

Humanitarian Use Licences

CGIAR-CAS

prepared by Dr Sean Butler, University of Cambridge, UK
scb46@cam.ac.uk

Summary

The concept of the Humanitarian Use Licence would allow CGIAR and the Centres to work within existing intellectual property systems to ensure free access to intellectual property assets. Although the precise terms of the Licences are still under discussion, they could become the primary vehicle for providing effective access to proprietary technology for developing countries.

At this stage it is important to continue refining the terms of the licences so that they are acceptable to the owners of proprietary technology, while ensuring full access to recipients.

Humanitarian Use Licences (HULs)

The basis of the HUL is to use existing intellectual property mechanisms, such as licensing, to carve out or to retain rights that may be used in specific countries and by specific groups of people in those countries ('users' and 'user countries'). In many ways, therefore, these licences can be understood simply as Field of Use/Territory licences or retentions.

There is an excellent discussion of needs and nature of the humanitarian licence by SIPPI (<http://www.aaas.org>) available at <http://sippi.aaas.org/hue.shtml>, including a report at 'Exploring a Humanitarian Use Exemption to Intellectual Property Protections' which explores the nature and needs of the HUL.

There is also an interesting paper about the issues raised by patenting at <http://pewagbiotech.org/buzz/printfull.php3?IssueID=19>

There is, of course, only a need for an HUL where there are intellectual property rights which would otherwise not be accessible, ie,

- there are registered rights (such as a patent) in the user country, or
- there are unregistered rights (such as confidential information).

Patents are national, so if technology (or a plant variety) is not protected by patent (or by plant variety rights) in a user country then it is freely available in that country - ie to be used, enjoyed, exploited, and exported except to a country where it is protected. Confidential information, on the other hand, is essentially

international, and is either known or not known. If it is known, ie passes into the public domain, then it is useable by everybody in all countries.

Specific HULs, including the Generation Challenge Program

From a drafting point of view, HULs can either be reservation or grant:

- a reservation is where rights are granted, but a Humanitarian reservation or exception is made, which allows the licensor to grant HULs within the reservation;
- a grant is where a HUL is granted, so that the licensee is able to benefit from it, or sub-licence others to benefit.

There are various draft proposals for precise wording of HULs: PIPRA (public intellectual property resource for agriculture, <http://www.pipra.org>, of which CIMMYT is a member) has drafted wording that allows commercial and non-commercial use by anyone in a ‘developing country’ as defined by the World Bank (see attached at Schedule I), but specifically excluding export except to another developing country. The PIPRA wording has the advantage of simplicity, defining the licence/retention by country, addressing the concern of export, but otherwise allowing substantially free use within the country.

The Generation Challenge Program HUL is somewhat different, in that in the Program Agreement itself the members of the Consortium grant royalty-free rights to “each person throughout the world” for ‘Subsistence Use’; any commercial licences are granted subject to the HUL. In effect, this is the licence for anyone to use, provided they meet the criteria for Subsistence Use, no further documents are needed, although obviously to be effective there needs to be dissemination of the Program results and of the terms of the HUL.

Interestingly, this HUL will only be relevant for protected/patented results, and not for unprotected/unpatented: if information is unprotected and not freely available, the HUL is ineffective, if it is unprotected but freely available, the HUL is unnecessary. Even with protected results, again the HUL will only be necessary for users in countries where the results have been protected - in countries where it is not protected, there is no need for the HUL (at least for intra-country activity..

The HUL will not, of course, be applicable to a potential user who falls outside the definition of Subsistence Use. This may present difficulties where an intermediate supplier (to users *within* the definition) is itself *outside* the definition, and so cannot exercise the rights - but would presumably need to apply for a commercial licence.

Nevertheless in principle both sets of words seem broadly acceptable, despite

very different legal approaches, although more work is needed to address the concerns below.

Future for HULs: the needs and concerns of the parties

Assuming that a Humanitarian Licence is necessary, it is important to be clear about the needs and concerns of the licensor and licensee in granting/receiving HULs.

Licensee

- ensure that the licence terms properly allow benefit to target groups
- limited administrative demands, eg sub-licensing

Licensor

- limited or manageable impact on commercial activity elsewhere
- clear benefit to target groups, eg subsistence farmers, and not to commercial organisations
- proper recognition/publicity for the action
- limited use of HULs to avoid significant loss of income

It may be useful to explore these further, in particular the commercial concerns of industry licensors, to ensure that granting HULs is an attractive and standard activity.

It will also be important to explore (by individual case study) the mechanisms by which technology under a HUL actually reaches its target users. For example, it will often be necessary for technology to be developed by commercial organisations in a developing country, in order for it to be available to small farmers, so the HULs must allow (in effect) commercial licences to be granted.

While standard models for any agreements are difficult, it would of course be useful to have standards for HULs, either in terms of wording or - better - in terms of criteria by which specific wording can be measured, so that licensors can accept what is being asked.

Public Intellectual Property Resource for Agriculture (PIPRA)

Draft Definition of Humanitarian Use

Definitions:

“Humanitarian Purposes” means (a) the use of Invention/Germplasm for research and development purposes by any not-for-profit organization anywhere in the World that has the express purpose of developing plant materials and varieties for use in a Developing Country, and (b) the use of Invention/Germplasm for Commercial Purposes, including the use and production of Germplasm, seed, propagation materials and crops for human or animal consumption, in a Developing Country.

“Commercial Purposes” means to make, have made, propagate, have propagated, use, have used, import, or export a product, good or service for the purpose of selling or offering to sell such product, good or service.

“Developing Country” means any one of those countries identified as low-income or lower-middle-income economies by the World Bank Group at the time of the effective date of this agreement and all other countries mutually agreed to by Licensor and Licensee.

Reservation of rights. “Notwithstanding other provision of rights granted under this agreement, University hereby reserves an irrevocable, non-exclusive right in the Invention/Germplasm for Humanitarian Purposes. Such Humanitarian Purposes shall expressly exclude the right for the not-for-profit organization and/or the Developing Country, or any individual or organization therein, to export or sell the Germplasm, seed, propagation materials or crops from the Developing Country into a market outside of the Developing Country where a commercial licensee has introduced or will introduce a product embodying the Invention/Germplasm. For avoidance of doubt, not-for-profit organization and/or the Developing Country, or any individual or organization therein, may export the Germplasm, seed, propagation materials or crops from the Developing Country of origin to other Developing Countries and all other countries mutually agreed to by Licensor and Licensee.