



Reflections on the development and purpose of the breeder's right in relation to harvested materials

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Outline

- **Purpose**: What is the purpose of the breeder's right?
- **Relation to Harvested Material**: Why does the protection focus on propagating material?
- **Development**: Some historic remarks about the extension to harvested material;
- Reflections.

UPOV Mission Statement



- Mission Statement
- To provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.
 - Encourage plant breeding
 - Benefit of society;

Object and scope of PBR:

- Patent: product or process;
 - Copyright: work;
 - PBR: plant variety.
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- PBR object = plant variety;
 - Scope = propagating material.

UPOV 1961 – 1972:

Article 5

- [Rights Protected; Scope of Protection]
- (1) The effect of the right granted to the breeder of a new plant variety or his successor in title is that his prior authorization shall be required for the production, for purposes of commercial marketing, **of the reproductive or vegetative propagating material, as such,** of the new variety, and for the offering for sale or marketing of such material.

UPOV 1991:

Article 14

- **Scope of the Breeder's Right**

- (1) [*Acts in respect of the propagating material*] (a) Subject to Articles 15 and 16, the following **acts in respect of the propagating material of the protected variety** shall require the authorization of the breeder:
 - (i) production or reproduction (multiplication),
 - [etc.]

UPOV 1961 - Actes:

ACTES DES CONFÉRENCES INTERNATIONALES POUR LA PROTECTION DES OBTENTIONS VÉGÉTALES

Point 6°

La protection d'une variété nouvelle, d'après l'avis unanime des délégations, doit avoir pour effet de soumettre à l'autorisation de l'obtenteur toute mise au commerce du matériel de reproduction ou de multiplication de cette variété. La Délégation de la République fédérale d'Allemagne a fait remarquer que cette protection ne peut évidemment intervenir qu'à condition que ce matériel ne soit utilisé que pour des fins de reproduction ou de multiplication et non pas pour d'autres fins.

Mais la Délégation de l'Italie insiste sur l'intérêt qu'attache son pays à l'extension de la protection à la fleur coupée, dans le cas des plantes ornementales. Elle indique l'importance de la question du point de vue économique pour son pays.

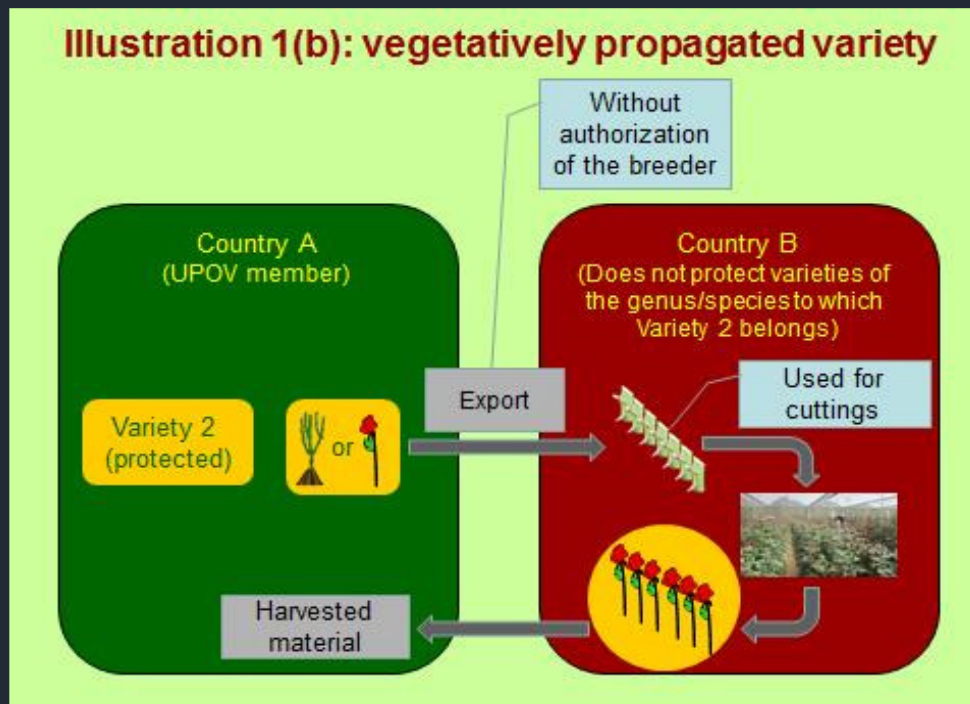
Après une longue discussion, l'ensemble des délégations tombe d'accord pour reconnaître l'intérêt que présente la question, décide de signaler l'existence du problème dans ses résolutions finales mais de ne pas chercher à le résoudre pour l'instant.

Why focus on propagating material?

- Unanimous view of delegations:
- All bringing into commercial circulation of propagation material (“toute mise au commerce du matériel de reproduction ou de multiplication”) should be subject to the authorization of the breeder;
- Obviously there is a relation between the scope of protection and the doctrine of exhaustion;
- The exhaustion principle was probably at the basis of the remark of the German delegation and in the back of the minds of the members of other delegations.

Enforcement against propagating material not always enough:

- When harvested products originating from illegal propagation have already reached the market;
- Cross-border traffic / U-turn schemes:



Conditions in respect of harvested material:

- The extension of the right in relation to harvested material applies only:
 - i) if it was obtained through the unauthorized use of propagating material of the protected variety;
 - ii) unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

Possible situations of unauthorized use:

- 1) In the country where propagation takes place (or has taken place) the variety is protected by PBR:
 - a) without a license;
 - b) under license but the propagator violated its provisions;
- 2) In the country where propagation takes place (or has taken place) the variety is **NOT** protected by PBR:
 - a) no license or other contractual restrictions apply;
 - b) propagation has taken place under license or other contractual restrictions.

Meaning of unauthorized:

- Two views:
- a) No authorization has been granted, whereas this was in fact required ('strict approach');
- b) No authorization has been granted – without paying regard to the question whether authorization is required.

EXN HRV:

- “4. “Unauthorized use” refers to the acts in respect of the propagating material that require the authorization of the holder of the breeder’s right in the territory concerned (Article 14(1) of the 1991 Act), but where such authorization was not obtained. Thus, unauthorized acts can only occur in the territory of the member of the Union where a breeder’s right has been granted and is in force.”

Consequences of strict approach:

- Text of the basic proposal:
- “(b) in respect of the harvested material of the protected variety, any of the acts referred to in (a), above, provided that the harvested material was obtained through the use of propagating material **whose use**, for the purpose of obtaining harvested material, **was not authorized** by the breeder [and if, but only if, the breeder has had no legal possibility of exercising his right in relation to the propagating material];
- Amendments were proposed to replace “**whose use** (...) **was not authorized**” by “unauthorized”.

Consequences of strict approach:

- During the Diplomatic Conference this consequence of the difference between “unauthorized” and “whose use [...] was not authorized” was not discussed;
- Under the strict approach there will never be ‘unauthorized use’ if there is no title, not even if propagation has taken place under contractual restrictions (situation 2a);
- As a result, the expansion of the right to harvested material remains out of reach for a significant part of the conceivable situations.

‘No reasonable opportunity to exercise his right’

- Article 14(2) does not make clear whether it is necessary for the variety to be protected in the country where the act of propagation has taken place;
- In 2006 this issue was partly settled by the German Bundesgerichtshof (BGH 14 February 2006 (case X ZR 93/04 - Melanie): it is not possible to exercise the right outside the territory of protection;
- Still unclear whether the breeder can be considered to have exercised a reasonable opportunity if he imposes contractual export conditions or other restrictions upon the use of propagating material.

Conclusions

- The result of the strict approach in the EXN HRV is that the objective of the intended reinforcement of the PBR is not achieved;
- The extension to harvested material brings no benefit in many situations where it should. Even the so-called U-turn schemes cannot be properly addressed;
- The word 'unauthorized' should cover all cases in which material is propagated without the breeder's authorization (whether required or not), including contractual provisions.
- The text of the convention provides sufficient basis for such amendment of the EXN HRV.

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