

The practical legal conditions for enforcing an ABS-claim under Norwegian Law

a hypothetical case-study of taking legal actions on a bioprospector

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My Background: Law and Genetic Resources

Bioprospecting and the Convention on Biological Diversity:

- First study in the Initiative project: Balancing Building Blocks of a Functional ABS System (2009 w. Tomme Young)
- *Beyond Access – Options for implementing CBD in User Countries* (2007 with Tomme R. Young)
- Elements for Legislation in User Countries to Meet the Fair and Equitable Benefit-Sharing Commitment (The Journal of World Intellectual Property (2006) Vol. 9, no. 2, pp. 199-212)

International Patent Law and Genetic Resources:

- A World Wide Universal Patent System: what is in it for developing countries (Third World Quarterly 2010)
- A Path to One Universal Patent (Journal of Environmental Policy and Law 2008)
- How will the new WIPO draft Substantive Patent Law Treaty affect Genetic Resources? (Journal of World Intellectual Property 2005 no 3 May)

Forest Trees and Law:

- Ongoing project: Nordic Council of Ministers: How to ensure an open-access model for Forest Trees?
- A Nordic Approach to Access and Rights to Genetic Resources

Marine and Fish Genetic Resource:

- Ongoing projects on Aquatic Genetic Resources (Marine Biobank, Norway and India)
- Patent Law and Bioprospecting in Antarctica (accepted for publication in Polar Record, forthcoming 2009)
- Access to and Property Rights of Aquaculture Genetic Resources – Norwegian Perspectives (The Journal of World Intellectual Property (2009) Vol. 9, no. 4, pp. 392-412)

Animal Genetic Resources:

- Process Patent Protection in the Field of Animal Breeding and Farm Animal Genetic Resources (with Magnus Finckenhagen)
- FAO project about AnGR: Animal Genetic Resources – Exchange, Conservation and Sustainable Use – Policy and Regulatory Options (January 2007);
- Patenting in the Field of Animal Breeding and Animal Genetic Resources

The Topic for Today:

The overall aim is to identify a series of elements of practical and concrete suggestions to be included into the International Regime for the purpose of enabling CBD-members to adopt and implement a balanced approach to ABS, including on the user side.

Methodological approach:

The Norwegian legal situation

Three legal vehicles for ABS

Test these three situations and how they will provide help for legal enforcement of an ABS-claim

The situation assumed: the bioprospector is in breach of one of these three legal vehicles

Legal vehicles for ABS:

1. Enforceable Contract
2. Unenforceable Instruments
3. Implied/Equitable Contract
4. Permit qualifying for Contractual Enforcement
5. National Law Requiring ABS Permit, License or Other Permission
6. National law requiring other action
7. National law imposing requirements without permit or contract
8. No Relevant National Law
9. Transactions which the parties believe to be outside the scope of the ABS regime
10. Non compliance with existing requirements

Contractual implementation:

First certainty	who owns the GR, including: - who has the right to grant access to GR; - who has the right to give permission to utilise the GR; and - who has the power to decide how benefits will be shared and how this information can be known/determined
Second	what are the rights of each person who has an interest in GR (as above) with regard to the GR
Third	what actions the user must undertake in order to obtain the right to utilise the GR, and what right or power he will thereby obtain
Fourth	at what point does the ABS agreement, permission, etc. become "final" for purposes of contract law (and agreement on what "final" means)
Fifth	how users who do not comply with the above requirements will be prevented from using that GR [or from obtaining whatever other user-incentive is linked to the ABS regime]
Sixth	how users who violate the conditions of their ABS contract/permit shall be liable for known and appropriate remedies, which are able to adequately, consistently and reproducibly redress the harm caused, including the harm to expectations and the harm to marketable trade secrets and the release of controlled information
Seventh	How source countries and other providers will be able to know of, recognise or identify user-violations of the basic ABS requirements, including violations of source country law as well as instance of noncompliance with ABS contracts

Foil by Tomme Young
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Implementation in Norway: Nature Diversity Act (i)

§ 60 (*genetic material from other countries*)

1. "Import of genetic material for exploiting of genetic material to Norway, from a state which requires prior informed consent to use or export, can only happen in compliance with such consent. The one having genetic material in hand is bound by the conditions and limitations for the consent. The State/government can enforce the conditions and limitations, including by court-cases, pro-bono of the other country having established those criteria."

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Implementation in Norway: Nature Diversity Act (ii)

§ 60 (*genetic material from other countries*)

2. When genetic material from another country is used in Norway for research purposes or from a commercial purpose, the material shall be accompanied with information about from which country the genetic material is received or collected (providing country). In the case that the providing country requires prior informed consent, also information about such consent shall follow the material.

Implementation in Norway: Nature Diversity Act (iii)

3. If the providing country is another than the country of origin for the genetic material, also the country of origin shall be named. "Country of origin" means the country where the material was collected from its natural habitat. If the country of origin requires prior informed consent for access to genetic material, it shall be informed whether such consent is received. If there are no knowledge about such information, there shall be given information of the lack of information.
4. The King may give supplementary regulations about the use of associated traditional knowledge if the use of the genetic material uses local or indigenous peoples traditional knowledge.

Implementation in Norway: Nature Diversity Act (iv)

5. For plant genetic material covered by the International Treaty on Plant Genetic Resources for food and agriculture (of November 3th 2001) shall be accompanied with information confirming that the said breeding material is acquired in accordance with the standard material transfer agreement under the treaty.

Also a similar obligation in the patent act.

In conclusion: Attempt to make ABS work. But no cases yet.

Legal vehicles for ABS:

- Contract – Mutually Agreed Terms
- Nationally Granted ABS Permit, License or Other Permission – Prior Informed Consent
- Non compliance with existing requirements

Important caution:

Not critics of Norway, as Norway is one of the few implementers of article 15.7

It is explicitly stated in the prep. work to the act that Norwegian law alone cannot solve all ABS-problems alone

Ad Hoc WG and COP must add tools



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Let us take a practical attorney/lawyer perspective and prepare a benefit-sharing case in Norway:

(First: information is not equal to benefits)

Therefore, needs a system to take use of the information
So, the Nature Diversity act, nor the patent act ensures enforcement

1. Enforcement outside the court system:
 - Without any legal vehicle: no obligation in No law; obligation to comply with the ABS-laws of all other countries must be implemented
 - An administrative decision of another country: not per se binding in Norway
 - A written contract is binding. No experience with GR-contracts. Hard to survey breach: costly and difficult. Here the disclosure may have a role.



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2. Taking the case to court:

Access to court by a plaintiff from another country:

- **Personal competence:** foreign entities, not clear-cut access for the government of other countries (§ 2-1)
 - **Object of the dispute:** “only judicial claims can be brought before a court”. Prove a judicial need: easy where there is a contract; harder for administrative decision; and probably not possible if only violation of a law in another country
- Paradox:** it is easier to take the nice-guy (with a contract) to court than the worse-guy (without any legal vehicle)



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2. Taking the case to court, more obstacles:

Access to court by a plaintiff from another country (cont.):

- The plaintiff must have a close connection to the case. This could stop a Norwegian NGO to take a case on behalf of an African country to court in No. The Norwegian Gov could do this (§60.1.3).
- BUT I:** Lack of a specific organ to look into this
- BUT II:** Lack of resources to investigate and take these cases to court
- BUT III:** The political cost of the government to bring a national company before a court – not behalf on itself. Would be a highly political question.



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2. Taking the case to court, even more obstacles:

- **Attorney must have a license in Norway**
- **Substantive questions:**
 - Enforceability/validity: problem for the amd. decision; less problem for the contract; impossible for the non-vehicle.
 - Interpretation and applicability of a foreign country law
Common law/ civil law
Methodology of law
Prejudicial decision about another legal system
- **ABS is unknown to each and every judge**
- **Will involve gene- or biotechnology and GR-issues**
- **Language problem of the law of another country**

After this, then you only need to convince the judge that the citizens of Norway is infringing your right.

That is, that he finds it more likely that you have the right than the infringer.



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2. Taking the case to court, even more obstacles:

- **How much should the damage be?**
- **A fair and equitable part of what?**
 - No support for this in the No law
 - No relevant practice; besides tort: thus the economic loss you have had. This is difficult to prove:
What is your loss from someone else gaining?
 - What is a fair share?

Conclusion: the Norwegian situation needs guidance (international clarification) from the Protocol on the following issues: - national rules regarding the mandatory-type of ABS; - assistance to the material understanding of when ABS is infringed/ the obligation of BS is triggered; - procedural issue for enforcing ABS outside courts or even by taking ABS to courts.



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So the question is:

Does the draft protocol give guidance to Norway on how the Nature Diversity Act can be further developed?

And broader: will following the draft protocol make ABS-claims enforceable in other user countries?



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create incentives to enter into MAT and PIC:

Incentives to actually enter into an access-MAT or a benefit-sharing-MAT is crucial since this has the greatest potential to meet the obligation

- Which elements in the draft protocol aims at creating better incentives for private companies to share benefits?
- No positive incentives, that is encouragements or positive sanctions
- Information-sharing is one step (art. 11)
- Monitoring might create an incentive to comply.



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national rules regarding the mandatory-type of ABS:

Article 12 states that countries shall take "appropriate, effective and proportionate measures to ensure that genetic resources utilized within their jurisdiction have been accessed and used in accordance with prior informed consent and that mutually agreed terms have been established"

Leaves states with discretion and implementation-challenges.

Art 12.2: "measures to address situations of non-compliance"
Open wording – huge discretion, leaves uncertainty



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assistance to the substantial understanding of when an ABS-vehicle is infringed/ the obligation of BS is triggered (utilisation):

The discussion about derivatives and the concept of GR has not been developed more in detail in the draft protocol

This is a major issue for legal certainty and for the conditions to enforce an ABS-claim in another jurisdiction.

Article 15 model clauses might contribute (however depending on the development of such models)



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procedural issue for enforcing ABS outside courts:

Art. 12.1: "appropriate, effective and proportionate measures"

Measures could include enforcement outside the legal system, but the lack of more specific listings reduces the chance of stream-lining the type of measures taken



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even by taking ABS to courts:

Article 14 takes some steps in direction of over-all obligations upon states to make courts accessible



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Reflection:

The current discussion is very focused on [a non-existing] linear connection from the act of access, then use, then benefit-sharing:

- Since a high number of access incidents was not followed by any ASB-vehicle, then a lot will depend on the enforcement of the ABS-laws extra territorially
- The temporal scope, combined with focus on enforcement of PIC and MAT leaves challenges for the enforcement

Thank you for your attention

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