
Competing Rights

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The focus of this workshop was on the “competing rights” of native peoples, genetic explorers, researchers and commercial entities to genetic resources, i.e., “genes.” There is a growing recognition that native peoples have rights to genes that are part of their culture, just as the discoverers and developers of these genes in the industrial world have rights. And there is appreciation of the moral obligation to find means for providing equitable compensation to all who have justifiable claims to the genes.

The purpose of this workshop was to raise and discuss issues regarding these “competing rights” and to recommend improvements in policies covering these competing rights in order to maximize social benefit — with the understanding that definitions of “benefit” differ widely among individuals and communities and will have to be negotiated between parties who are treated as equals.

Issues

The first workshop session had about 30 participants, including the four co-chairs and the facilitator. Each cochair was introduced and then presented a brief description of his perspective on the issue of competing rights. The participants were then placed into one of four subgroups, each led by one of the co-chairs, and the identification of issues began. The resulting issues/questions/comments/ideas are listed under three categories entitled *Ownership*, *Access* and *NABC Workshop Process and Related Issues*.

Ownership

1. The Intellectual Property Rights of local communities and indigenous farmers should be considered on an equal basis with those of industrial countries. Decisionmakers need to be informed that there are alternative ideas concerning Intellectual Property Rights and about the nature of these ideas.
2. Industry needs to educate society on how they treat intellectual property:
 - Explanations should be understandable by the lay person; and
 - The education should be designed to increase public trust in the process and the owners of intellectual property.
3. The Intellectual Property Rights system currently works well – leave it as it is.
4. Do away with Intellectual Property Rights entirely; they no longer provide net social benefit. In assigning value to genes, a “farmer’s” investment in development of “domesticated” sources should be recognized in contrast to “wild” sources. But “local” knowledge about the use of “wild” plants and animals should be recognized and compensated accordingly.
5. Indigenous people need to be empowered to enforce their rights under biodiversity treaties both internationally and nationally. The possible means to assist this effort:
 - Public defender resources in world court, and
 - Easy forum for initial rights determination.
6. Does the public want to know details regarding intellectual property rights and issues, or simply that such rights exist and that they should be handled fairly?
7. Who decides what is reasonable compensation for intellectual property rights? We endorse the principle that compensation should be fair and equitable. However, we are at a loss to recommend methods to achieve this end other than through negotiation.
8. Place an international tax on natural product derivatives in order to maintain biodiversity and/or compensate owners of the genes from which such products are derived:
 - Establish an international pool to dispense compensation;
 - Require matching funds from the country? Industry?
 - National tax or check off on product areas for research, e.g., tax on middleperson, on consumer, but NOT on farmer; and
 - If there are no intellectual property rights, who will pay for innovation?

9. Biotechnology must serve the interests of the majority. Who will determine the research agenda for biotechnology and how do intellectual property rights affect this? Economic return is not equal to “success.” Alternatively, how do we measure research success? Could human beings, if born after gestation in a non-human species, be ownable and patentable? How can society provide for accountability over industry to solve problems that are not discovered until they reach the consumer? For example, the peanut allergy factor.

Access

1. Broad patents limit access to genetic material for domestic and international research. Therefore a panel composed of government/university/industry representatives should be established to review this issue and recommend guidelines.
2. Reverse the trend to privatize the basic gene pool by:
 - Public education;
 - Providing long-term, guaranteed research funding wherein universities and NGOs [nongovernmental organizations] give up all Intellectual Property rights, i.e., knowledge is handled on a “free in, free out” basis, and a research exemption is granted to public not-for-profit research institutions for patented technologies;
 - Providing long-term funding for biodiversity preservation;
 - Determining how the public and private sectors can best work together for the common good; and
 - Not granting intellectual property rights in genetic resources to private, for-profit institutions.
3. The research exemption for patents needs to be clarified.
4. NABC should support class action challenges to patent holders who prevent use of materials and processes for research; and strive to change basis of research exemption for utility patents from “purely philosophical” to “research for nonprofit” entities through lobbying for change in the law.
5. NABC should hire lawyers to get some type of research exemption for universities. Should there be a *pro bono* effort to challenge patents?
6. Consolidation of ownership in the food industry, e.g., turkey production, presents two potential problems: First is the vulnerability to environmental and biological hazards of food production systems dependent on a very narrow genetic base, and second are the capital requirements of such systems that control access to the most productive genotypes and reduces genetic variability within commercial populations.

Workshop Process and Related Issues

1. There is a need to educate people on issues of biotechnology and bioethics, therefore NABC member institutions should establish outreach programs on biotechnology and associated intellectual property issues.
2. NABC should develop policies and procedures among member institutions for:
 - Materials exchange (NIH model);
 - Cross-licensing of intellectual property rights and management within the NABC group;
 - Information exchange; group confidentiality agreement?
 - Go to Congress, if necessary, for antitrust relief;
 - Interaction with industry groups such as American Seed Trade Association and North American Plant Breeders Association; and
 - Easing the interaction of researchers at member institutions.
3. NABC should get lawyers to advise participants at these meetings. NABC should be organized by specific topics, with agendas and efforts made to include a broader spectrum of views.

Recommendations

In subsequent workshop sessions, participants discussed the above ideas and attempted to distill them into four to five recommendations that might be the basis for action by appropriate organizations. The workshop co-chairs presented the following recommendations on behalf of the participants.

- *There is a need to manage the basic gene pool for the common good. There has to be cooperation between the private sector and the public sector to work for the common good. Therefore it is the recommendation of this workshop that the public sector increase efforts to determine and set long term policy with broad constituency involvement, e.g., farmers, local government, universities, consumer groups, NGO's and industry. The private sector should develop products in an environment compatible with genetic preservation and access.*

For the common good to be served, policies and procedures dealing with the intellectual property rights of all stakeholders must be established. To assure acceptance of these policies and procedures, all stakeholders must be involved in establishing and implementing them.

- *There should be formal recognition by potential users of biological resources of rights to control over and compensation for use of biological resources not only by individuals and nation states but also by local communities, cultural groups and regional groups.*

- *At forums such as the Fourth International Technical Conference on Plant Genetic Resources in Germany in 1996, and at the next meeting of the Conference of Parties to the Convention on Biological Diversity November, 1995 in Indonesia, there should be encouragement of equitable and enduring agreement among those with rights in biological resources and between those with rights and potential users, which should include education of all parties on fundamental issues and long-term funding of biodiversity conservation.*

The issues before this NABC workshop are the subject of an intense international debate. The situation is extremely fluid and the issues that require resolution very real. As just one example, the control of existing worldwide germplasm collections, and access to them, is currently in flux.

While international and national agencies, and local communities are developing policies, companies and universities (gene explorers) continue to operate, albeit in an uncertain environment. However, they can attempt to identify rightful stakeholders in a gene, seek the consent of those stakeholders, establish reasonable value for the gene based on negotiation, and provide some means for compensation of all stakeholders.

While the rights of explorers, nation-states and individuals are usually covered by current intellectual property law in developed countries, the possibility of community and farmers' rights has typically not been recognized. By recognizing and valuing these rights, companies and universities can begin the process of providing equitable and enduring compensation for all stakeholders, not just those protected by current laws.

If the international community can formalize such *community* rights and *farmers' rights*, then current policies and procedures can be modified to accommodate such rights rather than establishing totally new intellectual property laws.

If mechanisms are not in place for legal recognition of community and farmers' rights and for providing appropriate compensation for such rights, companies and universities may be able to assign value to those rights and reserve funds to provide compensation at a future date when mechanisms are in place.

- *NABC meetings should be organized to provide more background information and direction to participants, including availability of expertise in legal, social and biotechnology issues; and should actively recruit participation of a broader range of views. This improvement should lead to more useful recommendations.*

Although there is value in independent identification, discussion and resolution of issues, much of this workshop's time was devoted to educating participants on the current thinking regarding the issue of competing rights. In addition, the participants did not represent the broad range of parties with interests in this issue. The value of these recommendations is therefore diminished.

- *NABC member institutions should establish outreach programs on biotechnology and associated intellectual property issues.*

One specific suggestion is to provide the forum for public discussion of pros and cons of these issues. In this way, universities can hopefully maintain credibility as an unbiased source of information.

A second suggestion is to target decisionmakers in local communities. Make them aware of current intellectual property practices and the issues related to these practices that are being discussed by organizations involved in maintenance and use of germplasm resources.

- *Clarify the "research exemption" for utility patents for use by public research institutions.*
 - Gene sequence information (all uses),*
 - Process information (e.g., the enzyme Taq polymerase as a tool for research),*

Specifically:

- A specific plan for action proposed by one participant, but not presented here as a consensus of the workshop was: universities should challenge the ability of patent holders to restrict research at universities (using patented technology), and*
- If the challenge is unsuccessful, they should lobby Congress to change the law to allow such research.*

This topic generated much of the discussion in the workshop sessions, and most of the discussion after the workshop's formal presentation. The issue is becoming extremely important to university researchers as they recognize that current patent law does not contain such a broad research exemption. The enforcement of patent rights against university researchers seems counter with the intent of the patent system to encourage disclosure of a patentable idea and to educate the public. There is a perception that the philosophy of companies is changing to be more hostile and litigious towards universities.

If patent policy is intended to make inventions available to the public and to provide the means to increase societies collective knowledge base, then a clarification, and if necessary expansion, of the scope of the existing research exemption is beneficial and essential.