UPOV

PLANT VARIETY PROTECTION

Gazette and Newsletter
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GAZETTE

EXTENSION OF PROTECTION TO FURTHER GENERA AND SPECIES

France

By virtue of Decree No. 87-573 of July 22, 1987 (Journal officiel of July 24, 1987, pages 8275 and 8276), amending Decree No. 71-765 of September 9, 1971, Fixing the List of Plant Species for which New Plant Variety Certificates may be Issued, and the Scope and Duration of the Breeder's Right in the Case of each Plant Species, protection has been extended to the following with effect from July 25, 1987 (the French names appear in the Decree, whereas the English and German names have been added, without guarantee of concordance, by the Office of the Union) :

Français	English	Deutsch
Chicorée, Endive (Cichorium intybus L.)	Chicory (Cichorium intybus L.)	Wurzelzichorie, Salatzichorie (Cichorium intybus L.)
Chou cabus	White Cabbage	Weisskohl
Chou de Bruxelles	Brussels Sprouts	Rosenkohl
Chou de Milan	Savoy Cabbage	Wirsing
Chou frisé	Curly Kale	Grünkohl
Chou rouge	Red Cabbage	Rotkohl
Concombre, Cornichon	Cucumber, Gherkin	Gurke
Courge, Courgette (Cucurbita pepo L.)	Pumpkin, Marrow, Courgette (Cucurbita pepo L.)	Gartenkürbis, Oelkürbis, Zucchini (Cucurbita pepo L.)
Epine du Christ	Christ's Thorn, Crown of Thorns	Christusdorn
Fétuque élevée	Tall Fescue	Rohrschwingel
Lentille	Lentil	Linse
Noyer	Walnut	Walnuss
Pélargonium des fleuristes	Show and Fancy Pelargoniums	Edelpelargonie
Pleurotes (Pleurotus ostreatus et pulmonaria)	Oyster Mushrooms (Pleurotus ostreatus and pulmonaria)	Austernseitlinge (Pleurotus ostreatus und pulmonaria)
Seigle	Rye	Roggen

For chicory (Cichorium intybus L.), white cabbage, Brussels sprouts, Savoy cabbage, curly kale, red cabbage, cucumber and gherkin, and pumpkin, marrow and courgette (Cucurbita pepo L.), protection is only available for F_1 hybrids, hybrids between clones and for lines.

The duration of protection was set:

(i) at 20 years for chicory (Cichorium intybus L.), white cabbage, Brussels sprouts, Savoy cabbage, curly kale, red cabbage, cucumber and gherkin, pumpkin, marrow and courgette (Cucurbita pepo L.), Christ's thorn, lentil, show and fancy pelargoniums, oyster mushrooms (Pleurotus ostreatus and pulmonaria) and rye;

(ii) at 25 years for tall fescue and walnut.

Foreigners may obtain protection for varieties of those taxa on the basis of reciprocity.

Pursuant to Article 58 of the Decree Concerning New Plant Variety Certificates and the Issue and Renewal Thereof (see Plant Variety Protection No. 34, page 21), applications that relate to varieties of recent creation and are to benefit from the transitional limitation of the requirement of novelty under Article 36 of the Law on the Protection of New Plant Varieties (see Plant Variety Protection No. 33, page 21) must be filed before December 31, 1988.

The list of taxa which are covered by plant variety protection legislation is given below, with some details on the duration and scope of protection. The French common names appear in the Decrees, whereas the English and German common names have been added, without guarantee of concordance, by the Office of the Union.

A consolidated text of Decree No. 71-765 of September 9, 1971, as last amended by Decree No. 87-573 of July 22, 1987, is published in the "Legislation" subsection of the "Newsletter" section, starting on page 4.

Explanations to the List Starting on Page 4

Column 1 indicates the duration of protection in years.

Column 2 indicates the scope of protection as follows.

A: Protection relates to seeds, as defined in accordance with Article 1 of Decree No. 81-605 of May 18, 1981, as well as to plants and parts thereof marketed for planting purposes.

B: Protection relates to the whole plant or parts thereof, as well as to any reproductive or vegetative propagating material.

C: Only fruit-bearing varieties and rootstocks may be protected. Protection relates to any part of the plant to be used as vegetative propagating material, such as plants, grafts, cuttings, layers, or to be used for laying down plantations with a view to the commercial production of fruit. It relates also to seeds as defined in accordance with Article 1 of the above-mentioned Decree, or to the pips and stones of these species in cases where they may be used as seeds for the generative reproduction of the varieties.

D: Protection relates to the whole plant or parts thereof to be used as vegetative propagating material.

E: Protection relates to the cuttings and, generally, to any part of the plant to be used as vegetative propagating material.

F: Protection relates to monocaryotic and dicaryotic mycelium (vegetative and undifferentiated state, respectively).

G: Protection relates to seeds (seed potatoes) to be used for the propagation of the species as defined in accordance with Article 1 of the above-mentioned Decree.

Notes explicatives sur la liste commençant à la page 4

La colonne 1 indique la durée de la protection, en années.

La colonne 2 indique l'étendue de la protection comme suit.

A: La protection porte sur les semences, telles qu'elles sont définies conformément à l'article premier du décret No 81-605 du 18 mai 1981, ainsi que sur les plantes ou parties de plantes commercialisées en vue de la plantation.

B: La protection porte sur tout ou partie de la plante de même que sur tous éléments de reproduction ou de multiplication végétative.

C: Seuls les variétés productrices de fruits et les porte-greffes peuvent être protégés. La protection porte sur toute partie de la plante destinée à être utilisée comme matériel de multiplication telle que plants, greffons, boutures, marcottes, ou destinée à l'établissement de cultures en vue de la production commerciale du fruit. Elle porte également sur

les semences, telles que définies conformément à l'article premier du décret susvisé, ou sur les pépins et noyaux de ces espèces dans le cas où ils sont utilisables à titre de semences pour la reproduction des variétés par voie sexuée.

D: La protection porte sur tout ou partie de la plante destinée à être utilisée comme matériel de multiplication.

E: La protection porte sur les boutures et, d'une manière générale, sur toute partie de la plante destinée à être utilisée comme matériel de multiplication.

F: La protection porte sur les mycéliums monocaryotiques et dicaryotiques (état végétatif et indifférencié).

G: La protection porte sur les plants destinés à la propagation de l'espèce tels qu'ils sont définis conformément à l'article premier du décret susvisé.

Erläuternde Anmerkungen zu der unten wiedergegebenen Liste

Spalte 1 gibt die Schutzdauer in Jahren an.

Spalte 2 gibt den Schutzumfang wie folgt an:

A: Der Schutz bezieht sich auf Saatgut im Sinne von Artikel 1 der Verordnung Nr. 81-605 vom 18. Mai 1981 sowie auf Pflanzen und deren Teile, die zum Zwecke des Anbaus vertrieben werden.

B: Der Schutz bezieht sich auf die ganze Pflanze oder Teile davon, sowie auf jede Art von generativem oder vegetativem Vermehrungsmaterial.

C: Nur Obstsorten und Unterlagen können geschützt werden. Der Schutz bezieht sich auf alle Teile der Pflanze, die als vegetatives Vermehrungsmaterial verwendet werden sollen, z. B. Pflanzen, Pfropfreiser, Stecklinge, Senkreiser, oder die zur Anpflanzung für die gewerbsmässige Erzeugung von Früchten bestimmt sind. Er bezieht sich ausserdem auf Saatgut im Sinne von Artikel 1 der obengenannten Verordnung oder auf Kerne und Steine dieser Arten, falls sie als Saatgut für die generative Vermehrung der Sorten verwendet werden können.

D: Der Schutz bezieht sich auf die zur Verwendung als Vermehrungsmaterial bestimmte ganze Pflanze oder Teile davon.

E: Der Schutz bezieht sich auf die Stecklinge und ganz allgemein auf alle Teile der Pflanze, die als vegetatives Vermehrungsmaterial verwendet werden sollen.

F: Der Schutz bezieht sich auf monokaryotisches und dikaryotisches Myzelium (vegetatives bzw. undifferenziertes Stadium).

G: Der Schutz bezieht sich auf Pflanzgut (Pflanzkartoffeln) im Sinne von Artikel 1 der obengenannten Verordnung, das zur Vermehrung der Art bestimmt ist.

Plant Variety Protection in France* / Protection des obtentions végétales en France* / Sortenschutz in Frankreich*

Français	English	Deutsch	1	2
Abricotier	Apricot	Aprikose	25	C
Alstroemère	Alstroemeria, Herb Lily	Inkalilie	20	B
Amandier	Almond	Mandel	25	C

* See explanations, page 3 / Voir les explications à la page 3 / Siehe Erläuterungen oben.

Français	English	Deutsch	1	2
Aubergine	Eggplant, Aubergine	Eierfrucht, Aubergine	20	A
Avoine	Oats	Hafer	20	A
Bégonia elatior	Elatior Begonia	Elatior-Begonie	20	B
Berberis	Berberis, Barberry	Berberitze	20	B
Blé dur	Durum Wheat, Macaroni Wheat, Hard Wheat	Durumweizen (Hartweizen)	20	A
Blé tendre	Soft Wheat, Bread Wheat	Weichweizen	20	A
Brome (Bromus carinatus Hook. et Arn., Bromus sitchensis Trin., Bromus stamineus Desv. incl. B. valdivianus Phil., Bromus willdenowii Kunth, B. unioloides H.B.K., Catharticus auct.)	Brome (Bromus carinatus Hook. et Arn., Bromus sitchensis Trin., Bromus stamineus Desv. incl. B. valdivianus Phil., Bromus willdenowii Kunth, B. unioloides H.B.K., Catharticus auct.)	Trespe (Bromus carinatus Hook. et Arn., Bromus sitchensis Trin., Bromus stamineus Desv. incl. B. valdivianus Phil., Bromus willdenowii Kunth, B. unioloides H.B.K., Catharticus auct.)	20	A
Buddleia	Buddleia, Butterfly-bush	Buddleie, Schmetterlingsstrauch	20	B
Cassis	Black Currant	Schwarze Johannisbeere	25	C
Cerisier	Cherry	Kirsche	25	C
Châtaignier	Chestnut	Kastanie	25	C
Chicorée, Endive (Cichorium intybus L.)*	Chicory (Cichorium intybus L.)*	Wurzelzichorie, Salatzichorie (Cichorium intybus L.)*	20	A
Chicorée frisée et Chicorée scarole	Endive	Winterendivie	20	A
Chou cabus*	White Cabbage*	Weisskohl*	20	A
Chou de Bruxelles*	Brussels Sprouts*	Rosenkohl*	20	A
Chou de Milan*	Savoy Cabbage*	Wirsing*	20	A
Chou frisé*	Curly Kale*	Grünkohl*	20	A
Chou rouge*	Red Cabbage*	Rotkohl*	20	A
Concombre, Cornichon*	Cucumber, Gherkin*	Gurke*	20	A
Courge, Courgette (Cucurbita pepo L.)*	Pumpkin, Marrow, Courgette (Cucurbita pepo L.)*	Gartenkürbis, Oelkürbis, Zucchini (Cucurbita pepo L.)*	20	A
Chrysanthème	Chrysanthemum	Chrysantheme	20	B
Cognassier	Quince	Quitte	25	C
Colza	Rapeseed	Raps	20	A
Cyprès (cyprès de Provence, cyprès de l'Arizona, cyprès de Duprez, cyprès de Leyland - X Cupressocyparis et ses hybrides)	Cypress (Mediterranean cypress, Arizona cypress, Duprez cypress, Leyland cypress - X Cupressocyparis and its hybrids)	Zypresse (echte Zypresse, Arizonazypresse, Duprez Zypresse, Leyland Zypresse - X Cupressocyparis und ihre Hybriden)	25	B

* Protection limited to F_1 hybrids, hybrids between clones and to lines / Protection limitée aux hybrides F_1, aux hybrides de clones et aux lignées / Schutz beschränkt auf F_1-Hybriden, Hybriden zwischen Klonen und auf Linien.

Français	English	Deutsch	1	2
Dieffenbachia	Dieffenbachia	Dieffenbachia	20	B
Epine du Christ	Christ's Thorn, Crown of Thorns	Christusdorn	20	B
Euphorbia fulgens	Euphorbia fulgens	Korallenranke	20	B
Fétuque élevée	Tall Fescue	Rohrschwingel	25	A
Forsythia	Forsythia, Golden Bell	Forsythie, Goldflieder, Goldglöckchen	20	B
Fraisier	Strawberry	Erdbeere	20	D
Framboisier	Raspberry	Himbeere	25	C
Freesia	Freesia	Freesie	20	B
Gerbera	Gerbera	Gerbera	20	B
Glaïeul	Gladiolus	Gladiole	20	B
Groseillier	Red and White Currants	Rote und Weisse Johannisbeeren	25	C
Groseillier à maquereau	Gooseberry	Stachelbeere	25	C
Haricot	Bean	Bohne	20	A
Hortensia	Hydrangea	Hortensie	20	B
Houblon	Hop	Hopfen	25	C
Houx (hybrides d'Ilex aquifolium)	Holly (hybrids of Ilex aquifolium)	Stechpalme (Hybriden von Ilex aquifolium)	25	B
Iris bulbeux et rhizomateux	Bulbous and rhizomatous Iris	Zwiebel- und wurzelstockbildende Iris	20	B
Juniperus	Juniper	Wacholder	25	B
Kalanchoë	Kalanchoë	Kalanchoë	20	B
Lagerstroemia	Crape Myrtle	Lagerstroemia	20	B
Laitue	Lettuce	Salat	20	A
Lavande et Lavandins	Lavender	Lavendel	20	B
Lentille	Lentil	Linse	20	A
Lin	Flax, Linseed	Lein	20	A
Lis	Lily	Lilie	20	B
Lupin blanc	White Lupin	Weisse Lupine	20	A
Luzerne	Lucerne	Luzerne	25	A
Mâche	Cornsalad, Lamb's Lettuce	Feldsalat	20	A
Maïs	Maize	Mais		
- lignées endogames	- inbred lines	- Inzuchtlinien	25	A
- autres variétés	- other varieties	- andere Sorten	20	A
Malus ornemental	Ornamental Crab	Zierapfel	25	B
Nerium oleander	Oleander, Rose Bay	Oleander	20	B
Noisetier	Hazelnut, Filbert	Haselnuss	25	C

Français	English	Deutsch	1	2
Noyer	Walnut	Walnuss	25	C
Oeillet	Carnation	Nelke	20	B
Orchidées	Orchids	Orchideen	20	B
Orge	Barley	Gerste	20	A
Pâturin des prés	Kentucky Bluegrass, Smooth Stalked Meadow-grass	Wiesenrispengras	20	A
Pêcher	Peach	Pfirsich	25	C
Pélargonium (pélargonium zonale, géranium-lierre et hybride)	Pelargonium (zonal, ivy-leaved and hybrid Pelargoniums)	Pelargonie (Zonal-, Efeupelargonie und Halbpeltaten)	20	B
Pélargonium des fleuristes	Show and Fancy Pelargoniums	Edelpelargonie	20	B
Peuplier	Poplar	Pappel	25	E
Piment	Sweet Pepper, Capsicum, Chili	Paprika	20	A
Pleurotes (Pleurotus ostreatus et pulmonaria)	Oyster Mushrooms (Pleurotus ostreatus and pulmonaria)	Austernseitlinge (Pleurotus ostreatus und pulmonaria)	20	F
Poinsettia	Poinsettia	Poinsettie, Weihnachtsstern	20	B
Poirier	Pear	Birne	25	C
Pois	Pea	Erbse	20	A
Pomme de terre	Potato	Kartoffel	25	G
Pommier	Apple	Apfel	25	C
Prunier	Plum	Pflaume	25	C
Pyracantha	Firethorn	Feuerdorn	20	B
Ray-grass	Ryegrass	Weidelgras	25	A
Rhododendron	Rhododendron	Rhododendron	25	B
Riz	Rice	Reis	20	A
Rosier	Rose	Rose	20	B
Ronces fruitières	Fruiting Blackberries	Obstbrombeeren	25	C
Saintpaulia	Saintpaulia, African Violet	Usambaraveilchen	20	B
Seigle	Rye	Roggen	20	A
Soja	Soya Bean, Soybean	Sojabohne	20	A
Sorgho (Sorghum bicolor (L.) Moench)	Sorghum (Sorghum bicolor (L.) Moench)	Mohrenhirse (Sorghum bicolor (L.) Moench)	25	A

* Protection limited to inbred lines / Protection limitée aux lignées endogames / Schutz beschränkt auf Inzuchtlinien.

Français	English	Deutsch	1	2
Streptocarpus	Streptocarpus, Cape Primrose	Drehfrucht	20	B
Thym	Thyme	Thymian	25	B
Thuya	Thuya	Lebensbaum	25	B
Tomate	Tomato	Tomate	20	A
Trèfle violet	Red Clover	Rotklee	25	A
Triticale	Triticale	Triticale	20	A
Tournesol	Common Sunflower	Sonnenblume	20	A
Tulipe	Tulip	Tulpe	20	B
Vigne	Vine	Rebe	25	C
Weigela	Diervilla	Weigelie	20	B

South Africa

By virtue of the Regulations Relating to Plant Breeders' Rights - Amendment No. R. 2349 of November 14, 1986 (Government Gazette of November 14, 1986, page 2), protection has been extended to the following with effect from November 14, 1986:

Latine	English	Français	Deutsch
Agrotricum	-	-	-
Brassica napus L.	Rape	Colza	Raps
Brassica napus L. var. napobrassica (L.) Rchb.	Swede	Chou-navet, Rutabaga	Kohlrübe
Brassica oleracea L. convar. acephala (DC.) Alef. var. medullosa Thell.	Fodder Kale	Chou fourrager	Futterkohl
Brassica oleracea L. convar. acephala (DC.) Alef. var. sabellica	Borecole, Curly Kale	Chou frisé	Grünkohl
Brassica oleracea L. convar. capitata (L.) Alef. var. sabauda L.	Savoy Cabbage	Chou de Milan	Wirsing
Bromus unioloides H.B.K.	Rescue Grass	Brome de Schrader	Horntrespe
Chloris gayana Kunth	Rhodes Grass	Herbe de Rhodes	Rhodesgras
Digitaria eriantha Steud. ssp. eriantha	Smuts Digitaria	-	-
Eragrostis tef (Zucc.) Trotter	Teff	Teff, Teff d'Abyssinie	Abessinische Zwerghirse, Teff
Festuca arundinacea Schreb.	Tall Fescue	Fétuque élevée	Rohrschwingel
Raphanus sativus L. var. oleiformis Pers.	Fodder Radish	Radis oléifère, Radis chinois	Oelrettich

The list of taxa which are covered by plant variety protection legislation is given in the "Legislation" subsection of this issue, starting on page 15, together with some details on the fees payable and the duration of protection.

[This text replaces the text published in Plant Variety Protection No. 50]

FRANCE

Decree Fixing the List of Plant Species for which New Plant Variety Certificates may be Issued, and the Scope and Duration of the Breeder's Right in the Case of each Plant Species*

Consolidated Text of Decree No. 71-765 of September 9, 1971, as Last Amended by Decree No. 87-573 of July 22, 1987

Article 1

New plant variety certificates may be issued, under the conditions provided for by the Law of June 11, 1970, mentioned above[1] and its implementing decrees, for the following species: apple, barley, bean, carnation, red clover, lettuce, lucerne, maize, oats, pea, potato, rice, rose, ryegrass, hard wheat, soft wheat.

For those species, any foreigner who is a national of a State party to the International Convention for the Protection of New Varieties of Plants of December 2, 1961, or who has his domicile, registered office or establishment in one of those States may obtain a new plant variety certificate under the same conditions as French nationals.

Foreigners who are not nationals of one of those States or do not have their domicile, registered office or establishment therein may obtain new plant variety certificates only under the conditions of reciprocity set out in Article 2 below.

Article 2

New plant variety certificates may also be issued under the conditions provided for by the Law of June 11, 1970, and its implementing decrees for the following species: almond, alstroemeria, apricot, elatior begonia, berberis, fruiting blackberries, Kentucky bluegrass, brome (Bromus carinatus Hook. et Arn., Bromus sitchensis Trin., Bromus stamineus Desv. incl. B. valdivianus

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* French title (of Decree No. 71-765): Décret fixant la liste des espèces végétales pour lesquelles peuvent être délivrés des certificats d'obtention végétale ainsi que, pour chacune d'elles, la durée et la portée du droit de l'obtenteur.

** Consolided text prepared by the Office of the Union from the texts published in the Journal officiel:

Decree No. 71-765 of September 9, 1971: J.O. of September 18, 1971;
Decree No. 76-775 of August 9, 1976: J.O. of August 18 and September 12, 1976;
Decree No. 78-245 of February 23, 1978: J.O. of March 8, 1978;
Decree No. 82-247 of March 12, 1982: J.O. of March 18, 1982;
Decree No. 83-22 of January 12, 1983: J.O. of January 15, 1983;
Decree No. 84-619 of July 4, 1984: J.O. of July 18, 1984;
Decree No. 85-1452 of December 26, 1985: J.O. of December 31, 1986;
Decree No. 87-573 of July 22, 1987: J.O. of July 24, 1987.

[1] Law on the Protection of New Plant Varieties (No. 70-489 of June 11, 1970); J.O. of June 12, 1970.

Phil., Bromus willdenowii Kunth, B. unioloides H.B.K., Catharticus auct.), Brussels sprouts, buddleia, red cabbage, Savoy cabbage, white cabbage, cherry, chestnut, chicory (Cichorium intybus L.), chrysanthemum, Christ's thorn, corn-salad, ornamental crab, cucumber and gherkin, black currant, red and white currants, cypress (Mediterranean cypress, Arizona cypress, Duprez cypress, Leyland cypress - X Cupressocyparis and its hybrids), dieffenbachia, eggplant, endive, Euphorbia fulgens, tall fescue, firethorn, flax and linseed, forsythia, freesia, gerbera, gladiolus, gooseberry, hazelnut, holly (hybrids of Ilex aquifolium), hop, hydrangea, bulbous and rhizomatous iris, juniper, kalanchoë, curly kale, lagerstroemia, lavender, lentil, lily, white lupin, oleander, orchids, oyster mushrooms (Pleurotus ostreatus and pulmonaria), peach, pear, pelargonium (zonal, ivy-leaved and hybrid pelargoniums), show and fancy pelargoniums, sweet pepper, plum, poinsettia, poplar, pumpkin, marrow and courgette (Cucurbita pepo L.), quince, rapeseed, raspberry, rhododendron, rye, sorghum (Sorghum bicolor (L.) Moench), soya bean, strawberry, streptocarpus, common sunflower, thuya, thyme, tomato, triticale, tulip, vine, African violet, walnut, weigela.

For these species, any foreigner may obtain a new plant variety certificate provided that French nationals are accorded reciprocal protection for the said species by the State of which the foreigner is a national or in which he has his domicile or establishment.

Orders of the Minister of Agriculture and the Minister for External Relations, issued on the proposal of the Committee for the Protection of New Plant Varieties shall determine, for each species and for each State concerned, that the legislation of that State satisfies this condition of reciprocity.

Article 2bis

For the species appearing in the following list, only F_1 hybrids, hybrids between clones, and lines may be protected: Brussels sprouts, red cabbage, Savoy cabbage, white cabbage, chicory (Cichorium intybus L.), cucumber and gherkin, curly kale, and pumpkin, marrow and courgette (Cucurbita pepo L.).

For the species appearing in the following list, only inbred lines may be protected: sorghum (Sorghum bicolor Moench).

For the species appearing in the following list, only fruit-bearing varieties and rootstocks may be protected: almond, apple, apricot, fruiting blackberries, cherry, chestnut, black currant, red and white currants, gooseberry, hazelnut, hop, peach, pear, plum, quince, raspberry, vine, walnut.

Article 3

For the species appearing in the following list, the breeder's right shall relate to the seeds, as defined in accordance with Article 1 of the Decree of May 18, 1981, mentioned above[1], as well as to the plants or parts thereof marketed for planting purposes: barley, bean, Kentucky bluegrass, brome (Bromus carinatus Hook. et Arn., Bromus sitchensis Trin., Bromus stamineus Desv. incl. B. valdivianus Phil., Bromus willdenowii Kunth, B. unioloides

[1] Decree No. 81-605 Issued for the Implementation of the Law of August 1, 1905, on the Repression of Fraud as far as the Commerce in Seed and Planting Material is Concerned (J.O. of May 20, 1981). Article 1 of this Decree reads as follows:

> "This Decree shall apply, under the term "seeds" or "planting material," to plants or parts of plants of any kind intended for production or multiplication.
>
> "In the marketing of these products, the terms "seeds" or "planting material" may only be preceded by the qualifiers "basic," "certified," "commercial," "standard" or by another qualifier fixed under the conditions laid down in Articles 9 and 10."

H.B.K., Catharticus auct.), Brussels sprouts, red cabbage, Savoy cabbage, white cabbage, chicory (Cichorium intybus L.), red clover, cornsalad, cucumber and gherkin, eggplant, endive, tall fescue, flax and linseed, curly kale, lentil, lettuce, lucerne, white lupin, maize, oats, pea, pumpkin, marrow and courgette (Cucurbita pepo L.), rye, sorghum (Sorghum bicolor (L.) Moench), sweet pepper, rapeseed, rice, ryegrass, soya bean, common sunflower, tomato, triticale, hard wheat, soft wheat.

Article 4

For potatoes, the breeder's right shall relate to the seeds to be used for the propagation of the species as defined in accordance with Article 1 of Decree No. 81-605 of May 18, 1981, mentioned above.

Article 5

For poplars, the breeder's right shall relate to the cuttings and, generally, to any part of the plant which is to be used as material for the multiplication of the variety.

Article 6

For strawberries, the breeder's right shall relate to the whole plant or part thereof which is to be used as material for the multiplication of the variety.

Article 7

For the species appearing in the following list, the breeder's right shall relate to the whole plant or part thereof, as well as to any reproductive or vegetative propagating material of the variety concerned: alstroemeria, elatior begonia, berberis, buddleia, carnation, Christ's thorn, chrysanthemum, ornamental crab, cypress (Mediterranean cypress, Arizona cypress, Duprez cypress, Leyland cypress - X Cupressocyparis and its hybrids), dieffenbachia, Euphorbia fulgens, firethorn, forsythia, freesia, gerbera, gladiolus, holly (hybrids of Ilex aquifolium), hydrangea, bulbous and rhizomatous iris, juniper, kalanchoë, lagerstroemia, lavender, lily, oleander, orchids, pelargonium (zonal, ivy-leaved and hybrid pelargoniums), show and fancy pelargoniums, poinsettia, rhododendron, rose, streptocarpus, thyme, thuya, tulip, African violet, weigela.

Article 8

For the species appearing in the following list, the breeder's right shall relate to any part of the plant which is to be used as vegetative propagating material, such as plants, grafts, cuttings, layers, or which is to be used for laying down plantations with a view to the commercial production of fruit: almond, apple, apricot, fruiting blackberries, cherry, chestnut, black currant, red and white currants, gooseberry, hazelnut, hop, peach, pear, plum, quince, raspberry, vine, walnut.

It shall also relate to the seeds, as defined in accordance with Article 1 of Decree No. 81-605 of May 18, 1981, mentioned above, or to the pips and stones of the said species in cases where they may be used as seeds for the generative reproduction of the varieties.

Article 8bis

For oyster mushrooms (Pleurotus ostreatus and pulmonaria) the breeder's right shall relate to monocaryotic and dicaryotic mycelium (vegetative and undifferentiated state, respectively).

Article 9

The term of protection shall be twenty years for the following species: alstroemeria, barley, bean, elatior begonia, berberis, Kentucky bluegrass, Brussels sprouts, buddleia, red cabbage, Savoy cabbage, white cabbage, carnation, chicory (Cichorium intybus L.), Christ's thorn, chrysanthemum, cornsalad, cucumber and gherkin, dieffenbachia, eggplant, endive, Euphorbia fulgens, firethorn, flax and linseed, forsythia, freesia, gerbera, gladiolus, hydrangea, bulbous and rhizomatous iris, kalanchoë, curly kale, lagerstroemia, lavender, lentil, lettuce, lily, white lupin, maize (except inbred lines), oats, oleander, orchids, oyster mushrooms (Pleurotus ostreatus and pulmonaria), pea, pelargonium (zonal, ivy-leaved and hybrid pelargoniums), show and fancy pelargoniums, sweet pepper, poinsettia, pumpkin, marrow and courgette (Cucurbita pepo L.), rapeseed, rice, rose, rye, soya bean, strawberry, streptocarpus, common sunflower, tomato, triticale, tulip, African violet, weigela, hard wheat, soft wheat.

The term shall be twenty-five years for the following species: almond, apple, apricot, fruiting blackberries, brome (Bromus carinatus Hook. et Arn., Bromus sitchensis Trin., Bromus stamineus Desv. incl. B. valdivianus Phil., Bromus willdenowii Kunth, B. unioloides H.B.K., Catharticus auct.), cherry, chestnut, red clover, ornamental crab, black currant, red and white currants, cypress (Mediterranean cypress, Arizona cypress, Duprez cypress, Leyland cypress - X Cupressocyparis and its hybrids), tall fescue, gooseberry, hazelnut, holly (hybrids of Ilex aquifolium), hop, juniper, lucerne, maize (inbred lines only), peach, pear, plum, poplar, potato, quince, raspberry, rhododendron, ryegrass, sorghum (Sorghum bicolor (L.) Moench), thyme, thuya, vine, walnut.

Article 10

Any person who desires at the time of any act of assignment, concession or commercialization of the varieties referred to in the foregoing Articles, to avail himself of the possibility under Article 9 of the Law of June 11, 1970, mentioned above of adding a trademark to the variety denomination, whether he is the owner of the mark or other lawful user thereof, shall take the necessary precautions, especially in correspondence, in advertisements, in the preparation of trade catalogs and on packages or labels, to ensure that the denomination is sufficiently visible in its context so as to prevent any likelihood of confusion in the mind of the purchaser as to the variety's identity.

Article 11

Orders of the Minister of Agriculture issued on the proposal of the Committee for the Protection of New Plant Varieties shall determine, when the need arises, the details of the application of this Decree, which shall enter into force on publication in the Journal officiel of the French Republic of the Order provided for by Article 11 of the Law of June 11, 1970, mentioned above.[1]

Article 12

The Minister for External Relations, the Minister for Overseas Departments and Territories and the Minister of Agriculture are entrusted, each within his attributions, with the implementation of this Decree, which shall be published in the Journal officiel of the French Republic.

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[1] Order of September 17, 1971, Relating to the Tariff of the Fees Charged in New Plant Variety Protection Matters (J.O. of October 2, 1971). The entry into force referred to is that of the original Decree No. 71-765.

[These pages replace the corresponding pages published in Plant Variety Protection No. 47]

SOUTH AFRICA

Regulations Relating to Plant Breeders' Rights*

Consolidated Text of Regulations No. R. 2630 of December 24, 1980, as Amended by Regulations No. R. 37 of January 6, 1984, R. 990 of May 3, 1985, R. 1588 of August 1, 1986, R. 2349 of November 14, 1986, and R. 2341 of October 16, 1987

Regulation 1

Definitions

Unless the context otherwise indicates, words and phrases in these regulations shall have the meaning assigned thereto in the Act, and-

"Director-General" means the Director-General: Agriculture; and

"the Act" means the Plant Breeders' Rights Act, 1976 (Act 15 of 1976[1]).

Regulation 2

Kinds of Plants in Respect of Which Plant Breeders' Rights May Be Granted

A plant breeder's right, the content and mode of exercise of which are as determined in the Act and these regulations, may be granted in respect of new varieties of the kinds of plants specified in column 1 of Table 1.

Regulation 3

Requirements for New Varieties

(1) A variety of a kind of plant referred to in regulation 2 shall be deemed to be a new variety if-

(a) propagating material thereof has not at the time of the application for the relevant plant breeder's right and with the agreement of the breeder concerned-

(i) been sold in the Republic for longer than one year;

(ii) in the case of any fruit tree or any root-stock thereof, any ornamental tree, any vine or root-stock thereof, or any forest tree, been sold for longer than six years, and in the case of any other kind of plant, been sold for longer than four years in a convention country or an agreement country;

(b) [Repealed]

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* Consolidated text prepared by the Office of the Union from the texts published in the Government Gazette (the date of publication of each of those texts corresponds to its date of issue).

1 As last amended by Act No. 38 of 1983 (G.G. of April 20, 1983 (Vol. 214, No. 8663)).

(c) it is by reason of any important characteristic clearly distinguishable from any other variety of the same kind of plant, the existence of which is a matter of common knowledge at the time of the application for the relevant plant breeder's right, whatever the origin, artificial or natural, of the initial variation from which it resulted, may be;

(d) it is sufficiently homogeneous having regard to the particular features of the sexual reproduction or vegetative propagation thereof;

(e) it is stable with regard to the essential characteristics thereof and remains true to the description thereof after repeated reproduction or propagation or, where the breeder has defined a particular cycle of reproduction or multiplication, at the end of each cycle.

(2) Notwithstanding the provisions of subregulation (1)(a) the registrar may, within six months from the date on which the name of a kind of plant is specified in column 1 of Table 1 for the first time, in his discretion consider an application for the grant of a plant breeder's right in respect of a variety of the kind of plant concerned regardless of the fact that such variety is generally known for longer periods than those specified in that subregulation.

(3) For the purposes of paragraph (c) of subregulation (1) the existence of a variety shall be deemed to be a matter of common knowledge if the variety at the time of the relevant application for a plant breeder's right-

(a) was entered in an official list of varieties, or an application for such entry is under consideration;

(b) is included in a reference collection accessible to the public;

(c) has been precisely described in a publication which is accessible to the public; or

(d) has otherwise come to the knowledge of the public.

(4) A characteristic referred to in subregulation (1)(c) shall be such that it is clearly recognizable and precisely describable.

Regulation 4

Submission of Applications

(1) An application for the grant of a plant breeder's right shall be submitted to the registrar in the form set out in Schedule A*.

(2) Such application shall be accompanied by-

(a) a description, in a technical questionnaire obtainable from the registrar for this purpose, of a typical plant of the variety concerned and of the procedure to be used for the maintenance and reproduction of the variety concerned;

(b) such coloured illustrations as are required by the registrar, of a typical plant of the variety concerned;

(c) an indication, in the form set out in Schedule B*, of the denomination proposed for the variety concerned;

(d) written proof, where applicable, of the title or authority of the legal representative or agent submitting such application;

(e) the application fee specified in paragraph 1 of Table 2.

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* Not reproduced here.

TABLE 1*

KINDS OF PLANTS, FEES AND PERIODS OF RIGHTS

[Regulations 10(1), 12(1)]

Latine	English	Français	Deutsch	A	B	C	D
Actinidia chinensis Planch.	Kiwifruit	Actinidia, Groseille de Chine	Kiwifrucht	405	18	40	8
X Agrotriticum	-	-	-	280	15	40	5
Allium cepa L.	Onion	Oignon	Zwiebel	280	20	40	8
Aloë spp.	Aloe	Aloès	Aloe, Bitterschopf	405	18	40	8
Amygdalus spp.	Almond	Amandier	Mandel	405	20	40	8
Ananas comosus (L.) Merr.	Pineapple	Ananas	Ananas	405	18	40	8
Arachis spp.	Groundnut	Arachide	Erdnuss	280	15	55	5
Aulax, Leucadendron, Leucospermum, Mimetes, Orothamnus, Paranomus, Protea, Serruria	Proteas	Proteas	Proteen	405	18	40	8
Avena spp.	Oats	Avoine	Hafer	405	15	55	5
Beta vulgaris L. var. esculenta L.	Garden beet	Betterave rouge, Betterave potagère	Rote Rübe	280	15	40	5
Brassica napus L.	Rape	Colza	Raps	280	15	40	5
Brassica napus L. var. napobrassica (L.) Rchb.	Swede	Chou-navet, Rutabaga	Kohlrübe	280	15	40	5

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* This table is an adapted form of the one published in Government Gazette No. 7349, as last amended. The Latin names have been adapted where necessary to the latest knowledge in plant taxonomy. The English names are the ones published in the Governement Gazette. The French and German common names have been added by the Office of the Union, without guarantee of concordance.

The abbreviations have the following meaning:

A = Examination fee (in Rands)
B = Period of plant breeder's right (in years)
C = Annual fee (in Rands)
D = Period of sole rights (in years)

Latine	English	Français	Deutsch	A	B	C	D
Brassica oleracea L. convar. acephala (DC.) Alef. var. medullosa Thell.	Fodder Kale	Chou fourrager	Futterkohl	280	15	40	5
Brassica oleracea L. convar. acephala (DC.) Alef. var. sabellica	Borecole, Curly Kale	Chou frisé	Grünkohl	280	15	40	5
Brassica oleracea L. convar. botrytis (L.) Alef. var. botrytis	Cauliflower	Chou-fleur	Blumenkohl	280	15	40	5
Brassica oleracea L. convar. capitata (L.) Alef. var. capitata L.	Cabbage	Chou pommé	Kopfkohl	280	15	40	5
Brassica oleracea L. convar. capitata (L.) Alef. var. sabauda L.	Savoy Cabbage	Chou de Milan	Wirsing	280	15	40	5
Brassica rapa L.	Turnip	Navet	Herbstrübe, Mairübe	280	15	40	5
Bromus unioloides H.B.K.	Rescue Grass	Brome de Schrader	Horntrespe	280	15	40	5
Capsicum spp.	Sweet pepper	Poivron, Piment	Paprika	280	15	28	5
Carica papaya L.	Pawpaw	Papayer, Arbre à melon	Melonenbaum, Papaya	250	18	40	8
Carya illinoinensis (Wangenh.) C. Koch	Pecan nut	Pacanier	Pekan, Pekannuss	538	20	40	8
Cenchrus ciliaris L.	-	Cenchrus cilié	Büffelgras	280	15	40	5
Chloris gayana Kunth	Rhodes Grass	Herbe de Rhodes	Rhodesgras	280	15	40	5
Chrysanthemum spp.	Chrysanthemum	Chrysanthème	Chrysantheme	405	15	55	5
Citrullus lanatus (Thunb.) Matsum. et Nakai	Water-melon	Pastèque	Wassermelone	280	15	40	5

Latine	English	Français	Deutsch	A	B	C	D
Citrus spp.	Sweet orange, Lemon, Grapefruit, loose skin types, other (Bitter Seville, Lime, Kumquat)	Oranger, Citronnier, Pomélo, types à écorce lâche, autres types (Bigaradier, Limettier, Kumquat)	Orange, Zitrone, Grapefruit, Arten mit loser Schale, andere Arten (Pomeranze, Saure Limette, Kumquat)	673	25	83	10
Coffea arabica L.	Coffee	Caféier	Kaffee	405	18	40	8
Cucumis spp.	Sweet melon, Cucumber	Melon, Concombre	Melone, Gurke	280	15	40	5
Cucurbita spp.	Pumpkin, Squash	Potiron, Giraumon Courge, Pâtisson, Citrouille	Kürbis	280	15	40	5
Cydonia spp.	Quince	Cognassier	Quitte	405	18	40	8
Dactylis glomerata L.	Cocksfoot	Dactyle	Knaulgras	280	15	40	5
Daucus carota L.	Carrot	Carotte	Möhre	280	15	40	5
Dianthus caryophyllus L.	Carnation	Oeillet	Nelke	405	15	55	5
Digitaria eriantha Steud. ssp. eriantha	Smuts Digitaria	-	-	280	15	40	5
Eragrostis curvula (Schrad.) Nees	-	Eragrostis courbé	Behaartes Liebegras	280	15	55	5
Eragrostis tef (Zucc.) Trotter	Teff	Teff, Teff d'Abyssinie	Abessinische Zwerghirse, Teff	280	15	40	5
Euphorbia pulcherrima Willd. ex Klotzsch	Poinsettia	Poinsettia	Poinsettie, Weihnachtsstern	405	15	40	5
Festuca arundinacea Schreb.	Tall Fescue	Fétuque élevée	Rohrschwingel	280	15	40	5
Fragaria ananassa Duch.	Strawberry	Fraisier	Erdbeere	280	15	40	5
Freesia spp.	Freesia	Freesia	Freesie	405	15	40	5
Gladiolus spp.	Gladiolus	Glaïeul	Gladiole	405	15	55	5

Latine	English	Français	Deutsch	A	B	C	D
Glycine max (L.) Merrill	Soya bean	Soja	Sojabohne	280	15	40	5
Gossypium hirsutum L.	Cotton	Cotonnier	Baumwolle	405	15	55	5
Helianthus annuus L.	Sunflower	Tournesol, Soleil	Sonnenblume	280	15	55	5
Hibiscus cannabinus L.	Kenaf	Kénaf, Chanvre de Guinée	Ambari, Dekkan-Hanf	280	15	40	5
Hordeum spp.	Barley	Orge	Gerste	405	15	68	5
Humulus lupulus L.	Hops	Houblon	Hopfen	405	18	40	8
Lachenalia spp.	Lachenalia	Lachenalia, Coucou du Cap	Lachenalia	405	15	40	5
Lactuca sativa L.	Lettuce	Laitue	Salat	280	15	28	5
Litchi chinensis Sonn.	Litchi	Litchi	Litschi	538	20	40	8
Lolium spp.	Rye grass	Ray-grass	Weidelgras	405	15	55	5
Lupinus spp.	Lupin	Lupin	Lupine	280	15	40	5
Lycopersicon lycopersicum (L.) Karst. ex Farwell	Tomato	Tomate	Tomate	405	18	83	8
Macadamia spp.	Macadamia	Macadamia	Macadamia	405	20	68	8
Malus spp.	Apple	Pommier	Apfel	538	25	68	8
Mangifera indica L.	Mango	Manguier	Mango	538	20	55	8
Medicago sativa L.	Lucerne	Luzerne	Blaue Luzerne	405	15	55	5
Musa cavendishii Lamb.	Banana	Bananier	Banane	405	18	40	8
Narcissus L.	Narcissus	Narcisse	Narzisse	405	15	40	5
Ornithogalum spp.	Chinkerinchee	Ornithogale, Dame d'onze heures	Milchstern, Vogelmilch, Stern von Bethlehem	405	15	40	5
Oryza sativa L.	Rice	Riz	Reis	280	15	40	5

Latine	English	Français	Deutsch	A	B	C	D
Passiflora edulis Sims	Grenadilla	Barbadine	Purpurgranadilla	405	18	40	8
Pelargonium spp.	Geranium (Pelargonium)	Géranium (Pélargonium)	Pelargonie	405	15	40	5
Pennisetum typhoides (Burm.) Stapf et C.E. Hubb.	Pearl millet	Pénicillaire, Mil à chandelle	Federborstengras	280	15	40	5
Persea americana P. Mill.	Avocado	Avocatier	Avocado	405	20	55	8
Phaseolus coccineus L.	Kidney bean	Haricot d'Espagne	Prunkbohne	280	15	55	5
Phaseolus vulgaris L.	Bean	Haricot	Gartenbohne	280	15	55	5
Pisum spp.	Pea	Pois	Erbse	280	15	55	5
Prunus armeniaca L.	Apricot	Abricotier	Aprikose	405	18	55	8
Prunus avium (L.) L.	Sweet cherry	Cerisier (cerises douces : guignes, bigarreaux)	Süsskirsche	405	18	40	8
Prunus cerasus L.	Sour cherry	Cerisier (cerises acides : griottes, amarelles)	Sauerkirsche	250	18	40	8
Prunus domestica L.	Plum	Prunier	Pflaume	538	20	68	8
Prunus persica (L.) Batsch	Peach	Pêcher	Pfirsich	538	25	68	8
Prunus salicina Lindl.	Japanese Plum	Prunier du Japon	Japanische Pflaume	538	20	68	8
Psidium guajava L.	Guava	Goyavier	Guayave	405	18	55	8
Pyrus communis L.	Pear	Poirier	Birne	538	25	68	8
Raphanus sativus L. var. oleiformis Pers.	Fodder Radish	Radis oléifère, Radis chinois	Oelrettich	280	15	40	5
Ricinus communis L.	Castor bean	Ricin	Wunderbaum, Palma Christi	280	15	40	5
Rosa hort.	Rose	Rosier	Rose	405	15	55	5

Latine	English	Français	Deutsch	A	B	C	D
Saintpaulia ionantha H. Wendl.	African violet	Saintpaulia	Usambaraveilchen	405	15	40	5
Solanum melongena L. var esculentum Nees	Egg-fruit	Aubergine	Eierfrucht, Aubergine	280	15	40	5
Solanum tuberosum L.	Potato	Pomme de terre	Kartoffel	405	20	68	8
Sorghum spp.	Grain sorghum, Fodder sorghum	Sorgho grain, Sorgho fourrager	Mohrenhirse (Korn- und Futter-)	405	15	55	5
Thea sinensis L.	Tea	Théier	Tee	405	18	40	8
Trifolium hybridum L.	Alsike clover	Trèfle hybride	Schwedenklee	405	15	40	5
Trifolium pratense L.	Red clover	Trèfle violet	Rotklee	405	15	40	5
Trifolium repens L.	White clover	Trèfle blanc	Weissklee	405	15	40	5
Trifolium resupinatum L.	Pin clover	Trèfle de Perse	Persischer Klee	405	15	40	5
Trifolium subterraneum L.	Subterranean clover	Trèfle souterrain	Bodenfrüchtiger Klee	405	15	40	5
Triticum turgidosecale	Triticale	Triticale	Triticale	538	15	68	5
Triticum spp.	Wheat	Blé	Weizen	538	15	68	5
Vigna unguiculata (L.) Walp.	Cowpea	Dolique de Chine	Catjangbohne, Spargelbohne, Augenbohne	405	15	55	5
Vitis spp.	Grape	Vigne	Rebe	538	20	68	8
Zea mays L.	Grain maize	Maïs	Mais	538	15	83	5
Zea mays L.	Sweet corn, popcorn	Maïs sucré, popcorn	Zuckermais, Popkorn	280	15	40	5

TABLE 2

FEES PAYABLE

No.	Purpose	Amount
1	Application for a plant breeder's right (reg. 4(2)(e))	R135 each
2	Priority claim for the grant of a plant breeder's right (reg. 5(2)(c))	R28 each
3	Objection to the grant of a plant breeder's right (reg. 5(2)(c))	R28 each
4	Furnishing of the results of tests and trials to the appropriate authority in a convention country or an agreement country (reg. 10(3))	R360 each
5	Application for a compulsory licence (reg. 15(1)(a))	R56 each
6	Notice of the transfer of a plant breeder's right (reg. 16(2)(b))	R28 each
7	Application for the alteration or supplementation of the denomination of a variety (reg. 17(1)(b))	R280 each
8	Objection to the alteration or supplementation of the denomination of a variety (reg. 17(3)(e))	R28 each
9	Objections to intended termination of a plant breeder's right (reg. 18(1)(f))	R56 each
10	Notice of the voluntary surrender of a plant breeder's right (reg. 19(1)(b)(i))	R56 each
11	Inspection of the register of plant breeders' rights (reg. 22(2))	R13 per occasion or certificate
12	Application to inspect documents pertaining to a plant breeder's right, or for a certificate by the registrar (reg. 23(2))	
13	Application for a copy of particulars in the register or of documents pertaining to a plant breeder's right (reg. 23(2))	R3 per page
14	Lodging of appeal against a decision or action taken by the registrar (reg. 24(1)(d))	R280 each

NEWSLETTER

UPOV

The International Union for the Protection of New Varieties of Plants in 1987

State of the Union

There was no change during 1987 regarding membership of the Union, which therefore comprises the following 17 member States: Belgium, Denmark, France, Germany (Federal Republic of), Hungary, Ireland, Israel, Italy, Japan, Netherlands, New Zealand, South Africa, Spain, Sweden, Switzerland, United Kingdom, United States of America. All, except Belgium and Spain, are party to the Revised Act of October 23, 1978.

Concerning the position of the various States vis-à-vis the various Acts of the Convention, as at May 1, 1988, reference is made to Plant Variety Protection No. 51, page 16.

Sessions

During 1987, the various bodies of UPOV met as described below. Unless otherwise specified, the sessions took place in Geneva.

The Council held its twenty-first ordinary session on October 15 and 16, 1987, under the chairmanship of Mr. S.D. Schlosser (United States of America). The session was attended by the representatives of the member States and by observers from seven non-member States, namely, Australia, Brazil, Chile, China, Morocco, Poland and Portugal. The European Economic Commmunity (EEC), the Food and Agriculture Organization of the United Nations (FAO) and the International Seed Testing Association (ISTA) were also represented by observers.

The main decisions taken by the Council were as follows:

(i) The report of the Secretary-General on the activities of the Union in 1986 and the first nine months of 1987 was approved;

(ii) The program and budget of the Union for the 1988-89 biennium were established;

(iii) The progress reports on the work of its various subsidiary bodies and their plans for future work were approved;

(iv) Workshops on variety examination, to which the interested circles would be invited to participate, would be held in various countries in 1988 and 1989;

(v) A revised text of the UPOV Recommendations on Variety Denominations was adopted as appearing in document UPOV/INF/12;

(vi) The preparatory work for the revision of the Convention would be done by the Administrative and Legal Committee, which could create subgroups to deal with special questions if necessary;

(vii) Mr. F. Gougé (France) was elected Vice-Chairman of the Administrative and Legal Committee for the remainder of the term of office of Mr. M. Simon (France), who had taken up other duties at the national level. The following officers were elected for a term of office of three years, expiring at the end of the twenty-fourth ordinary session of the Council, in 1990: Mr. D.P. Feeley (Ireland) as Chairman of the Technical Working Party for Agricultural Crops; Dr. F. Laidig (Federal Republic of Germany) as Chairman of the Technical Working Party on Automation and Computer Programs; Mr. B. Bar-Tel (Israel) as Chairman of the Technical Working Party for Fruit Crops; Mr. C.J. Barendrecht (Netherlands) as Chairman of the Technical Working Party for Ornamental Plants and Forest Trees; Mr. R. Brand (France) as Chairman of the Technical Working Party for Vegetables.

The Council also took note of the resignation, with effect on February 29, 1988, of Dr. Walter Gfeller, Vice Secretary-General.

The Consultative Committee held its thirty-fifth session on April 2, 1987, and its thirty-sixth session on October 14, 1987, under the chairmanship of Mr. S.D. Schlosser (United States of America). The thirty-fifth session was mainly devoted to discussing the preparation of the commemorative book on the twenty-fifth anniversary of the UPOV Convention and the possibility of revising the Convention, and to the preparation of the Third Meeting with International Organizations. The thirty-sixth session was mainly devoted to the preparation of the twenty-first ordinary session of the Council (see above) and to the preparations for the recruitment of a new Vice Secretary-General.

The Administrative and Legal Committee held three sessions in 1987 under the chairmanship of Mr. F. Espenhain (Denmark): the nineteenth on March 31 and April 1, 1987, the twentieth on June 17 and 18, 1987, and the twenty-first on October 8 and 9, 1987. During the morning of October 8, the Committee held a joint meeting with the Technical Committee to discuss the items "Definition and Examination of Hybrid Varieties" and "Minimum Distances Between Varieties." The Biotechnology Subgroup of the Committee met twice, at the times of the nineteenth and the twentieth sessions, under the chairmanship of Mr. M. Heuver (Netherlands). Observers from the Commission of the European Communities (CEC) and the European Free Trade Association (EFTA) participated in all three sessions of the Committee; observers from Canada and Mexico attended the nineteenth session.

At its sessions, the Committee considered the following subjects: (i) revision of the Convention; (ii) the work of the Biotechnology Subgroup; (iii) UPOV Recommendations on Variety Denominations; (iv) examination of hybrid varieties; (v) minimum distances between varieties; (vi) priorities in relation to extending protection to species not already protected in member States; and (vii) preparations for the Third Meeting with International Organizations.

On the subject of revision of the Convention, a number of member States and international non-governmental organizations had submitted their proposals for use at the nineteenth session of the Committee. At that session, the Committee held a general exchange of views in order to identify those points for which a possible revision of the Convention should be studied.

The Biotechnology Subgroup of the Committee produced, for the nineteenth session of the Committee which discussed it, a first draft of a report on the "Possible Consequences of Biotechnology in the Field of Intellectual Property Protection." At the twentieth session, the Committee agreed that the report could be submitted to the Third Meeting with International Organizations.

At its nineteenth session, the Committee discussed proposals for amendment of the UPOV Recommendations on Variety Denominations and adopted a draft new text. At its twentieth session, it decided that this new text should be presented for discussion to the Third Meeting with International Organizations. As a result of that discussion, a further amendment was made to Recommendation 2 and the text thus amended was adopted by the Council at its twenty-first ordinary session.

Concerning the examination of hybrid varieties, the Committee discussed at its nineteenth session a motion submitted by ASSINSEL on the definition of maize hybrids. At its twentieth session, the Committee discussed a document produced by the delegation of France entitled "Definition and Examination of Hybrid Varieties." At the part of the twenty-first session that was held jointly with the Technical Committee, the testing procedure described in the document was further explained and discussed, and it was decided that the Technical Committee and the Technical Working Party for Agricultural Crops should receive more details of the proposed procedure and study further the technical aspects of the problem. Thereafter, the Administrative and Legal Committee would study, if necessary, the legal implications of the proposed procedure.

Concerning the subject of minimum distances between varieties, it was decided at its twenty-first session, during the joint meeting with the Technical Committee, that it should be discussed further on a species by species basis by the Technical Working Parties and in the workshops mentioned above.

At its nineteenth session, the Committee engaged in a general discussion of the question of priorities in relation to extending protection to species not already protected in member States. In accordance with a decision of the twenty-first ordinary session of the Council, the Committee will do further work on this question on the basis of document C/XXI/8 (statistics on the number of protected varieties).

The Technical Committee held its twenty-third session from October 6 to 8, 1987, under the chairmanship of Dr. J.K. Doodson (United Kingdom). The session was attended by representatives from member States and observers from the Commission of the European Communities (CEC) and the European Free Trade Association (EFTA).

On the basis of preparatory work carried out by the Technical Working Parties, the Technical Committee adopted 12 Test Guidelines (for Gooseberry, Guava, Macadamia, Mango, Zonal Pelargonium and Ivy-leaved Pelargonium, Alstroemeria, Christmas Cactus, Regal Pelargonium, Easter Cactus, Melon, Chinese Cabbage and Leaf Beat) and examined a number of questions that had arisen from the practical experience gained by the offices of the member States when conducting tests for distinctness, homogeneity and stability in the framework of their examination of new varieties.

The following were among the matters considered by the Technical Committee: an interim report on the replacement of the present UPOV criteria used for assessing distinctness of grasses by the combined over-years' analysis method; an interim report on the use of different electrophoresis methods in the testing of varieties of wheat; a report on the possibility of "machine vision" to identify varieties of wheat; interim reports on the study of changes in the criteria for testing homogeneity in cross-fertilized and self-fertilized plants; the increased participation of experts from professional organizations in the work of the Technical Working Parties and their Subgroups. The Technical Committee also had brief discussions on the possible revision of the General Introduction to the Test Guidelines, the question of hilum color in broad beans and field beans, the use of the term "resistance" in Test Guidelines, the use of color pictures as a supplement to variety descriptions, the revision of the first page of the UPOV Model Report on Technical Examination, the logical order of states of expression in Test Guidelines, and the increased workload of the Technical Working Parties. The Technical Committee received the reports on the progress of the work of the Technical Working Parties and gave guidance on a number of questions raised by them. It also instructed them on the major aspects of their future work.

The Technical Working Party on Automation and Computer Programs held its fifth session from June 10 to 12, 1987, at Lyngby, near Copenhagen (Denmark), under the chairmanship of Mrs. V. Silvey (United Kingdom). The Working Party's task was to study the harmonization of automation and computer programs used by the authorities of the member States in carrying out the examination of new varieties and, in general, the administration of their plant variety protection legislation. The Working Party continued its study on the suitable level of significance, and on the application of the combined over-years' analysis to varieties of species other than grasses; it studied various methods used in the member States when producing variety descriptions; it took note of the progress in the field of electronic exchange of information, of the collection of information on existing hardware and computer languages used in the member States and of the efforts made to develop a library of software for the assessment of varieties which could easily be exchanged between the offices of the member States.

The Technical Working Party for Agricultural Crops held its sixteenth session from June 23 to 25, 1987, in Geneva (Switzerland), under the chairmanship of Mr. J. Guiard (France). It completed the preparation of the first drafts of Test Guidelines for Common Vetch (revision) and for Durum Wheat (revision), for submission to the professional organizations for comment. It noted the progress on the introduction of the combined over-years' analysis for varieties of grass species. It had discussions on the concept of distinctness and homogeneity for discontinuous characteristics of not truly self-pollinated varieties and cross-pollinated varieties, on the definition of hybrid varieties and synthetic varieties and on the question of distance between varieties.

The Technical Working Party for Fruit Crops held its eighteenth session from March 18 to 20, 1987, in Kiryat Anavim (Israel), under the chairmanship of Mr. F. Schneider (Netherlands). In addition to its work on Test Guidelines adopted by the Technical Committee, the Working Party completed the preparation of the first drafts of revised Test Guidelines for Blackberry, for submission to the professional organizations for comment.

The Technical Working Party for Ornamental Plants and Forest Trees held its twentieth session from March 23 to 26, 1987, in Kiryat Anavim (Israel), under the chairmanship of Mr. B. Bar-Tel (Israel). In addition to its work on Test Guidelines adopted by the Technical Committee, the Working Party completed the preparation of the first drafts of Test Guidelines for Tuberous Begonia hybrids, for Exacum, for Tulip and for Euphorbia fulgens (revision), for submission to the professional organizations for comment.

The Technical Working Party for Vegetables held its twentieth session from June 2 to 4, 1987, in Bamberg (Federal Republic of Germany), under the chairmanship of Dr. J. Habben (Federal Republic of Germany). In addition to its work on Test Guidelines adopted by the Technical Committee, the Working Party completed the preparation of the first drafts of Test Guidelines for Vegetable Marrow and Pumpkin, for Endive, for Eggplant, for Runner Bean (revision) and for Black Salsify, for submission to the professional organizations for comment.

The Third Meeting with International Organizations was held on October 21 and 22, 1987, under the chairmanship of Mr. S.D. Schlosser (United States of America). The meeting was attended by representatives of the member States and by members of seven international non-governmental organizations: International Association of Horticultural Producers (AIPH), International Association for the Protection of Industrial Property (AIPPI), International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL), International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA), Association of Plant Breeders of the European Economic Community (COMASSO), International Federation of the Seed Trade (FIS) and International Chamber of Commerce (ICC).

The subjects discussed at the meeting were: (i) proposals for possible revision of the Convention; (ii) UPOV Recommendations on Variety Denominations; (iii) definition and examination of hybrid varieties.

Contacts with States and Organizations

From January 15 to 17, 1987, the Vice Secretary-General took part in a meeting devoted to biotechnology and industrial property held at the European Patent Office (EPO) in Munich (Federal Republic of Germany) and organized by the Gesellschaft für Rechtspolitik (Society for Law Policy) and the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law.

On January 21, 1987, the Vice Secretary-General received the visit of Mrs. H.I. Lommi of the Finnish Patent Office.

On January 30, 1987, the Vice Secretary-General took part in the meeting of the Plant Variety Protection Committee of the International Association of Horticultural Producers (AIPH) held in Berlin (West).

An official of the Office represented UPOV at the European Conference on Biological Diversity--A Challenge to Science, Economy and Society organized jointly by An Foras Talúntais (Agricultural Institute), the National Council for Science and Technology of Ireland and the Commission of the European Communities and which was held in Dublin (Ireland) from March 4 to 6, 1987.

On March 10, 1987, at the invitation of the University Institute for Development Studies in Geneva, an official of the Office gave a lecture on the protection of plant varieties as part of a course on "New Agricultural Technology and Rural Development."

The Genetic Resources Committee of the Food and Agriculture Organization of the United Nations (FAO) held its second session in Rome (Italy) from March 16 to 20, 1987, and the Vice Secretary-General participated in those meetings that were of interest to UPOV.

On May 18 and 19, 1987, the Vice Secretary-General participated in Paris (France) in the annual meeting of the representatives of the authorities of the member States of the Organisation for Economic Co-operation and Development (OECD) competent for the implementation of the OECD seed schemes.

On June 4 and 5, 1987, the Vice Secretary-General participated in a symposium jointly organized by WIPO and Cornell University in Ithaca (United States of America) on the protection of biotechnological inventions.

On June 12, 1987, the Vice Secretary-General gave a lecture on plant variety protection at the Federal Institute of Technology in Zurich (Switzerland), as part of a course on industrial property.

From June 29 to July 3, 1987, the Office of the Union participated in an observer capacity in the third session of the WIPO Committee of Experts on Biotechnological Inventions and Industrial Property.

On July 2, 1987, the Vice Secretary-General received the visit of the Director of the Department for Agriculture, Forestry and Fisheries of the Patent Office of the Republic of Korea.

On August 3, 1987, the Secretary-General received the visit of the Permanent Representative of Peru to the Food and Agriculture Organization of the United Nations (FAO) and discussed with him, in particular, the question of "farmers' rights," which is currently being debated within FAO.

On September 2, 1987, the Vice Secretary-General took part in the meeting of the Plant Variety Protection Committee of AIPH held in Tulln (Austria).

On September 10 and 11, 1987, the Vice Secretary-General took part in the fifth Colloquium of the International Community of Breeders of Vegetatively Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA) held in Washington, D.C. (United States of America) and gave a lecture.

On October 27, 1987, an official of the Office gave a lecture on the results of the Third Meeting with International Organizations to the (Swiss) Committee for the Protection of Plant Varieties in Berne (Switzerland).

From November 2 to 6, 1987, an official of the Office attended the Twelfth Panamerican Seed Seminar in Montevideo (Uruguay) and gave a lecture on Recent Discussions on Biotechnology in UPOV.

From November 24 to 26, 1987, an official of the Office participated in the annual meeting of the Austrian Directors for Breeding and gave a lecture on Austria and Plant Variety Protection.

On December 8 and 9, 1987, Dr. D. Böringer (Federal Republic of Germany) and an official of the Office paid a visit to the competent authorities of Czechoslovakia in Prague to discuss and advise on a draft law on the protection of new plant varieties.

The Vice Secretary-General paid official visits to the authorities in charge of the protection of new plant varieties in Belgium, France, Ireland, Sweden, the United Kingdom and the United States of America.

Publications

In 1987 the Office of the Union published two issues of Plant Variety Protection and a commemorative book on the twenty-fifth anniversary of the UPOV Convention (UPOV publication No. 879(F)).

MEMBER STATES

Israel: Modification of Fees

A new tariff of fees has been introduced with effect from July 1, 1987. It is now as follows (in new shekalim)

Application and publication	50
Examination of varieties	
Field and vegetable crops	1,600
Ornamental plants	1,050
Fruit crops	950
Limited examination (verification test)	610
Withdrawal of application	80

South Africa: Modification of Fees

By virtue of the Regulations Relating to Plant Breeders' Rights - Amendment No. R. 2341 of October 16, 1987 (Government Gazette of October 16, 1987, page 11), the fees have been increased with effect from October 16, 1987. The new fees are given in the "Legislation" subsection of this issue, starting on page 15.

Spain: Modification of Fees

By virtue of Article 107(2) of Law No. 33/1987 of December 23, 1987, Concerning the General Budgets (Boletín Oficial del Estado of December 24, 1987), a new tariff of plant variety protection fees has been laid down with effect from January 1, 1988. The main fees are now as follows (in pesetas).

Type of Fee / Group	1	2	3	4
1. Application fee	10,482	10,482	10,482	10,482
2. Examination fee (per year)	24,458	24,458	17,470	13,975
3. Grant fee	10,482	10,482	10,482	10,482
4. Maintenance fee				
- first year	8,735	5,242	3,494	3,494
- second year	12,229	8,735	6,988	5,242
- third year	17,470	13,975	10,482	8,735
- fourth year	20,963	17,470	13,975	10,482
- fifth and subsequent years	25,458	20,963	17,470	13,975

Group 1: cereals, oil seeds, lucerne, cotton, sugar and fodder beet, vetch, potato, pea, broad bean and French bean.
Group 2: fruit trees, rose, carnation and strawberry.
Group 3: lettuce, tomato, onion, melon, sainfoin, red and white clover.
Group 4: all other species.

Netherlands: Modification of Fees

By virtue of Order No. I 2491 of October 16, 1987 (Nederlandse Staatscourant No. 204 of October 22, 1987) Amending the Order on the Tariff of Fees of the Raad voor het Kwekersrecht (Board for Plant Breeders' Rights), a new tariff of fees has been introduced with effect from November 1, 1987. Furthermore, by virtue of Royal Decree of March 7, 1988 (Staatsblad No. 132), Amending the Order Concerning the Annual Fees Under the Seeds and Planting Material Act, the annual fees for the first and the fifth years have been amended with effect from May 1, 1988. The main fees are now as given overleaf.

Type of fee	Amount
Application fee (to be paid in advance)	500 fl.
Examination fee	
- for the first growing period (to be paid at the same time as the application fee)	1,000 fl.
- for the second growing period (to be paid on the request of the Raad)	1,000 fl.
- for the third growing period, in the case of a variety belonging to the grasses (to be paid on the request of the Raad)	500 fl.
- in the case of cooperative examination resulting from an earlier application filed in another UPOV member State (to be paid at the same time as the application fee)*	500 fl.
- in the case of any variety entering into a composite variety, e.g. a multiline	half of the amounts stated above, as applicable
Annual maintenance fee	
- first annuity	200 fl.
- second annuity	300 fl.
- third annuity	400 fl.
- fourth annuity	500 fl.
- fifth and subsequent annuities	700 fl.

* In this case the procedure is as follows:

(i) No examination fees for the second and third growing periods are required by the Board where:

(a) the applicant requests that the examination of the variety be based on a cooperative examination resulting from an earlier application filed in another UPOV member State;

(b) the applicant declares, when the application is filed with the Board or within the time specified by the Board, that the material relating to the earlier application also relates to the application filed with the Board;

(c) the Board receives, when the application is filed with the Board or within the time specified by the Board, a certified copy of the earlier application;

(d) the Board declares that the examination by the foreign authority can replace its own examination.

(ii) Where the Board receives a report resulting from the cooperative examination, a fee amounting to 500 fl. is charged in lieu of the examination fees.

(iii) Where the situation described in (i) above ceases to exist, following withdrawal or rejection of the earlier application, the normal application fees become applicable if and in so far as corresponding growing periods of examination are based on the application filed with the Board, on the understanding that at least the fee of 500 fl. mentioned in (ii) above will be payable.

(iv) Where the application filed with the Board is rejected or withdrawn before the Board has received the report resulting from the cooperative examination, no fee is charged for the examination of the variety and the Board restitutes any amount paid to that effect.

(v) The fees referred to in (ii) and (iii) above are accounted on the fees already paid in connection with the application.

(vi) For varieties entering into composite varieties, e.g. multilines, the fees payable in connection with the examination (home or cooperative) are half of those payable for normal varieties.

CASE LAW

Commission of the European Communities: Decision of December 13, 1985, Relating to a Proceeding under Article 85 of the EEC Treaty (IV/30.017 - Breeders' Rights: Roses)

The Commission of the European Communities delivered on December 13, 1985, its second decision relating to the validity, under Article 85 of the Treaty of Rome Establishing the European Community, of certain provisions of licensing agreements in plant variety matters. Its conclusions on the provisions for the surrender to the licensor of any mutation discovered in the plantation of the licensee and the provisions fixing the conditions for the exploitation of the mutation are of particular importance. The full text of the decision is given below. It is reproduced from the Official Journal of the European Communities (No. L 369 of December 12, 1985, pp. 9-18). It should be noted that only the French text of the decision is authentic.

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No. 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty,(1) as last amended by the Act of Accession of Greece, and in particular Articles 2, 3, and 4 thereof,

Having regard to the complaint lodged with the Commission pursuant to Article 3(1) of Regulation No. 17 on 31 January 1980 by Mr. René Royon,

Having regard to the Commission Decision of 9 December 1983 to initiate proceedings in this case,

Having regard to the application for negative clearance and the notification filed on 27 April 1985 by Mr. Alain Meilland pursuant to Article 4 of Regulation No. 17,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19(1) of Regulation No. 17 and to Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No. 17,(2)

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. FACTS

A. The parties

1. The parties to this case are active mainly in the ornamental plant sector; they specialize in roses, which constitute a specific market.

2. The general partnership Meilland et Cie, Antibes, exploits throughout the world varieties of rose bushes which are produced and distributed under the name Selection Meilland.

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(1) OJ No. 13, 21.2.1962, p. 204/62.
(2) OJ No. 127, 20.8.1963, p. 2268/63.

The partners are:

- Mr. Alain Meilland,
- Mrs. Marie-Louise Paolino, widow of Francis Meilland,
- Mr. Raymond Richardier.

The activities of this undertaking include the breeding of new varieties of rose bush, the production of plants, the exploitation of such plants (so-called 'garden' exploitation) or of the flowers ('cut flower' exploitation) and their distribution both wholesale and retail through an international network of licensees and sub-licensees.

The private company Universal Plants, Le Cannet des Maures, specializes more particularly in the production of rose bushes. It is also the breeder of a number of varieties or holder of the rights in their exploitation. The partners are:

- Mr. Alain Meilland,
- Mr. Raymond Richardier, and
- Mrs. Marie-Louise Paolino, referred to above, is the manager.

These two undertakings trade under the name Universal Rose Selection-Meilland (URS-M, hereinafter called 'Meilland').

Owing to the economic importance, from both the qualitative and quantitative points of view, of its varieties, which are sold in numerous countries, including the two biggest markets for ornamental plants, North America and Europe, Meilland has for the past 30 years been one of the world's leading breeders and producers of roses. Its current turnover is approximately 12 million ECU, two-thirds of which is from sales in the Community. This figure includes both earnings from its own production and the royalties charged for the exploitation of its varieties by third parties.

3. In France, Meilland has granted a licence for the commercial exploitation of its varieties to Mr. and Mrs. Francisque Richardier (hereinafter called 'Richardier'), who are related to Mr. Raymond Richardier. They are exclusively authorized, under an agreement they concluded with Meilland on 30 September 1968, to produce and sell, or cause to be produced and sold, in that country rose bushes and cut flowers of the Selection Meilland varieties. They trade on this basis under the name Universal Rose Selection-France (URS-F), at Tassin-la-Demi-Lune, in the capacity of general licensee, and grant sub-licences to French nurserymen and horticulturists wishing to exploit those varieties.

4. While he was employed by Meilland as Director entrusted with administrative and managerial functions and responsible for the international distribution of the Selection Meilland varieties, Mr. R. Royon himself became in 1971, at the same time and on an independent basis and with Meilland's consent, one of Richardier's sub-licensees. In this capacity, he produced under glass, at his nursery 'Les Roses du Capitou' at Antibes, cut flowers from rose bushes of the Selection Meilland varieties, including the variety Sonia. In 1983, Mr. Royon closed his business and sold his equipment.

B. The products and their distribution

5. The products in question which are the subject of the contract covered by this proceeding, are rose bushes and cut roses of the varieties Sweet Promise-Sonia Meilland and Pitica/Kyria, which are Selection Meilland varieties, the second being a natural mutation of the first, discovered in Mr. Royon's glass-houses in 1971. Selection Meilland varieties are as a rule intended either for professional horticulturists specializing in the production of cut flowers sold as such to the consumer, or for amateur gardeners seeking rose bushes. Almost all these varieties are protected, usually by a plant breeders' certificate, which is the case in all the Member States--except Greece and Luxembourg --and in certain non-Community countries, but sometimes by a patent; moreover, each one is distributed under a fancy name which has formed the subject matter of an international filing. In January 1980, the date of the complaint, about 150 Selection Meilland varieties were exploited with a production in excess of 1 000 or 2 000 plants. Of those varieties, 24, including Sonia, were distributed throughout the Community and in 25 non-member countries for sale as cut flowers. At the same time, a large number of other varieties are used to a limited extent by Meilland as selection material.

6. (a) The number of rose bushes sold to amateur gardeners each year in Europe is put at 150 million; approximately 20 million are derived from protected varieties, representing retail sales worth about 30 million ECU; two-thirds of these are supplied by four major breeders--the German breeders Kordes and Tantau, and the French breeders Meilland and Delbard--or their licensees in the various countries of the Community.

(b) As to the cut flower trade, 90% of which is in protected varieties, it is estimated that 200 million rose bushes are exploited by rose growers world-wide, two-thirds of whom are in Europe where they own 3 000 hectares of glasshouses, and where 20 million such bushes worth about 25 million ECU are renewed on average each year: including imports from non-Community countries, close on 5 thousand million cut roses are sold each year to private individuals in the Community, approximately half of which are protected in the name of four major breeders--Meilland and Kordes, who remain on an equal footing from one year to the next, followed by the American breeder Hill, and the Dutch breeder de Ruiter.

7. As a rule, the varieties exploited are 'creations' in that they are obtained by trial and error from at least two existing varieties, being produced by more or less systematic cross-breeding using creative selection methods. In the breeders' establishments, as in nature, the 'choices' of crossing may also be made empirically by natural factors such as the wind or insects. However, certain varieties are the result of mutations. A distinction is drawn between natural mutations, which appear spontaneously, and mutations brought about artificially by applying more or less arbitrary scientific processes.

The mutation takes the form of a growth, commonly known as a 'mutation' or 'sport,' appearing on a plant of an existing variety known as the 'parent variety.' Cuttings taken from this first growth enable it to be reproduced by grafting ad infinitum while retaining its characteristics. A natural mutation with sales potential is a relatively rare phenomenon which can, moreover, as a rule be observed knowingly only by the trained eye of a connoisseur. To qualify for protection as a 'new variety of plant,' in France and in those countries which have introduced a system of protection derived from the International Convention for the Protection of New Varieties of Plants (Paris, 2 December 1961), the mutation must, like any new variety, first be examined to determine whether it has the features required by law. Both mutations and varieties resulting from selection work must undergo a series of examinations extending over several growth cycles, a lengthy process the outcome of which is uncertain; deciding whether or not to incur the necessary expense therefore calls for good judgment, which presupposes experience and knowledge, notably of the potential market.

8. Where, as in the case of the variety Pitica/Kyria, a natural mutation is discovered by a third party on a plant of a parent variety already protected in the name of an original breeder, the problem arises of determining the extent of the respective rights of each party--third party discoverer and original breeder--under the law, in the new variety resulting from that mutation. In the field of plant species, this question of principle is of considerable economic importance, particularly in the horticultural and floral sphere where any new variety--whether it be a mutation or a creation--can become a best-seller overnight and capture a market share as large as that held, for example, by Baccara in its day or Sonia at the present time.

Relations between the breeder of the parent variety which mutated naturally or of the variety which was used as the initial source of variation and the third party who discovered or created the new variety resulting from the original variety are governed by the following provisions of the French Plant Protection Law (Loi relative à la protection des obtentions végétales) (No. 70-489) of 11 June 1970:

(a) Article 1(1):

'For the pruposes of this law, new variety of plant means a new variety of plant that has been either created or discovered.'

(b) Article 3(1):

'Any new variety of plant may be covered by a "plant breeders' certificate," which confers on its holder an exclusive right to produce, import into the territory where this law is applicable, sell and offer for sale the whole

or part of the plant or any reproduction or vegetative propagation material of the variety concerned and of the varieties which are obtained from it by hybridization where their reproduction requires the repeated use of the original variety.'

(c) Article 23(2):

'Subject to the provisions of Article 3, use of the protected variety as a source of initial variation with a view to obtaining a new variety shall not constitute an infringement of the rights of the holder of a breeders' certificate.'

The French law is itself derived from the Paris Convention referred to above, of which, among other provisions, Article 5(3) stipulates that:

'Authorization by the breeder shall not be required either for the utilization of the new variety as an initial source of variation for the purpose of creating other new varieties or for the marketing of such varieties'

and that such authorization is required only

'when the repeated use of the new variety is necessary for the commercial production of another variety.'

For the purposes of this case, suffice it to say that Article 1(1) of the French law makes no distinction according to whether or not the parent variety on which a mutation was discovered was itself already protected in the name of an original breeder. The breeders' right in respect of the new variety Pitica/Kyria discovered by Mr. Royon therefore belonged to him if not exclusively, then at least to a large extent within the framework of an ex lege sharing of the rights attached to that new variety. On the basis of these provisions, Meilland claimed ex lege, in the course of the proceedings, not an exclusive right but a solution of the 'joint proprietorship' type concerning the variety Pitica/Kyria.

9. For the purposes of the exploitation of the Selection Meilland varieties in France, in respect of which he has been granted a licence, Richardier supplies freely to all horticulturists and nurserymen who so request three types of non-exclusive sub-licences, simultaneously if necessary, for each variety they wish to exploit:

(a) the so-called 'cut flower' agreement, granting a sub-licence to produce only cut flowers and to sell them wholesale and retail;

(b) the so-called 'nurseryman cut flower' agreement, granting a sub-licence to produce and sell only rose bushes, themselves intended to be sold wholesale to cut flower producing horticulturists (holders of a 'cut flower' agreement);

(c) the so-called 'garden agreement,' granting a sub-licence to produce only rose bushes and to sell them retail and wholesale to amateur gardeners.

As a result of the expansion of the Meilland network, and at a rate of one agreement per licensed variety, thousands of such similarly worded agreements have been concluded in France with about 900 of Richardier sub-licensees.

C. The agreements

10. The agreement to which this proceeding relates is the 'cut flower' sub-licensing agreement concluded between URS-F Richardier and Mr. R. Royon on 28 October 1971 containing the following clause concerning mutations:

Article X: 'The user undertakes to inform the distributor or his authorized agent, within 15 days, of the appearance of any mutation in the rose bushes of the variety referred to in this agreement, which he exploits for cutting. Such mutation shall remain the property of Universal Rose Selection-Meilland and shall be surrendered to it by the user in order that it might examine the mutation and judge whether it can be marketed. If it can be marketed, Universal Rose Selection-Meilland will remunerate the user according to the qualities exhibited by the new variety.'

As from 1974, this clause was replaced by the following:

New Article XII: 'Mutations: the user undertakes to inform the distributor or his authorized agent within 15 days of the appearance of any mutation in the rose bushes of the variety referred to in Article 17, which he exploits for

cutting. Such mutation shall be surrendered by the user to the distributor alone in order that he might examine it and judge whether it can be covered by a plant breeders' certificate and be marketed.

The distributor shall inform the user of his decision within three years from the date of such surrender.

During that period, the user shall refrain from propagating the variety for commercial purposes.

If he decides to produce the mutation, the distributor shall so notify the user. Unless the parties agree otherwise, the user shall be paid at 15% of the gross royalties collected throughout the period of exploitation of the new variety. All experimentation, protection and distribution costs shall be borne by the distributor. If the distributor does not announce his decision within a period of three years, he shall be deemed to have waived his rights over the mutation and shall return it to the user.'

An Article VIII entitled Guarantee was also added to the agreement as from 1974, worded as follows:

Article VIII: Guarantee: 'The distributor guarantees only the material existence of the patent, the application for a plant breeders' certificate or the plant breeders' certificate. The user undertakes not to challenge the validity of those documents.

If the application for a breeders' certificate is refused, or if the patent or breeders' certificate issued is invalidated at the request of a third party, the agreement shall be terminated as from the day on which those decisions become final, without any compensation being due to either party. The royalties paid to the distributor shall not be refundable and the royalties falling due up to the date of the final decision must be paid. No more royalties shall be payable by the user after that date.'

11. The provisions of the agreement in question concerning mutations were originally agreed between Richardier and Mr. Royon along the lines of a basic licensing agreement drawn up on September 1968 between URS-M (Meilland) and URS-F (Richardier), which itself contained the following clause:

Article IV-(5): 'Mr. and Mrs. Richardier shall inform URS-Meilland of the appearance of any new mutations of rose varieties which appear either on the rose bushes exploited by them or on those exploited by their licensees. Such mutations shall remain the property of URS-Meilland, which shall determine without appeal whether or not it is appropriate to market them.'

However, this agreement of 30 September 1968 was amended on 30 October 1972, the above wording being replaced by the following new wording:

New Article IV-(5): 'Mr. and Mrs. Richardier shall inform URS-Meilland of the appearance of any new mutations of rose varieties which appear either on the rose bushes exploited by them or on the rose bushes exploited by their licensees.'

This amendment to the basic licensing agreement did not give rise, in regard to mutations, to a corresponding amendment of the agreement concluded between Richardier and Mr. Royon on 28 October 1971.

12. In the other Member States, Selection Meilland varieties are exploited either by exclusive licensees or by Meilland agents, who grant sub-licences to nearly 2 000 sub-licensees. Except in Germany, the latter are obliged not to challenge the breeder's property rights and to transfer to him the ownership in mutations. In the case of Germany, the following new provision concerning mutations has been incorporated in all agreements concluded by Meilland and its German licensee Strobel & Co. with sub-licensees since 1972:

'1) If, in the course of the vegetative propagation of the varieties to which this agreement relates, the licensee discovers mutations (sports), he shall inform the agent thereof. The latter or an authorized representative may come to take note of the mutation on the licensee's premises and examine it, without, however, being able to have any influence on the future use of the mutation.

As inventor of the mutation, the licensee may reserve the right to the new variety resulting from that sport save where the courts decide otherwise pursuant to paragraph 12(2) of the law on plant breeders' certificates. Where the licensee intends to sell the right in the sport accruing to him under paragraphs 1 and 2, or if he wishes to have the mutation licensed, the agent shall retain an option right.'

13. The thousands of similar contracts to the agreements in question concluded either by Meilland or by the other plant breeders in the EEC provide the economic context in which the present agreement may be considered.

14. The version as amended in 1974 of the 'cut flower' standard form agreement signed by Mr. Royon (new Article XII concerning mutations, referred to above, and Article VIII entitled 'Guarantee' concerning the no-challenge clause, also referred to above) was notified by Meilland together with an application for negative clearance on 27 April 1985, that is to say more than nine months after the oral hearing of 4 July 1984.

D. The application in the case of Pitica/Kyria of Article X of the agreement between URS-F (Richardier) and R. Royon

15. Outstripping Baccara, which fell into the public domain in 1974 after having provided 25 million plants, Sonia is the rose which has been the biggest commercial success in the world (with about 40 million plants sold in 15 countries) since it was created in 1960, in front of Visa--about 15 million plants--and far ahead of all the others. In 1984, some 40 Selection Meilland varieties were exploited for cutting. In addition to the above-mentioned varieties, 10 provided a total of between 1 and 5 million plants throughout the period of their exploitation, and the others less than 1 million, amongst which the variety Pitica/Kyria was moderately successful with about 500 000 plants. These varieties had at that time, including Pitica, six natural mutations discovered by third parties at their own places of business, representing altogether nearly four million plants used for cutting in about 10 countries.

16. In 1971, Mr. Royon reported the discovery of several natural mutations of the variety Sonia at his 'Les Roses du Capitou' nursery at Antibes. As stipulated in the above-mentioned Article 10 of the agreement he concluded on 28 October 1971 with Richardier, he immediately sent grafts to Meilland for examination of the mutations. Since he had still not received any reply by the end of 1973, on 10 December 1973 he filed, by way of precaution, an application for a breeders' certificate in respect of one of them under the varietal name Pitica and informed Meilland of his action; in a letter dated 7 March 1974, he again stressed the importance he attached to this new variety. Meilland then announced its intention of exercising its rights over it, as can be seen from the following extract from a letter to Mr. Royon dated 10 April 1974:

'This mutation, which you refer to as 'RR7,' having been discovered in your plantations of 'Sweet Promise/Sonia Meilland' forming the subject matter of licensing agreement No. 1442-2 signed on 28 October 1971 between Universal Rose Selection-France (Mr. Francisque Richardier) and yourself, we are willing to agree as follows:

1. In the event of our reaching, before 31 March 1975, a favourable decision regarding production of the variety:
   - you will assign to us the claim to protection you have already considered necessary to file as a precaution;
   - we shall pay you, before 31 December of each year, 15% of the gross royalties collected throughout the period of exploitation of the said variety in all countries and territories,
   - all expenses in connection with experimentation, protection (including those you have already incurred) and distribution will be borne by us.
2. In the event of our reaching, before 31 March 1975, an unfavourable decision regarding production of the variety, we shall waive our rights over the mutation.'

17. A period of bargaining followed, during which Mr. Royon expressed his dissatisfaction with Meilland's offer and his wish to protect and exploit Pitica himself in all countries in which Meilland decided to renounce its rights over it. On 18 November 1974, i.e. less than a month before the expiry of the one-year period, which started to run with the application for a certificate filed on 10 December 1973, for commencing the protection formalities in other countries, Meilland formally announced its intention:

- to protect the variety in all countries in which that was possible,
- to seek protection in those countries both for 'cut flower' exploitation and for 'garden' exploitation,

- not to increase the rate of remuneration payable to the discoverer under the sub-licensing agreement of 28 October 1971, as amended in 1974.

On this basis, a deed of assignment was drawn up on 23 November 1974, the main provisions of which were as follows:

(a) by a separate instrument, Mr. Royon assigns to Meilland (in the case in point, to Universal Plants Sarl), his application for a breeders' certificate in France, No. 00730, concerning the variety Pitica, and his priority rights in other countries, and in general all his rights in the invention;

(b) Meilland reimburses all the expenses incurred by Mr. Royon in registering Pitica and takes steps to obtain protection in all countries where that is possible (notably: the common market countries, Spain, the United States, Sweden, Morocco and Hungary) (Article 2,3 and 4); any property rights subsequently relinquished by Meilland would then be reassigned free of charge to Mr. Royon (Article 5); Meilland will give Pitica a commercial designation protected in all countries as a trademark, which Mr. Royon may use freely (Article 6); in return for the assignment by Mr. Royon of all his rights, he will receive a royalty of 15% of the gross amount, before deduction of any discounts, of the royalties paid by licensees in respect of Pitica (Article 7); Mr. Royon remains free to produce cut flowers of the variety Pitica at his nursery 'Les Roses du Capitou,' and the propagation licences already granted by him to horticulturists will be confirmed; however, any other exploitation will be reserved exclusively for Meilland (Articles 8, 9 and 10); Meilland undertakes to distribute Pitica as widely as possible, but will alone be entitled to take decisions concerning its marketing; it undertakes also to offer this variety for sale in the same way as the other varieties in respect of which Universal Plants holds the exclusive production and distribution rights (Articles 11 and 12); Meilland undertakes to carry out all the necessary tests to determine Pitica's suitability for 'garden' exploitation, to inform Mr. Royon of the results, and, if appropriate, to apply the provisions of this contract to 'garden' exploitation (Article 13).

18. In July 1977, Pitica was declared by Meilland, on the basis of tests carried out both by itself and by its agents or licensees in the Netherlands, Germany, the United States and Israel, to be unsuitable for 'garden' rose bush exploitation. In August 1977, the protective rights over the variety in Hungary and Morocco were reassigned free of charge to Mr. Royon, and protection was purely and simply abandoned for lack of interest in Sweden and Denmark. It was first marketed for cutting in 1978, when it was given the name Kyria, which formed the subject matter of an international filing in Meilland's name. At that time, there were 50 000 Pitica/Kyria plants in three countries. By the end of 1980, there was a total of 265 000 plants in several countries (France, Japan, the United States, Latin America and a few in new plantations in Italy and Switzerland). Having reached the 500 000 mark in 1984, it ranks 20th in importance compared with the 60 other Meilland varieties that have been cultivated for cutting since that company was formed.

The other mutations discovered by third parties have been produced in a number of countries ranging from five (Privé) to four (Carinella) and three (Carlita), and have each produced a total of between 500 000 and 1 million plants depending on how well they have been received, firstly by the licensees, and secondly by the public. Generally speaking, the number and relative importance of the factors militating in favour of or against the success of a variety on a market are highly unpredictable and are not always directly dependent on the decisions taken or the resources employed by the breeder and his agents. Moreover, the exploitation of each variety within a collection of varieties is necessarily subject to the requirements of the exploitation of the collection as a whole. This is especially true in the case of Pitica, whose pale pink colour places it in the same colour scale as its parent variety Sonia, which is also a pink shade.

E. Mr. Royon's complaint and the arguments raised by Meilland

19. Mr. Royon lodged his complaint on 28 January 1980 against Article 10 of his agreement of 28 October 1971 with Richardier for infringement of the competition rules set out in the Treaty. He considers that the above clause obliged him to assign to Meilland his rights in the variety Pitica by the agreement of 23 November 1974, the underlying principle and terms of which,

notably as regards payment, were dictated to him without any scope for discussion. He feels that, despite its worldwide production and distribution network, Meilland did not do all in its power to make the variety a commercial success. He believes that Article X, incorporated as it is in all the agreements with sub-licensees who use Selection Meilland roses, prevents those sub-licensees from setting up as international distributors of the new roses discovered by them, in such a way as to affect competition within the common market within the meaning of Article 85(1).

The procedure which was opened on 9 December 1983 in response to this complaint was extended by the Commission to include the no-challenge clause contained in the same standard form licensing agreement of URS-F Richardier (see above, point 10 at the end: Article VIII entitled "Guarantee") which prohibits the sub-licensee from challenging the validity of the breeders' rights conferred on Meilland.

20. Meilland has advanced the following main arguments in its defence:

(a) The Article X referred to in the complaint was not applied to Mr. Royon since it was in his capacity as Director with Meilland until February 1972 that he surrendered to his then employer the Sonia mutations discovered in 1971. Moreover, for the same reason, he was not at that time free to carry on business as a plant breeder. Lastly, he himself stepped outside the bounds of the agreement he complains of, first of all by signing on 10 December 1973 an application for a plant breeders' certificate in respect of a variety which Meilland had not considered worthwhile adopting, then by not invoking expressly himself Article X of his agreement in the course of subsequent bargaining. Meilland had, moreover, never invoked Article X against its licensees or sub-licensees. Furthermore, since 1974, the new Article X of its agreements recognizes the discoverer's rights over mutations and confers on Meilland only a right of pre-emption, which it considers perfectly legitimate. In this respect, Meilland feels that the granting of a plant breeders' certificate for a mutation discovered on a bush of a parent variety already protected in the name of an original breeder differs fundamentally from the granting of a patent for the improvement of a protected industrial invention: the improvement patent implies an 'exploitation' of the main patent, itself involving an inventive 'effort' which is completely lacking in the case of the unexpected discovery of a mutation. In the present case, there are no grounds for granting Mr. Royon, as it were, an improvement patent. Firstly, the 'power of mutation' is already intrinsically present in the genetic make-up of the parent variety, the credit for which belongs exclusively to the latter's creator. Secondly, the growth which represents the natural mutation of a rose, a non-sexually reproducing species, is already in itself a new variety which fulfils the conditions for protection owing to the fact that its characteristics are determined from the outset by nature in such a way as to satisfy the requirements of distinctiveness, uniformity and stability provided for by law without owing anything to the discover's intervention.

Meilland considers that the question of rights over the mutation is not expressly dealt with in the above-mentioned French Plant Protection law and that it is only natural, since the law is silent on this matter, that the parties to a licensing agreement relating to a new plant variety should settle it by common accord. On the whole, Meilland believes it has made the same sales promotion effort for the variety Pitica as for the others, bearing in mind all the requirements inherent in the management of the group, even if in 1971 a preliminary examination had in fact overlooked the intrinsic qualities of the new variety. At all events, the licensee-discoverer generally has neither the means nor the inclination to launch out into the exploitation of a mutation, preferring by far to surrender it--sometimes spontaneously--to Meilland, if only to take advantage of the latter's worldwide distribution capability.

(b) As regards the clause prohibiting the licensee from challenging the breeders' rights held by Meilland, the latter points out first of all that no-one is obliged to contract; on the other hand, once they are agreed to, all the clauses of a contract must be complied with in good faith by both parties where they have freely given their consent; and a licensee must not be able both to reap the benefits of licence based on an intellectual property right and to reserve the right to challenge that right as such. In the first place, under a licensing agreement, especially in the case of a man--Mr. Royon--who is a former employee and therefore has inside knowledge both of the group and of its products

and methods, the licensee possesses information which puts him in a particularly favorable position to create or exploit situations in which a challenge is possible. In the second place, and as a general rule, deletion of the clause would be a bonus to the bad payer, who could then lawfully continue to use the licence while refraining from paying royalties for the simple reason that he has initiated a challenge procedure, hence with, as it were, the support of the courts. Lastly, from a pragmatic point of view, settlements in actions for infringement would become impossible because they are based in most cases on the undertaking by the infringer to withdraw any petition for nullity of the complainant's rights, which clearly implies that he will no longer file such a petition.

Everything which would deprive the licensor of the benefits, thus detailed, of the clause would inevitably discourage in the long run an open licensing policy such as that pursued by Meilland. This would ultimately undermine the macro-economic advantages of such a policy, including the advantages from the point of view of competition.

(c) The notification made on 27 April 1985 by Meilland contains nothing new in relation to the arguments and information already submitted in the course of the procedure, and at the oral hearing held on 4 July 1984.

II. LEGAL ASSESSMENT

A. Article 85(1)

21. Article 85(1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings and decisions by associations of undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

22. The parties concerned are undertakings within the meaning of Article 85, carrying on at the time of the facts their main activity in the economic sector of ornamental flowers, and the agreements in question are agreements between undertakings within the meaning of that Article.

23. The following two provisions of those agreements have as their object and effect the restriction of competition within the common market:

(a) Article X of the agreement concluded on 28 October 1971 between URS-F (Richardier) and the sub-licensee Mr. Royon obliging the latter to surrender to Meilland any mutations he might discover on rose bushes of the licensed variety Sonia:

- The restrictive nature of this first provision lies in the fact that it obliges the licensee to relinquish completely rights he is justified in claiming in his discovery under the French law referred to above. Consequently, the agreement which deprives Mr. Royon of all rights over mutations and reduces him to collecting a royalty has the effect of completely eliminating the licensee as a potential supplier of varieties resulting from mutations, both at the national level and on the markets of the other Member States. By and large, the restrictive effect of this obligation was not substantially modified by the changes made in this respect in 1974 to the standard form agreements in question (new Article XII), limiting to three years the period within which Meilland may require compliance with the said obligation by all its licensees or sub-licensees. In the present case, the letter sent on 10 April 1974 to Mr. Royon by Meilland referred expressly to the latter's rights over the mutation Pitica, which occurred in 1971, and it is therefore on the basis of this prior contractual obligation that the agreement of 28 October 1971, the purpose of which was to lay down detailed rules for the assignment by Mr. Royon of his own rights, was drawn up between Universal Plant Sarl and Mr. Royon.

- The arguments put forward by Meilland in order to deny Mr. Royon any property rights in the mutation of the parent variety Sonia cannot be accepted. Firstly, in so far as several mutations were discovered in Mr. Royon's glasshouses in the context of the exploitation which he carried on under the production and selling licence granted by Richardier, all those discoveries must be considered to be independent of work done by Mr. Royon directly connected with administrative

responsibilities exercised by him in the management of the Meilland group. It is not contested between the parties, and it is borne out by the existence of the licensing agreement forming the subject matter of this procedure, that, despite his functions as Director within the Meilland group, Mr. Royon at the same time and with Meilland's consent ran his business 'Les Roses du Capitou' on an independent basis. The fact, raised, moreover, by Meilland, that the rose is a non-sexually reproducing species and that its mutations are determined from the outset by nature with the qualities of varietal uniformity and stability required for protection itself tends to rule out breeding activities or work by Mr. Royon incompatible with his obligations towards his then employer. Moreover, the very fact that there came into being a 'new variety' (the variety Pitica) within the meaning of the law in itself implies an inventive activity given tangible form in that new variety, which is incontestable both in its existence and in the degree of invention it expresses. Irrespective of the lack, if any, of an inventive 'effort,' which Meilland also points to, an inventive 'activity' is not in itself, where it is involuntary or unexpected, sufficient to exclude the granting of property rights. Both the French law (in particular its Article 1(1), referred to above) and the laws of the other Member States, and the International Convention for the Protection of New Varieties of Plants (referred to above), from which the former are derived, provide expressly that the discovery of a mutation may give rise to the grant of a plant breeders' certificate in the same way as the creation of a variety in the course of selection work. Moreover, Mr. Royon's aptitude for correct observation of the existence and qualities of a natural mutation itself proceeded from an at least implicit prior inventive effort, and this is particularly attested to in the present case by the fact that an unfavorable preliminary examination of the same mutation by Meilland was subsequently to be proved wrong.

(b) The obligation on the licensee, contained in the same agreement in Article VIII entitled 'Guarantee,' not to challenge the validity of the rights in the licensed variety:

- The restrictive nature of this second provision lies in the fact that it denied the licensee the opportunity, open to any third party, of removing an obstacle to his economic activity by means of a petition for revocation. The importance of the restriction remains despite the prior examinations and official tests which precede the grant of a plant breeders' certificate for a new variety of plant, since those examinations do not entirely exclude the possibility of a wrongly conferred right or imply that firms must forgo in advance any opposition or action for infringement in which they might have an interest. Generally speaking, even where a licensee is able to challenge an intellectual property right only on the strength of information received from the licensor himself, the maintenance of free competition and, where appropriate, the revocation of an exclusive right which was conferred wrongly are in the public interest, and this overrides any consideration concerning the privileged relations between the parties to a licensing agreement.

24. The restrictions resulting from these two provisions are appreciable.

(a) These restrictions have an appreciable effect on the market in the products in question in the EEC in view of the importance, both qualitative and quantitative, on that market of the rose varieties known as 'Selection Meilland.' This is all the more true as a single variety, possibly a mutation discovered by a licensee, may acquire a leading, or even dominant, position on the market. According to the case law of the Court of Justice of the European Communities of 12 December 1967 in Case 23/67 Brasserie de Haecht,(1) the appreciable nature of the restrictions established in the present case stems inter alia from the cumulative effect due to the existence in France and in the other Member States of thousands of similar contracts obliging, in the case of each variety, licensees and sub-licensees to surrender to the licensor any mutations that are discovered and not to challenge the validity of the licensed rights, which confers on the restrictions taken as a whole even greater economic importance. The restrictions have the effect of concentrating in the licensor's hands alone all the varieties discovered by hundreds of licensees.

(1) (1967) ECR 407.

(b) The restrictions also appreciably affect trade between Member States in view notably of the cumulative effect described above. Firstly, the obligation on Mr. Royon not to challenge the validity of the licensed rights is imposed on all licensees and sub-licensees throughout the Community, and applies also to Meilland's rights in the other Member States. It thus enhances Meilland's position vis-à-vis its competitors throughout the common market. Secondly, the obligation on Mr. Royon to relinquish all his rights in mutations is also imposed on all licensees and sub-licensees in the Community with the exception of Germany, and affects Mr. Royon's rights not only in his own country but also in the other Member States. It thus eliminates him, and in general all other Meilland licensees, as an independent international supplier of this type of new variety throughout the world and, in particular, throughout the Community.

25. The conditions for the application of Article 85(1) of the Treaty are therefore satisfied.

B. Article 85(3)

26. Under Article 85(3), the provisions of Article 85(1) may be declared inapplicable in the case of any agreement between undertakings which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

27. As regards the obligation on the licensee to waive completely his rights in future mutations:

- In the present case, this obligation imposed on Mr. Royon did not concern his activities in respect of the production, propagation or distribution of the licensed variety Sonia or of the cut flowers which are the end product thereof. It was, on the contrary, extraneous to the conditions proper under which that product is produced or distributed, and to any concern for the promotion of technical or economic progress or to any such effect, even indirect.

- The only connection which can be established in the present context between the aforementioned obligation on the licensee and production, distribution or the promotion of technical or economic progress is a negative connection in that the clause in question has had the effect of purely and simply depriving Mr. Royon in advance of the new variety Pitica in respect of which he could have endeavoured to bring about such improvements. The only practical result of the clause is that, by thus completely eliminating this possibility, it also at the same time diminishes the licensee's interest in the qualities of the mutations he might observe.

- Nor can it be maintained that the improvement effects listed in Article 85(3) will be automatically assured because the said obligation transfers responsibility for any action in relation to the production and distribution of the new variety Pitica to the Meilland group, which has greater resources at its disposal than Mr. Royon, the licensee. The exploitation both of the licensed parent variety and of its mutation has in that case to take place within the overall framework of the management requirements peculiar to Meilland and its collection of varieties and must therefore bend to those requirements. As a result, the mutation does not receive the undivided attention it would have been given by Mr. Royon, who could have devoted his entire resources, his efforts and his detailed knowledge of the international market to making it a success. This assessment is borne out by the fact that, despite Mr. Royon's exhortations, five years elapsed (1971 to 1976) between the discovery of the new variety Pitica and the time when Meilland started to market it.

It is therefore not an obligation capable of fulfilling the first condition of Article 85(3). This rules out any benefit to consumers within the meaning of that Article. Lastly, this obligation on Mr. Royon was not indispensable to the satisfactory exploitation of the variety Sonia which had been licensed to him.

28. As regards the obligation on the licensee not to challenge the validity of the rights licensed to him:

- The obligation not to challenge a breeder's right prevents both the licensee and any third parties interested in exploiting the same variety under licence from acting freely in the sphere of the descriptions and claims relating thereto, which constitutes an obstacle to technical progress.
- In the event of a breeder's right being conferred wrongly on Meilland, its licensee would nevertheless be obliged to pay royalties or purchase rose bushes in order to exploit the variety concerned and would therefore likewise not be free to sell that variety wherever he wished, not even in other countries where it would not be protected.

Consequently, this obligation, too, is not capable of fulfilling the first condition of Article 85(3). This in itself also rules out both any benefit to consumers and the need for an examination in the light of the last two conditions laid down in that Article.

29. For the reasons set out above, the agreement in question does not satisfy all the conditions which must be met in order to qualify for exemption under Article 85(3). Thus, it is not necessary to examine if the late notification, which arrived on 27 April 1983, could cover the contract in question, which expired in 1983, or if this contract falls in the categories exempted from the obligation of notification by Article 4(2) of Regulation No. 17.

III. ARTICLE 3 OF REGULATION No. 17

30. Where the Commission finds that there is infringement of Articles 85 or 86 of the EECT Treaty, it may, under Article 3 of Regulation No. 17, require the undertakings concerned to bring such infringement to an end. However, in the present case there is no longer any need to require the parties to bring the infringements established to an end since the agreement in question, which Mr. Royon concluded with Richardier on 28 October 1971, was terminated when the former closed his business and sold the equipment of 'Les Roses du Capitou' in 1983.

There are nevertheless reasons for finding that infringements were committed in the past. The Commission's position, notably in the light of Article 85(3), on all the agreements concerned or on similar agreements should be clarified for the benefit of the public. Moreover, the complainant has a manifest interest in the outcome,

HAS ADOPTED THIS DECISION:

Article 1

The following provisions of the licensing agreement concluded on 28 October 1971 and modified in 1974 between URS-F (Richardier) and Mr. R. Royon for the exploitation of the rose bush variety Sonia Meilland ('cut flower' agreement) constituted infringements of Article 85(1) of the EEC Treaty:

1. The obligation imposed on the licensee, Mr. R. Royon, by Article X of the agreement to surrender to Meilland all mutations discovered on rose bushes of the licensed variety so that such mutations might remain the exclusive property of Meilland and so that the latter might decide unilaterally whether to exploit them commercially.

2. The obligation imposed in this respect on the licensee by the new version of the agreement, after the amendment incorporated in 1974 (new Article XII), which allows the plant breeder Meilland a period of three years

from the date of surrender of a mutation by the licensee within which to impose its unilateral decision concerning the commercial exploitation of the mutation.

3. The obligation imposed on the licensee in the new version of the agreement drawn up in 1974 (new Article VIII entitled 'Guarantee') not to challenge the validity of applications for plant breeders' certificates or of the plant breeders' certificates which are assigned to him under licence.

Article 2

The application for exemption under Article 85(3) of the EEC Treaty for the provisions referred to in Article 1 is hereby refused.

Article 3

This Decision is addressed to:

1. SNC Meilland & Cie, 134 boulevard Francis Meilland, F-06600 Antibes;
2. Universal Plant Sarl, 134 boulevard Francis Meilland, F-06600 Antibes;
3. Universal Rose Sélection-France (Mr. and Mrs. Francisque Richardier), F-69160 Tassin-la-Demi-Lune;
4. M. René Royon, 128, Les Bois de Font Merle, F-06250 Mougins.

GENERAL STUDIES

Is the Patent System Applicable to Biotechnological Inventions?

Hely Lommi*

Plant Variety Protection has made its columns available to a landmark study by Tore Oredsson on the legal protection of biotechnological inventions and to the discussions that it has raised in the Nordic countries, in particular in Sweden.** The article below is one more reaction, this time from Finland. It is reproduced from issue No. 4 of 1985 of Nordiskt Immateriellt Rättskydd (pp. 502-508) with the kind permission of the periodical and the author.

This article reflects conceptions of which some may in the meantime have been overtaken by developments in the field, both in its technical and legal aspects. Nevertheless, it contains thoughts of lasting importance, and therefore still deserves to be published here.

Introduction

The history of the granting exclusive rights, monopolies or patents is an old one. According to some historians the patent system was started by the doges of Venice in the 1400's. Reference has also been made to the law of the Sybarites in Greater Greece in the seventh century B.C., which law gave cooks "who invented any peculiar and excellent dish exclusive rights to make it for

* Head of Section, National Board of Patents and Registration of Finland.

** "Biological Inventions and Swedish Patent Legislation" by Tore Oredsson in PVP No. 48, pp. 37-63, L. Börklund and R. Walles, ibid., pp. 64-65; Ragnhild Walles in PVP No. 50, pp. 32-41, and Tore Oredsson, ibid., pp. 42-45); Ragnhild Walles in PVP No. 53, pp. 26 and 61.

one year in order that others might be induced to labour at excelling in such pursuits."[1] This ancient "law" for exclusive rights is really not an example of the doctrine that the patent system has only been created for mechanical inventions, as, on the contrary, its subject matter is closely related to the biological inventions!

Although the patent system of our days is more advanced, with precise requirements for the patentability of inventions, etc., the basic principle of the system is still the same as before: against the granting of exclusive rights to him for a limited period, the inventor describes his invention and thus stimulates other inventors to improve the disclosed invention or make new inventions in the same field, thereby promoting the progress of civilization. An additional benefit for society is the ever-increasing collection of patent documents--published applications as well as granted patents--the amount of which is evaluated to be at present about 40 million documents. This treasury is appreciated today by technicians all over the world and especially in the developing countries.

One of the main aims in the patent system and its legislation has been said to be to keep it flexible and to keep pace with the technological development. As it is well known that biotechnology has a long historical background, not only as a field of technology as such but also as subject matter of patent documents during hundreds of years, it would be utmost deplorable if the patent legislators had to confess today that this old technology has reached such an intelligence level that its inventions can no longer be ruled by the patent system!

Are the Alternatives to the Patent System Proposed by Mr. Oredsson Necessary?

Mr. Oredsson refers shortly to the existing alternatives to the patent system: trade secrets, copyright protection or special contracts between the researcher and the user of the research results. These alternatives as well as trademarks have not been considered to be able to compete with the patent system as a form of protection for biotechnological inventions.[1,2]

1. The Registration System

Mr. Oredsson proposes a kind of registration system for research reports on the results of work in the biological sciences. The published results should not be utilized without the approval of the researcher. The administration and publication of registrations are proposed to be headed by the World Intellectual Property Organization (WIPO) and a scientific council with the greatest possible expertise and which would be using also the help of international institutions such as the planned UN/UNIDO centers for genetic engineering and biotechnology! It is difficult to imagine the amount of bureaucracy this kind of registration system would create in practice. The qualified experts of scientific UN/UNIDO centers would surely not have much time left for their own creative intellectual actions! The poor international support to a registration treaty of the same kind, i.e., the Geneva Treaty on the International Recording of Scientific Discoveries, adopted in 1978, but still not in force, should be remembered.

The good attempts by biological scientists themselves to establish complete registers or data banks in order to collect information on different biological units, i.e., proteins (antibodies, enzymes), plasmids and their restriction maps, other DNA sequences or microorganisms, have not yet fulfilled the hopes of their creators either. A good example of this kind of effort could be the Nordic Register of Microbiological Culture Collections and its originally planned form, a centralised internordic culture collection, both confirmed by the Nordic Council of Ministers!

If the registration demanded by researchers for private rights on their research results are really needed outside the patent system, why not use the tremendous scientific data bank network already existing, cf. Chemical Abstracts' collections and various special data banks in biological sciences, and supplement them accordingly? The qualification requirements proposed by Mr. Oredsson for the reports for the register are in any case about the same as those for articles for scientific journals!

2. Special Conventions

The second step of the proposed project for the improvement of the protection rights of biotechnological inventors would be a study of the possible need for special conventions for the protection of animal breeding products, microorganisms and gene technical methods in addition to the existing International Convention for the Protection of New Varieties of Plants (UPOV). This kind of study on a broader scale has already been started by WIPO to improve the present situation in respect of the protection of biotechnological inventions at the international level. According to the preliminary study, the interest in several agreements concerning restricted subject matters is not so high at the international level if it is possible to carry out the alternative of amending the existing international treaties in the field concerned.[3] The Executive Committee of AIPPI, too, has stated in its resolution of May 1985 on question 82 concerning patent protection for biotechnological inventions that the creation of a special body of law is not necessary and that the existing principles of patent legislation should be applied to the protection of biotechnological inventions, including plant and animal organisms, microorganisms as well as biological material in patentable subject mattter. This AIPPI resolution has been approved unanimously after the study of the 24 national groups' reports on the subject.[4]

To have several conventions for the protection of closely related subject matters is surely not convenient to applicants or to legislators in practice. As Mr. Oredsson expresses in his comprehensive, survey one of the most difficult problems for the biotechnological inventor is caused by the different meaning of basic biological concepts in legal statutes compared to their meaning in scientific circles. The legal statutes have a very special interpretation of the meaning of microbiology, microorganism, biological method, plant variety, etc.--not to speak of the way the statutes define the borderline between living and non-living material! It is clear that this kind of divergences would also be reflected in the proposed conventions as they cause a lot of overlapping problems and still more uncertainty to users than today. For these reasons, special conventions for microorganisms and for gene technical methods cannot be realistic. Furthermore, it must be kept in mind that the inventor usually does not make only one invention but a series of inventions at a time, e.g., an "invention package" can contain a new gene, a transfer vector, a microorganism, a new protein and different process steps for their preparation. Should these inventions, which can be presented now (and are presented in EP-patents referred to in the article) in one patent document, be divided into different legal protection systems? It must also be remembered that gene manipulation is only a unit process, a means in a bigger multistep process and not an independent technical field as such.

Maybe it is too optimistic to believe that all protection problems of the present biotechnological inventors could be solved worldwide within the existing system of intellectual property rights. The interpretation of the basic criteria for patentability in the present patent system is acceptable to some extent, but they should be interpreted very delicately in order not to destroy the clarity and trustworthiness of the system. The reproducibility criterion of the patent system still seems to be rarely met in inventions concerning animal breeding. Animals *per se* could hardly be included into patentable inventions even if the most liberal interpretation was used. Therefore, the animal breeders would perhaps need a convention of their own for their protection rights.

For plant breeders and inventions dealing with plant cells, the present situation is different. The invasion of many biotechnical methods at the cellular level into classical plant breeding--e.g., micropropagation of plants or gene-splicing *in vitro*--and the increased possibilities of making use of the plant cells' ('meristematic cells') special feature, totipotency (i.e. of using the cells in an undifferentiated state like microorganisms--or as partly differentiated--and of inducing them to produce expensive chemicals in vitro or converting the cells into artificial seeds) have caused an urgent need for reevaluation of the present protection forms for plants and seeds. Whether today's demands for appropriate protection forms in the emerging "plant biotechnology industry" can be met in cooperation with patent legislators and those being responsible for the above-mentioned UPOV Convention will be seen in the near future. The discussions have already started with the Convention members, between them and among those concerned with it in practice.[3,5,6,7]

3. Grace Period, Ethical Problems

Mr. Oredsson proposes as the third step in his program the investigation of the need for a grace period, i.e., a given time before the research report is published which would not constitute a novelty bar to the registration. The international creation (re-creation in some States) of a similar grace period concerning patent applications is already under discussions at the international level.[8] This question as well as the ethical problems are, however, considered to require an equal solution in all technical fields of patentable inventions and should not be solved for biotechnological inventions separately.[3,4]

How to Make the Patent System More Applicable to Biotechnological Inventions?

It must be admitted that the inventions of modern biotechnology have put the classical patent system and its flexibility on trial. In fact, many of today's difficulties would have existed already with the biotechnical applications in old times if the deposit and an early release of deposited samples would have been requested then.

According to e.g. AIPPI, OECD and WIPO reports,[4,9,10] the present situation is, however, not hopeless. There has also been unanimity between Nordic patent legislators, including patent offices, when the latest amendments to patent legislation have been prepared in cooperation in order to take into consideration the modern international (European) practice concerning applications for microbiological inventions (e.g., the so called expert solution in connection with release of samples during the application phase). The present discrepancy in modern plant biotechnological protection forms according to the UPOV and patent systems has also been discussed.[11]

It seems that many of the modern patent system problems which Mr. Oredsson mentions in his article could be solved more easily with the following remedies than with the radical proposal given in the article.

1. The biological concepts used in patent legislation should be clarified to have as far as possible the same meaning to the patent legislator and to the user of the patent system. The microorganism concept in the patent system includes in some countries the disputed plasmids and in some countries also enzymes. ATCC has quite recently extended the list of "microorganisms under the Budapest Treaty," e.g. to oncogenes and seeds.[12] It should be remembered that knowledge of the correct meaning of "microorganism" is of utmost importance to the patent applicant, at the latest when filing the application, because the possibly missing deposit cannot be remedied at a later stage.

One ambiguous expression used in patent law texts is "essentially biological process for the production of plants and animals" which originally probably only meant the contrary of "technical process for...," but has later been understood differently, as for instance in the article where it unexpectedly also means the gene technical process for the production of microorganisms. It is important that the exact meanings of the plant, plant variety and seed concepts according to UPOV and patent legislations are clear, at least as long as there exist borderline problems between those systems.[10,13] The concepts "microbiological process," "derived culture" and "industrial application" as used in patent legislation are not self-evident for a biotechnician either!

2. Attempts should be made to reach an international harmony in interpretation of the basic criteria for patentability in the biotechnological field. Although novelty, unobviousness and industrial application (or utility) are important criteria and have their special features in biotechnological inventions, the enablement or reproducibility (repeatability) requirement is, however, the key criterion in this field of technology. For the applications where deposits are part of the description, the provisions for the release of samples from the deposits should be harmonized at the same restriction level internationally. Otherwise the legislation of a State where the provisions are the poorest for the applicant could overrule the legislation of another State where the provisions are meant to be more applicant-minded.

3. As it seems obvious that the future inventor will be among an ever increasing number of scientists working with basic research in universities or research institutes, it will be of utmost importance to impreve their knowledge

of and attitude towards patent systems and other protection rights. One full-time patent expert among the staff of every research institute and university could be a good beginning towards better patent policy and understanding between patent officials, academic inventors and industry as the sponsor of their work.

4. As biotechnology belongs to the very fast-developing technologies, its application to the patent system should--for the above-mentioned reasons--be followed continuously and at international level. The continuous revision work needed in respect of the international patent classification in order to keep pace with technical development could be used as an example of international cooperation concerning patent problems and their solutions regarding biotechnological inventions. Each period of time can have some special urgent problem needing high priority in discussions. Today those problems occur surely in the unclear relationships between patents and plant breeders' rights. For many States, this does not mean at present the "double protection" problem but, on the contrary, a "no protection at all" problem, i.e., plant breeders do not get any protection for their inventions in those countries where patenting of plants is not allowed and their inventions do not belong to the varieties that can get protection through the UPOV Convention or which are not a signatory of the above-mentioned Convention.

International cooperation will also be necessary for novelty search in patent offices. The sidelong DNA-sequence--and amino acid sequence--characteristics in claims need suitable computer memories and data registration for efficient research in patent practice.

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Landwirtschaftliche Pflanzenzüchtung in Deutschland - Geschichte, Gegenwart und Ausblick
1987, 256 pp. (17 x 25 cm)

This book outlines the history of 79 German plant breeding enterprises and their professional organizations, with a description of the plant breeding methods and objectives in historical perspective and of the contribution of scientific institutions to plant breeding. One chapter is of course devoted to plant variety protection and the Federal Office of Plant Varieties. The chapter on the outlook for the future says the following: "The question whether a specific protection system for plant varieties will be maintained or whether such protection will be incorporated in industrial property (patent) protection will be decisive. This question will have to be decided upon at international level, and it is to be hoped that UPOV member States will remain true to the philosophy underlying plant variety protection."

DEUTSCHER BUNDESTAG (publisher)

Chancen und Risiken der Gentechnologie - Bericht der Enquete-Kommission "Chancen und Risiken der Gentechnologie" des 10. Deutschen Bundestages
Herausgeber: Deutscher Bundestag, Referat Oeffentlichkeitsarbeit, Bonn, 1987 [Zur Sache; 1/87], 405 pp. (15 x 21 cm)

The result of two years' work of a parliamentary Commission comprising not only Parliamentarians but also university professors of biology, ethics and law, and private sector representatives: impressive.

FLURY-JEKER (Anne-Marie)

La Protection juridique des obtentions végétales sous le régime de la Convention de Paris du 2 décembre 1961 et de la loi fédérale du 20 mars 1975
Editions Ides et calendes, Neuchâtel, 1987, 224 pp. (15 x 22,5 cm)

A particularly clear and comprehensive review of the protection system for new plant varieties based on the UPOV Convention and Swiss legislation.

T.A. WILLIAMS and G.S. WRATT (editors)

Plant Breeding Symposium DSIR 1986
Jointly published by The Agronomy Society of New Zealand and the Department of Scientific and Industrial Research, Christchurch, 1986, 380 pp. (17 x 21 cm)

This voluminous book contains the record of the DSIR Plant Breeding Symposium held in Lincoln from February 17 to 20, 1986, to celebrate 50 years since the first New Zealand-bred wheat variety was released and the first DSIR building was established in Lincoln.

A total of 68 contributions were made, covering the following subjects: Genetic conservation and exchange; evaluation of approaches to plant breeding; interface between private and public breeding; recent developments in wheat breeding; breeding long-lived perennials; physiology contributions to plant breeding; breeding for disease resistance; quality requirements in plant breeding; pasture plant breeding; novel techniques in plant breeding. The editors wrote in the preface that the publication "is also intended to provide an insight into the working strategies of plant breeders and scientists in supporting fields of research" and that the participants "met ... to take a glimpse at the future of the plant breeding industry." The publication provides much more than an insight or a glimpse.

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CALENDAR

UPOV Meetings

June 7 to 9 Edinburgh (United Kingdom)	Technical Working Party on Automation and Computer Programs
June 13 to 15 Wageningen (Netherlands)	Technical Working Party for Vegetables
June 16 and 17 Wageningen (Netherlands)	Workshop on the Examination of Varieties of Lettuce
June 20 to 24 Melle (Belgium)	Technical Working Party for Ornamental Plants and Forest Trees
June 29 to July 1 Hanover (Federal Republic of Germany)	Technical Working Party for Fruit Crops (Subgroups on June 28)
July 5 to 8 Surgères (France)	Technical Working Party for Agricultural Crops
September 27 and 28 Cambridge (United Kingdom)	Workshop on the Use of New Technology in the Examination of Varieties
October 11 to 14	Administrative and Legal Committee
October 17	Consultative Committee
October 18 and 19	Council
October 20 and 21	Technical Committee

Other Meetings

June 4 to 8 Brighton (United Kingdom)	FIS Congress
June 9 and 10 Brighton (United Kingdom)	ASSINSEL Congress
September 4 to 8 Budapest (Hungary)	Hungarian Group of AIPPI and Hungarian Association for the Protection of Industrial Property - International Conference on Recent Phenomena in the Protection of Industrial Property
September 14 to 16 Geneva	WIPO Worldwide Forum on the Impact of Emerging Technologies on the Law of Intellectual Property
October 24 to 28 Geneva	WIPO Committee of Experts on Biotechnological Inventions and Industrial Property
November 17 Amsterdam (Netherlands)	ASSINSEL 50th Anniversary Celebration and meetings
November 21 and 22 Brussels (Belgium)	COMASSO General Assembly
December 5 and 6 Ithaca (New York, United States of America)	Cornell University, Conference on Animal Patents

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The International Union for the Protection of New Varieties of Plants (UPOV)--an international organization established by the International Convention for the Protection of New Varieties of Plants--is the international forum for States interested in plant variety protection. Its main objective is to promote the protection of the interests of plant breeders--for their benefit and for the benefit of agriculture and thus also of the community at large--in accordance with uniform and clearly defined principles.

"Plant Variety Protection" is a UPOV publication that reports on national and international events in its field of competence and in related areas. It is published in English only--although some items are trilingual (English, French and German)--at irregular intervals, usually at a rate of four issues a year. Subscription orders may be placed with:

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