From: mfkswolf@gmail.com <K.Friese@mchsi.com> on behalf of
Kurt Michael Friese <K.Friese@mchsi.com>
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To: ATR-Agricultural Workshops <agriculturalworkshops@usdoj.gov>
Subject: Plant v. Utility patents

The Barons are at Court

How an Unheralded Supreme Court Case Could Turn Us into Serfs.

By Kurt M. Friese

The United States Supreme Court, in a 6-2 decision authored by Justice Clarence Thomas, has declared that it is legal to claim utility patents on plants. The December 10, 2001 ruling states that the Plant Patent Act (PPA) of 1930 and the Plant Variety Protection Act of 1970 (PVPA) are so broad that they can cover any type of plant that is new, distinct, uniform, and stable. No exclusivity is granted to genetically modified plants. In fact, companies such as the plaintiff in this case, Pioneer Hy-Bred, can claim utility patent on any seed it breeds, making it illegal not just for you to propagate and sell that seed, but even for a farmer to save seeds from the previous season to plant next season.

In your own garden when the coriander goes to seed so quickly, as it does when the whether gets warm, you could keep those seeds, grind a few for your chili or curry powder, and save the rest for next year. The trouble is, now you may be breaking the law when you do, at least if your original seeds were patented. Companies like Dupont (who owns Pioneer) may not be interested in going after one lonely gardener or farmer for patent infringement, but the disturbing part is that under this ruling they could. In fact, Monsanto has already started prosecuting farmers. They have already *succeeded* in a case against a Canadian farmer, Perry Schmeiser of Bruno, Saskatchewan. In that case, Schmeiser claimed that the patented Roundup Ready seed blew onto his land from neighboring farms and passing trucks. No matter, Monsanto said, it was still their proprietary seed. Schmeiser lost in Canadas Supreme Court.

In the American Supreme Court case, Pioneer Hy-Bred V. JEM Ag Supply, Pioneer brought suit against JEM for buying, repackaging and reselling Pioneers proprietary brand of corn. While this may well be an infringement of patent or copyright law, the decision by the Supreme Court goes well beyond that to include rights, bestowed by the court upon companies, to claim proprietary rights on generations of *sexually* reproduced plants. That is where it gets disturbing. That tomato in your garden might be heirloom seed that your Great-Grandmother began saving, but when a butterfly cross-pollinates your plant with pollen from your neighbors patented tomato, your next crop will be a violation of the law and you wont even know it.

According to the Plant Variety Protection Office at the USDA, The PVPA expressly states that among its exemptions is A farmer's exemption to allow the saving of seed for the sole use of replanting the farmer's land. Neither plant patents nor utility patents provide these exemptions.

The United States Patent and Trademark Office (USPTO) states that a utility patent may be granted to anyone who invents or discovers any new, useful, and nonobvious [*sic*] process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof. The same office states that a Plant Patent may be granted to a person who invents or discovers and asexually reproduces any distinct and new variety of plant.
Justice Thomas (a former attorney for agri-business giant Monsanto) and 5 assenters have declared that since the PVPA does not expressly forbid utility patents on plants, then they are to be allowed, effectively circumventing the obvious intent of Congress when it made the original farmers exemption in the PVPA. This is unusual for a strict constructionist like Thomas. Remember Civics class? A constructionist is one who

believes that if the law does not say you can, then you cant.

Justices Breyer and Stevens dissented. In the dissent, authored by Justice Breyer, what is made clear is the intent of patent law *vis a vis* the intent of the PPA and the PVPA. The key factor is the term asexually reproduce. In high school biology you learned about asexual reproduction when the little amoeba cell divided and became two amoebae, genetically identical to the original. In agriculture, asexual reproduction means grafting. For example, take a cutting from a grape vine, graft it to existing rootstock, and the new grapes will be genetically identical to the old vine. A similar goal can be achieved with apples and other fruit trees. Breyer and Stevens dissented because while the original lawsuit was brought to stop JEM Ag from packaging and reselling Pioneers seed (akin to copying and selling a movie on video), the ruling Justice Thomas penned conveyed rights having little to do with the case. It is as if Microsoft programmed Windows to replicate itself onto other computers via the Internet, and then claimed that the users of those new computers owed royalties to Microsoft. Such an idea would be laughable, even for mighty Microsoft to attempt, but the Agri-business industry seems to have managed it.

Since that term asexually reproduce is clear in Plant Patents, the Agri-business giants are eager to make Utility Patent claims, insuring their grip on vital food supplies worldwide for generations, and sounding perhaps the final death-knell of the family farm. A regression to land barons and serfs in a fiefdom has already begun. Do you know the penalty for poaching the Kings deer?