

## Bowman v. Monsanto: Striking at the Roots of Innovation February 13, 2013

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*When a fellow says it ain’t the money but the principle of the thing, it’s the money.*
— **Artemus Ward (Lincoln’s favorite humourist)**

Two cases before the U.S. Supreme Court, Bowman v Monsanto and Association of Molecular Pathology v Myriad Genetics have much in common. Both involve companies that played by the rules using the patent system to develop products providing great social benefits. Both innovators find themselves in high stakes law suits with plaintiffs credited with representing the broad public interest whose bottom line is gaining cheaper access to important discoveries without being hampered by patents.

And both cases have ramifications for our nation beyond the interests of the targeted companies.

Bowman v Monsanto involves a farmer who figured out how to get Monsanto’s patented seeds cheaper from a grain elevator than from the company. I won’t attempt to delve into the intricacies of the litigation or the doctrine of patent exhaustion, but do want to consider a larger point. What happens if our innovators lose confidence in the patent system? Some apparently believe this is a desirable outcome.

Each case attracted critics of patents and technology transfer. One posted after an article on Bowman “In Standing Up for Big Ag, Are Universities Undercutting Their Own Research?” the following:

*The idea that “strong patents” are needed is grossly untrue. Look at the internet—the whole core of it was built without strong patents. Look at Microsoft and Facebook—also built without strong patents. About the only place where “strong patents” are needed for investment in developing university research inventions (rather than bullying or speculation) is in the biotech industry, which has its own highly problematic operating model that hasn’t changed much since Middlemarch and probably should. The huge flaw in all this is that somehow university administrators should have ownership of faculty scholarship, and that the purpose of ownership is to sell off patent rights to speculators, bullies, and trolls, as if doing so represents the high point of public service.* (<http://chronicle.com/blogs/bottomline/in-standing-up-for-big-ag-are-universities-undercutting-their-own-researchers/>).

The rebuttal regarding the development of university research is convincingly presented in the amicus brief supporting Monsanto by several leading research universities and academic associations. (<http://sblog.s3.amazonaws.com/wp-content/uploads/2013/01/WARF-McBride-Amicus-January-24-2013.pdf>)

However, the amicus brief by soybean, corn and wheat farmer associations is the best rejoinder in this particular case. And it contains a fascinating tale. (<http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/11-796_resp_amcu_asa-etal.authcheckdam.pdf>)

In 1836 the Patent Commissioner obtained Congressional funds for a free seed program to promote American agriculture. The program moved to the Dept. of Agriculture, eventually consuming almost one third of its budget. It ran until 1924.

The federal program, coupled with lack of patent protection, undercut incentives for industry to invest in genetic seed research. Rather than producing the brave new world freed from the tyranny of patents envisioned by the critics, something quite different happened. Average national yield for corn production **decreased from 24.3 to 20.5 bushels per acre** between 1866 and 1930.

Here’s what the grower’s brief says:

*Although soybeans and other crops have been cultivated for centuries, advances in plant genetics were historically stifled by a lack of incentives to invest in new technologies and breeding techniques.*

*Genetic innovation in soybeans grew exponentially, like Jack’s magical beanstalk, after this Court’s 1980 decision in* ***Diamond v. Chakrabarty****… which confirmed the applicability of utility patent protection to qualifying organisms.*

*No other country possesses the United States’ prolific record in developing new crop varieties. Without the protection of intellectual property afforded by the U.S. legal system, seed and biotechnology companies would not have undertaken the expensive and time-consuming research necessary to improve plant technology. (pp. 5-6)*

Perhaps explaining why these farmers see companies like Monsanto as partners rather than exploiters, consider these impacts after *Chakrabarty*:

* Domestic soybean production increased 96%;
* Yields per acre are up 55%;
* Land needed to produce a bushel of soybeans declined 35%;
* Soil erosion decreased 66%;
* Water needed for irrigation is down 42%;
* Fuel consumption decreased 42%; and
* Greenhouse gas emissions declined 41%. (p. 6)

This seems like the patent system worked as intended.

So what will entrepreneurial companies lacking the legal resources of Monsanto and Myriad think with these cases before the Supreme Court? If patent protection appears increasingly capricious, will they continue to invest the money and sweat needed for commercialization?

The answer’s important: intellectual property increasingly drives international economic competition. And there are very real consequences for winning or losing.

Hernando De Soto shows in his monumental book **The Mystery of Capital** that the *secure* ownership of property, both physical and intellectual, is the essential driver of national wealth creation.

Benjamin Friedman argues in **The Moral Consequences of Economic Growth** that political freedom is directly tied to economic growth. When societies feel the economic pie is expanding personal freedom and tolerance increase. When countries are economically stagnant or regressing, fears and resentments spread splitting society apart.

Adam Smith said: “It is in the progressive state, while the society is advancing to the further acquisition, rather than when it has acquired its full complement of riches, that the condition… of the great body of the people seems to be the happiest and most comfortable. *It is hard in the stationary, and miserable in the declining state.*“ (emphasis added)

Those who so blithely undermine our patent system are playing a very dangerous game. In the short term it may appear clever to take the benefits of inventions made by the sweat of others. However, companies like most people are not fools. When it appears that even when innovators play by the rules that the rug can be yanked out from under them, American prosperity is in jeopardy. We’d better think long and hard what that portends. It’s a bridge that once burned, is not easily rebuilt.

It is about the money-- and our future.