the protected variety; or

(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 of the protected variety; or

(d) the production, selling or marketing of propagating and 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.

**Examples of our understanding of the notion “unauthorized use” under Article 14(2) of the 1991 Act and how our understanding would impact the ability of breeders to exercise their rights in the territory (see document WG HRV/2/6 “Draft Report”, paragraph 33):**

Authorization is the clear manifestation of an act of will from the side of the breeder. Therefore, “Unauthorized use” refers to the acts in respect of the propagating material, where no such explicit authorization from the breeder was obtained.

The “Unauthorized use” condition should be construed to mean that the propagating material has been used without formal prior consent of the breeder. From the preparatory papers with the discussions and text proposals for the revision of the UPOV Convention during the years prior to 1991, it was clear that the term “authorization” was intended as providing “consent” from the breeder, and not a permission based on a formal right.

The breeder normally doesn’t have any possibility to trace the origin of the harvested material to verify whether it has been produced from unauthorized propagating material at a given time and in each territory.

Therefore, those who are trading/exporting/importing the harvested material shall provide upon request from the breeder and/or other stakeholders (e.g., courts, enforcement authorities, PVP offices) the evidence they must have available, establishing that the harvested material has been obtained from an authorized use of the propagating material of the protected variety or of a variety that has been applied for protection.

Accordingly, anyone dealing with the harvested material of a protected plant variety is obliged to check or to have checked in the supply chain and prove that it has been obtained from an authorized use of the propagating material of that variety. It is not up to the breeder to prove that s/he has not given the authorization (impossible to prove that an act has not taken place, whilst easy for someone to show that s/he has been authorized to do something).

Example1:

When in the territory of a member of the Union where a breeder’s right has been granted and is in force (**Country A**), unauthorized export of propagating material would be an unauthorized act. Likewise, if the propagating material of a variety has been imported in a given territory without the authorization of the breeder, and is multiplied and/or sold, in that territory (**Country B**) where the variety is not protected then, any activity performed that is listed in Article 14(1)(a) of the 1991 Act of the UPOV Convention shall be regarded as unauthorized. This does not mean that the breeder of the right in **Country A** can invoke the right granted in **Country A** in relation to the use of propagating or harvested material of the variety in **Country B**. However, for the purpose of assessing

whether the condition in Article 14.2 of the Convention “*obtained through the unauthorized use of the propagating material*” is met, in a case relating to import from **Country B** to **Country A**, the initial export from **Country A** mentioned above shall be considered as unauthorized.

A different interpretation of the concept "unauthorized use" (i.e., based on the existence of a granted breeder's right on **Country B**) would not only be contradictory with the understanding of the concept during the discussions for revision of the UPOV Convention, but lead to unreasonable consequences such as forcing breeders to apply and obtain plant variety protection in any country of the Union where their varieties could potentially be exploited. Otherwise, the breeder would be defenseless if the propagating material of its protected variety is used without his/her consent (or even awareness) in any third country to produce harvested material that could freely be imported in **Country A**, where his/her variety was protected.

#### Example 2:

In the territory of a member of the Union where a breeder's right on a fruit variety has been applied but not granted yet, the breeder could authorize reproduction or multiplication of propagating material (i.e., licensing the variety) to identified nurseries or growers. Nevertheless, in case that propagating material is further reproduced or multiplied by third parties without consent or notice by the breeder before the granting of the breeder's right, once the breeder's right is granted, those activities shall be regarded as unauthorized for the purpose of assessing whether the condition in Article 14.2 of the Convention “*obtained through the unauthorized use of the propagating material*” is met.

A different interpretation of the concept "unauthorized use" (i.e., based only on the existence of a granted breeder's right) could be an unwelcome incentive for unscrupulous growers and nurseries to start propagating varieties under the process of protection. It could also lead to undesired consequences such as dissuading breeders to quickly make available their newest, innovative varieties, as there would not be an incentive but rather risks for breeders to commercialize their varieties before the breeder's right is granted.

#### Example 3:

In the territory of a member of the Union where a breeder's right on a fruit variety has been granted and is in force (**Country A**), the breeder could authorize export of propagating material to a third country (**Country B**) where there is an unlimited farmer's exemption. Consequently, the breeder could not impede or prevent further multiplication by farmers of the trees of the protected variety on **Country B**. Nevertheless, when such multiplication was not authorized by the breeder, in case that harvested material produced in Country B would be imported in **Country A**, the breeder must have the option to legally oppose to that import in **Country A**, as the harvested material shall be considered as to be “*obtained through the unauthorized use of the propagating material*”, according with Article 14.2 of the Convention.

## **WG-HRV/2/5 - Proposals concerning the Explanatory Notes on Provisional Protection under the UPOV Convention**

We still stand behind our comments that were submitted earlier and have been captured in documents WG-HRV/1/5 and WG-HRV/2/5.

We remain at your disposal for questions.

Kind regards,

Marcel Bruins

On behalf of AFSTA, APSA, CIOPORA, Croplife International, Euroseeds, ISF and SAA.