CIOPORA Position

on

The Scope of the Right

as approved by its Annual General Meeting on 02 April 2014 in The Hague, NL

Key Statements:

- **CIOPORA requests UPOV and its member countries to harmonize the definition of propagating material world-wide.**

- **Propagating material should include *any material of a plant from which, whether alone or in combination with other parts or products of that or another plant, another plant with the same characteristics can be produced.***

- **CIOPORA requests the clarification that propagating material that (in a technical sense), has been harvested is considered exclusively as propagating material. Only material of a variety which is not capable, by any means, of producing another plant with the same characteristics should be considered to be harvested material in the legal sense.**

- **CIOPORA requests that harvested material should be protected directly and per se.**

- **CIOPORA requests that products that are obtained directly from material of a protected variety should be protected directly and per se.**

- **CIOPORA requests to include into the scope of rights the use of propagating material for the production of harvested material.**

- **CIOPORA requests that the EDV concept is clarified and implemented in a sufficiently broad way. CIOPORA is in the process of developing a comprehensive position on this matter.**

- **CIOPORA requests that the concept of varieties, which are not clearly distinguishable from the protected variety, will be restored and its meaning be sufficiently broadened, by establishing a sufficiently broad minimum distance between varieties.**

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Full Text:

The scope of the Right

1. The protected material

According to Article 14 (1) of the UPOV 1991 Act 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), (ii) conditioning for the purpose of propagation, (iii) offering for sale, (iv) selling or other marketing, (v) exporting, (vi) importing and (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

According to Article 14 (2) of the UPOV 1991 Act the acts as listed above shall apply also to harvested material, including entire plants and parts of plants, that has been obtained through the unauthorized use of propagating material of the protected variety, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

Additionally, according to Article 14 (3) of the UPOV 1991 Act, the UPOV members may – optionally - provide that the acts as listed above apply also to products made directly from harvested material of the protected variety falling within the provisions of paragraph (2) through the unauthorized use of the said harvested material, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

Although the terms are key terms in the UPOV system, the UPOV Acts do not include a definition of “propagating material” and “harvested material”.

As a consequence of the absent definition of propagating material in the UPOV Acts, many of the UPOV member states have a – to some extent significant - different definition for propagating material. As a consequence, one and the same material of a variety is considered in one country to be propagating material, while in another country it is considered to be harvested material. This causes confusion in the international trade and runs contrary to the aim of UPOV to harmonize the IP protection for plant varieties.

CIOPORA requests from UPOV and its member countries to harmonize the definition of propagating material world-wide. Propagating material should include *any reproductive or vegetative material of a plant from which, whether alone or in combination with other parts or products of that or another plant, another plant with the same characteristics can be produced.*

Additionally, CIOPORA requests the clarification that propagating material that (in a technical sense) has been harvested is considered exclusively as propagating

material. Only material of a variety which is not capable, by any means, of producing another plant with the same characteristics should be considered to be harvested material in the legal sense.

Harvested material and products directly obtained from propagating or harvested material should be covered directly and without limitations.

Harvested material of protected vegetatively reproduced ornamental and fruit varieties needs to be protected directly and *per se*, without the restrictions and conditions as given in the current UPOV 1991 Act. Given the large number of countries with an increasing production and export of horticultural products, but without effective IP protection for plant varieties, the restricted protection of harvested material causes a lot of confusion, uncertainties and the severe risk of wide loopholes, which can make the protection for vegetatively reproduced ornamental and fruit varieties ineffective.

Protecting directly and *per se* harvested material is to the benefit of the honest growers and producers, too. They pay royalties anyway and suffer from unlicensed propagation and production of harvested material. Particularly imports of fruits from countries with limited or no protection can be controlled more effectively if the harvested material is protected directly.

Taking into consideration the fast growing amount of processed products, such as fruit juice, being processed in many parts of the world and being imported into other countries, products that are obtained directly from material of a protected variety must be protected directly and per se, too, as far as vegetatively reproduced ornamental and fruit varieties are concerned.

CIOPORA, therefore, requests that harvested material and products that are obtained directly from material of a protected variety should be protected directly and per se.

2. The acts which require the authorization of the title holder

According to Article 14 of the UPOV 1991 Act 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), (ii) conditioning for the purpose of propagation, (iii) offering for sale, (iv) selling or other marketing, (v) exporting, (vi) importing and (vii) stocking for any of the purposes mentioned in (i) to (vi), above.

In the horticultural industry the cut-flowers, fruits and plants are the main added-value products. The use of propagating material for the production of such products is one of the most important acts in the production chain. Therefore, it needs to be included within the scope of rights in order to allow the title-holders to license said acts.

Even under a broad concept of “propagating material”, as it is described above, the use of propagating material for the production of harvested material needs to be covered by the scope of the right.

CIOPORA strongly requests to include into the scope of rights the use of propagating material for the production of harvested material.

3. Varieties which fall under the scope of the protected variety

According to Article 14 (5) of the UPOV 1991 Act the authorization of the title holder is also required for acts listed in paragraphs (1) to (4) of this Article in regard to:

(i) varieties which are essentially derived from the protected variety,

(ii) varieties which are not clearly distinguishable from the protected variety and

(iii) varieties whose production requires the repeated use of the protected variety.

In its ‘Green Paper’, CIOPORA articulated its appreciation about the extension of protection manifested in Article 14 (5) and expressed its hope that this Article corrects the existing loophole in regard to “cosmetic breeding”. As a precondition to the closing of this loophole, CIOPORA mentioned: “These new provisions oblige the authorities in charge of the examination of distinctness to be more rigorous when evaluating the minimum distances between varieties for the grant of a title of protection.”

However, in practice it turns out that the inclusion of Article 14 (5) does not keep its promises to better protect existing protected varieties. The EDV-concept is still heavily disputed and some circles try to limit this concept as far as even possible. Regarding varieties which are not clearly distinguishable from the protected variety it turns out that in today´s reality the provision of Article 14 (5) (ii) of the UPOV 1991 Act is devoid of meaning, as even a very small difference between two varieties makes the varieties clearly distinguishable in the eyes of the examination offices (see also the CIOPORA Position Paper on Minimum Distance of 2 April 2014). Only the extension to “repeated use” seems to work, but this is not of importance for vegetatively reproduced ornamental and fruit varieties.

CIOPORA, therefore, requests that the EDV concept is clarified and implemented in a sufficiently broad way. CIOPORA is in the process of developing a comprehensive position on this matter.

Additionally, CIOPORA requests that the concept of varieties, which are not clearly distinguishable from the protected variety (Article 14 (5) (ii)) will be restored and its

meaning be sufficiently broadened, by establishing a sufficiently broad minimum distance between varieties (see also the CIOPORA Position Paper on Minimum Distance of 2 April 2014)**).**