

Working Group on harvested Material and Unauthorized use of Propagating Material

WG-HRV/5/2

**Fifth Meeting
Geneva, March 21, 2024**

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PROSPECTS OF COMMISSIONING A STUDY ON THE “SCOPE OF THE BREEDER’S RIGHT” AND THE RELATIONSHIP WITH THE “EXHAUSTION OF THE BREEDER’S RIGHT”

Document prepared by the Office of the Union

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EXECUTIVE SUMMARY

1. The purpose of this document is to invite the Working Group on harvested material and unauthorized use of propagating material (WG-HRV) to consider a proposal of Terms of Reference for a study. The study will address aspects on the Scope of the Breeder’s Right and the Exhaustion of the Breeder’s Right.

2. The structure of this document is as follows:

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BACKGROUND

3. The WG-HRV, during its third meeting,¹ agreed to organize a study to assist its deliberations on the “Scope of the Breeder’s Right” in Article 14(1) and (2) of the 1991 Act, including the notions of “unauthorized use” and “reasonable opportunity” and the relationship with the “Exhaustion of the Breeder’s Right” in Article 16 of the 1991 Act (WG-HRV/3/4 paragraph 11).

4. The WG-HRV agreed to invite the members of the WG-HRV to propose issues and/or suggest authors for such a study (WG-HRV/3/4 paragraph 17). Consequently, the Office of the Union sent UPOV Circular E-23/071.

5. The WG-HRV noted, during its fourth meeting,² the replies to UPOV Circular E-23/071, as set out in paragraphs 9 and 10 and the Annex of document WG-HRV/4/2.

6. The WG-HRV agreed that the Office of the Union would consult the members of the WG-HRV that provided replies to UPOV Circular E-23/071 and propose the basis of a study, including terms of reference, timeline, and authors, for consideration by the WG-HRV at its fifth meeting.

¹ Held in Geneva on March 21, 2023

² Held in Geneva on October 25, 2023

7. The WG-HRV agreed that the study would include a first part with an analysis of the intentions of the drafters of the 1991 Act of the UPOV Convention in relation to Article 14 and Article 16 of the 1991 Act, and a second part, that would include summaries of court cases from UPOV members bound by the 1991 Act.

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8. Based on the conclusions from its fourth meeting, the Office of the Union has drafted proposed terms of reference for a study, including a timeline, and authors (see Annex).

9. Before drafting the terms of reference, the Office of the Union consulted the members of the WG-HRV that provided replies to UPOV Circular E-23/071.

Summary of the consultations

10. During the consultations, oral and in writing, some members have expressed their opinion on the number of authors. It has been suggested that there could be five authors. One member proposed a list of five authors during the consultation process.

11. It has also been proposed that the study be presented by the authors to the WG-HRV or in a seminar hosted by UPOV, followed by a panel discussion.

12. Japan proposed that the scope of the study be extended with a third part;

- “providing an explanation on what is “unauthorized use” and “reasonable opportunity” including an explanation on whether the following cases are enforceable by a PBR right, why and why not.

Case 1: Fruit tree without PVR protection in another UPOV member country B is propagated, planted, and cultivated without consent of the breeder, and the harvested material produced from that fruit tree is imported to country A where the breeder originally has PBR protection. Can the PBR holder from country A enforce his/her rights on the import of the harvested material?

Note: the reason why the fruit tree is unprotected can be because of various reasons, possibly because it is still under provisional protection or it could be that PVR was not applied in that country, or that UPOV state does not protect the genera but in either of these cases.

Case 2: The fruit tree was exported to country B without the permission of the breeder whilst, the breeder was applying in his own country A. When the breeder receives protection in Country A, the harvested material produced from the fruit tree which was propagated and planted without his permission in country B is imported into country A. Would the breeder be able to enforce his right in country A? “

13. The question of funding of the study has also been raised during the consultation.

14. The proposed authors have been contacted by the Office of the Union and they have all confirmed their availability.

Matters for consideration

15. The enclosed draft terms of reference provide that the study would include a first part with an analysis of the intentions of the drafters of the 1991 Act of the UPOV Convention in relation to Article 14 and Article 16 of the 1991 Act, and a second part with summaries of relevant court cases from UPOV members bound by the 1991 Act.

16. The WG-HRV is invited to consider extending the scope of the study as proposed above under paragraph 12.

17. The WG-HRV is invited to consider the number of authors and the composition. It is also proposed that the authors agree that one of them will be coordinating the work.

18. It is proposed that the authors be independent in drafting the study. Having received the study, it would be up to the WG-HRV to consider a possible follow-up and to request further guidance from the CAJ, as appropriate. UPOV Members are not bound by the content and/or conclusions drawn in the study.

19. The WG-HRV is invited to consider the matter of providing funding for the study, as it might influence the final composition of the authors. If the WG-HRV recommends that some funding be allocated to recognize the contribution of the authors, partial funding from UPOV budget may require making savings from other planned activities. Therefore, the WG-HRV is invited to suggest possible additional sources of funding.

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

- (a) consider the matters presented in this document and the draft terms of reference for a study, as set out in the Annex; and*
- (b) propose sources to fund a study.*

[Annex follows]

ANNEX

DRAFT TERMS OF REFERENCE OF THE STUDY ON THE "SCOPE OF THE BREEDER'S RIGHT" AND THE RELATIONSHIP WITH THE "EXHAUSTION OF THE BREEDER'S RIGHT"

SCOPE:

The study to include

- a first part with an analysis of the intentions of the drafters of the 1991 Act of the UPOV Convention in relation to Article 14 and Article 16 of the 1991 Act; and
- a second part with summaries of relevant court cases from UPOV members bound by the 1991 Act.

COMPOSITION:

It is proposed that the study should be carried out by [five of] the authors mentioned below. The authors should agree on one of them to be coordinating their work.

The working language of the authors should be English and the study should be drafted in English.

The below names have been suggested by members of the WG-HRV, but no final selection has yet been made

Proposed Experts (alphabetic order)
Mr Sven Bostyn
Mr Huib Ghijzen
Ms Vivianne Kunisawa
Mr Charles Lawson
Mr Axel Metzger
Ms Pilar Montero
Mr Joseph Strauss

MODUS OPERANDI:

Independence:

The authors are independent in drafting the study.

Having received the study, it is up to the WG-HRV to consider a possible follow-up and to request further guidance from the CAJ, as appropriate.

UPOV members are not bound by the content and/or conclusions drawn in the study.

Timeline:

The authors will be asked to deliver the study for consideration at the sixth meeting of the WG-HRV, expected to take place in Geneva in October, 2024, date and time to be decided.

The time could be prolonged upon request by the authors.

Financial support:

[to be discussed]

[End of Annex and of document]