9-2-1994

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THE "SAVED SEED" EXCEPTION TO THE PVPA

— by Neil E. Harl*

In 1970, the Plant Variety Protection Act was enacted1 authorizing the Secretary of Agriculture to issue a certificate of plant variety protection to the breeder of any novel variety of sexually produced plants.2 The plant variety certificate protection extends to both the plant and its seeds.3

By contrast, the plant patent statute4 provides that one who either invents or discovers any distinct and new variety of plant and who also asexually reproduces the plant is entitled to a patent.5 A plant variety patent extends only to the plant and gives the patentee the right to exclude others from asexually reproducing the plant or selling or using the plant which has been reproduced.6

The statutory exception to plant variety protection

As enacted, the Plant Variety Protection Act (PVPA) contained an exception to the holder of the plant variety certificate.7 A producer of seed subject to the PVPA "whose primary farming occupation is the growing of crops for sale for other than reproductive purposes" is given the right to sell "saved seed" to other persons (whose primary occupation is the growing of crops for other than reproductive purposes).8 The statute specifically provides that —

"A bona fide sale for other than reproductive purposes, made in channels usual for such other purposes, of seed produced on a farm either from seed obtained by authority of the owner for seeding purposes or from seed produced by descent on such farm from seed obtained by authority of the owner for seeding purposes shall not constitute an infringement."9

The statute contains no limits on the amount of seed that may be sold under the "saved seed" exception.

The exception is of no consequence for corn because any seed saved from the first generation of production after the crossbreeding to produce a commercial variety lacks the performance of the original seed. However, the exception is of great importance for soybeans and other crops where saved seed performs almost as well as the parent seed.

The Winterboer decision — Federal District Court

In a case that is currently pending before the United States Supreme Court, Dennis and Becky Winterboer through their corporation, D-Double-U Corporation, had purchased soybean seed from Asgrow Seed Company. The Winterboers planted the seed, harvested the crop, cleaned it and placed the seed in bags for sale. Asgrow sought an injunction based on the PVPA to prohibit the Winterboers from selling the seed. An injunction was granted for the 1991 season.

Asgrow then brought an infringement action and a request for a permanent injunction. The Winterboers defended on the grounds that the sales were within the "saved seed" exception to the PVPA.

The federal district court10 found evidence that Congress intended to create a narrow exemption for "saved seed" and quoted approvingly from a 1983 Fifth Circuit Court of Appeal case11 —

"The broader the construction given the exemption, the smaller the incentive for breeders to invest the substantial time and effort necessary to develop new strains.... Thus, the narrower reading of the exemption, is more in keeping with Congress' primary objective.... Congress did not intend for the crop exemption to cover every sale from one farmer to another."12

The district court, acknowledging that its view represented a "restrictive reading of the exception," held that saved seed "shall be limited to the amount of the protected seed reasonably needed by the farmer who grew it to plant the number of acres of the protected variety, or its progeny, he or she needs in the upcoming crop year."13

Court of Appeals decision in Winterboer

Not surprisingly, the Winterboers appealed the district court decision to the United States Court of Appeals for the Federal Circuit.14 That court reversed the district court and remanded the case to the lower court.

The appellate court noted that the statute does not limit the amount of seed a farmer can save under the "saved seed" exception15 but acknowledged that the statute imposed several limitations on such sales.16 In particular, the court explained that, even though within the exception, a farmer (1) remains subject to infringement under

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subsection 2341(3) and (4), (2) can only save and sell seed descended from a PVPA certificate owner for seeding purposes, (3) in selling seed must primarily grow crops from that seed for consumption, (4) in acquiring seed, must primarily grow crops from that seed for consumption, (5) can neither save nor sell seed harvested from that seed, (6) must comply with state laws, and (7) cannot divert seed originally sold for consumption to planting purposes. The Circuit Court held that the "saved seed" exception permitted up to one-half of a farmer's crop produced from a protected novel plant society to be sold as seed in competition with the owner of the novel variety. The appellate court held that the district court had erred in reading the limitation (of the seed needed by the farmer for the following year) into the statute and vacated the permanent injunction against the Winterboers.

Supreme Court grant of review On April 18, 1994, the U.S. Supreme Court granted review in the case. Implications of the case The long-running case has attracted a great deal of attention among farmers and in the seed trade. The ultimate outcome, whether in the Supreme Court or the Congress, will have important implications for firms engaged in plant breeding. On the other hand, the case as finally laid to rest will have important implications also for farmers in terms of the cost of seed.

FOOTNOTES


2 See 7 C.F.R. Part 180.


5 Id.


7 7 U.S.C. § 2543.

8 Id.

9 Id.


11 Delta and Pine Land Co. v. People Gin Co., 694 F.2d 1012 (5th Cir. 1983).

12 Id. at 1016.

13 795 F. Supp. 920.

14 Asgrow Seed Co. v. Winterboer, 982 F.2d 486 (Fed. Cir. 1992).

15 982 F.2d 486, 489.

16 Id. at 490.

17 Id.


19 982 F.2d 486, 490.


21 Amicus curiae briefs were filed by 16 firms in the appellate court proceeding. 982 F.2d 486, 487 (Fed. Cir. 1992).