



CIOPORA Position
on
Breeders' Exemption

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

Key Statements:

- **CIOPORA supports a breeders' exemption that contains the use of commercialized plant material of protected varieties for further breeding.**
- **CIOPORA requests that the commercialization of any variety, which falls under the scope of a protected variety, shall require the authorization of the title holder of the protected variety.**
- **The breeders' exemption should read: *The breeder's right shall not extend to acts done for the purpose of breeding other varieties.***

Full Text:

Breeders' exemption

According to Article 15 (1) (iii) of the UPOV 1991 Act the breeder's right shall not extend to 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.

The breeders' exemption is imbedded in the UPOV PBR system since its beginning. It is a unique feature in IP protection systems. The underlying rationale for the breeders' exemption was that without unrestricted access to existing genetic variation advances in breeding would be hampered.



The current breeders' exemption consists of two components:

- The free use of protected plant material for further breeding
- The - limited - commercialization of the new breeding result.

The free use of protected plant material for further breeding is the component of the breeders' exemption which has not changed since the beginning of the UPOV system.

What has changed in the course of time is the limitation of the commercialization of the breeding result: while in the UPOV 1961 Act and 1978 Act (Article 5.3) the breeders' exemption was limited only when the repeated use of the protected variety is necessary for the commercial production of another variety, in the UPOV 1991 Act, Article 15 (1) (iii) in combination with Article 14 (5) was meant to limit the breeders' exemption to a greater extent - at least on paper - by prohibiting the free commercialization of three groups of varieties:

- varieties which are essentially derived from the protected variety (where the protected variety is not itself an essentially derived variety),
- varieties which are not clearly distinguishable from the protected variety and
- varieties whose production requires the repeated use of the protected variety.

From a systematical point of view, the reference in Article 15 (1) (iii) to the varieties listed in Article 14 (5) (ii) and (iii) is incorrect: only varieties which are essentially derived from the protected variety are necessarily the result of breeding with the protected variety. Varieties which are not clearly distinguishable from the protected variety can be developed by using other material than the protected variety (e.g. the same parents of the protected variety), and varieties whose production requires the repeated use of the protected variety are usually the result of sexual reproduction of plants, but not of breeding work. The main reason for this systematical error is obviously that UPOV on the one hand wanted to maintain the "traditional" possibility to commercialize varieties resulting from breeding with a protected variety, while on the other hand it wanted to further limit the breeders' exemption by prohibiting the commercialization of two more types of varieties.

In order to have a systematically correct structure, the breeders' exemption should be re-structured. Additionally, in order to adapt the PBR system to the current environment in modern breeding and to make it suitable for the challenges in the future, the breeders' exemption should be fine-tuned.



Additionally, it should be clarified that the free use covers only material, which has been put on the market by the breeder or with his consent. Plant material, which for example has been handed over to an examination office for purposes of DUS examination, should not be freely available for further breeding. The same applies to material which has for example been propagated illegally or has been stolen from the breeder or obtained by another unlawful activity.

In conclusion, CIOPORA is in favor of the free use of commercialized plant material of protected varieties for further breeding, provided that the commercialization of the breeding results does not weaken the exclusive right in the protected innovation.

CIOPORA, therefore, supports a breeders' exemption that contains the use of commercialized plant material of protected varieties for further breeding.

CIOPORA requests that the commercialization of any variety, which falls under the scope of a protected variety, shall require the authorization of the title holder of the protected variety¹.

Such varieties shall be:

- varieties which are not clearly distinguishable from the protected variety
- varieties which are essentially derived from the protected variety
- varieties whose production requires the repeated use of the protected variety.

Therefore, for the sake of clarification and convenience, the second part of the current breeders' exemption (... 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.) should be deleted and the breeders' exemption should read:

The breeder's right shall not extend to acts done for the purpose of breeding other varieties.

Such change of the wording of the breeders' exemption will correct its current structure and will, in combination with a clarification of the EDV concept and a broadening of the Minimum Distance strengthen the breeders' right.

¹ This solution is comparable with the "limited" breeders' exemption in some Patent laws, such as the Unitary Patent in the EU and the Patent laws in Germany, France and Switzerland.