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What Farmers Need to Know about Seed-Saving Laws

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In 2012, an Indiana farmer, Vernon Hugh Bowman, found himself before the United States Supreme Court in a battle over his planting soybean seeds on his 65-acre farm.

The seeds Bowman planted were produced by Monsanto and genetically modified to survive the spraying of the popular herbicide Roundup.

Monsanto, after spending millions to develop this genetically modified seed, also obtained legal protection that prevented farmers from saving and replanting second-generation seeds.

Bowman had done just that. He went to the local grain elevator, purchased seeds harvested from Roundup Ready soybean plants that the elevator believed he would use for feed purposes, and replanted these seeds. When he sprayed Roundup and his crop survived, he continued this practice for the next eight years. When Monsanto caught wind of this situation, they filed suit against Bowman for patent infringement. The U.S. Supreme Court issued a unanimous decision in favor of Monsanto, making clear that seed companies are afforded legal protections for certain genetically modified seeds. Bowman was ordered to pay damages in the amount of $84,456.

This case illustrates the serious consequences farmers may face for violation of laws related to seed saving. There are three main sources of protection for seed companies under the law. It is possible, and indeed likely, that all three of these protections may apply to a given seed variety.

Plant Variety Protection Act

Seed companies are afforded statutory protection under federal law. The first such law, the Plant Protection Act (PPA) was passed in 1930 and applied only to the discovery and creation of distinct varieties of asexually reproducing plants.

The Plant Variety Protection Act (PVPA), which was passed in 1970, expanded the reach of statutory protection. The PVPA is administered by the USDA. This act offers broader protection than the PPA, including protection for asexually reproducing plants.

The act requires that the seed be "new," "distinct," "uniform," and "stable" and provides the certificate holder with the right to exclude others from selling, marketing, offering for sale, reproducing, consigning, exchanging, importing or using a variety in the production of hybrid or different varieties for 20 years.

Seed companies may obtain a PVPA certificate in order to enjoy these protections, and anyone selling protected seed must inform the buyer that such seed is protected.

Two exemptions, however, lessen the protections offered by this act. First, one exemption allows replanting of seeds for research and development of new seed varieties.

Second, farmers who lawfully purchase such seeds are permitted to save enough seeds to replant on his or her own property (no larger than the area originally planted).

Importantly, farmers may not sell or otherwise transfer these seeds to others for use as seed.

Farmers who violate the PVPA protections are subject to statutory penalties, including an injunction against the farmer from using the seeds, monetary damages to compensate the certificate holder for the infringement, attorney's fees and, if intentional, treble damages, which multiply actual damages three times.

Most frequently, cases under the PVPA involve seed companies selling a PVPA variety without paying required royalties or including proper notices, or farmers who intentionally sell brown-bagged seed to neighbors.

Licensing agreements

Frequently, when farmers purchase seed, they are required to enter into a licensing agreement; that is, a contract that governs their use of the seed.

Sometimes these licensing agreements take the form of a written contract, which the farmer must sign. For example, Monsanto requires farmers to sign a technology agreement when purchasing Roundup Ready seeds.

Other times, the licensing requirements are printed on the seed bag itself, providing that by merely opening the bag and using the seed, the farmer agrees to the contractual terms printed on the bag.

These agreements generally allow the farmer to use the seed only for a limited period of time—one growing season, for example. Further, licenses often prohibit the sale or transfer of the seeds to any other person.

Licensing agreements may also include clauses addressing forum selection, choice of law, arbitration requirements, attorney fee recovery, and disclaimer of warranties.

Failure of a farmer to comply with the licensing agreement can result in liability for breach of contract.

Utility patents

A utility patent is the most stringent form of protection available to seed companies. This was the protection litigated in Bowman's case, discussed earlier. Utility patents are granted by the U.S. Patent and Trademark Office.

These patents prohibit others from making, using, or selling the patented seed without permission for 20 years. Unlike the PVPA, there is no exception allowing a farmer to replant second-generation seeds or to replant such seeds for research purposes.

Farmers who violate these rules are subject to suit for patent infringement. Damages may include injunctive relief, compensation to the patent holder (often lost profits and/or lost royalties), treble damages, and attorney's fees.

Conclusion

It is extremely important that farmers determine which types of protections are applicable to any seed that they purchase and be careful to abide by these rules.

This includes learning whether the seed holds a patent or PVPA certificate, when the protection under the patent or certificate expires, as well as carefully looking over any licensing or contractual agreements, including those on the seed tag.

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