

number 2

Briefing paper

*Food, biological diversity
and intellectual property*

QUNO's Briefing papers on Intellectual Property and Agriculture aim to inform discussion about what kind of intellectual property systems can best encourage innovation and economic development, whilst also fostering resilient, equitable and sustainable food systems.

We envision an international system that ensures long-term food security, protects fragile livelihoods and provides incentives to maintaining biological and genetic diversity.

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Definition of "Breeder" under UPOV

Why it matters

October 2013

During the October 2013 UPOV Sessions, Members will be considering the explanatory notes on the definition of the Breeder. Delegates, particularly from developing countries, should carefully consider their countries' objectives and realities in the area of agriculture and plant breeding when discussing this document.

Introduction

During the October 2013 UPOV Sessions, Members will be considering the explanatory notes on the definition of the breeder. Like other matters in UPOV, this is an issue that needs to be approached in a way that reflects the needs, the objectives and the realities of breeding activities within each member country.

The International Union for the Protection of New Varieties of Plants (UPOV) occasionally adopts Explanatory Notes, to provide guidance on various matters in the UPOV Convention. Explanatory Notes are not legally binding. The Explanatory Notes on the definition of the breeder¹ provide guidance on a provision that is in the 1991 Act of UPOV.

However, as all other documents coming out of UPOV, the document has potentially significant policy implications for all developing countries, including those that are parties to UPOV's 1978 Act.²

1. UPOV, Explanatory Notes on the definition of breeder. UPOV/EXN/BRD Draft 7, 30 September 2013, available at: www.upov.int/edocs/mdocs/upov/en/c_47/upov_exn_brd_draft_7.pdf

2. Developing country members of UPOV 1978 are under no obligation to join UPOV's 1991 Act if it does not reflect the needs, objectives and realities of their national breeding activities.

Farmers and Breeders Around the World

UPOV has played an important role in developing a consistent, effective and reliable international intellectual property (IP) protection system for countries characterized by industrial agriculture. It has tended to leave aside consideration of the kinds of innovation that happens among and between small scale farmers.

Smallholder farming continues to provide the majority of the world's food³ and smallholder farmers' plant breeding methods play a central role in global food security. Plant breeding continues to be an accumulative process as plant varieties are bred through the selection, mixing and exchange of many seeds. In most food security crops in developing countries and LDCs, the majority of new varieties are developed by and exchanged among farmers.

Delegates, particularly those from developing countries, should carefully consider their countries' objectives and realities in the area of agriculture and plant breeding when discussing the draft Explanatory Note on the definition of "breeder" in the UPOV Council and Committee.

Definition of Breeder - Why is it Important?

The definition of a "breeder" in national Plant Variety Protection (PVP) law will clarify who may claim rights over a new variety of plant. These rights have implications on the availability of the variety for further research and seed production, and so impact the dissemination of the new variety and its incorporation into

3. Small farms produce about 80 percent of the food consumed in Asia and sub-Saharan Africa, for instance, See Kanayo F. Nwanze, IFAD, Smallholders can Feed the World, 2011, www.ifad.org/pub/viewpoint/smallholder.pdf

existing germplasm for future plant breeding and innovation.

UPOV members of 1978 have no obligation to provide for a definition of breeder in their national PVP regime, and if they choose to do so the entitlement of breeder's right will be based on the interpretation of the definition of "breeder" under the national law.

Under UPOV 1991, however, the entitlement of breeder's right will be based on the interpretation of the definition of "breeder" under the UPOV 1991 Act, as follows:

- The person who bred, or discovered and developed, a variety
- The person who is the employer of the aforementioned person or who has commissioned the latter's work, where the laws of the relevant Contracting Party so provide, or
- The successor in title of the first or second of the aforementioned person.

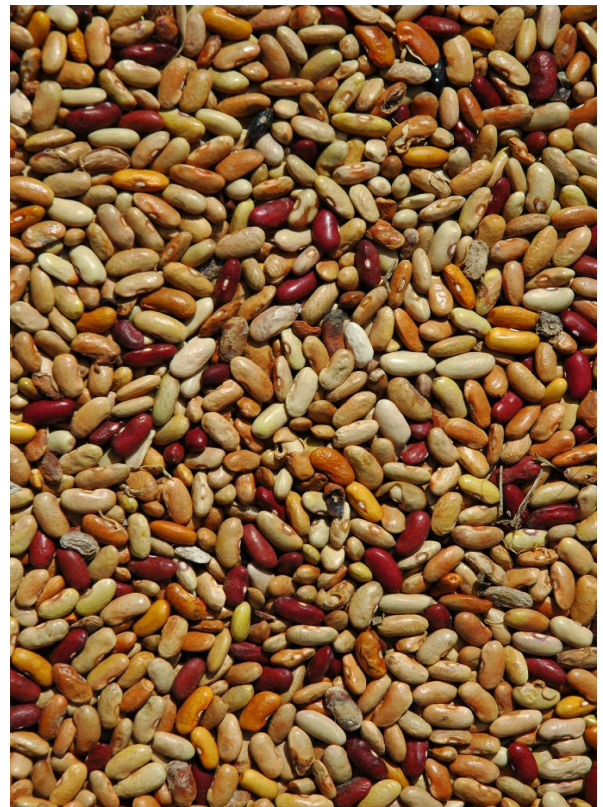


Photo credit: Martin Kunz

Farmers as “Breeders”

Although most seeds of commercially valuable crops used by large scale and commercial farmers derive from varieties bred by (largely) public and (increasingly) private agricultural research institutes, the reality is, that particularly in developing countries, small scale farmers are also breeding and developing improved varieties that respond to their specific needs and are adapted to local climatic, soil and other conditions.

Plant breeding in developing countries is most often characterized by small scale farmers undertaking traditional breeding activities such as planting seeds of their useful crops, selecting from their harvest those seeds that present the best traits, inter-crossing those seeds with other seeds with other interesting traits but acquired from other farmers or bought in local markets and re-selecting from the harvest products bearing the traits that they are seeking.

In this context, the suggestion made by the European Coordination Via Campesina regarding the draft Explanatory Notes, to remove the term “only” from section (b) dealing with the entitlement to a breeder’s right in the explanatory notes is welcome.⁴ Indeed, having the term “only” may imply that only “scientific” breeders are entitled to breeders’ rights.

Furthermore, farmers can also discover and develop new varieties of plant. Discovery can occur via visits to other farmers; exchange of seeds with other farmers, or acquisition and introduction of protected

varieties that are bred by agricultural research institutions.

Once farmers discover through any means varieties that are interesting to them, they can develop them into new varieties. This strengthens their eligibility to the status of breeder.

UPOV Members should note the importance of ensuring that there is no restriction on who can become a breeder, and welcome that this is set out in paragraph seven recalls of the current proposed Explanatory Note.

Developing country members of UPOV 1978 should ask about the extent to which UPOV 1991 can allow national PVP law to recognize small scale farmers as breeders. Delegates should also be aware that the UPOV 1991 Act has not defined or specified the breeding techniques that need to be used by a “person” in order to qualify as breeder.

This therefore leaves sufficient policy space and provides flexibility for UPOV members to integrate small scale farmers in the definition of breeder on the basis of their breeding practices .

Conclusion

It is important for each country to consider its national reality regarding plant breeding when considering who may qualify as “breeder” in its PVP law.

During UPOV meetings, developing countries could stress that by addressing these issues, UPOV will be demonstrating that it pays attention to and takes seriously the role of small scale farmers in their agricultural systems.

4. See comments of the European Coordination Via Campesina available at www.upov.int/meetings/en/details.jsp?meeting_id=24135

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