Four Ontario farmers help clarify the cost of seed patent infringement

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Patent infringement is a serious matter. In cases involving biotechnology patents (referred to in this article as "seed patents"), infringement can occur when a farmer plants seeds saved from a previous year's GMO crop which feature characteristics patented by a biotechnology company.

Although infringement should be avoided at all times, when a farmer does make a mistake and infringes a seed patent, he or she should only compensate the patent owner to the extent provided by law – which is generally equal to the harm caused, or improper benefit enjoyed, through infringement. This of course begs the question: in terms of dollars, how much is that?

In true David and Goliath fashion, four Ontario Farmers helped answer this question in an appeal heard by the Federal Court of Appeal on June 16, 2010. In Judgments dated August 6 and October 1, 2010, the three appeal court judges sided with Charles Rivett of Simcoe County (*Rivett v. Monsanto et. al.*), and brothers Alan Kerkhof, Lawrence Janssens and Ronald Janssens of Kent County (*Janssens et. al. v. Monsanto et. al.*), to determine an appropriate award for seed patent infringement. The four farmers were ultimately ordered to pay Monsanto $24.00 and of $28.14 per acre respectively – awards designed to represent the portion of the farmers' profits attributable to the benefit of the patent – which was approximately 82% less than what Monsanto was seeking.

These cases were litigated following failed settlement efforts in which Monsanto demanded much more. In fact, the amounts awarded ended up being very close to what the farmers offered to pay to settle the matters. The amounts were also significantly lower than highly publicized settlements previously reached involving Monsanto's patents (including a 2008 Quebec settlement of $200 per acre). By litigating their cases, these four farmers, for the first time in Canada, have provided other farmers facing similar litigation with an idea of what the Courts might order them to pay.

In Canadian patent infringement cases, Plaintiffs, such as Monsanto, can elect between receiving an award based on damages (which normally equals the licensing fees associated with the patent)

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or profits earned by the infringing party. Monsanto routinely elects an award based on profits – meaning that such an award is dependent on the profits of the defending farmer.

The *Rivett* and *Janssens* rulings are the most important decisions since the 2004 Supreme Court judgment in *Monsanto Canada v. Schmeiser*. Albeit an extremely important case, the *Schmeiser* matter stands primarily for determining that seed technology is actually patentable – and anyone growing such crops without permission may be liable for patent infringement. Due to the particular facts of that case, however, the Court did not provide Monsanto with any award for infringement of its patent. The facts showed that Mr. Schmeiser did not spray his crop with Roundup®. As a result, the Court found that he should not owe Monsanto any of his profits because he did not use or profit from the patent.

The *Rivett* and *Janssens* decisions are the first contested Canadian cases where the Court has been asked to assessed an award for patent infringement in a situation where it was found that the farmers did use the patent – i.e. where a farmer planted saved patented seed and sprayed his or her crop with Roundup®.

In the course of litigating the *Rivett* and *Janssens* cases, Monsanto insisted that the award should equal the farmers' entire net profits earned as a result of growing Roundup Ready® soybeans. Monsanto appeared to be seeking not just the compensation provided by law, but also a remedy which would unduly punish the farmers – specifically awards of over $130.00 and $150.00 per acre respectively.

The farmers, meanwhile, took the position that, although they did infringe Monsanto's patent, a fair award should only equal the portion of their profits attributable to the patent – essentially the difference between the profits earned growing soybeans containing Roundup Ready® technology, and what they could have profited growing a conventional crop.

The principle behind the farmers' argument was that Monsanto did not invent soybeans and should only be entitled to the benefit provided by their patent – not profits attributable to soybeans generally. The Court agreed with the farmers and assessed the benefit attributable to Roundup Ready® soybeans at 18% – which resulted in the awards of $24.00 and $28.14 per acre.

By standing up for such a principle, the farmers in these cases brought some clarity to this area of law – ultimately to the benefit of all farmers. With the matter now settled, farmers facing litigation related to seed patents should be in a better position to defend themselves and /or settle claims of infringement in a fair manner.

Although infringement of any patent should be avoided, if a farmer makes a mistake and infringes a patent, the remedy should not go beyond what is justified – and four Ontario farmers, who squared off against Monsanto this past summer, have helped illustrate just what that should be.

What to do if you face patent infringement claims

1. Contact a lawyer experienced in Intellectual Property litigation immediately. After being served with a claim, you will have limited time to file a defence and should have a lawyer assist you with the process. In 2007, an Ontario farmer, without adequate legal representation, was ordered to pay Monsanto $248.86 per acre for growing 392 acres of patented soybeans – more than 10 times per acre what Mr. Rivett was ordered to pay under similar circumstances.
2. Get your accounting records in order. In a patent infringement case, the defendant is responsible for proving expenses related to the infringing crop. A remedy based on a farmer's profits will be reduced by every expense proven at trial.
3. Expect tough negotiation for settlement. At all times, seek advice from your lawyer. It is important to be patient with the process while, at the same time, do not be afraid to put forward your best offer to settle as early as possible. The longer it drags out, the more legal expenses will be incurred and, if the matter goes to trial, you will likely receive favourable cost and interest consequences if your offer to settle exceeds the award ultimately ordered by the court.
4. In event that a settlement cannot be reached, seek advice from your lawyer.