

Liability of CGIAR Centers and NARS  
partners under intellectual property and  
biosafety laws arising from the supply of  
biological resources

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# Outline of Presentation

- Liability – legal and reputational
- Damage as the gist of liability
- Causes of action
- Potential litigants
- Avoidance of liability

# Liability

- Potential Defendants
  - CGIAR Centers
  - Private Sector Collaborators
  - Farmers
  - Exporters
- Legal
  - Arising from legal actions (IP infringement, negligence, breach of biosafety regulations)
- Reputational

# Damage (harm) as the gist of liability

- Physical harm
  - Health and safety
  - Environmental harm
- Economic loss
  - Loss of markets
  - Cost of restoration of land
  - Testing costs

# Legal causes of action

- IP infringement
- Negligence
- Biosafety violations

# IP Infringement-patent infringement

- Direct liability of farmers for cultivating proprietary GM crops, even in absence of technology agreement

*Monsanto Co. v. Scruggs* 342 F. Supp 2d 584 (2004)

- liability of importers of soy meal possibly containing patented GM soy?

*Monsanto Technology LLC v Cargill International S.A*  
[2007] EWHC 2257

## IP Infringement-non-patent

- Theft of budwood cuttings = breach of confidential information *Franklin v Giddins* (1978) Queensland Reports 72
- Use of sacred secrets, eg healing properties of tree bark=breach of confidential information *Foster v Mountford* (1976) 14 *Australian Law Reports* 71 and breach of bioprospecting laws based on the CBD (Zimbabwe *Swartzia madagascariensis* US-patent 5,929,124 obtained by University of Lausanne)
- Use of other's data displays or software, eg Fishbase = breach of copyright
- Use of other's agricultural machinery=breach of industrial designs

# Enabling IP Infringement

- Vicarious liability of CGIAR Centers and private sector collaborators?

*Monsanto Co. v. Parr* 2008 WL 1808365 (N.D. Ind. 2008)-  
liability of a seed cleaner for facilitating patent infringement

- Contributory copyright infringement = activity which induces, causes, or materially contributes to infringement (*Napster* and its progeny)

# Civil liability eg Negligence

*Larry Hoffman and others v Monsanto Canada Inc and Bayer Cropscience Inc.* 2005 SQKB 225.

Depends on:

- foreseeability of damage (eg loss of markets)
- establishing a causal nexus between cultivation of GM crops and adventitious presence of GM material in neighbouring farms

# Biosafety violations

- Depends on the provisions of the national biosafety legislation if any.
- If a national biosafety approvals process exists and has been complied with, liability will usually be avoided.

## Contractual liability of farmers

the Customer shall indemnify, keep indemnified and hold harmless [bulk handler] from any and all Loss or Damage suffered by or claimed from [bulk handler], whether caused by the negligence, breach of contract, breach of statutory duty or any other legal or equitable obligation of [bulk handler] or otherwise howsoever arising in connection with this Agreement from:

(c) the presence, in any Wheat received or Outturned for the Customer, at any level or concentration of any Genetically Modified Organisms.”

# Potential Litigants

- Claimants
  - Farmers (loss of markets, costs of restoration of fields)
  - NARS, research partners (compromising research)
  - Traders –exporters and importers (loss of markets)
  - Shippers and bulk carriers (cleaning costs)
- Defendants
  - Farmers
  - CGIAR Centers, NARS, private sector collaborators)
  - Government approvals authorities

## Minimizing CGIAR liability eg SMTA

- The Provider makes no warranties as to the safety of or title to the Material, nor as to the accuracy or correctness of any passport or other data provided with the Material. Neither does it make any warranties as to the quality, viability, or purity (genetic or mechanical) of the Material being furnished. The phytosanitary condition of the Material is warranted only as described in any attached phytosanitary certificate. The Recipient assumes full responsibility for complying with the recipient nation's quarantine and biosafety regulations and rules as to import or release of genetic material.

Krattiger et al *Intellectual Property Management in Health and Agriculture Innovation: A Handbook of Best Practices*

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# Reputational Harm

- Legal liability is generally unlikely
  - Negligence and related actions have been unsuccessful
  - IP infringement has succeeded in egregious cases
- Reputational harm
  - The principal concern for CGIAR Centers and private sector collaborators

# Avoidance of liability

- Insurance
- Compensation Funds
- Stewardship

# Insurance

- Currently not generally available for GM crops because of a lack of experience of the insurance industry with GM agriculture
- FAO currently working with insurance industry to develop insurance cover for aquaculture in Thailand
- FAO could work with insurance industry to develop insurance for GM agriculture.

# Compensation Funds

- usually introduced to fill a gap in the insurance market
- Denmark (5 year trial) GM crop growers pay 100 DKK per hectare of GM into a fund which administered by the Danish Plant Directorate, a division of the Ministry of Agriculture.
- UK July 2006 Defra consultation on proposals for managing the co-existence of GM with non-GM crops. (ToR “options for providing compensation to non-GM farmers who suffer financial loss through no fault of their own” to be funded by the GM sector rather than by Government or non-GM producers.
- CGIAR could consider a similar model

# Stewardship

- See recommendations in report and following study