Liability in the context of biotechnology: Patent related cases in North America

Dr Philippe Cullet
IELRC & School of Oriental and African Studies (SOAS)
Background

• Liability issues not limited to environmental and socio-economic damage

• GMOs often protected by patents

• GMOs can contaminate fields of farmers who have not purchased seeds
Monsanto vs Schmeiser (Canada)

- Background: GM seeds found on Mr Schmeiser land though he did not purchase them
- Facts establish that seeds likely to have migrated without Mr Schmeiser’s knowledge
Claims

• Action brought by Monsanto for infringement of its patent

• Specific claim: Mr Schmeiser has been ‘using, reproducing and creating genes, cells and canola seeds and plants containing genes and cells claimed in the plaintiff’s patent (…) without the consent of the plaintiffs.’
Decision

- Mr. Schmeiser ‘knew or can be taken to have known’ that the seeds saved from the 1997 crop were Roundup tolerant
- Infringement found because:
  - That seed was grown and ultimately the crop was harvested and sold.
  - Growth of the seed, reproducing the patented gene and cell, and sale of the harvested crop constitutes taking the essence of the plaintiffs’ invention, using it, without permission.
Other noteworthy elements

- **Use of the invention and infringement:** Under *Schmeiser*, whether or not the crop was sprayed with Roundup was deemed immaterial.

- **Land rights:** Under *Schmeiser*, the farmer may ‘own the seed or plants on his land even if he did not set about to plant them’.

- **Land rights vs intellectual property rights:** Under *Schmeiser*, rights attached to the ownership of the land seem to be hierarchically inferior to the rights granted to the patent holder.
Schmeiser decision & biosafety

• A farmer liable to the patent holder is likely to be liable to his/her neighbour for the further contamination of the environment

• In a situation where the farmer is liable, the person given the authorisation to introduce the GMO into the environment seems to escape all responsibility
Monsanto v McFarling (USA): Background

- Patent on herbicide resistant seeds
- Seeds purchased by farmers covered by patent and a ‘technology agreement’
- Technology agreement includes requirement that seeds can be used for planting one crop only
Monsanto v McFarling: Decision

- Court accepting validity of restrictions posed by technology agreement
- Exhaustion of rights after first sale not at stake since new seeds grown from previous crop never sold
- Original sale not conferring licence to construct new seeds
Liability under Monsanto v. McFarling

- Patent liability clearly established (irrelevance of Plant Variety Protection Act)
- Patent liability restricts McFarling’s right to reproduce the seed but doesn’t indicate whether Monsanto or McFarling is liable in case of unwanted reproduction and contamination of other fields
Liability and redress in biotechnology and patent liability

• Existing case law shows that issues cannot be considered in isolation
• Patent liability brings up new challenges which need to be addressed in the development of liability and redress regimes
• A system of strict environmental liability seems required to counter-balance existing strict patent liability