



CAJ/40/4

ORIGINAL: French

DATE: July 26, 1999

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS  
GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Fortieth Session  
Geneva, October 18, 1999

BREEDER'S EXEMPTION

*Document prepared by the Office of the Union*

1. The UPOV Convention provides that a protected variety may be freely used for the purposes of creating varieties under what is known as "breeder's exemption":

(a) Article 5(3) of the 1978 Act reads as follows:

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

(b) Article 15(1) of the 1991 Act reads as follows:

"[*Compulsory exceptions*] The breeder's right shall not extend to

[...]

(iii) acts done for the purpose of breeding other varieties and, except where the provisions of Article 14(5) apply, acts referred to in Article 14(1) to (4) in respect of such other varieties."

2. The Office of the Union was consulted as to the validity of a clause under which a breeder wished to prohibit the use of a protected variety for the purposes of varietal creation. There is no point in giving more detail of the individual case submitted to the Office of the

Union (particularly since the whole of the affair was not presented to it). Hypothetically, such a clause could be found:

(a) in a formal contract (signed by the two parties), for example a licensing contract for the production of seed or propagating material (or, for example, cut flowers) or a sales contract for seed or propagating material,

(b) in a document reproduced on a bag of seed or affixed to it in some other manner (in such case, the “purchaser” is deemed to have accepted the clause when purchasing the bag of seed or when opening it).

Such a clause may also concern:

(a) the protected variety,

(b) in the case of hybrid seed, the seed of lines that may be admixed.

3. The issue of validity of a clause that restricts the breeder’s exemption is of particular interest in the present context, particularly with regard to the revision of the International Undertaking on Plant Genetic Resources and the attempts to implement the Convention on Biological Diversity at national level.

4. In the ongoing discussions on genetic resources and biodiversity, the Office of the Union is presenting the breeder’s exemption as the cornerstone of the system of protection based on the UPOV Convention. Since plant improvement is a repetitive activity (future progress is built up essentially on the most recent protected advances), it is therefore important that access to the most recent (protected) varieties should not be restricted by the breeders’ rights. Furthermore, the breeder’s exemption is the result of a compromise: having had access to the parents, the breeder of a protected variety has to accept – and does so readily – that other breeders should have free access to his own variety, with all the improvements that it contains, in order to create further varieties. To use the words of Article 1 of the Convention on Biological Diversity, the UPOV Convention provides for a more than “appropriate access to genetic resources” (since not subject to breeders’ rights) and a “sharing of the benefits arising out of the utilization of genetic resources” (since an improved genetic resource becomes available for the purposes of varietal creation).

5. It would therefore seem desirable to hold an exchange of views within the Administrative and Legal Committee to ensure that all parties are better informed and armed for the discussions that are liable to arise in other bodies. The issue at point could be formulated in the following manner:

*Can the holder of a breeder’s right – under national law on plant variety protection – derogate by individual agreement from the breeder’s exemption laid down in Article 15(1) of the 1991 Act as a compulsory exception to the breeder’s right?*

6. The question of the validity of the clause restricting the breeder’s exemption also depends on other branches of national law (or of regional law in the case of the European Union), for example contract law, sales law, competition law, etc.

7. It may be recalled that a similar question was put to the Committee in 1986 with regard to the validity, in view of Article 85 of the Treaty Establishing the European Economic Community, of a clause requiring any mutation that appeared in the plantation of a licensee to be handed to the licensor. The relevant decision of the Commission of the European Communities is given at annex hereto.

8. Any information on the effects of such other branches of law would be useful for the Office of the Union.

[Annex follows]

CAJ/40/4

ANNEX/ANEXO

















