

Working Group on Harvested Material and Unauthorized Use of Propagating Material
WG-HRV/8/2
**Eighth Meeting
Geneva, October 22, 2025**
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STUDY ON THE “SCOPE OF THE BREEDER’S RIGHT” AND THE RELATIONSHIP WITH THE “EXHAUSTION OF THE BREEDER’S RIGHT”
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BACKGROUND

1. The purpose of this document is to invite the Working Group on harvested material and unauthorized use of propagating material (WG-HRV) to take note of the authors’ draft study on the “Scope of the Breeder’s Right” and the relationship with the “Exhaustion of the Breeder’s Right”.
2. This draft study provided by the authors is reproduced in Annex I of this document.
3. The WG-HRV, during its sixth meeting¹, agreed that the final report would be expected by September 1, 2025, as mentioned in the Terms of Reference.
4. The Terms of Reference mentions that the time could be prolonged upon request by the authors.
5. With Circular E-25/053 of September 11, 2025, the WG-HRV was informed that the authors of the study requested to postpone the delivery date of the final report to December 15, 2025, as the scope of the study, particularly the review of the history of the development of Articles 14 and 16 of the 1991 Act, was extensive and the collection and analysis of material required more time than initially anticipated.

PRESENTATION BY THE AUTTHORS DURING THE MEETING ON OCTOBER 22, 2025

6. The authors will present a draft study at the eighth meeting of the WG-HRV, on October 22, 2025, in person. This draft study is reproduced in Annex I of this document.
7. The authors will be ready to deliver a final version of the study on December 15, 2025, to the Office of the Union. The study will be made available to the WG-HRV in January 2026, giving the members time to consider the final version of the study before the ninth meeting of the WG-HRV, foreseen to take place in March 2026, date to be confirmed. The Terms of Reference of the study as approved by the WG-HRV, at its sixth meeting, and amended by Circular E-25/053, are reproduced in Annex II of this document.

8. The WG-HRV is invited to note the draft study provided in Annex I to this document.

[Annex I follows]

¹ Held in Geneva on October 22, 2024.

Draft Study

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

by the members of the Expert Group:

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Interim Report September 2025

Terms of Reference, Annex to the document CAJ/81/5 Add:

- 1) Analysis of the intentions of the drafters of the 1991 Act of the UPOV Convention in relation to 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; and
- 2) Summaries of relevant court cases from UPOV members bound by the 1991 Act.

On account of a time frame appearing too tight for this extensive study, the relationship of unauthorized use" and "reasonable opportunity" with the "Exhaustion of the Breeder's Right" has not yet been analyzed.

The provisional results of the study:

The Expert Group (the Group) had 4 meetings via Teams in the period April – July 2025. The Group analyzed the history of the 1978 and 1991 UPOV Conventions and the intentions of the drafters, for the concepts of article 14(2) of UPOV 1991, viz. "unauthorized use", "reasonable opportunity", "propagating material" and "harvested material", by studying the preparatory papers and the records of the diplomatic conferences, together with the relevant jurisprudence. The study on the concepts of "propagating material" and "harvested material" were performed as they are also regarded as an integral part of article 14(2) UPOV 1991.

On the basis of these extensive studies, the Group arrives at the following provisional and summarized conclusions:

I. Unauthorized use

- The analysis of the Preparatory Documents and the Records of the Diplomatic Conference as regards the notion of "unauthorized use of propagating material" of the protected variety in Article 14 (1) (b), now Article 14 (2) UPOV 1991, leads to the following conclusions:
- Any use specified in Article 14 (1) (a) UPOV 1991, including any conditioned under Article 14 (1) (b), of propagating material of a protected variety, requires authorization of the owner of the breeder's right related to that variety. It is otherwise an unauthorized use.
- The notion 'unauthorized' in Article 14 (2) UPOV 1991 relates to the authorization of the holder of the breeder's right at issue and not to the legal status of the propagating material used for obtaining the harvested material. It is irrelevant whether the use of the propagating material outside the territory where the respective breeder's right is granted, valid and enforced, is covered by any proprietary right or not, i.e. legally or illegally used.
- The two preconditions for the extension of the breeder's right to harvested material, i.e. "unauthorized use" of the propagating material of the protected variety, and that the "breeder has had [no] reasonable opportunity to exercise the right in relation to the said propagating material", in Article 14 (2) UPOV constitute an inseparable whole.
- The introduction of the notion "reasonable opportunity" into the wording of Article 14 (2) has widened the possibility to claim protection of the breeder's right to harvested material beyond the previous notion of "has had no legal possibility to exercising the right in relation to the propagating material".

- Under the cascading principle set forth in Article 14 (2) UPOV 1991 the owner of the right can exercise the right once only and receive a royalty once only, subject to possible contractual conditions and limitation imposed by the owner of the breeder's right.
- The authorization of the breeder's right holder is required for all acts specified in Article 14 (1) (i)-(vii) UPOV 1991, also related to the harvested material so obtained outside the validity of the respective breeder's right, when that harvested material enters into and is distributed in the territory where the respective breeder's right is valid. As the harvested material then fulfills the cumulative requirements "unauthorized use" and "no reasonable opportunity to exercise his right". Any other exercising of that right, e.g. by claiming royalties, at the same time constitutes "exercising of the breeder's right at the earliest possible stage" within the cascade.
- Summarized: "*Unauthorized use*": the use of propagating material of a protected variety, without the authorization of the holder, for the production of the resulting harvested material within or outside the territory where the variety is protected and, in the latter case, where the possibly imported harvested material falls under the protection of article 14(2) UPOV 1991.

II. REASONABLE OPPORTUNITY:

- The *reasonable opportunity* clause was introduced during the 1991 Diplomatic Conference as a flexible alternative to stricter proposals ("no legal possibility" / "in spite of all due care") and it had not appeared in the 1978 Act or earlier texts.
- The clause was adopted as a compromise during the 1991 Diplomatic Conference, replacing stricter proposals such as "no legal possibility" or "in spite of all due care." This drafting choice ensured a flexible, context-sensitive interpretation while preserving the cascade structure. It reflects a negotiated compromise intended to preserve the cascade structure while allowing contextual judicial interpretation and marked a new safeguard in extending rights to harvested material.
- Its primary function is to ensure proportionality: downstream enforcement over harvested material is permitted only when breeders lacked a realistic chance to exercise rights earlier at the propagation stage. The distinction drawn at the Conference between "exercise" of rights (e.g., licensing or royalty collection) and "enforcement" (legal remedies) confirmed that *reasonable opportunity* pertains primarily to the former: whether the breeder had a commercially meaningful chance to intervene upstream.
- Explanatory Notes (UPOV/EXN/HRV/1) state that two cumulative conditions must be met: (i) unauthorized use of propagating material, and (ii) no reasonable opportunity to act at that stage. The clause is territorial and fact-based, assessed according to the specific circumstances of each case.
- Case law shows illustrates the practical scope of this condition.
 - **Nadorcott (CJEU)** – restrictive; the provisional protection period does not require the preconditions of unauthorized use and the reasonable opportunity, as the cascade applies only to a protected variety.
 - **Melanie (BGH, Germany)** – extraterritorial limits (no rights in France) constituted absence of opportunity. It was held that the breeder's inability to enforce rights extraterritorially was sufficient to satisfy the clause.
 - **Shiitake (IP High Court, Japan)** – recognized broader factual limits (legal gaps abroad, evidentiary and technical hurdles). It extended the reasoning further, recognizing that lack of legal protection abroad, evidentiary constraints, and technical challenges could jointly amount to absence of a reasonable opportunity.
 - **Erntegut (BGH, Germany)** – emphasized the importance of the concrete possibility for the breeder to exercise his right; lack of traceability and hidden supply chains excluded the opportunity to act upstream.

- Across jurisdictions, the notion of *reasonable opportunity* has emerged as a decisive threshold: it prevents opportunistic or retroactive enforcement while preserving the breeder's ability to act when upstream control was legally or practically impossible.
- Summarized: *reasonable opportunity* has emerged as the decisive threshold for applying the cascade principle: it prevents retroactive or opportunistic claims while ensuring breeders are not deprived of protection when upstream enforcement is legally or practically impossible.

III PROPAGATING MATERIAL AND HARVESTED MATERIAL:

The Records of the 1991 Conference take a clear position on not defining "propagating material" and "harvested material". They discussed proposed amendments that were ultimately not adopted, which allows conclusions to be drawn about the understanding of the final text, but they explain this only indirectly and without taking a clear position on the disputed issue about the scope of protections. These debates also deferred some of the discussion about "propagating material" and "harvested material" to the discussions about exhaustion (Article 16). With this in mind, the following cautious conclusions are apparent:

- a) For "harvested materials" that can be used as "propagating materials" or as consumption products (potatoes, crops, and so on), the mere biological possibility to use those materials for reproduction has not been seen as sufficient to apply the 1st level of the cascade; however the Records do not take a clear position as to what additional conditions (e.g. intention or knowledge) must be met to characterise consumption products as "propagating materials".
- b) The Records indicate that plant material which is neither "propagating material" nor "harvested goods" in a literal sense should still be covered, especially full plants (pot plants, fruit trees), cut flowers, flower bulbs, cuttings, seedlings, and so on. For cut flowers, the Records give clear indications that the drafters considered them as "harvested materials". The delegates referred breeders who wish to have more extensive protection to the conclusion of appropriate contracts.

The court decisions do not paint a completely coherent picture, but can be summarized as follows:

- a) Plant material which is not capable of reproduction true-to-type cannot be characterized as propagating material but only as harvested material (or certain products) if the conditions are met.
- b) Plant material which is capable of reproduction true-to-type must not necessarily be characterised as propagating material. Here one has to distinguish several cases:
 - i) Parts of plants or full plants optimized for reproduction are propagating material.
 - ii) Parts of plants or full plants optimized for (professional) cultivation or growing is propagating material (flower bulbs, cuttings) ("Goldfinger", "Amaryllis").
 - iii) Parts of plants or full plants that are typical products of consumption harvested material (potatoes, crops, cut flowers, pot plants, Shitake mushrooms), if not sold or used as propagating or cultivation material ("Achat", "Cilena", "Melanie", but "Franklin", but "Amethyst").

FUTURE WORK:

1. To analyze the relationship between unauthorized use and Exhaustion.
2. Summaries of relevant court cases from UPOV members bound by the 1991 Act.

The Group aims to present a concept of the final report before the end of 2025, that will be finalized and discussed in the WG-HRV March 2026 meeting.

[Annex II follows]

ANNEX II

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"
as approved by the WG-HRV, at its sixth meeting, and amended by Circular E-25/053

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 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; and
- a second part with summaries of relevant court cases from UPOV members bound by the 1991 Act.

COMPOSITION:

The study should be carried out by the five 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.

Experts (alphabetic order)
Mr. Huib Ghijsen
Ms. Vivianne Kunisawa
Mr. Charles Lawson
Mr. Axel Metzger
Mr. Joseph Straus

MODUS OPERANDI:

Independence:

The authors are independent in drafting the study, in the sense that the authors should not receive individual instructions from anyone and that the authors should be impartial and objective.

The five authors should draft one study and should follow a collaborative working method following academic standards. Following such standards, the authors should manage potential different perspectives or analysis and, if applicable, how such matters should be reflected in 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 draft study by latest September 1, 2025, for consideration at the eighth meeting of the WG-HRV, on October 22, 2025. The final version of the study to be delivered by latest December 15, 2025.

Financial support:

55,000 Swiss Francs which would include:

- Honorarium of 10,000 Swiss francs for each of the 5 authors.
- Travel expenses up to 5,000 Swiss francs in total for the 5 authors. The purpose of the travel could be to convene a meeting amongst the authors or to support travel to come to Geneva to present the findings of the study or any other unforeseen travel expenses.

The overall estimation of the cost to be shared as follows: UPOV regular budget would cover 30,000 Swiss francs and the Funds-in-Trust Agreement between the Government of Japan and UPOV (JP-FIT) would cover 25,000 Swiss francs.

[End of Annexes and of document]