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WHERE THE WILD WIND BLOWS: GENETICALLY ALTERED SEED AND NEIGHBORING FARMERS

In March 2001, agro-business giant Monsanto won a victory in Canadian Federal Court over Saskatchewan farmer Percy Schmeiser. This case sets international precedent for appropriated seed cases and illustrates the primary concerns American courts must face as they consider Monsanto's prosecution of 22 cases against American farmers.

Introduction

¶ 1 Percy Schmeiser is a farmer in the town of Bruno, Saskatchewan, Canada.[1] He has spent the last 50 years of his life farming canola and has, like many other local farmers, had his ups and downs over the years. But things seemed to plummet straight down in 1998, when agro-business giant Monsanto contacted Schmeiser and accused him of illegally planting its patented "Roundup Ready"[2] canola seed without the requisite contract.[3] Unlike other farmers who have crossed paths with Monsanto in the past, Schmeiser refused to pay Monsanto's requested fees. So Monsanto took Schmeiser to Canadian Federal court seeking damages of $145,450 (Canadian Dollars).[4]

¶ 2 Mr. Schmeiser claimed to be wrongly accused, stating that the seeds blew onto his farm without his knowledge or permission. Schmeiser noted that his farm is surrounded by other farms using the patented seed and that his fields are located along highways connecting to grain elevators. Monsanto was unmoved by these claims, arguing that even if the seed blew onto Mr. Schmeiser's property, he still cannot sell it - the seed and resulting crop are the property of Monsanto as patent-holder of "Roundup Ready."[5]

¶ 3 Canadian Federal Court Judge W. Andrew Mackay held weeks of hearings in the case and announced his decision in favor of Monsanto on March 29th, 2001.[6] Judge Mackay awarded damages based on Schmeiser's 1998 profits, as well as what would have been the amount of technical fees for contracted use of the seed.[7]

¶ 4 All eyes have been on the Schmeiser case as the first international precedent in Monsanto's genetically modified seed cases. The Canadian court appeared to hold that it was irrelevant whether or not Schmeiser took advantage of the modified strain.[8] Judge Mackay was quoted as saying that even if the seed was windblown onto Schmeiser's property it was Schmeiser's duty to destroy it as soon as he realized that it was the patented strain; it was no Monsanto's duty to prevent it from spreading.[9]

Monsanto's Image

¶ 5 Monsanto has suffered from disfavored status in the public's eyes for quite a while now, despite obvious efforts by its public relations department. It has faced criticism from governments, from such crusaders as Ralph Nader, and even conservative business journals, such as Forbes. Monsanto has a long history of association with potentially suspicious scientific endeavors ranging from the distribution of Agent Orange, to the use of bovine growth hormones, to the creation of genetically modified foods. All in all, Monsanto has kept ordinary people on edge, and social justice and environmental activists very busy. Suing Percy Schmeiser is nothing out of the ordinary.

¶ 6 One area of concern among commentators is Monsanto's methods for detecting "seed pirates," those using Monsanto seeds without a license. Monsanto employs a private investigation firm, Robinson Investigations, to question farmers and take samples from crops in both the U.S. and Canada. Farmers claim that Robinson and Monsanto use their weight to bully and intimidate farmers to obtain information and Monsanto even uses a toll-free telephone line that allows farmers to report others for seed piracy. Monsanto claims that its tactics are useful deterrents and refers to the practice as "auditing."

American Patent Law and the 22 Pending Cases

¶ 7 Seed patents and altered natural substances are nothing new to patent law. Congress first considered the patentability of plants in 1930,[10] and currently plants are patentable under three statutes, the utility patent statute, the plant patent statute, and the Plant Variety Protection Act.[11] Specifically, plants may be patented when they have been substantively transformed into man-made articles through the introduction of characteristics that would not result naturally in that substance.[12] Over the years there were significant debates on a more theoretical level regarding whether a new plant was a discovery or a man-made creation.[13]

¶ 8 While plant and seed protection are not new, the issue of how to deal with a patented-product that appears to have a natural tendency not to remain under the clear control of the patent-owner and his licensee - the problem of the windblown patented seed - is new. Under U.S. patent law, the patent owner has the right to use or license her use of her patented product.[14] This is what allows Monsanto to control the use of "Roundup Ready" in the United States.

¶ 9 In the United States, direct infringement of a patent is defined as the making, using, selling, or offering to sell of the patented product within U.S. jurisdiction.[15] In specific, a patent owner of a sexually reproduced seeds holds the rights to "exclude others from selling the variety, or offering it for sale, or reproducing it, or importing it, or exporting it, or using it in producing (as distinguished from developing) a hybrid or different variety therefrom."[16] There are four primary defenses to direct infringement: invalidity of the patent, fraudulent procurement, misuse, and laches or estoppel.[17] A few other defenses have been made available by virtue of 35 U.S.C. §282, but these are narrow exceptions that would not apply to the neighboring farmer, such as Schmeiser.[18] There are also a few doctrines that have appeared in courts over the years, such as first use (exhaustion), implied licensing, experimental purpose, legal estoppel, and bona fide purchaser.[19]

¶ 10 It appears that no innocent infringement doctrine would necessarily protect U.S. farmers dealing with windblown patented seeds, and none of the major defenses to infringement would necessarily apply either. The farmers may be able to make a case using one of the court-made doctrines such as an implied license (resulting from the very nature of the "escaping" seed), but Monsanto would surely fight this argument. However, it could be argued that what Monsanto was seeking in the Schmeiser case might be rights not at all accorded to the patent-owner under American law - i.e. a holding for Monsanto in such a case would be an unreasonable extension of our patent laws and thus misuse of patent.[20]

Cultural and Agricultural Concerns for Farmers: The Aftermath of the Schmeiser Case

¶ 11 Schmeiser was a test case for Monsanto. According to a spokesperson, Monsanto is currently pushing forward on prosecution of roughly 22 cases against American farmers.[21] Many Governmental agencies and farmers in countries such as India, Great Britain, and the United States have anxiously awaited the Schmeiser result. Clearly, the impact of this decision goes far beyond the edges of Percy Schmeiser's farm.

¶ 12 Many American farmers have begun to grow and market foods derived from genetically modified seeds, but many are resisting this technology. But their resistance may be futile. Examples show that genetically engineered seeds can contaminate organic fields through wind or animal distribution despite such precautions as tree line barriers. Some sources predict American farmers could lose millions of dollars in profits from genetic contamination.[22] On top of these lost profits, the farmers may have to pay Monsanto for their contamination.

¶ 13 Farmers are also concerned that newly patented seeds will threaten the historic and economical practice of seed saving by stifling the practice in non-patented crops possibly contaminated by patented seeds. It is perhaps a justified fear in light of the bill Monsanto encouraged to be introduced into the Ohio State Legislature last year requiring registration of all seed cleaning and conditioning activities. The sponsoring representative of the bill quickly backed away after the strong response, but suggestions remained that it would be reintroduced later is perhaps another form.[23]

¶ 14 Perhaps the largest concern for American farmers is the very one that infuriated Percy Schmeiser: Can Monsanto recover damages when seed is spread to the fields of non-paying, non-contractual farmers through natural means?

Conclusion

¶ 15 The *Schmeiser* case is the first case regarding the use of patented seed without a contract, regardless of how that seed is obtained. This case presented several difficult issues, but the Canadian court provided little international guidance on these issues from either a policy or theoretical standpoint. These issues will need to be addressed in the 22 pending cases brought by Monsanto against U.S. farmers. It does not appear that a similarly situated farmer in America would have a defense to Monsanto's claims, but several questions remain:

- Can a U.S. patent-owner recover for damages for unlicensed seed use when that seed was planted only through natural distribution, such as wind or animal transportation?
- Is it relevant if the farmer took advantage of the genetically altered characteristics of that seed?
- Can a U.S. organic farmer recover for damages if his or her crop is contaminated by genetically altered seed that is spread through natural means despite preventative measures undertaken by the organic farmer?

- If damages can be recovered by organic farmers, then from whom? The neighboring farmer or the patent owner such as Monsanto?

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Footnotes

1. Mr. Schmeiser's case has resulted in the launch of a personal Internet site covering his side of the story. Percy Schmeiser, *Monsanto vs Schmeiser*, http://www.percyschmeiser.com/ (visited May 3, 2001).

2. The "Roundup Ready" canola seed that grew in Mr. Schmeiser's fields is resistant to glyphosate, an herbicide marketed by Monsanto as "Roundup." The seed is sold only to farmers willing to sign a contract preventing them from engaging in seed-saving practices for planting in later years. Once a farmer agrees, they spray their fields with "Roundup," which kills everything but the "Roundup Ready" canola.

3. Monsanto's homepage may be accessed at http://www.monsanto.com/ (visited May 3, 2001).

4. *Monsanto Canada Inc. v. Schmeiser* [2001] FCT 256.

5. *See* Canadian Broadcasting Company, *Blowin' in the Wind*, http://www.tv.cbc.ca/national/pgminfo/canola/ (visited May 3, 2001). This site contains links to some of the documents from the case, such as affidavits and memoranda.

6. The Canadian Federal Court decision may be viewed in full (.pdf document format) from the Percy Schmeiser site, *supra*.

7. *Monsanto Canada Inc. v. Schmeiser* [2001] FCT 256.

8. *GM Ruling Against Farmer Brings Shockwaves*, The Dominion (Wellington), April 3, 2001 at 7.

9. Kurt Kleiner, *Victory for Monsanto*, New Scientist, April 7, 2001 at 13.

10. 1-1 Chisum on Patents §1.05.

11. 1-1 Chisum on Patents §1.05. The Plant Variety Protection Act was enacted in 1970 and added specific protection for plants that are sexually reproduced, i.e. grown from seeds.

12. The primary U.S. Supreme Court case which discussing patents for quasi-natural or natural substances is Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 76 USPQ 280 (1948).

13. *See* 1-1 Chisum on Patents §1.05.

14. 1-16 Chisum on Patents §16.01.

15. 35 U.S.C. §271(a).

16. 7 U.S.C. §2483.

17. *See* 1-19 Chisum on Patents §19.01.

18. *See* 35 U.S.C. §282.

19. 1-19 Chisum on Patents §19.01.

20. The theory here might be something similar to issues in trade secret law: once the protected-material has clearly escaped control of the owner, the law no longer offers protections.

21. Bill Lambrecht, *Monsanto's Win in Court Sharpens Battle Lines in Biotech Fight*, St. Louis Post-Dispatch, April 1, 2001 at A1.

22. Anthony Shadid, *Blown Profits: Genetic Drift Affects More Than Biology--US Farmers Stand to Lose Millions*, The Boston Globe, April 8, 2001 at G1.

23. Brian Williams, *Battle Over Farming Growing with Monsanto Seed Debate*, The Columbus Dispatch, April 4, 1999 at 2H.

24. My thanks to Robert Hyde for substantial editing work and advice in preparation of this iBrief.