

FARMERS' PRIVILEGE UNDER ATTACK

GRAIN

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Intellectual property rights (IPR) applied to seeds give breeders, or whoever claims to have discovered or developed a new plant variety, an exclusive monopoly right in relation to the seed. Under patent law, that monopoly right is very strong. It will generally prevent anyone from using, selling or producing the seed without the patent holder's permission. Under a typical *sui generis* plant variety protection law – an IPR system designed specifically for plant varieties – there are usually a few exceptions to this powerful right built in. One of those exceptions is that farmers may be allowed to save, exchange, sell or reuse part of their harvest as a new batch of seed.

The legal ability to reuse IPR-protected seed is called the “farmers’ privilege”. On the face of it, this a terrible misnomer. Saving seeds is as natural and essential as eating. That’s how we are able to produce crops: by gathering seeds, or other plant parts like tubers, from mature plants and growing them. Under plant variety protection (PVP) law, this totally ordinary act becomes a privilege, a legal exception. The breeders are granted the rights, while farmers are allowed to do something despite that right – and only under certain conditions. Breach those conditions and you breach the breeder’s rights, for which you have to pay economic or legal consequences. That’s why it is wrong to look at this privilege as a right in itself.

Cutting out the competition

The farmers’ privilege is a hot issue because the seed industry wants to control who produces seeds – they want to control the market. According to Rabobank International, current world seed sales of US\$30 billion a year should jump to US\$90 billion soon.¹ But a substantial part of world food production is based on farm-saved seed – as much as 90% in sub-Saharan Africa or 70% in India. Even in industrialised countries, farmers also save seed rather than buy a fresh batch, if it makes sense for them and they can.² So there’s still a sizeable market out there for the industry to get a grip on.

It’s also a hot issue because the seed industry is working hard to secure legal systems that restrict seed saving by farmers, be it through the World Trade Organisation (WTO), bilateral trade agreements or direct lobbying of governments. PVP or plant breeders’ rights legislation is all about taking power away from farmers to produce and reproduce seeds. And these laws are gaining ground.

Governments caving in to the pressure often say, “Don’t worry, we will protect the rights of the farmers at all cost!” They swear that nothing will prevent farmers from continuing their “traditional” and “historic” practice of conserving, exchanging and further developing seeds. And so they write into their law this “farmers’ privilege”. Yet the fact is, the farmers’ privilege is a legal “yes, but” on seed saving – with the “but” getting bigger by the day.

Country after country that has established a plant variety protection law has progressively made the farmers’ exception more and more restricted. To the point that it becomes meaningless. Why? Because the breeders keep asking for stronger and stronger rights.

Tightening the loophole that allows farmers to save seeds is the easiest way to give more power to the breeders.

Restrictions on the farmers' privilege in PVP law come in several forms, often combined in one mixture or another:

- farmers are prohibited from saving seeds of *certain crops*
- only *certain farmers* (e.g. those with a specific farm size or income level) can enjoy the privilege
- farmers *have to pay* an additional royalty to the breeder for any seed that they save on the farm
- farmers can save seed, but *not exchange* it (they can only grow it on their own farm)
- farmers can save seed and exchange it, but they can *not sell* it
- farmer can save, exchange and sell seeds, but only *without using the name* of the variety

In addition, governments are increasingly telling farmers that, as part of this privilege, they have to provide accounts to the breeders about what seed they saved. This is to better enforce the restrictions. Governments are also debating whether to let the seed industry circumvent the farmers' privilege through sales contracts – in other words, allow companies to impose specific restrictions on saving seeds, printed on the bag, despite whatever the PVP law says.

What is the purpose of all this cracking down on farmers? “To finance research!” the industry proclaims. Not quite. It's to control the market, the competition, full stop.

A raw deal turning rotten

If this seems like a total injustice, it is. But it is very real and it is important not to be fooled by glittery promises of protection for farmers' rights under *sui generis* plant variety laws.

The World Trade Organisation recently published an update of where countries are in implementing its agreement on Trade-Related Aspects of Intellectual Property Rights, including the question of the farmers' privilege.³ Below is a country by country account drawn from that report and from several other government sources.⁴

The result is sobering, to say the least. Country after country, the historic and supposedly untouchable right of farmers to save and reuse seeds is under attack. But this is not where the story ends – it is where it starts. Intellectual property rights for plant breeders, once adopted, are always being strengthened at the expense of the farmers. It is in that sense that PVP laws, and their imposition on virtually all countries through the WTO, really serve as a jumping board towards accepting full-fledged industrial patents on all forms of life.

THE FARMERS' PRIVILEGE AROUND THE WORLD⁵

QUESTION: BY LAW, CAN FARMERS SAVE & REPLANT PVP-PROTECTED SEEDS WITHOUT AUTHORISATION FROM THE BREEDER?

AND THE ANSWER IS...

AFRICA & MIDDLE EAST

BENIN

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

BURKINA FASO

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

CAMEROON

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

CHAD

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

CENTRAL AFRICAN REPUBLIC

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

CONGO

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

COTE D'IVOIRE

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

EGYPT

- only if the seed is from their own harvest (e.g. they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)

EQUATORIAL GUINEA

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

GABON

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

GUINEA

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

GUINEA-BISSAU

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

JORDAN

- NO. "The farmers shall be prohibited to use in their lands the harvest's product they have obtained by planting a protected variety or any [essentially derived] variety."

MALI

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

MAURITANIA

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

MOROCCO

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit or ornamental species

NIGER

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

SENEGAL

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

SOUTH AFRICA

- only if the only if the original seed was legally acquired (i.e. from a source authorised by the breeder)
- only if the farm-saved seed is resown on the farmer's own land (no sharing, exchange or selling)

NB: The government is working to change this situation. It wants to remove the farmers' privilege from the Plant Breeder's Rights Act and introduce a clause into the Seed Act saying that farmers may not save any seed from any plant variety that is either subject to IPR (any kind of IPR) or registered as certified seed.

TOGO

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only if it is not a fruit, tree or ornamental species

ASIA

CHINA

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)

HONG KONG, CHINA

- only with those crops expressly subject to such an exemption
- only if the original seed was legitimately acquired
- only for use on the farmers' own holding

INDIA

- only without packaging and selling the farm-saved seed as a protected variety

KOREA, SOUTH

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only up the amount of seed needed to replant own farm

PHILIPPINES

- only for and among small farmers
- depending on the nature of the plant
- any exchange or sale must be for reproduction or replanting on own land
- selling the variety under the trade mark or name associated with it is expressly prohibited
- subject to further conditions and guidelines still to be issued

TAIWAN

- NO.

NB: The government may introduce some form of farmers' privilege in the next revision of the law.

THAILAND

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- if the variety is published as a "promoted" plant variety, then its "cultivation or propagation by a farmer may be made in the quantity not exceeding three times the quantity obtained"

VIET NAM

- only without selling the farm-saved seed

LATIN AMERICA & CARIBBEAN

ARGENTINA

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only for replanting on their own farm (no sharing, exchanging, selling)
- only if the crop is neither a fruit species nor an ornamental plant

BOLIVIA

- only if it is for their own use (no sharing, exchanging, selling)
- only if it is not a fruit, ornamental or forest species
- only for farmers with a landholding of 200 ha or less under cultivation, of which a maximum allowance per crop within that area is as follows: 100 ha for soybean, wheat, maize, sorghum, sunflower or cotton; 50 ha for rice; 20 ha for all other crops

BRAZIL

- only small farmers
- no exchange of seeds except if it's on a non-commercial basis with other small farmers
- not if it's sugar cane

CHILE

- only if the variety was legally acquired (i.e. a royalty was paid)
- only to replant it on their own farm (publicising, exchanging or selling farm-saved seed as seed is expressly prohibited)

NB: The government has prepared an amendment to the plant breeders' rights law which will introduce new limitations on the farmer's privilege. It is awaiting signature of the President.

COLOMBIA

- only if it is for their own use (no sharing, exchanging, selling)
- only if it is not a fruit, ornamental or forest species

ECUADOR

- only if it is for their own use (no sharing, exchanging, selling)
- only if it is not a fruit, ornamental or forest species

NICARAGUA

- only if it is for their own use (no sharing, exchanging, selling)

PANAMA

- only if the variety was legally acquired
- only to replant it on their own farm (marketing, selling or any transfer of the material as seed or as propagating material is expressly prohibited)

PERU

- only if it is for their own use (no sharing, exchanging, selling)
- only if it is not a fruit, ornamental or forest species

TRINIDAD & TOBAGO

- not for commercial marketing or sale

URUGUAY

- only if the seed was legally acquired (i.e. royalties were paid to the breeder)
- only if the seed is resown on land under the property title of the farmer
- only if the seed is kept segregated from other seed at all stages (harvest, cleaning, conditioning, etc.)
- the free exchange and the commercialisation of farm-saved seed is expressly prohibited
- any volume of seed retained on the farm that appears unreasonably large given the size of the farm serves as basis for presumed infraction of the law

NB: The government recently established that breeders may not oblige farmers, through sales contracts, to pay an additional fees when they save seed – which is what breeders have been trying to do.

VENEZUELA

- only if it is for their own use (no sharing, exchanging, selling)
- only if it is not a fruit, ornamental or forest species

INDUSTRIALISED COUNTRIES

AUSTRALIA

- only for replanting on their farm (no sharing, exchange or selling)
- only if the crop is not on the list of crops for which there is no farmers' privilege
- in some cases, the breeder can require payment of fee

CANADA

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)

NB: The government is planning to require farmers to pay for the privilege (i.e. imposing royalty payments on farm-saved seed).

CZECH REPUBLIC

- only if the seed is from their own harvest (they didn't get it from another farmer) wherein they own, lease or sublease the land on which it was produced
- not in the case of hybrid or synthetic varieties
- strictly maintaining the identity of the variety
- small growers do not have to pay the breeder an additional fee to use their farm-saved seed, but other farmers do (around 50% of the normal royalty)

ESTONIA

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- a license fee has to be paid if the farmer grows a new crop from the farm-saved seed on a land area greater than 10 ha

EUROPEAN UNION

- only with the following crops: chickpea milkvetch, yellow lupin, lucerne, field pea, Berseem/Egyptian clover, Persian clover, field bean, common vetch, oats, barley, rice, Canarygrass, rye, triticale, wheat, durum wheat, spelt wheat, potatoes, Swede rape, turnip rape, linseed with the exclusion of flax, and, in the case of Portugal, Italian rye-grass.
- not in the case of hybrid or synthetic varieties
- small farmers are not required to pay any fee to the breeder when re-using the seed; all other farmers have to pay

JAPAN

- only if the original seed was legitimately obtained
- only to be resown on the farmer's own holding (no sharing, exchanging or selling)
- not for crops that are vegetatively propagated and on a list of species for which this privilege is expressly prohibited (as of 1999, this list included 23 species)
- not when a contract prescribes otherwise

KYRGYZSTAN

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only within two years time
- depending on the crop (a list is determined by the government)

LITHUANIA

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- small farmers may be exempt from payment of fee to the breeder

POLAND

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- limited to two hectares of agricultural varieties
- only for 14 species

SLOVAKIA

- NO. The breeder's explicit and written consent is required under all circumstances, including with regard to "derived varieties" of the protected one and "certain other varieties"

SLOVENIA

- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to replant it on their own farm (no sharing, exchanging or selling)
- only for certain crops
- small farmers do not have to pay for this privilege, but all others must

UNITED STATES

- only if the original seed was legitimately obtained
- only if the seed is from their own harvest (they didn't get it from another farmer)
- only to be resown on the farmer's own holding (no sharing, exchanging or selling)

¹ Lather Venkatraman, "Hike research spend in seed technology: Rabobank report", *Hindu Business Line*, Mumbai, 25 March 2002. <http://www.blonnet.com/bline/2002/03/25/stories/2002032500240700.htm>

² See, for example, Alvaro Toledo, "Saving the seed: Europe's challenge", *Seedling*, GRAIN, Barcelona, April 2002. <http://www.grain.org/seedling/seed-02-04-2-en.cfm>

³ WTO Council for TRIPS, "Review of the Provisions of Article 27.3(b): Illustrative List of Questions", IP/C/W/273/Rev.1, Geneva, 18 February 2003, 56 pp.

⁴ GRAIN consulted plant variety protection laws or other government sources, as available from government websites, for this account. What is reflected is currently approved legislation, whether or not the provisions are being implemented yet. So, for example, the situation in the member states of the African Organisation for Intellectual Property (OAPI) is exposed, even though the PVP chapter of the revised Bangui Agreement has not yet been put into force.

⁵ This list is incomplete. GRAIN would appreciate any additions or comments people have to share. Please contact us at <mailto:grain@grain.org>.