

PANEL REMARKS ON LIABILITY

LIABILITY FOR FARMING?

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{1} Good afternoon. To begin, I'd like to thank Ed Wallis and the *Richmond Journal of Law & Technology* for inviting me to speak on such a distinguished panel. And I'd like to tell you one thing about myself that is not in my fancy lawyer biography. I grew up on a small family farm down in North Carolina, so I learned from an early age about the different types of genetic manipulations that go on a farm, from breeding cattle to grafting apple trees, which if you're fourteen years old, consists of spending your entire Spring Break taking one kind of apple tree with sturdy rootstock, and a branch from another kind of tree that makes tasty apples, smushing them together, wrapping the result in freezer tape, and planting it. It's not Johnny Appleseed, but it works.

{2} So for me, the idea of splicing genes together just seemed like somebody else doing the work, and not much of an existential advance in terms of farming technology. But obviously, for many people, this is a big deal and a very new and different type of technology.

{3} One of the things that has been noted here today as a difference between this type of crop production and others is that its introduction has given rise to questions regarding how these crops should be treated under the law. And, of course, there are plenty of laws to discuss. As Professor Kershen said in his earlier remarks, the products of biotechnology are like other products, and the people who work with them are subject to the same laws as everybody else, whether they are contract laws, tort laws or product liability laws.

{4} But there is movement, in state legislatures, internationally, and in forums like this symposium, to advocate for a specific scheme of liability associated with biotechnology. I would posit that before that type of action should take place, there need to be some questions asked.

{5} What are the questions that need to be asked to determine if there's a need for a new liability scheme? I think the major question is, "Are crops developed through agricultural biotechnology fundamentally different than crops developed by more conventional breeding methods, such as me in the basement grafting apple trees and wrapping them up with freezer tape?" Some of the questions that go to whether or not there's a fundamental difference between these two means of production, first of all, relate to safety. You know, that's the key thing. Are these things dangerous? Are they safe to grow and safe to eat?

{6} Other important questions include, "Are these crops commonly grown? Where does the reasonable person standard come into this debate? What's the reasonable farmer doing? How does he or she fit into this biotechnology scheme?"

{7} Finally, "Do these crops grow differently than others? Is there something about biotechnology that makes them a new challenge, a new way of doing business, a new paradigm, if you will, for all farmers?"



Is there something about them that will make them unable to coexist with other methods of growing crops? Is this a fundamentally different challenge from challenges farmers have faced in the past?" I just want to go through each of these questions a little more closely.

{8} First of all, I'd like to address safety, and I suspect that this has been a big topic before I got here this morning, so I don't want to belabor these points. But all commercially produced biotechnology-derived crops have been reviewed for safety by at least two federal agencies. They must be cleared for commercial production and sale before they go on the market. It's not as though people are sneaking things into your food and nobody has looked at them and nobody knows whether they're safe or not and we've left safety to the plaintiff's lawyers to decide. After a decade in the fields and on our tables, there hasn't been a single instance of substantiated harm to human safety or to the environment resulting from biotechnology-derived crops.

{9} Who looks at them? The U.S. Department of Agriculture (USDA) looks at all of these crops to see if they're safe to grow. Are they going to become "super weeds?" Are they going to present some new or different opportunity for disease? The U.S. Food and Drug Administration (FDA) reviews the food crops to determine if they are as safe for humans and animals to eat as conventional food. And if the crops are engineered to control pests, the U.S. Environmental Protection Agency (EPA) looks at them to see if they're safe to grow and safe to eat.

{10} So how safe is safe? What are we talking about with regard to food safety, for example? As I said, all biotechnology-derived crops on the market today have been looked at by federal agencies to examine potential toxicity, allergenicity, and impacts to environmental safety. Crops without biotech traits are put on the market without this kind of intensive health and environmental safety review. If somebody had been around doing this kind of review when they invented peanuts, as Professor Kershen alluded to, maybe they never would have let them on the market. So, if we're talking about the need for a liability scheme for safety's sake, is it fair to single out products of biotechnology? If we want liability for safety, what would that require of other crops? I think that's a fair question to ask. So, that's safety.

{11} What about going back to our reasonable farmer? I would argue that these biotechnology-derived crops are not different than regular crops. It's more that they are regular crops. Seventy-five percent of the 2002 soybean crop had a biotechnology-derived trait. Seventy-one percent of last year's cotton crop was produced through biotechnology. So was thirty-four percent of last year's corn crop. Given these numbers, how would you define what is "regular?" What is "normal?" What is the reasonable farmer doing when you're thinking about a liability scheme for biotechnology-derived crops, and how would it affect the options that these farmers have? What about these farmers' options for how they're going to farm?

{12} Finally, are these crops different in terms of how they grow? One of the things that you hear about in the context of biotech crops is that they present a threat to the crops around them through pollen flow. You also hear this referred to as "contamination" and that this is somehow a new thing; that pollen flow is a new phenomenon that has somehow developed as a result of biotechnology.

{13} In fact, the biotechnology-derived crops that are sold in the market today pollinate exactly like their conventional counterparts. They cross-pollinate the way that crops have always cross-pollinated. And any open pollinated crop can cross-pollinate with any other neighboring sexually-compatible crop; this is what the crops do, and this isn't something that's new.

{14} If you grow white corn, and you grow up on a farm and your mother makes you shuck it, you can sometimes see little yellow kernels in the ears of the white corn. That's evidence that cross-pollination

has occurred.

{15} The growers of specialty crops have known about this cross-pollination for years. If you're making blue corn for those cool blue tortilla chips, you keep that corn separate from your yellow corn or your white corn. Canola also comes in various types, some of which are extremely toxic, so the growers of canola (the edible type) and rapeseed (the toxic variety) keep those segregated. Organic farmers and farmers growing "non-GMO" crops are simply other types of specialty farmers. They have the same obligations to protect their crops to fulfill their contracts. Those farmers know how to control cross-pollination. They're not immediately thinking that they should sue their neighbors to address this issue. (This is one of the reasons folks like farmers better than lawyers).

{16} So, cross-pollination happens. Should the blue corn grower immediately sue his neighboring yellow corn grower for planting too close to him? Or the sweet corn grower sue the field corn grower? Those of you in law school immediately recognize how easy it is to envision the outrageous hypotheticals. Should you sue your neighbor if his grass makes you sneeze? If you have to get your car washed in the spring because his pollen is making your car turn green? Are you going to make him pay for your Claritin prescription if your neighbor's grass is making you sneeze? Do you make him plant a rock garden instead? Or if Bermuda grass isn't native to your neighbor's lawn, can you make him plant "native" grasses, instead?

{17} You can see where this could potentially lead. But, as I said, farmers are nicer to people than lawyers, and they coexist. And the way it works is that the blue corn growers, the sweet corn growers, and the organic growers are specialty growers. They earn a premium profit. It's hard work, and they contract to meet certain standards. They assume the responsibility of meeting those standards. They take an extra effort to do so. They get a premium price, and they don't go share it with their neighbors for enabling them to do it. That's how specialty growers have always operated.

{18} As for organic farmers, there has been some talk that biotechnology makes it impossible for farmers to grow organic foods, and that's just simply not the case. The USDA adopted national organic standards that went into effect in October 2002 because everybody was putting "organic" on their labels and nobody knew what it meant. So the government actually passed an organic law so folks would know what they were getting when they bought something that was labeled "organic." It's a process-based standard. If, after following the production standards, there is a little bit of pollen flow coming in from a neighbor's field, and if you've taken all reasonable steps to protect yourself from it, it's not going to make your products non-organic. USDA isn't going to take them off the shelves.

{19} On the other hand, if you enter into a contract requiring you to have a zero level of genetic material produced through biotechnology present in your crops, then it's like any other contract. And, again, we're here in law school today and, as law students and practitioners, you all know the kind of obligations a contract binds you to. Unlike Professor Kershen, I'm not going to push the limits of the laws of contract. As the law now stands, you are free to contract for a "zero" level of the genetic presence of products of biotechnology, but if you do so, you're obligated to meet that number. So that is the story on organic – if you're following an organic program, the mere presence of genetic material from crops produced through biotechnology found in your organic crops won't put you out of the organic business, unless you sign away the right to have that little bit of biotech product in your crops.

{20} So is there a need for a new liability scheme? I take the position that one is not needed that is based on safety. There hasn't been any indication that these crops are any less safe and, as Professor Kershen argued, they may be more safe, than other crops. A new liability scheme isn't required based on the rare or uncommon nature of this product. Most of the cotton and soybeans grown in this country



were derived from biotechnology. It's not required based on pollen concerns because pollen has always been out there (when spring arrives in a few more weeks, it's going to be much more evident than it is now). And it's not required based on any inability of growers to protect organic crops. They've been doing it for years, and they know how to do it. Organic farming doesn't require a new liability standard.

{21} Those are the questions that I have determined are relevant to this debate, and I think that, based on the answers to these kinds of questions, there isn't any need for a new liability scheme. Thank you.

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