

Essentially Derived Varieties in UPOV

From time to time comments have been made in the UK trade which indicates to us that there may be a real lack of information regarding Essentially Derived Varieties (EDVs) although general information is provided on this subject in the ProVaR documentation. Therefore, we publish a short summary here which we stress is the view of Genesis accumulated from our contacts and licensing activities since all these rules relating to EDVs really came into play in 1997 under our National Law or by application of the existing EU Law. We shall publish more information extensively on our website very shortly.

In essence an Essentially Derived Variety is a sport (and in our opinion included in “sports” is a tissue culture development) arising from a variety which has a valid Grant of Rights or is under application and therefore enjoying provisional protection. We and UK authorities at this date take the view that this sport will belong to the discoverer whereas there are various views circulating Denmark and Holland that a sport belongs to the owner of the Rights in the parent variety. This is particularly prevalent in the cut flower industry or where breeding by sports (tissue culture, radiation or other soma clonal systems) is the norm. The discoverer is obliged to advise the owner of the Rights in the sport parent within a short and reasonable time of the existence of the sport and to provide them with a sample for their reference and comparison. Furthermore the exploitation of the sport – EDV – does require the reasonable permission of the owner of the parent variety for any of the acts specified in the Acts (mentioned in summary in ProVaR documentation) which effectively deal with re-production, stocking, offering for sale and actual commercialization. It is the convention so far that permission is not unreasonably withheld and negotiations frequently take place for some form of consideration or royalty share based on the use of the genetic material within the EDV. Our advice is that the circumstances of the interpretation of Law means that permission is given to exploit an EDV commercially then the exploiter will not attack the market position of the holder of the Rights in the sport parent and in many cases may find it convenient that the EDV is offered alongside the parent variety and through the same marketing network.

Any application for Intellectual Property Rights in UPOV for the sport does require the applicant of the EDV to notify the authority concerned that they have made the necessary connections with the owner of the sport parent. Normally the sport parent is required to be grown as one of the comparators in any DUS test.

What seems to be unclear to our industry is that EDV rules apply whether or not the sport is subject to application for Plant Breeders Rights (or has been rejected) in a territory in which the sport parent has its Rights. Therefore making a self propagation sale without Rights can be deemed to be an offence and stimulate a legal reaction from the holder of Rights of the sport parent.

These EDV rules apply so long as the sport parent has the valid Grant of Rights in the territory that is relevant to the exploitation of the EDV.

To give a concrete example within the varieties that are offered through ProVaR:

- Ceanothus ‘El Dorado’ is an EDV of Ceanothus ‘Zanzibar’ as mentioned in the Genesis offer pages.

Finally, a new variety generated from crossing is not any form of EDV. Pollen is “free” unless one of the parents is under a binding trial agreement.

This is a big subject and if any Registered Grower wishes to consult us further on a confidential basis so as to ensure that they are complying with the present interpretation of the Laws we are ready to do so noting that this will be the opinion of Genesis, which they may wish to reaffirm elsewhere. All the necessary information is available on the websites of FERA, PBR Plant Breeders Rights Office Cambridge, CPVO Angers and in individual member states of UPOV - now over 90 member states.