



# AGRICULTURAL LAW

*The newsletter of the ISBA's Section on Agricultural Law*

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## The Supreme Court plants an idea—All life forms are patentable! And farmers get the short end of the stalk. Part I: The decision

By Eugene F. Friedman, J.D., Ph.D.; FRIEDMAN & FRIEDMAN, LTD.; Chicago, Illinois

**T**he U.S. Supreme Court, in the case of *J.E.M. Ag Supply Inc. v. Pioneer Hi-Bred International Inc.*, 60 USPQ2d 1865 (U.S. 2001), decided that plants constitute proper subject matter for utility patents under 35 U.S.C. § 101. The Court reached this conclusion notwithstanding the availability of protection for plants under the Plant Patent Act ("PPA"), 35 U.S.C. §§ 161 *et seq.*, and the Plant Variety Protection Act ("PVPA") 37 U.S.C. §§ 2321 *et seq.* The 6-2 opinion announcing this decision answered far more questions than it

asked. Furthermore, both the majority and the dissent base their opinions upon a totally false assumption as to Congress' intent in passing the specific plant-protection statutes referenced above. Lastly, in issuing over 1,800 utility patents for plants, the U.S. Patent and Trademark Office ("PTO"), for over 20 years, correctly divined the course that the courts would take when directly faced with this issue.

The *J.E.M. Ag Supply* case involved a utility patent owned by Pioneer for a hybrid strain of corn. Producing the hybrid involved first producing two separate inbred corn lines. The inbreds resulted from careful, multi-generation and selective breeding to produce strains that clearly and reliably demonstrated particularly desirable characteristics.<sup>1</sup> Although the inbreds contain the intended features, the inbreeding, as often occurs, produces weak plants that have unacceptably low yields of product when planted. However, crossing two inbred strains then creates a hybrid that not only incorporates the desirable features of the inbreds, but also avoids their deleterious weaknesses and shortcomings. The hybrids prove hardy and productive.

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Clearly, producing the plants that form the subject matter of the Pioneer patent involved human intervention; they do not occur naturally.<sup>2</sup> Most significantly, however, the plants do not involve "genetic engineering" in which foreign genetic material is inserted by a human worker directly into a cell which then reproduces with both the original and the additional genetic material.<sup>3</sup> Rather, in *J.E.M. Ag Supply*, only natural reproductive processes occur; the pollen of one plant fertilizes the eggs of another. All of the genetic material of any cell at any time derives solely from this natural reproductive process. The only human involvement consists of selecting which plant supplies the pollen and which provides the egg in this otherwise totally ordinary undertaking. Moreover, the process of selective breeding, which the above process entails, has been around forever and represents standard agricultural processes.

As a result, the question arises as to what the patents in *J.E.M. Ag Supply* actually cover. As the Court states at 60 USPQ2d 1867:

A patent for a an inbred corn

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line protects both the seeds and plants of the inbred line and the hybrids produced by crossing the protected inbred with another corn line. . . . A hybrid plant patent protects the plant, its seeds, variants, mutants, and trivial modifications of the hybrid.

Thus, a patent on either the inbred or the hybrid covers the plants that result from the processes described above. As usual, the patent specifically prohibits the use, making, sale, or offering for sale of the plant (including its seeds).<sup>4</sup>

Pioneer sued J.E.M. for infringing 17 utility patents for corn inbreds, including U.S. patent 5,596,367, and hybrids, including U.S. patent 5,491,295. In response, the defendant counterclaimed, alleging invalidity of the patents on the basis that plants do not fall within the ambit of a utility patent as set forth in 35 U.S.C. § 101, and filed a motion for summary judgment on this single issue. The District Court for the Northern District of Iowa denied the motion<sup>5</sup> but granted certification for an immediate appeal of this decision on this issue under 28 U.S.C. § 1292(b). The Court of Appeals for the Federal Circuit permitted the appeal and affirmed.<sup>6</sup> The Supreme Court granted certiorari.<sup>7</sup>

The Supreme Court stated the issue before it as follows:

This case presents the question whether utility patents may be issued for plants under 35 U.S.C. § 101 (1994 ed.), or whether the Plant Variety Protection Act, 84 Stat. 1542, as amended, 7 U.S.C. § 2321 *et seq.*, and the Plant Patent Act of 1930, 35 U.S.C. § 161-164 (1994 ed. and Supp. V), are the exclusive means of obtaining a federal statutory right to exclude others from reproducing, selling, or using plants or plant varieties.

Justice Thomas, writing for a divided (6 to 2) Court, gave the succinct answer, "We hold that utility patents may be issued for plants." Reaching this conclusion proved not so simple, and the dissent disagreed on the key issue of the difference in scope of coverage of a utility patent as compared to the two plant acts listed above.

The Court commenced the analysis

with reference to its prior decision in *Diamond v. Chakrabarty*, 447 U.S. 303 (1980), saying:

As this Court recognized over 20 years ago in *Chakrabarty*, 447 U.S., at 308, the language of § 101 is extremely broad. "In choosing such expansive terms as 'manufacture' and 'composition of matter,' modified by the comprehensive 'any,' Congress plainly contemplated that the patent laws would be given wide scope." *Ibid.* This Court thus concluded in *Chakrabarty* that living things were patentable under § 101, and held that a manmade micro-organism fell within the scope of the statute. As Congress recognized, "the relevant distinction was not between living and inanimate things, but between products of nature, whether living or not, and human-made inventions." *Id.*, at 313.

Accordingly, new, useful, and unobvious forms of life merit utility patent protection.

However, this clear, concise statement that life forms are patentable may make one wonder as to the existence of any argument to support the proposition that Pioneer's plants do not fall within the ambit of 35 U.S.C. § 101. The majority and dissenting opinions *both* focus upon the question of whether the Plant Patent Act ("PPA") and the Plant Variety Protection Act ("PVPA"), separately or together, preclude utility patent protection for plants. More specifically, do these acts evidence a Congressional intent that plants may solely receive their protection from these specific statutes? The answer to this question necessarily involved wrestling with the rule of statutory construction that the specific trumps the general. In other words, did the fact that Congress passed the "specific" PPA and PVPA necessarily mean that Congress intended that the "general" utility patent grant under § 101 should not apply to plants? Obviously, the majority said "no," while the dissent reached the opposite conclusion.

To reach the conclusion that section 101 includes plants, the Court had to focus on the following question: If Congress had *intended* to permit utility patents for plants, then why

did it enact the PPA and the PVPA? Stated in other words, do the PPA and the PVPA differ sufficiently from the utility patent act so that all of them, especially the last, may cover plants? By engaging in a detailed analysis of the three statutes, the majority concluded that indeed the plant acts each displayed significant differences from the utility patent act, which enabled section 101 to protect, *inter alia*, plants.

Starting with the PPA,<sup>8</sup> the Court discerned the following most important difference from the utility patent section: the PPA lowers the written description required for plant patents as compared to utility patents. As the Court observed in footnote 6:

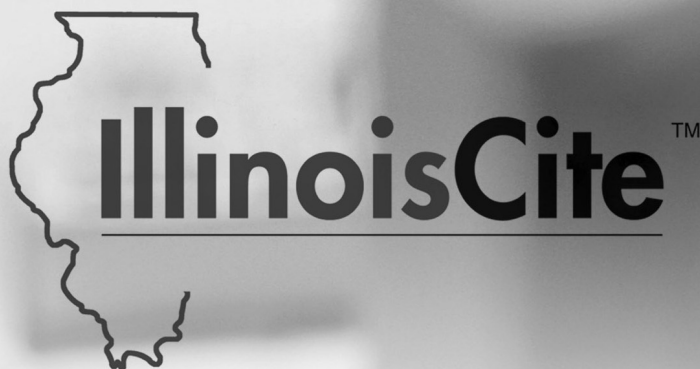
To obtain a plant patent under [35 U.S.C.] § 161 a breeder must meet all of the requirements for § 101, except for the description requirement. See § 162 ("No plant patent shall be declared invalid for noncompliance with section 112 [providing for written description] of this title if the description is as complete as is reasonably possible").

As the Court previously noted, this reduced requirement appeared in the original PPA of 1930, Act of May 23, 1930, § 2, 46 Stat. 376. This relaxation in the PPA substantially distinguished it from the utility patent statute.

Further, the protection under the PPA extended to only asexually reproducing the plant (and using, selling, offering for sale the plant *so reproduced*).<sup>9</sup> This compares to the utility patent which grants the right to exclude others from making the invention by any means whatsoever.<sup>10</sup> The defendant-appellant argued that this difference showed that, in passing the PPA, Congress' inclusion of this restriction on the rights of a plant patent showed its intent not to include plants within the ambit of utility patents. The Court, however, when it mentioned this difference,<sup>11</sup> merely passed it off by saying, "[I]t is hardly surprising that plant patents would protect only asexual reproduction, since this was the most reliable type of reproduction for preserving the desirable characteristics of breeding." Accordingly, since this difference was not really a difference at all, it cannot

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show any intent on the part of Congress to include plants only in the PPA.

The Court then considered the PVPA and actually found quite significant differences between the protection afforded by the plant seed act and that of the utility patent act. In particular, a PVPA certificate specifically excludes from its protection the activities of farmers saving seed from a harvested crop to plant the next year's growth (7 U.S.C. § 2543) and the use of the protected variety for research purposes (7 U.S.C. § 2544). The PVPA also permits the use of the protected plant variety to develop (but not produce) a hybrid or new variety (7 U.S.C. § 2541(a)(4)). The utility patent act contains none of these exceptions.

The Court then found that the different *scopes of protection* between the PVPA and the utility patent act established Congress' intent, when it enacted the PVPA, to allow the protections of *both* statutes for seed plants. Otherwise, the PVPA would have proved redundant. Or, to state it the other way, identity in the scope of protection between the two acts would actually show that the PVPA was merely redundant. Since Congress would never engage in a completely meaningless undertaking, such congruence between the two acts would actually establish that the utility patent act did not apply to seed plants. Because of the differences discerned between the protections afforded by the utility patent act and that of the PVPA, the Supreme Court concluded that both acts, and in particular the utility patent section 101, applied to seed plants.

The Court also found differences in the requirements for a PVPA certificate as compared to those for a utility patent. As the Court stated:

[A] utility patentable plant must be new, useful and unobvious, 35 U.S.C. §§ 101-103. In addition, to obtain a utility patent, a breeder must describe the plant with sufficient specificity to "make and use" the invention after the patent term expires. § 112. . . . The description requirement for plants mandates a deposit of biological material, for example seeds, and mandates that such material be accessible to the public. See 37

CFR §§ 1.801-1.809 (2001). . . .

By contrast, a plant variety may receive a PVP certificate without a showing of usefulness or nonobviousness. See 7 U.S.C. § 2402(a) (requiring that the variety be only new, distinct, uniform, and stable). Nor does the PVPA require a description and disclosure as extensive as those required under § 101. The PVPA requires a "description of the variety setting forth its distinctiveness, uniformity, and stability and a description of the geneology and breeding procedure, when known." 7 U.S.C. § 2422(2). It also requires a deposit of seed in a public depository, § 2422(4), but neither the statute nor the applicable regulation mandates that such material be accessible to the general public during the term of the PVP certificate. See CFR § 97.6 (2001). [60 USPQ2d 1873].

The stricter requirements for a utility patent, as the Court stated, provided the bases for the greater protection of the utility patent as compared to the PVP certificate, discussed above.

The dissent, led by Justice Breyer with Justice Stevens joining, argued that the enactment of the PPA and the PVPA *removed* coverage for plants from the utility patent statute. In effect, according to the dissent, although the utility patent act covered plants, these later statutes repealed section 101 to this extent. Accordingly, the utility patent act no longer provided protection for plants. This partial repeal occurred *explicitly*. The PPA, by its own words, amended the general patent act by making specific reference to asexually reproduced plants. The PVPA explicitly removed seeded plants from the general patent act by limiting the protection accorded to this category of new creations.

The dissent also relied on the propositions that "a later, more specific statute trumps an earlier, more general one."<sup>12</sup> However, the Court stated that this "rule" had arisen in the cited case since the earlier, general statute under review there had not received any clear interpretation in the extended period of time that has elapsed since its passage.

The defendant-petitioner also

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argued for repeal of the utility patent statute by the PVPA *by implication*. The dissent defined this doctrine by saying, "The canon has traditionally been embraced when a party claims that a later statute—that does not *actually modify an earlier statute*—implicitly repeals the earlier legislation." (Emphasis in the original, citation omitted). The dissent found no repeal by implication, since it found *explicit* repeal as discussed above.

The majority delimited the doctrine as follows:

Yet "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974). "The rarity with which [the Court has] discovered implied repeal is due to the relatively stringent standard for such findings, namely that there be an irreconcilable conflict between the two federal statutes at issue." *Matsushita*, 516 U.S. at 381 (internal quotation marks omitted). [60 U.S.P.Q.2d, 1873.]

However, as the discussion above shows, the majority found that the plant variety protection statute differed for reasons *intended by Congress* from the utility patent statute. Thus, the Court could detect no "irreconcilable conflict," but only harmony between the two statutes, providing the breeder with a beneficial plethora of choices. As the Court stated (at 60 U.S.P.Q.2d, 1873):

[T]he requirements for obtaining a utility patent under § 101 are more stringent than those for obtaining a PVP certificate, and the protections afforded by a utility patent are greater than those afforded by PVP certificate. Thus, there is a parallel relationship between the obligations and the level of protection under each statute.

So saying, the Court upheld a utility patent for a plant notwithstanding the availability of a PVP certificate for the very same plant.

The question, however, may be legitimately asked as to whether either side of the Court's decision, the majority or the dissent, actually posits a correct argument. Both sides start from the assumption that Congress *intended*

to cover plants when, in 1952, it passed the current version of the Patent Act, especially 35 U.S.C. § 101 (and before when enacting the Patent Act's predecessors). The majority decided that nothing had occurred in the interim to remove utility patent protection for plants. The dissent maintained that the passage of the Plant Patent Act and the Plant Variety Protection Act had, in one fashion or another, *removed* plants from the ambit of the Utility Patent Act.

However, a third argument may also be made concerning plants and the Utility Patent Act. Simply stated, in 1952, when Congress passed the current Patent Act, it simply did not intend to cover *any plants or other life forms* within the scope of section 101 of that act. Rather, Congress intended to cover the types of inventions that had historically qualified for utility patent protection up to that time. These had included inventions involving inanimate, nonliving mechanical, electrical, and chemical developments.

In fact, until the 1980 decision in *Chakrabarty*, *supra*, the United States Patent and Trademark Office had taken exactly that position. The individual named "Diamond" in the case of *Diamond v. Chakrabarty*, *supra*, was none other than the Commissioner of Patents and Trademarks. Until that time, the Office had never issued a patent on any life form, and it argued that section 101 simply did not cover *any* life form.

The issue then becomes not whether Congress took steps that showed its intent to *remove* protection for plants from the Utility Patent Act. Rather, the focus should properly be on what protections for plants did Congress *add* to the law in 1930 when it first passed the Plant Patent Act and in 1970 when enacting the PVPA and what restrictions on these protections did Congress clearly intend when it permitted protection that had never existed before. Viewed in this light, neither decision in the *J.E.M. Ag Supply* case, *supra*, makes any sense.

Until 1930, the canvas of protection for plants had always remained entirely blank; under no circumstances could a developer (or "inventor") of a new plant of any kind have obtained any protection. In 1930, Congress put the first daub of color on the canvas

by passing the Plant Patent Act. This gave a modicum of protection for, *only*, asexually reproduced, nontuberos (i.e., not potato or the like) plants. The new patent act of 1952 carried this protection (and limitation) along in 35 U.S.C. §§ 161 et seqq.

Then, in 1970 (*10 years before the decision in Chakrabarty*), Congress enacted the PVPA. When it did so, clearly Congress was not wailing, "Oh my God, the poor producers of new seed varieties don't have enough alternatives for their protection. The utility patent is crap for many of them. We have to give them a new and different choice just in case they really don't like the utility patent." Just putting these words on paper shows their absurdity. Congress passed the PVPA in 1970 because seed breeders had *no protection* of any kind at that time. *Chakrabarty*, which for the very first time allowed a utility patent for a life form, was still 10 years away. So, the PVPA was designed to give some protection (instead of none) to new seeds to place them in a situation comparable to the PPA for asexually reproduced plants.

Further, to fill the gap in the PPA for *asexually* reproduced tuberos plants (explicitly excluded from protection in that statute), Congress included them as well in section 2402(a) of the PVPA (7 U.S.C. § 2402(a)). Clearly, Congress filled this gap for tuberos plants since, otherwise, they would also have absolutely no protection whatsoever. Again, no one ever thought that including them within the PVPA was simply to provide another alternative form of protection for these plants.

The history recited above also shows the absurdity of the majority's argument that uses the exceptions to coverage in sections 2543 and 2544 of the PVPA (7 U.S.C. § 2543 and 2544) to reinforce its argument that utility patents are available for inbreds and hybrids. The first statutory section explicitly permits a farmer saving seed from one year's harvest to plant his or her next year's crop while the second allows research with the protected plant. The utility patent act includes no such exceptions to its coverage. Simply stated, the majority concludes that Congress including these exceptions in the PVPA intended to make its protection available *in addition to the utility patent because the latter does*

not include the exceptions. Stated even more simply, the majority "reasons" that the fact that Congress clearly intended to exclude these activities from protection (in the PVPA) shows that it really intended to cover these activities (in the utility patent act). And, all of this occurred 10 years before the utility patent act was determined to cover life forms. The consequences of this conclusion will appear in Part II.

Regardless of the above musings of the current writer, the decision in *J.E.M. Ag Supply Inc. v. Pioneer Hi-*

*Bred International, Inc.* clearly established the principle that utility patents may be obtained for newly created plants. The question then centers upon the implications of this decision, which Part II of this article will discuss.

Editor's note: This article was previously published in the June 2005 issue of ISBA's Intellectual Property newsletter. Part Two is expected to appear in a future issue of this newsletter.

1. Pioneer also held utility patents for its inbred corn lines.

2. If the plants occur naturally, they would not deserve patent protection, *J.E.M. Ag Supply Inc.* supra at 60 U.S.P.Q.2d 1868.

3. As in *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

4. 35 U.S.C. § 101.

5. 49 USPQ2d 1813 (ND Iowa 1998).

6. 200 F.3d 1374 (C.A.F.C. 2000).

7. 531 U.S.1143 (2001).

8. First enacted in the Act of May 23, 1930, § 1, 46 Stat. 376.

9. 35 U.S.C. § 163.

10. 35 U.S.C. § 271.

11. At the discussion at footnote 7.

12. *United States v. Estate of Romani*, 523 U.S. 517 (1998).

## New Grain Insurance Fund provisions may affect your clients

By Jeffrey A. Mollet, SILVER LAKE GROUP LTD., Highland, IL

**E**ffective July 1, 2005, certain new provisions of the Illinois Grain Code went into effect which require assessment payments by various parties in or associated with the grain industry here in Illinois. This is yet another statutory amendment and legislative action resulting from the Ty-Walk failure and the "bankruptcy" of the old version of the Grain Insurance Fund that resulted. The following are the basic revisions as presented by Jeffrey D. Adkisson, Executive Vice President of the Grain & Feed Association of Illinois:

**Grain Seller Assessments start July 1, 2005**—any check dated July 1 or after for grain purchased at an Illinois licensed grain dealer will need to have the grain seller assessment subtracted off of the price. This is the assessment on the farmers which is their agreed-to portion of the funds that will repay and create a new Grain Insurance Fund. As in the past, the assessment will be in effect for 12 months. The money is collected by the licensed grain dealer and is to be remitted to the Illinois Department of Agriculture on a quarterly basis. Following is the time line applicable to these payments:

Collection Period	Due to IDOA
07/01/05 - 09/30/05	10/20/05
10/01/05 - 12/31/05	01/20/06

01/01/06 - 03/31/06

04/20/06

04/01/06 - 06/30/06

07/20/06

**Lender Assessment also starts July 1**—any warehouse receipt used as collateral will need to have the lender assessment calculated as well. This is the assessment on the banks and lenders which is their agreed to portion of the funding for the Grain Insurance Fund. The above payment schedule applies to lender assessments as well.

**Grain Dealer and Grain Warehouse Assessments**—When a grain dealer was notified by the Illinois Department of Agriculture in April that there would be another assessment, the Department indicated to each dealer the amount of the assessment. The assessment amount

can be paid all at once or in quarterly installments. If a dealer chooses to pay it in quarterly installments, the following schedule applies:

first installment due 07/20/05  
second installment due 10/20/05  
third installment due 01/20/06  
fourth installment due 04/20/06

If your client does not have the information sent by the Illinois Department of Agriculture on the grain seller and grain lender assessments, you can access those forms on the IDOA Web site. The link is <<http://www.agr.state.il.us/Forms/index.html>> and scroll down to Grain Warehouse/Dealer and the link to those forms is at the end of that section.

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