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GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

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RELATIONSHIP BETWEEN COMPETITION LAW AND
PLANT VARIETY PROTECTIONDocument prepared by the Office of the Union

1. At its first session, the Administrative and Legal Committee agreed that each Delegation to that body should prepare a paper "on the special situation prevailing for licenses for multiplication of propagating material" and that those papers should reach the Office of the Union by September 1, 1978, at the latest (see document CAJ/I/11, paragraph 17).

2. Experts from the Federal Republic of Germany have sent a paper which appears in the Annex to this document. The following information has been given by the Delegations of the other member States.

Belgium

3. According to the official regulations, the consent of the breeder or his representative is required for the multiplication of basic seed only. These regulations are based on the directives of the European Communities. The latter provide in particular that multiplication of basic seed must take place under the technical responsibility of the breeder or his representative, the latter either having obtained the authorization to produce basic seed himself or being responsible for the maintenance of the variety.

4. On the other hand, multiplication of certified seed takes place under private contracts concluded with the breeder or his representative, provided that they monitor the distribution of basic seed themselves.

5. The exercise of breeders' rights will probably enable breeders to monitor the multiplication of certified seed of their varieties.

France

6. The Delegation informed the Office of the Union that it was not in a position to formulate observations officially.

South Africa

7. The only type of license required in South Africa for the multiplication and sale of propagating material is the license to be obtained from the holder of a plant breeder's right, authorizing the licensee to produce, sell, import or export propagating material of the variety in respect of which such a right is held. These licenses are authorized in Sections 23 and 25 of the South African Plant Breeders' Rights Act.

Sweden

8. The Delegation has no information whatsoever on the number of licenses granted or on the provisions written into license agreements, neither have breeders requested the recording of licenses in the Plant Variety Register. To its knowledge, no restrictions have been imposed in terms of Article 9 of the Convention.

Switzerland

9. Licenses are not yet granted in that country under the terms of the Swiss Plant Variety Protection Law.

[Annex follows]

WORKING DOCUMENT
ON THE RELATIONSHIP BETWEEN COMPETITION LAW
AND PLANT VARIETY PROTECTION

Submitted by Experts from the
Federal Republic of Germany¹

- I. A French breeder of maize varieties had transferred by contract to a German partner the breeder's right and also the exclusive multiplication and commercialization license for those varieties, for the territory of the Federal Republic of Germany. In its decision of September 21, 1978 (IV/28.824--Breeder's Right--Maize Seeds) the Commission of the European Communities held that the exclusivity of the multiplication and commercialization license was an infringement of the rules of Article 85(1) of the EEC Treaty governing competition. With respect to multiplication it took the view, in its statement of grounds, that the necessity of a limitation of the multiplication, for instance by reason of climatic conditions, had not been established in the case at issue and that therefore there was no reason for, in general, exempting multiplication from the rules governing competition. The Commission thus indicated that, in its view, the same principles as those established for the field of industrial property were applicable, as a general rule, to licensing contracts in the field of plant varieties.

The following should be kept in mind concerning such treatment of multiplication licenses.

- II. The production of propagating material, because of the biological background, tends to have certain special features in comparison with the production of other goods. In the production of goods which fall within the scope of industrial property, the following conditions are generally met:
- (a) General technical knowledge (the published invention) is available. The latter is so described as to allow a man with average skill in the art to reconstruct the process of the invention, the description of which is part of the technical knowledge, and to reproduce the subject matter of the invention at will. Normally only the right to apply this technical knowledge is the subject of the contractual relations between inventor and producer.
 - (b) The basic requisites (for instance, metals, chemical raw materials) for the production of the subject matter of the invention are as a rule freely obtainable, in the same quality, from a variety of independent suppliers. The supply of these raw materials does not presuppose any special relationship between inventor and producer.
 - (c) Should different producers use the technical knowledge referred to in (a) and the raw materials referred to in (b), then the products of those producers will be essentially identical, regardless of the location of the production plant and other production factors. The goods are therefore the same, in spite of the independence of the production processes. It is thus fair to conclude that exclusive production licenses may affect trade in the goods concerned.
- III. Not all of the above conditions are met in the multiplication of botanical subject matter.
- (a) The raw material for the production of propagating material (and hence for the multiplication) is the plants of a given variety--or, in the case of hybrids or synthetic varieties, several varieties (genealogical components)--that is, an assemblage of plants, or several such assemblages, each having the same genetically determined morphological and physiological characteristics, subject to the particularities of the different species. The production of further plants having the same characteristics is only possible by hereditary transmission of those characteristics, through multiplication of the

¹In the accompanying letter, the Experts state that the document has been restricted to the points which generally apply to the multiplication of varieties. The description of the peculiarities of specific crops or multiplication systems or of other peculiarities (which the Commission of the European Communities does not intend to exclude) was regarded as being outside the subject area of this work.

plants of the said variety. The production of collections of plants, all having certain characteristics, cannot therefore be described in a body of general knowledge, whereby another man skilled in the art could, on the basis of plant material other than that of the said variety, produce plants which correspond to the characteristics of the variety. The process of producing plants having certain characteristics thus cannot be repeated by third parties who are not in possession of the initial material typical of the variety.

- (b) Even if a seed producer (multiplier) obtains plant material of the said variety, there is no certainty that he will be able to produce propagating material of the said variety at will by multiplying that initial material. It should be kept in mind in this connection that every multiplication of plant material is not merely a mechanical production process, but a hereditary transmission process in the biological sense. The combination of characteristics of a bred variety is the result of protracted breeding work through which specific hereditary characteristics have been bred into a variety by means of various breeding methods (such as crossing, back-crossing, mutation induction, all combined with stringent selection processes and descendance testing). However, depending on biological conditions, a variety does not remain stable, with all its plants retaining the same combination of characteristics, over an indefinite number of hereditary transmission processes (multiplications), tending rather to undergo certain changes. The most significant changes are the following:

(i) In the course of genetically controlled segregations and mutations, plants appear with characteristics that do not correspond to those established for the variety. In this way the variety loses its homogeneity. Homogeneity (or uniformity, subject to the particularities of the different species, of the characteristics of all the plants of a variety) is however an essential prerequisite for the variety to have a definable identity and for legal consequences to be attached to that identity (plant variety protection, inclusion in catalogues of varieties, seed certification). A collection of plants that are not identical, subject to the particularities of the species concerned, is not a "variety," and seed thereof is not a product that may be used for cultivation. Therefore, Article 6(1)(c) of the UPOV Convention, as well as Article 4 of the Directive of the Council of the European Communities on the Common Catalogue of Agricultural Species and Article 4 of the Directive of the Council of the European Communities on the Trade in Vegetable Seed, have prescribed homogeneity as one of the prerequisites for plant variety protection and for inclusion in catalogues of varieties.

(ii) It follows from the above that in most species varieties tend to undergo overall changes in the course of successive hereditary transmission processes, in other words the collection of plants "shifts" from one multiplication to the next. Eventually, therefore, after successive multiplications, a variety no longer corresponds in its morphological and physiological characteristics to the states of expressions originally specified by the breeder and established at the time of granting protection or including the variety in the catalogue of varieties. Consequently, the variety is no longer stable. Practically, through this change, a new variety is created, and the propagating material is therefore that of another product. For this reason stability is also among the prerequisites of protection and inclusion in a catalogue, pursuant to Article 6(1)(d) of the UPOV Convention and to the said Directives of the Council of the European Communities. In order to avoid the changes mentioned, the variety (including the genealogical components, in the case of hybrids or synthetic varieties for instance) must be subjected to continuous maintenance breeding. The maintenance of a variety thus always includes the essential steps of the original breeding work (elimination of extraneous material, mutations, mechanical mixtures and diseased plants). Proof of this maintenance selection and its result must be constantly submitted to the competent authority pursuant to Article 10(2) of the UPOV Convention and to Articles 11 and 12 of the aforementioned Directives of the Council of the European Communities. Should the variety not remain true to the states of expression originally specified, the protection or the entry in the catalogue, as the case may be, lapses.

- (c) Even if a multiplier always had propagating material at his disposal, which would allow the variety to be grown pure and true to type, this would not guarantee that the multiplication would produce typical and pure propagating material of the variety. The result of multiplication can be influenced by the following additional factors:

(i) Propagating material is living matter which cannot be stored at will like other goods, but must be kept alive by adequate measures. Inadequate measures (certain chemical or physical influences) may also lead to genetic changes in the propagating material so that, while it was originally a typical and pure example of the variety, it will result in a growth which is neither a typical nor a pure example of the variety.

(ii) Being botanical matter, plants are very vulnerable to attack by noxious organisms, which may be influenced by factors beyond the control of the multiplier (climate, location, surrounding crops and wild plants, general infection potential in the growing area). Diseases can be transmitted--often unnoticed at the beginning--by the propagating material. They do considerable economic harm to the user of propagating material (grower).

(iii) A variety can only be kept typical and pure if there is no pollination by surrounding plants, as otherwise undesired and uncontrollable inbreeding occurs, which modifies the variety. It must therefore be ensured that multiplication takes place only where such influences, which cannot always be monitored by the multiplier, are absent.

IV. In view of the above, the following factors should be regarded as characteristic of multiplication as compared with the production of other goods:

(i) The innovation consisting in the creation of a variety does not end with the production of a certain amount of plant material, but because of the variety's botanical nature, requires constant breeding work to be done on it.

(ii) Each multiplication is part of this maintenance. Errors in the multiplication process may modify the variety, or an important part of it, and thus seriously affect the availability of typical and pure propagating material of the variety, or even make it unobtainable.

(iii) Such errors cannot be observed on the propagating material itself, as they generally take the form of genetic deficiencies. The user of propagating material (grower) has therefore no means of judging the characteristics and quality of the propagating material on the basis of a sample. The deficiencies appear only at the growing stage, when, for the grower, the damage is already and irreversibly done.

(iv) As the person responsible for the variety, the breeder has to guarantee its maintenance. Defects in the maintenance of the variety have repercussions on the breeder, for in such cases protection may lapse or the entry in the catalogue be invalidated. As a general rule this is also prejudicial to the users of propagating material. The breeder can only fulfill his obligation to maintain the variety, which is imposed on him in the interest of the user, and guarantee that maintenance, if he retains decisive control over the multiplication of the variety. He must be able to determine and supervise absolutely the conditions under which his variety is multiplied.

(v) The biologically determined characteristics of breeding, including the requirement of constant maintenance breeding, are the main reason for which the rules of patent legislation, applicable to industrial products, proved unsuitable for ensuring the protection of breeders' rights, so that it became necessary to introduce a special right.

(vi) For the reasons set forth above, the breeder should still be given full control over multiplication and the power to limit it to certain establishments through the grant of exclusive multiplication licenses. This principle should also apply where a number of establishments with the same qualifications are available and the breeder cannot be expected, in economic terms, to set up a control system extending to several multiplication establishments.

It follows from the above that there are essential differences between the material prerequisites for usual production licenses on the one hand and multiplication licenses on the other hand. These differences should be given careful consideration in judgments on matters of competition.