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CIOPORA is the International Association of Breeders of Asexually Reproduced Horticultural Varieties. CIOPORA represents the interests of said breeders in all questions of Intellectual Property Protection worldwide, and in this capacity CIOPORA is observer in UPOV and acknowledged stakeholder in several IP and PBR Offices around the globe. For more information see [www.ciopora.org](http://www.ciopora.org).

CIOPORA very much appreciates that New Zealand is considering improving its Plant Variety Rights law to the standard of UPOV 1991. We are pleased to submit comments to the Options Paper - Review of the Plant Variety Rights Act 1987.

In general, it is concerning that the New Zealand Government seems to be opting for the lowest level of protection within the framework of the UPOV 1991 Act, as can be seen in its expressed preferred options in the issue of Essentially Derived Varieties, duration of protection, scope of the rights and provisional protection. CIOPORA had hoped for a more positive and global leadership approach from the New Zealand government in respect of IP protection.

#### **A) TREATY OF WAITANGI**

1. CIOPORA respects the New Zealand government's obligations under the Treaty of Waitangi in the PVR regime. However, it is suggested that New Zealand elaborates on ways to accede to UPOV 1991 and not only "give effect" to UPOV 1991.
2. It is advised to consult with the UPOV Office on possible solutions. The UPOV Office has already expressed its willingness to provide assistance in exploring options on how the UPOV Convention and the Treaty of Waitangi could be implemented in a mutually supportive manner. We understand on good authority that the UPOV Office has already informed the New Zealand government working party that it could provide examples of provisions addressing policy matters in legislation governing breeders' rights that have been examined by the UPOV Council and explore how those could be relevant for New Zealand. There are example provisions that have been found by the UPOV Council to be in accordance with the 1991 Act and the 1978 Act of the UPOV Convention, and, in

particular, the requirements of Article 5(2) of the 1991 Act and Article 6(2) of the 1978 Act.

## **B) DEFINITIONS**

3. CIOPORA suggests a broader definition of propagating material, at least for vegetatively reproduced horticultural crops. 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.

## **C) ESSENTIALLY DERIVED VARIETIES (EDV)**

4. CIOPORA suggests that the EDV concept in the New Zealand PVR law will be designed sufficiently broad, so that in the field of vegetatively reproduced horticultural crops all mutants and GMO are considered to be EDV.
5. Breeders of vegetatively propagated ornamental and fruit varieties are very often small and medium-sized companies. They mostly breed innovative varieties in a traditional way by crossing and selection, which can take up to 20 years of diligent work.
6. Breeding innovative varieties in a traditional way is one of the backbones of the ornamental and fruit industries. It requires significant human and financial investment to develop such varieties. In order to guarantee a sustainable continuation of such breeding there needs to be a sufficient return on investment.
7. Many new ornamental and fruit varieties serve as the basis for the development of mutants (natural, induced or otherwise developed by new breeding techniques) and GMO varieties. In many cases mutants and GMOs decrease the commercial success of the mother variety, because they compete in the same market segment. Even if the mutant or GMO differs from the initial variety in essential characteristics, the initial variety is their main source and contributes almost entirely to their genome.
8. This is the reason why CIOPORA suggests that in the area of vegetatively propagated ornamental and fruit varieties all mutants and GMO should be deemed to be EDVs of the

Initial Variety.

9. CIOPORA is very much concerned that the New Zealand government intends to limit the EDV concept to “copycat” varieties only (option 2), in line with the EDV approach of Australia. In the view of CIOPORA this is erroneous in several aspects:
10. An EDV has to be *clearly distinguishable* from the initial variety. This Distinctness requirement draws the line between an EDV and a *variety which is not clearly distinguishable from the protected variety*. Whereas the EDV is a discrete variety which is in principle eligible for PVR protection, a variety not clearly distinguishable from the protected variety is not a discrete one and cannot enjoy separate PVR protection but falls automatically within the scope of the earlier protected variety.
11. Preventing plagiarism or copycat breeding is not a question of derivation or dependency, but rather a question of Distinctness. If a “new” variety in its phenotype very much resembles a protected variety, it is not clearly distinguishable from the protected variety, its commercialization is a direct infringement and it should not get PVR protection, irrespective whether the new variety is (essentially) derived from the protected variety or not. Instead, the fact that an EDV needs to be distinct from its Initial Variety makes it clear that a “copycat” can never be regarded as EDV, as a “copycat” already lacks Distinctness.
12. Declaring “copycats” as EDV in New Zealand would have the strange consequence that the New Zealand PVR Office would be obliged to grant Plant Variety Rights titles to “copycats”, because EDV are in principle are eligible for PVR protection.
13. Para 245 of the Options Paper reads: *“Although “copycat” varieties are “new” in the sense that they did not previously exist, they add little or nothing of value to society. Compared with the variety they are derived from they have no additional or improved characteristics of commercial or social value.”*
14. One of the key objectives of any Intellectual Property Right is to reward the inventor for providing society with a useful invention / innovation. Intellectual property rights reward creativity and human endeavour, which fuel the progress of humankind.

([https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf))

15. Granting a PVR for a “copycat” would fail to meet the objective of IP Rights. Why grant an exclusive right for 25 years for a “copycat” variety, which adds little or nothing to society?
16. Requiring that an EDV must retain all essential characteristics of the Initial Variety would make the EDV Concept meaningless to a huge extent. A flower colour-mutant in an ornamental variety is one typical case of an EDV. The characteristic “colour” can be regarded as one of the most important characteristics in ornamental varieties, presumably an essential characteristic. The colour-mutant clearly does not retain the essential characteristic “colour” of the Initial Variety and thus in the approach outlined in the options paper could not be considered an EDV - even though it is a mutant, has only the Initial Variety as the main source and contribution of its genetics, and typifies what is understood to be an EDV. This is the practical circumstance that has been one of the main reasons for the introduction of the EDV-concept.
17. Also varieties resulting from New Breeding Techniques (NBT) do in principle not retain all essential characteristics of their Initial Varieties, because the NBT have been deliberately applied with the aim to change essential characteristics of the initial variety, e.g. by introducing a resistance into a susceptible variety or to limit the browning of apples (for example the range of products marketed as Arctic Apple™). The application of NBT usually will result in varieties which are clearly distinguishable from their Initial Variety. In fact, such varieties usually would not aim at copying an existing variety but adding an important or innovative trait to the initial variety. NBT are in principle not plagiaristic.
18. Following the Australian approach and option 2, such NBT varieties would not be considered EDV. However, against the background that the NBT variety consists almost entirely of the genome of the initial variety, it seems highly unfair to the breeder of the initial variety to deprive him of any benefit from the NBT. Additionally, if the New Breeding Technology / gene editing technology is protected by a Patent, the Patent holder can prevent the breeder of the initial variety from commercializing his variety or even to further breed with it. The EDV Concept was established in order to prevent such an inequitable situation (in UPOV 1991 with a focus on GMO).
19. The introduction of the EDV concept is the advance of the UPOV 1991 Act over the

UPOV 1978 Act. Negating the good intentions of that legislative improvement through a limited interpretation of the EDV concept would take away the value to breeders and society that improvement was designed to bring about.

20. The main associations of breeders in the world are united in their opposition to a too limited EDV concept, particularly the so called “Australian approach”. The attached joint letter has been written to UPOV by the International Seed Federation, CIOFORA, Crop Life International, Euroseeds, APSA (Asia and Pacific Seed Alliance), AFSTA (African Seed Trade Association), SAA (Seed Association of the Americas), that represent the interests of thousands of companies active in research, breeding, production and marketing of agricultural, horticultural, ornamental and fruit plant varieties.
21. CIOFORA, therefore, would like to ask the New Zealand government to re-consider its approach towards EDV and to adopt a sufficiently broad concept. For vegetatively reproduced horticultural crops the concept should include that all mutants and GMO are EDV.

#### **D) SCOPE OF THE RIGHT**

22. Breeders of ornamental and fruit varieties develop new innovative varieties, with the aim to contribute to the benefit of the society.
23. Varieties are intangible goods, their value being embodied in their plants, their plant parts (e.g. flower and fruits) and the products directly obtained from said plant material. It is in particular the flowers, fruits and the processed products which are globally traded and finally enter the consumer markets.
24. Providing direct protection for plants, their parts and their products would bring the protection in line with the commercial value of these materials and their commercialization. It would provide clarity and transparency to the producers and the growing international trade and would allow modern ways of licensing. It would allow breeders to fully tap the potential of their varieties, decrease illegal use of protected varieties, and better protect licensees from unfair competition – all of which increase breeder’s confidence to disseminate their varieties for use, and therefore contributes to the benefit of the society. Other IP protection systems already follow these principles.
25. This would allow the breeders of vegetatively propagated ornamental and fruit varieties a

fair return on investment, which is now estimated to be decreased by approximately ca. 20% due to illegal production.

26. This is why CIOPORA suggests that in the area of vegetatively propagated ornamental and fruit varieties the scope of protection directly and per se covers propagating material as well as harvested material and products that are obtained directly from material of a protected variety, such as juice and canned fruits.
27. The second-level protection of harvested material, as provided for by the UPOV 1991 Act, puts a higher burden of proof onto the breeder than other IP rights such as Trademark or Patent. Not only must the breeder identify his variety on the basis of the harvested material, but he also has the burden of proof that the harvested material was obtained through the unauthorized use of propagating material of the protected variety. This is in each case very difficult, in many cases not possible at all, and in any case increases the enforcement costs for the breeders. All this builds a barrier for breeders to enforce their rights, particularly for small breeders.
28. Providing direct protection for each and any material of a variety would not result in overly broad exploitation of the varieties and enforcement. The limits of the commercialization will be set by the concept of exhaustion, which rules that the PVR in a territory in principle shall be exhausted for material, which has been marketed by the title holder or with his consent in the territory where the PVR is effective. No multiple collection of royalties can take place under this concept.

#### **E) FARMERS' EXEMPTION**

29. CIOPORA is very much concerned that the New Zealand government is opting to apply the farmers' exemption to vegetatively reproduced horticultural crops. Applying the farmers' exemption to such crops would weaken the PVR protection significantly and would have a negative impact on the decisions of breeders to introduce their new varieties to New Zealand.
30. Vegetatively reproduced ornamental and fruit varieties can be easily propagated true to type, and the plants so propagated produce flowers and fruits for many years. These varieties are not food security crops and the traditional seed saving practices should do

not apply to them.

31. Applying the farmers' exemption to vegetatively reproduced ornamental and fruit varieties makes a PVR law for such species ineffective.
32. Being fully aware of this consequence, breeders of vegetatively reproduced ornamental and fruit varieties hesitate/refuse to introduce their newest and most improved varieties in a country where the farmers' exemption applies to such crops.
33. CIOPORA strongly suggests not to apply the farmers' exemption to vegetatively reproduced ornamental and fruit varieties.

#### **F) COMPULSORY LICENSE**

34. CIOPORA points out that according to Article 17 of the UPOV 1991 Act (Restrictions on the Exercise of the Breeder's Right) no UPOV member may restrict the free exercise of a breeder's right for reasons other than of public interest, except where expressly provided in this Convention. Similar provisions can be found in Articles 30 and 31 of the TRIPS Agreement.
35. It shall not be sufficient for the grant of a compulsory license that a PVR owner does not make propagating material of his protected variety available to the public on reasonable terms. As the PVR is - contrary to the opinion expressed in the Sapere report - a full IP right, it provides to the title holder an exclusive right to commercialize his variety, and there is no obligation to make available the protected variety to the public, except in rare cases of public interest.
36. Taking into consideration the widespread availability of a large assortment of all kinds of ornamental and fruit varieties, CIOPORA is of the opinion that in general there exists no public interest in the commercialization of a specific variety of such crops, so that the preconditions for a compulsory license usually are not met as far as ornamental and fruit varieties are concerned.

#### **G) DURATION OF PROTECTION**

37. CIOPORA takes note that also in respect of the duration of protection the New Zealand

Government seems to be opting for the minimum periods required by UPOV 1991, i.e. 25 years for woody plants and rootstock and 20 years for all other plants.

38. CIOPORA kindly asks the New Zealand Government to consider extending the duration of PVR to 30 years for all species for the following reasons:
  - the requirements to new varieties increase steadily, and new varieties, in general, are of higher value than the older ones;
  - the costs for breeding and research increase, while the average royalty payments for varieties decrease;
  - on average, a breeder invests 10 to 20 years before a new variety enters the market; alone the testing period and the period for building up elite mother plants can last five to ten years,
  - the scope of protection is less effective than the scope of other IP rights,
  - the desire of the public to get free access to the variety is fulfilled to a huge extent already during the protection period because of the breeders' exemption.
39. Extending the period of protection to 30 years will have no consequences for the vast majority of varieties. The vast majority of varieties have a rather short commercial life due to the rapid exchange of varieties in the market. It is only the exceptional, long-living varieties which would benefit from such extension. For such varieties, it is necessary to have a sufficient period of protection, because they earn most of the return on investment for breeder's entire breeding program. Additionally, it is fair to say that because of their excellence these varieties deserve longer protection.
40. At the least, the duration of protection should be extended to 30 years for woody plants and rootstock and 25 years for all other plants as it is currently provided in the European Union.



## **H) NULLIFICATION OR CANCELLATION AS A COUNTERCLAIM TO INFRINGEMENT**

41. CIOPORA is not in favour of the PVR Act amendment that provides that alleged infringers can counterclaim that a PVR should be nullified or cancelled. Nullification and cancellation should remain in the competence of the PVP Office, not the court.

## **I) PROVISIONAL PROTECTION**

42. CIOPORA suggests maintaining the current scope of provisional protection so that a breeder can start infringement proceedings during the period of provisional protection and add a compensation clause (Option 1).
43. Breeders of ornamental and fruit varieties develop new innovative varieties that benefit society. It often takes up to 20 years from the moment of the first cross to the commercialization launch of the new variety. It is to the benefit of the society if breeders release their varieties at an early stage because all parties in the production and trade chain, as well as consumers, benefit from new varieties with improved traits.
44. This is why breeders start the exploitation of their new varieties as early as possible. To provide effective protection for such new varieties and to create a real incentive for breeders to launch their innovations as early as possible, the breeder of the new variety should have been able to control the exploitation of his variety before the protection title is granted, namely, after filing for protection. Consequently, the PBR applicant should be able to enforce his right already during the period between the publication of the application and the grant. This also creates advantages for licensed growers, whose business model relies on breeder's ability to keep unauthorized exploitation at bay. Otherwise, unauthorized growers can propagate and grow the variety at will, which usually leads to overproduction and price-drop at the very beginning of the variety's commercial life.
45. If the application has been withdrawn, is deemed to be withdrawn or is finally refused, growers and traders should be protected. In such rare cases, rights listed above shall be deemed never to have existed and benefits received should be returned, unless otherwise agreed by the parties.
46. This is why CIOPORA suggests that in the area of vegetatively propagated ornamental

and fruit varieties the PBR protection should be fully effective as of publication date of the application, and, in return, effective measures should be installed in case a PBR title is not granted.

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