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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

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PROPOSALS FOR AMENDMENT OF THE GUIDELINES FOR VARIETY DENOMINATIONS

Document prepared by the Office of the Union

1. At its sixth session, the Administrative and Legal Committee decided that "States should transmit any proposals for amendments [to the Guidelines for Variety Denominations] to the Office of the Union by January 31, 1981," and that "the question of the Guidelines for Variety Denominations would then, if necessary, be put on the agenda for a future session of the Committee" (see paragraph 11 of document CAJ/VI/10).
2. The Office of the Union has received proposals from the delegations of South Africa and the United Kingdom and has incorporated them, in order to facilitate discussions, in the text of the Guidelines for Variety Denominations, on the right-hand pages of the Annex. They are supplemented by some proposals from the Office of the Union. In conformity with established practice, the parts of the present text to be deleted or replaced are in square brackets and the parts to be added or substituted are underlined. The comments made by those delegations and some comments by the Office of the Union appear on the left-hand pages of the Annex, opposite the parts of the Guidelines to which they relate. The comments of a more general nature are summarized hereinafter.
3. The Delegation of Belgium pointed to the fact that the provisions regarding the use of figures probably needed to be revised in view of the new text of Article 13 of the Convention.
4. The Delegation of France referred to the fact that there were quite some difficulties in the implementation of the Guidelines for Variety Denominations and that the Guidelines would be thoroughly examined in France by a working group. Pending that examination, it was unable to make proposals.
5. The Delegations of Denmark and of the United Kingdom made observations with regard to the use of prefixes:

(i) Denmark: Some names continue to cause problems and now they consist of four syllables. Although there is a risk of creating synonyms, it has been decided that such names will be refused if they consist of more than three syllables, the reason being that they are not easy to remember and that they confuse a purchaser of normal attentiveness.

(ii) United Kingdom: One of the problems which UPOV naming authorities are currently facing concerns the use of code prefixes by individual breeders (e.g. MEI-, BAR-, etc.). Had all UPOV authorities taken collective action in the beginning about the use of such code systems, the present situation might have been very different. It is a fact however that certain breeders have established a system which works well for them in commerce, and it is now doubtful whether representatives of national authorities could or should take action with the object of "outlawing" those systems. The systems are at least known and understood; if they were "outlawed," others would doubtless be used and that might provoke further difficulties. The United Kingdom does not therefore see much point in further discussions on this particular aspect.

6. With regard to the naming of the great number of chrysanthemum mutants, the Delegation of Denmark drew attention to the fact that it was becoming more and more confusing, and recommended that the matter be dealt with by the competent bodies of UPOV. Indeed, a new variety might be named 'Snapper,' the first mutant 'Bronze Snapper,' the second 'Salmon Bronze Snapper,' and--if the corresponding mutation appeared--there might be a 'Pale Salmon Bronze Snapper' and even a 'Light Pale Salmon Bronze Snapper.' Since there might also be a 'Pale Salmon Snapper' and a 'Golden Bronze Snapper,' the confusion would be complete.

7. In the view of the Office of the Union, it may be advisable to have at the outset a discussion as to which of the following subjects should be covered by the Guidelines for Variety Denominations, in view of the fact that, after the entry into force of the Revised Text of the Convention, the second will be better covered by Article 13 of that text:

(i) the selection of variety denominations;

(ii) the use of variety denominations, in particular in relation to trademarks, trade names and similar indications.

Similarly, it might be useful to examine at the outset whether the Guidelines should be a mere complement to the provisions of the Convention or, as at present, a document that also restates those provisions.

[Annex follows]

GUIDELINES FOR VARIETY DENOMINATIONS

CommentsAd Introductory Considerations

Office of the Union: In view of the fact that proposals have been made for the alignment of the Articles of the Guidelines with the new text of the Convention, the Office of the Union has attempted also to align the introductory considerations, without altering their sense. Another solution would consist in drastically shortening them by means of a mere reference to Article 13 of the Convention. It is proposed however that the introductory considerations be examined only after the discussion on the proposed amendments to the Articles of the Guidelines, when the need for revision of the Guidelines has been better assessed.

GUIDELINES FOR VARIETY DENOMINATIONS

Proposals for Amendments

The Council,

By virtue of the provisions of subparagraph (h) of Article 21 of the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, and on October 23, 1978,

Recalling that the Convention prescribes that each [new] variety that is the subject of an application for protection [, if protected,] shall be given a denomination (Article 6(1)(e) [and Article 13(1)]) destined to be its generic designation (Article 13(1)) [considered as the generic name for that variety (Article 13(8)(b))],

Recalling that the Convention prescribes that [and must be used by] any person who, in a member State of the Union, offers for sale or markets reproductive or vegetative propagating material of a [such] variety protected in that State shall be obliged to use the denomination of that variety, even after the expiration of the protection of the variety (Article 13(7)),

Recalling that the Convention provides [permits, in respect of the same product,] that, when a variety that is or was protected is offered for sale or marketed, it is permitted to associate a trademark, trade name or similar indication with [be added to] the denomination of the variety and that, if such an indication is so associated, the denomination must nevertheless be easily recognizable (Article 13(8) [(9))],

Taking into account the fact that the purposes of the denomination of the variety and of a trademark, which may be associated with [added to] it, are entirely different, the denomination being the generic name of the variety itself, independent of its origin, whereas the trademark distinguishes the products of one enterprise from those of other enterprises, even if an enterprise uses different trademarks for different products,

Taking into account, furthermore, that the purposes of the denomination of the variety and of a trade name or an indication similar to a trademark or a trade name are also entirely different,

Considering therefore, in the case of association of a trademark, trade name or similar indication with a denomination [simultaneous use of a denomination and a trademark], that it is important, on the one hand, that the denomination be of such character that it is not overshadowed and its significance is not appreciably diminished by the trademark, trade name or similar indication, and, on the other hand, that the latter, in particular, be prevented from appearing to be the name of the variety itself,

Considering that apart from regulating the choice of denominations member States of the Union should prescribe that any denomination must always be visibly presented as such, in order to distinguish it from all other signs and indications, and that it must be clearly distinguishable and legible in all documents made available to the public,

Recommends to the member States of the Union that, in respect of variety denominations, they apply the following guidelines when implementing Article 13 of the Convention:

Ad Article 1(1)

United Kingdom: The addition is proposed in order to conform to the new text of the Convention.

Ad Article 1(2) [present] - Article 2 [new]

United Kingdom: The words "for linguistic or other reasons" appear superfluous.

Ad Article 1(2) [new]

Office of the Union: This new paragraph is proposed by the United Kingdom. Adoption thereof entails deletion of the present Article 7, which covers the same subject matter.

Ad Article 2 [present]

United Kingdom: It is doubtful whether the meaning of this Article is clear to those dealing now with naming and also whether it can ever be implemented. It is proposed that it be deleted.

Ad Article 3(1)

United Kingdom: The words "easy to pronounce and to remember" were included with the best of intentions but in our experience they appear to be given little consideration. If this is so, they should be deleted.

Ad Article 3(2) [new]

United Kingdom: A new paragraph (to be inserted preferably before or after the present paragraph (2)) is required to embody the second sentence of the new text of Article 13(2) of the Convention.

Office of the Union: The proposed amendment is insufficient to cover the possibility of using letter-figure combinations as variety denominations. Such combinations are an established practice in the States in which numerical denominations are an established practice; they are also available in one present member State under its legislation--albeit hardly used. The following proposal is made to cover absolutely all cases:

"Article 3

"(1) The denomination must be capable of being used as the generic name of the variety.

"(2) The denomination must consist of one to three words with or without preexisting meaning.

"(3) Figures to a maximum of four may be included in a denomination if they have a meaning in connection with the word or words they refer to.

"(4) A denomination may not be formed by substituting figures for other figures included in a denomination already in use, or by adding figures to a denomination or by omitting figures from it.

"(5) Where a variety is exclusively used for the production of propagating material of other varieties, its denomination may also be formed by combining letters and figures.

Article 1

(1) A variety shall be designated by only one denomination, which must enable the variety to be identified.

(2) The denomination must be different from every denomination which designates, in any member State of the Union, an existing variety of the same botanical species or of a closely related species as prescribed in the Appendix. [The present paragraph (2) is made into a new Article 2.]

Article 2 [new - present Article 1(2)]

If a variety has already been submitted for registration or registered in a member State of the Union, only the denomination under which the variety has been registered in that State can be accepted in the other member States unless the authority which has to decide on the new application considers the denomination unsuitable [for linguistic or other reasons].

[Article 2 [present]

The denomination must make it possible to identify the new variety without risk of confusing a purchaser of average attentiveness.]

Article 3

(1) The denomination must consist of one to three words with or without a preexisting meaning [, easy to pronounce and to remember] and capable of being used as the generic name of the variety.

(2) The denomination may not consist solely of figures except where this is an established practice for designating varieties.

(3)[(2)] Figures to a maximum of 4 may be included in a denomination if they have a meaning in connection with the word or words they refer to.

(4)[(3)] A denomination may not be formed by substituting figures for other figures included in a denomination already in use, or by adding figures to a denomination or by omitting figures from it.

"(6) The provisions of paragraphs (2) to (5) shall be without prejudice to the faculty of member States to accept denominations not consisting of words, in particular those consisting solely of figures, if this is an established practice for designating varieties on their territories."

Ad Article 3(5) [new]

Office of the Union: It is proposed that the words "provided that..." to the end be deleted since member States accept such denominations in the circumstances described, and are thus of the opinion that they are an established international custom.

Ad Article 4

Office of the Union: The deletion is proposed in order to conform to Article 13(1) of the new text of the Convention and in view of the fact that there must be freedom to use the denomination at any time, not merely after the expiration of the term of protection.

Ad Article 5

United Kingdom: "In particular" should be deleted since there is nothing to say that the provisions of this Article are more important than those of any other Article. Paragraph (1) should be brought into accord with the new text of the Convention.

Ad Article 6

Office of the Union: The amendment is proposed by the Delegation of the United Kingdom.

Ad Article 7

United Kingdom: This Article would be deleted if the proposed new Article 1(2) were adopted.

Ad Article 10

United Kingdom: The addition of "or so closely resembles that denomination as to be likely to cause confusion" is proposed for consideration.

South Africa: It is suggested that once a denomination has been used in connection with an officially recognized variety of which propagating material has been commercialized, such denomination should not be allowed to be used again, even after the variety has disappeared from the agricultural or trading scene. A denomination is a description which is (or should be) unique and which goes on record for an indeterminable period of time. Therefore, although the physical variety may disappear (which is unlikely to happen, as such

(5)[(4)] Where a variety is exclusively used for the production of propagating material of other varieties, its denomination may also be formed by combining letters and figures [, provided that in the opinion of the competent authorities such combinations are established international custom for the species concerned].

Article 4

A denomination may not embody any element which [, on expiration of the term of protection of the variety,] would prevent or hamper the free use of such denomination in connection with the variety [, or would prevent the free commercialization of the variety].

Article 5

The denomination must [in particular] not

(1) be liable to mislead [deceive] or cause confusion concerning the [as to the origin, derivation,] characteristics, [or] value or identity of the variety or the identity of the breeder;

(2) refer solely to attributes which are also common or likely to become common to other varieties of the species concerned;

(3) be liable to give offense;

(4) be unsuitable for linguistic reasons.

Article 6

The denomination may not consist of, or include, the botanical or common name of a species or genus[; neither may it include the botanical or common name of a species or genus] where this is likely to deceive or to cause confusion.

[Article 7

The denomination must not be the same as that of any other variety belonging to a species of the same class as prescribed in the appendix, nor so nearly resemble it as to be likely to deceive or to cause confusion.]

Article 8

The denomination must not suggest that the variety concerned is derived from or related to another variety when this is not the case.

Article 9

The denomination must not include words such as "variety," "cultivar," "form," "hybrid" and "cross" or translations of such words.

Article 10

Proposal by the Delegation of the United Kingdom:

A new variety may not be given a denomination which has been applied previously to a variety belonging to a species of the same class as prescribed in the appendix or so closely resembles that denomination as to be likely to cause confusion if, according to a national authority, the old variety is still in cultivation or its denomination still of particular importance.

Proposal by the Delegation of South Africa: delete Article 10.

material is usually preserved in gene pools), the description together with its denomination are (or should be) maintained in official records which form the basis for the approval of new variety denominations.

Office of the Union: Alternatives to the deletion proposed by the Delegation of South Africa might be:

(i) to provide the possibility of re-using the denomination of a variety under the circumstances described only in respect of another variety from a different taxon of the same class, in view of the fact that little confusion is possible in such a case since the first variety is no longer in use;

(ii) adopt the principle embodied in Article 48 of the International Code of Nomenclature for Cultivated Plants 1980, which reads as follows:

"The name of a cultivar may not normally be re-used later for any other cultivar. Exceptionally, at the discretion of an international registration authority, re-use of a cultivar name may be authorized, but only if the registration authority is satisfied that the original cultivar is no longer in cultivation, has ceased to exist as breeding material or in a gene or seed bank, and is not an important component in the pedigree of other cultivars."

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