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## CULTIVATED PLANT NOMENCLATURE AND PLANT VARIETY RIGHTS

F. Wuesthoff\*

The periodical 'Taxon' 22 (1), February 1973, published an article by H. Reda who rightly drew the reader's attention to the fact that the rules on nomenclature contained in the International Convention for the Protection of New Varieties of Plants, 1961, do not refer to the ICNCP Rules in any way and even deviate therefrom. Consequently, a second code of nomenclature has been created this way. With reference to H. Reda's article the following is ascertained.

1. As is known, the International Convention for the Protection of New Varieties of Plants of 1961 provides that a new variety (new so as to be liable to the grant of a product proprietary right) must be identified by a variety denomination. This is a marginal provision barely touching the actual subject matter of the Convention, namely the granting of plant variety rights.

However, the Convention does not make use of the approach to an internationally uniform nomenclature of cultivated plants that has been in existence for many years. Instead it sets forth specific regulations on nomenclature that are only applicable in the particular sector of varieties on which plant variety rights are granted, which is still highly restricted, and only within the limited area encompassing those states that have ratified the International Convention (Member States of the Union).

2. The institution of the variety denomination has been known for a very long time indeed: it became customary long ago to classify "cultivated plants" according to various "varieties" and to bring them onto the market under their "varietal name". There are a great many different varieties of various genera of useful plants and ornamental plants. For only one botanical species, *Solanum tuberosum*, 671 varietal names are listed in a single handbook entitled "Die Kartoffel" by R. Schick and M. Klinkowski (published in VEB Deutscher Landwirtschaftsverlag, Berlin 1962, pages 1830 et seq.), and then only the European and North American potato varieties have been compiled that are "presently included in the lists of varieties" in the various countries.

The "preliminary list of agriculturally or horticulturally cultivated species of plants" published by Rudolf Mansfeld in the same year (1962) comprises approximately 1,430 species, *excluding ornamental plants*, and Mansfeld assumes that the number of actually *cultivated* species (excluding ornamental plants and plants cultivated in forestry) amounts to 1,400-1,800 (cf. Addendum No. 2 to "Die Kulturpflanze", 1958).

3. With such a diversity of varieties of various species of cultivated plants it is obvious that great importance is attached to the correct "systematical" naming of varieties and it can be appreciated that it was certainly a necessity to try and create a suitable system of naming, describing and registering varieties to ensure that each variety is given a "correct" denomination, in

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particular, one that may be distinguished from other varieties is not liable to lead in confusion in trade. Plants have for a long time been classified according to a scientifically established system in phyla, classes, families, genera and species (see in this connection Wuesthoff in "Festschrift Wilde", Verlag Franz Vahlen 1970 and "Saatgutwirtschaft SAFA" 1970, page 470). The various classifications are given names and the formation of these names is subject to certain rules. These rules have been set down in the "International Code of Botanical Nomenclature".

The same guide lines as for designating wild plants are employed by analogy for naming cultivated plants. The lowest category of cultivated plants is the variety (i.e. the new "cultivar").

A special "International code of nomenclature of cultivated plants", ICNCP, (edited and issued by the International Bureau for Plant Taxonomy and Nomenclature, Utrecht, Netherlands), deals with the nomenclature of varieties. The aim of the Code is to promote uniformity, accuracy, and fixity in the naming of agricultural, horticultural, and silvicultural cultivars (Article 3 ICNCP) which are normally given fancy names, such as apple 'Cox's Orange Pippin', orange 'Renette' or rose 'Märchenland'.

4. However, Article 13 of the International Convention of 1961 now constitutes a second code of nomenclature for naming "new" varieties which, in contrast to the ICNCP Rules, does not put "uniformity, accuracy and fixity" into practice when "new" varieties are named and therefore does not fulfil the task of "identifying" the variety adequately by any means. For according to Article 13 (2), sentence 2, of the International Convention, the "new" variety denomination must "in particular, be different from every denomination which designates, in any Member State of the Union (UPOV), existing varieties of the same or closely related botanical species"; (compare German Law on the Protection of Plant Varieties, section 8 (1), subsection 2; the same provision is to be found in the Dutch Law on the Protection of Plant Varieties Article 19, subsection 1, as well as in the French Variety Rights Law, Article 9, subsection 1; the Danish law, Article 11 (3) and the Swedish Law, Article 8 (2) IV, permit that already existing variety denominations are taken into account throughout the world).

Thus, special "rules of nomenclature within the UPOV" have been set down which do not supplement the internationally uniform rules by any means and are, in fact, meant to replace them in the territory of the Member States of the Union with regard to the "new" variety denomination.

These rules on nomenclature contained in Article 13 of the International Convention are therefore restricted to "identifying" the new variety by a variety denomination which is only "new" to some extent because, when this denomination is chosen, names of varieties existing in non-Member States of UPOV need not be taken into account. Consequently, it is possible to select a denomination for a "new" wheat variety in the Member States of UPOV which is so similar to the name of a North American, Argentine, or Australian wheat variety, or even a wheat variety in "future Member States of UPOV", such as Italy or Belgium, that it is liable to lead to confusion, or else the name may even be identical. Quite logically, the principle of "novelty throughout the world" applies to the "new" variety as such, yet illogically this principle does not hold true for the "new" variety denomination (cf. the article by H. Reda in *Taxon* 22 (1), 1973).

5. Irrespective of the International Convention of 1961, and to some extent in contrast to Article 13 (2) of the International Convention, it is

provided in "The Plant Breeders' Regulations" in England (regulation 18 (2)) that "the Controller may reject a name proposed . . . if it shall appear to him that such name . . . does not in other respects conform with international usage as regards the nomenclature of cultivated plants." It is evident from the manner in which the English Plant Varieties Rights Office conducts the examination that this apparently means that the "Code of Nomenclature of cultivated plants (ICNCP)" is to be taken into account to some extent.

6. Obviously borrowing from Art. 50 ICNCP, the "Provisional Guide Lines for Variety Denominations" of UPOV say in guide line 7: "The denomination must not be the same as that of any other variety belonging to a species of the same class as prescribed in the appendix, nor so nearly resemble it as to be likely to deceive or to cause confusion." However, this deviates from Art. 13 (2) of the International Convention according to which it is only necessary to consider whether a variety denomination is liable to be confused with names of existing varieties in one of the Member States of the Union.

Hence, this "international" guide line 7 is grossly inconsistent with the UPOV regulation", Art. 13 (2) of the International Convention. In line with Art. 27 (2) of the Convention, such a revision of the Convention is subject to a decision passed by the Council and, according to Article 27 (3), the revised text has to be adopted by a majority of five-sixths of the members present at a Conference. Therefore, the provisional guide line of UPOV is provisionally "ultra vires".

7. It should be added that the "variety denominations of varieties that are not afforded protection", registered in the "lists of species" of the member states of the EEC are subject to different rules on nomenclature still. It is said in section 50 of the German Seed Trade Law, for example, (in distinction to the variety denominations of varieties protected under the Variety Rights Law to be entered according to section 49 of the Seed Trade Law):

"As to a variety that is not protected, denominations are not permitted which . . . are in conformity with or liable to be confused with a variety denomination under which a variety of the same botanical species or botanically related species has been entered in an official list of varieties or seeds therefore have been distributed in the territory where this law is applicable, in another member state of the EEC, or in any Member State of the UPOV . . .".

This means that in the territory of the EEC and the Member States of UPOV varieties are in existence which were not "officially" registered, varieties that have been entered in a "Plant Variety Roll", and varieties that have only been entered in a "List of Species" (disregarding varieties that are only distributed under names protected by trade mark as an auxiliary measure). Hence, the particular varieties are named according to different "rules on nomenclature", depending on which "Registration Authority" has coined the variety denomination.

8. It can only be ensured that a variety may be truly identified while being clearly distinct from existing denominations if the ICNCP rules were respected everywhere and in each case when a variety denomination is chosen. The provisions of the International Convention of 1961 warrant the novelty of the variety, it is true, but they do not guarantee that the variety denomination is novel and correct.

It would probably be wisest if primarily and generally it was left to the ICNCP Registration Authorities to coordinate the naming of varieties.

*Conclusions:*

1. I hold the view that the ICNCP Rules should constitute the basis for the selection of variety denominations in general, independently of plant variety rights as well as in conjunction with plant variety rights. This is a problem that Taxon has already come to grips with.<sup>1</sup>

2. It is a prerequisite, if these aims are to be pursued, that some minor points of the ICNCP Rules be revised in the light of legal aspects that have so far not been considered.

a. The prime objective is to make it quite clear in the ICNCP Rules that variety denominations are only meant to serve as identification of the variety, i.e. they are to be a common product name and no competitive means, i.e. a trade name.

b. To this end, it would be expedient if the ICNCP Rules recommend, wherever necessary, that variety denominations should be formulated as combinations of syllables, letters and figures. (cf. item 4).

3. Once these prerequisites have been met, it will not be difficult to incorporate a provision into the variety right legislation or the International Convention for the Protection of New Varieties of Plants, to the effect that variety denominations serving for the identification of varieties protected by plant variety rights, shall be formulated in accordance with the ICNCP Rules. It will suffice if the ICNCP Rules are supplemented in the Convention where appropriate.

4. Studies will have to be initiated as to how it can be avoided that the version of variety denominations registered in line with the ICNCP Rules renders the registration and use of those trade marks or the use of those trade names more difficult which are different from the variety denomination.

5. A uniform international provision pertaining to the examination of the variety denomination for registrability should be corrected or adapted in the Convention within the framework of a revision conference of UPOV convened at an extraordinary meeting, outside the normal schedule.

6. Attempts should be made to render the general application of the ICNCP Rules possible and compulsory by way of an

*International Convention for the Nomenclature of Plants*

with a standing equal to that of the Paris Convention for the Protection of Industrial Property of 1883, the International Convention for the Protection of New Varieties of Plants of 1961, the Berne Copyright Agreement, the Arrangement of Madrid for the International Registration of Trade Marks, of Manufacture or of Commerce, and the like.

To this end, it should be suggested that some country, convene a diplomatic conference.

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1. Most recent version of the International Code of Nomenclature of cultivated plants, published in 1969 by the International Commission for the Nomenclature of Cultivated Plants of the International Union of Biological Sciences.

German version published by "Arbeitskreis Nomenklatur der Deutschen Gartenbauwissenschaftlichen Gesellschaft" authorized by the International Bureau for Plant Taxonomy and Nomenclature, Utrecht.

The "Code" is printed in German in "Handwörterbuch der Pflanzennamen", by Zander, Verlag Eugen Ulmer 1972.