

MODULE 4: INFORMATION TO BE PUBLISHED

Objective

The aim of this module is to explain the obligation that UPOV members have to ensure that the public is informed through the regular publication of information concerning applications for and grants of breeders' rights, and proposed and approved denominations.

The module refers to relevant provisions of the UPOV Convention concerning the obligation to inform the public and information to be published by the UPOV member concerned with regard to: application for breeders' rights; grants of breeders' rights; and matters after the grant of breeders' rights.

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OBLIGATION TO INFORM THE PUBLIC ON MATTERS CONCERNING BREEDERS' RIGHTS

The obligation to inform the public of relevant matters concerning breeders' rights is provided in Article 30(1)(iii) of the 1991 Act of the UPOV Convention and Article 30(1)(c) of the of the 1978 Act of the UPOV Convention :

<p>1991 Act of the UPOV Convention</p> <p style="text-align: center;">Article 30</p> <p style="text-align: center;">Implementation of the Convention</p> <p>(1) <i>[Measures of implementation]</i> Each Contracting Party shall adopt all measures necessary for the implementation of this Convention; in particular, it shall:</p> <p>[...]</p> <p>(iii) ensure that the public is informed through the regular publication of information concerning</p> <ul style="list-style-type: none">- applications for and grants of breeders' rights, and- proposed and approved denominations.

<p>1978 Act of the UPOV Convention</p> <p>Article 30</p> <p>Implementation of the Convention on the Domestic Level; Contracts on the Joint Utilisation of Examination Services</p> <p>(1) Each member State of the Union shall adopt all measures necessary for the application of this Convention; in particular, it shall: [...]</p> <p>(c) ensure that the public is informed of matters concerning such protection, including as a minimum the periodical publication of the list of titles of protection issued.</p>
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The obligation to ensure that the public is informed through the regular publication of information concerning applications for and grants of breeders' rights, and proposed and approved denominations, relies on the publication of official gazettes (see document UPOV/INF/5 "UPOV Model Plant Breeder's Rights Gazette" available at http://www.upov.int/information_documents/en/), or other means of publication, such as electronic publication. Information on the official publications of individual UPOV members is provided on the UPOV website at http://www.upov.int/members/en/pvp_offices.html.

PUBLICATION OF INFORMATION CONCERNING APPLICATIONS FOR BREEDERS' RIGHTS

Minimum Information Concerning an Application for a Breeder's Right

Introduction

The UPOV Convention requires that the public is informed through the regular publication of information concerning applications for breeders' rights (Article 30(1) of the 1991 Act and the 1978 Act).

The following information is the minimum information that is published concerning an application for a breeders' right:

- Application number
- Date of filing
- Breeder's reference and/or proposed denomination (see section below "Proposed Denomination")
- Applicant

Possible formats for the presentation of the information are provided in document UPOV/INF/5 (e.g. alphabetical order of botanical names or of common names and/or classification of the species according to crop groups).

Proposed Denomination

The UPOV Convention requires that the public is informed through the regular publication of information concerning proposed denominations (Article 30(1) of the 1991 Act and the 1978 Act).

Proposed denominations are often published with the information concerning new applications for breeders' rights. It may be the case that at the time of the filing or the publication of the application the breeder is not in a position to propose a denomination. In such cases, the breeder can provide a "breeder's reference" and the application will be published with such a breeder's reference. When the proposed denomination becomes available it will need to be published in a section concerning denominations.

The following information is usually published concerning proposed denominations:

- Application number
- Proposed denomination
- Applicant

The following additional information is also published by some UPOV members:

- Date of filing
- Breeder's reference

The publication of proposed denominations plays an important role for examining variety denominations (see Module 6 "Examining the variety denomination"). In the case of two conflicting proposed variety denominations in the same or different territories, the one with an earlier publication date should be retained and the relevant authority should request the breeder, whose proposed denomination was or might have been published at a later date, to submit another denomination (see document UPOV/INF/12 "Explanatory Notes of Variety Denominations under the UPOV Convention" available at http://www.upov.int/information_documents/en/).

The obligation to inform other members of the Union of matters concerning variety denominations relies on the exchange of official gazettes and/or other means of publication. However, the PLUTO Plant Variety Database is an important mechanism by which to maximize the availability of information for members of the Union concerning variety denominations in a practical form. The contribution of data by UPOV members to the PLUTO Plant Variety Database provides support in particular for the examination of variety denominations.

Possible Additional Information Concerning an Application for a Breeder's Right

Additional information may be published in accordance with the publication of the UPOV member concerned.

The following non-exhaustive list of additional information provided by some UPOV members is provided for illustrative purposes:

- Priority UPOV member and date
- Person who bred, or discovered and developed, the variety (if different from applicant)
- Procedural representative/agent/proxy
- Variety descriptions and photographs

Information concerning the breeder of the variety or their representative

Only the breeder, as defined in Article 1(iv) of the 1991 Act of the UPOV Convention, is entitled to be granted a breeder's right. The applicant should be the breeder (see Module 3 "Entitlement to a breeder's right").

Some publications include the name(s) and address(es) of applicant, the person who bred, or discovered and developed, the variety (if different from applicant) and the procedural representative/agent/proxy.

Changes concerning the applicant, and if appropriate their representative, should also be published.

Provisional protection

Article 13 of the 1991 Act of the UPOV Convention provides that members of UPOV bound by the 1991 Act shall provide measures designed to safeguard the interests of the breeder during the period between the filing or the publication of the application and the grant of the breeder's right. Provisional protection is an optional provision under the 1978 Act of the UPOV Convention (see Article 7(3)).

A UPOV member may provide in its legislation that the measures of provisional protection shall only take effect in relation to persons whom the breeder has notified of the filing of the application. Such a notification may be considered to be fulfilled in relation to all persons when the law has retained the date of the publication as the initial date for provisional protection, because publication is generally recognized as a notification mechanism of third parties.

An introduction to provisional protection was provided in DL-205 Module 6 "Scope of the Plant Breeder's Right: Acts and Material Covered" and further information is provided in document UPOV/EXN/PRP "Explanatory Notes on Provisional Protection under the UPOV Convention" (see http://www.upov.int/explanatory_notes/en/).

Variety descriptions and photographs

As part of supplementary procedures to reinforce the examination of distinctness, additional information, such as variety descriptions and photographs, may be published in the publication of the UPOV member concerned.

Objections in Relation to Published Information Concerning an Application

Any interested person may file an objection when the application and/or proposed denomination are published, if they consider that the information provided is false or incorrect. The authority should communicate relevant objections to the applicant, who should be given the opportunity to reply to the objections.

The process of publishing information concerning applications allows for objections to be raised with the authority, typically in relation to the entitlement to the breeder's right, suitability of a proposed variety denomination and compliance with the conditions of protection.

Withdrawal or Rejection of an Application for a Breeder's Right

In the course of the examination, the applicant may decide to withdraw the application for the breeder's right. The withdrawal of applications for breeders' rights needs to be published.

The authority may decide to reject the application due to lack of compliance with the conditions to grant the breeder's right. The rejection of applications for breeders' rights also needs to be published.

PUBLICATION OF INFORMATION CONCERNING GRANTS OF BREEDERS' RIGHTS

Grants of Breeders' Rights and Approved Denominations

The UPOV Convention requires that the public is informed through the regular publication of information concerning grants of breeders' rights and approved denominations (see Article 30(1) of the 1991 Act and the 1978 Act).

Minimum information

As noted in Module 2 "Administration of applications", the UPOV Convention requires that the denomination shall be registered by the authority at the same time as the breeder's right is granted (see Article 20(3) of the 1991 Act and Article 13(3) of the 1978 Act).

The following information needs to be published concerning grants of breeders' rights and approved denominations:

- Application number
- Date of filing
- Approved variety denomination
- Date of grant
- Title grant number
- Holder of the breeder's right

Additional information

Additional information may be published in accordance with the publication of the UPOV member concerned.

In addition to the information published concerning applications for breeders' rights, the following non-exhaustive list of additional information published by some UPOV members, under the section grants of breeders' rights, is provided for illustrative purposes:

- Person who bred, or discovered and developed, the variety (if different from the holder of the breeder's right)
- Procedural representative/agent/proxy
- As part of supplementary procedures to reinforce the decision to grant a breeder's right, additional information, such as variety descriptions and photographs, may be published in the publication of the UPOV member concerned.

Pre-Grant Publication

In addition to the mandatory publication of information concerning applications for breeders' rights and the publication of grants required by the UPOV Convention, some UPOV members provide for the publication of proposed decisions by the authority prior to the grant.

If the legislation of the UPOV member concerned requires the authority to publish its intention to grant protection or to reject an application, a section can be included in the publication (see document UPOV/INF/5 available at http://www.upov.int/information_documents/en/). Such a publication gives the parties, having a substantial interest in the result of the application for protection, the chance to make representations and to adduce evidence in favor of or against the proposed decision.

Termination of Breeders' Rights

The breeders' rights are terminated for the following reasons: nullity of breeders' rights; cancellation of breeders' rights; renunciation of breeders' rights and expiry of the period of protection of breeders' rights.

In those situations the following information needs to be published:

Title grant number
Date of grant
Approved variety denomination
Holder of the breeder's right
Date of termination of the breeder's right (i.e. date of nullity, cancellation, renunciation, expiry of the period of protection)

Nullity of breeders' rights

The provisions on the nullity of the breeder's right contained in Article 21 of the 1991 Act of the UPOV Convention and Article 10 (1) and (4) of the 1978 Act of the UPOV Convention are reproduced below:

<p>1991 Act of the UPOV Convention</p> <p>Article 21</p> <p>Nullity of the Breeder's Right</p> <p>(1) [Reasons of nullity] Each Contracting Party shall declare a breeder's right granted by it null and void when it is established</p> <p>(i) that the conditions laid down in Articles 6 or 7 were not complied with at the time of the grant of the breeder's right,</p> <p>(ii) that, where the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, the conditions laid down in Articles 8 or 9 were not complied with at the time of the grant of the breeder's right,^[1] or</p> <p>(iii) that the breeder's right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled.^[2]</p> <p>(2) [Exclusion of other reasons] No breeder's right shall be declared null and void for reasons other than those referred to in paragraph (1).</p>
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<p>Article 10 of the 1978 Act of the UPOV Convention</p> <p>Article 10</p> <p>Nullity [and Forfeiture] of the Rights Protected</p> <p>(1) The right of the breeder shall be declared null and void, in accordance with the provisions of the national law of each member State of the Union, if it is established that the conditions laid down in Article 6(1)(a) and (b) were not effectively complied with at the time when the title of protection was issued. [...]^[3]</p> <p>(4) The right of the breeder may not be annulled [or become forfeit] except on the grounds set out in this Article.</p>
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When a breeder's right is declared null and void, it is equivalent to pronouncing that it was an invalid right and should not have been granted in the first instance (see document UPOV/EXN/NUL "Explanatory Notes on Nullity of the Breeder's Right under the UPOV Convention" available at http://www.upov.int/explanatory_notes/en/)

¹ There is no corresponding provision to Article 21(1)(ii) of the 1991 Act in the 1978 Act.

² There is no corresponding provision to Article 21(1)(iii) of the 1991 Act in the 1978 Act.

³ Provisions in paragraphs 2 and 3 of Article 10 of the 1978 Act concern the forfeiture of the rights protected (see Explanatory Notes on the Cancellation of the Breeder's Right under the UPOV Convention (http://www.upov.int/explanatory_notes/en/)).

Decisions concerning the nullity of breeders' rights need to be published.

Cancellation of breeders' rights

The provisions on the cancellation of the breeder's right contained in Article 22 of the 1991 Act of the UPOV Convention and Article 10(2) to (4) of the 1978 Act of the UPOV Convention are reproduced below:

<p style="text-align: center;">1991 Act of the UPOV Convention</p> <p style="text-align: center;">Article 22</p> <p style="text-align: center;">Cancellation of the Breeder's Right</p> <p>(1) [Reasons for cancellation] (a) Each Contracting Party may cancel a breeder's right granted by it if it is established that the conditions laid down in Articles 8 or 9 are no longer fulfilled.</p> <p>(b) Furthermore, each Contracting Party may cancel a breeder's right granted by it if, after being requested to do so and within a prescribed period,</p> <p>(i) the breeder does not provide the authority with the information, documents or material deemed necessary for verifying the maintenance of the variety,</p> <p>(ii) the breeder fails to pay such fees as may be payable to keep his right in force, or</p> <p>(iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.</p> <p>(2) [Exclusion of other reasons] No breeder's right shall be cancelled for reasons other than those referred to in paragraph (1).</p>

<p style="text-align: center;">1978 Act of the UPOV Convention</p> <p style="text-align: center;">Article 10</p> <p style="text-align: center;">[Nullity and] Forfeiture of the Rights Protected</p> <p>[...]^[4]</p> <p>(2) The right of the breeder shall become forfeit when he is no longer in a position to provide the competent authority with reproductive or propagating material capable of producing the variety with its characteristics as defined when the protection was granted.</p> <p>(3) The right of the breeder may become forfeit if:</p> <p>(a) after being requested to do so and within a prescribed period, he does not provide the competent authority with the reproductive or propagating material, the documents and the information deemed necessary for checking the variety, or he does not allow inspection of the measures which have been taken for the maintenance of the variety; or</p> <p>(b) he has failed to pay within the prescribed period such fees as may be payable to keep his rights in force.</p> <p>(4) The right of the breeder may not [be annulled or] become forfeit except on the grounds set out in this Article.</p>
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⁴ Provisions in paragraph 1 of Article 10 of the 1978 Act concern nullity of the rights protected (see Explanatory Notes on the Nullity of the Breeder's Right under the UPOV Convention (see document UPOV/EXN/NUL available at http://www.upov.int/explanatory_notes/en/).

The cancellation of a breeder's right means that, from a given date, the breeder's right is no longer valid and the authorization of the breeder of the variety is no longer required for any of the acts which are covered by the scope of the breeder's right. A breeder's right which has been cancelled was valid until the date of cancellation and was, in particular, valid at the time of granting (see document UPOV/EXN/CAN "Explanatory Notes on the Cancellation of the Breeder's Right under the UPOV Convention" available at http://www.upov.int/explanatory_notes/en/).

Decisions concerning the cancellation of breeders' rights need to be published.

Renunciation of breeders' rights

Before the expiry of the period of protection of the breeder's right, the holder of the breeder's right may decide to renounce the breeder's right.

The renunciation of breeders' rights needs to be published.

Expiry of the period of protection of breeders' rights

The UPOV Convention provides that the period of protection (Article 19 of the 1991 Act and Article 8 of the 1978 Act) is counted from the date of grant of a breeder's right. The specific periods of protection are provided in the legislation governing breeders' rights.

The date of expiry of the period of protection of breeders' rights may be published. The date of expiry can also be determined from the date of grant and the period of protection provided in the legislation.

Changes to Variety Denominations

Article 20(7) of the 1991 Act and Article 13(7) of the 1978 Act of the UPOV Convention provide as follows:

Paragraph 7

[Obligation to use the denomination] Any person who, within the territory of one of the members of the Union, offers for sale or markets propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.

If, after the grant of a breeder's right, it is discovered that there was a prior right concerning the denomination which would have resulted in the rejection of the denomination, the denomination should be cancelled and the breeder should propose another suitable denomination for the variety. Article 22(1)(b)(iii) of the 1991 Act states that, if the breeder does not propose another suitable denomination, the authority may cancel the breeder's right.

Cancellation of denominations and the corresponding new approved denominations need to be published.

The obligation to use the denomination of the variety, even after the expiration of the breeder's right, means that the authority may need to publish changes in denominations even after expiration of breeders' rights.

Changes Concerning the Breeder of a Variety or their Representative

Only the breeder, as defined in Article 1(iv) of the 1991 Act of the UPOV Convention, is entitled to be granted a breeder's right.

Changes concerning the holder of the breeder's right, and if appropriate their representative, should be published.

[End of module]