



PATENT CONSIDERATIONS FOR CROSS-BORDER BIO-PRODUCTS

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In the emerging bio-marketplace, it may be economically sound to grow or process a feedstock where soil is rich, sun plentiful and labour affordable, to then sell the manufactured bio-products abroad.

Patent rights are a significant factor when considering not only where feedstocks should be grown and processed but also where the bio-products may be sold. Unlike some other forms of intellectual property, patents are *national*. A patent owner can exclude others from making, using and selling the invention defined in the claims within the country where the patent is granted and in force.

Case study: Monsanto v. Cargill

In the 2007 U.K. decision *Monsanto Technology LLC v. Cargill International SA & Anor*, we can see how some principals of patent law can apply to the importation of bio-products and ponder how these principles could apply to the biofuel industry.

To put the case in context, Cargill had imported into the U.K. soy meal that had been obtained from Round Up[®] resistant soy grown in Argentina. Growing and processing the genetically modified soy in Argentina was not problematic from a patent standpoint. However, Monsanto alleged that Cargill's importation of the soy meal into the U.K. infringed Monsanto's patent No. EP (U.K.) 0 546 090.

The claims of the patent cover the invention from different angles. One claim covers "an isolated DNA sequence"; another "a recombinant double-stranded DNA molecule"; and yet another "a method of producing genetically transformed plants which are tolerant toward glyphosate herbicide". All of the claims require the encoding or presence of a "Class II EPSPS enzyme" as an important element of the invention.

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^{*} Of LEGER ROBIC RICHARD, LLP, a multidisciplinary firm of lawyers, and patent and trade-marks agents. Published in the May 2009 issue of *Biofuels Canada Magazine*. Publication 063.007.

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At court, Monsanto produced tests showing that some DNA material survived the manufacturing process and were indeed present in the imported soy meal.

As to the question of patent infringement, however, the court narrowly interpreted the claims and found no infringement. According to the court, there was insufficient evidence to show that the DNA material in the soy meal could encode the particular “Class II” enzyme. The method claims were also considered not infringed because the meal had not been obtained “directly” from the patented method, as required by U.K. law.

Interestingly, the court added that the presence of the DNA material within the meal in mere trace quantities and in a genetically non-functional state were both *irrelevant* to the question of infringement.

Implications for biofuels and their by-products

Before deciding on a technology/feedstock platform or import/export tactics, patent considerations should be made. The risk of infringing a patent covering feedstock genetics may be relatively low for liquid biofuels such as ethanol and biodiesel, but proper patent clearance due diligence should be carried out for complex bio-products such as meal, distillers grains and solid fuel pellets.



