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Four-Wheeling Through the Soybean Fields of Intellectual Property Law: A Practitioner's Prospective

by

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Four-Wheeling Through the Soybean Fields of Intellectual Property Law: A Practitioner's Perspective

Todd D. Epp*

Is intellectual property law capitalism's "toady"?

You think of these things when you are a self-described "simple country lawyer with a specialty in intellectual property," bumping along on the back of a four-wheeler across a dirt field, looking for volunteer soybean plants on a hot summer day in South Dakota. In this part of South Dakota, the northeast, which is way north of much of the United States, the sun is high, beaming down on one's head like an array of sun lamps at a cheap spa. This area is sometimes described as "the empty quarter."

Out here, it is a long way from the glacial till of the eastern Dakotas to the intricacies of the Patent Act, philosophies of private property ownership, or even the federal courthouse one hundred miles west in Aberdeen. It is also a long way from the air-conditioned lecture halls, the tweed-clad professors, and the concerns about grades and class ranks that power my memories of my legal alma maters, the Washburn University School of Law and the University of Houston Law Center.

In the Washburn lecture halls, I decided not to become a lawyer. I was dismayed by my classmates' aggressive tendencies, sanctimoniousness, and very frankly, with my own lack of maturity. Neither the honor of being in the top ten of my class nor graduating magna cum laude meant diddly squat to me. With the exception of Myrl Duncan's employment law class and Ali Khan's and Ronald Griffin's classes in international law and business, law school seemed like a dismal profession of perpetual arguments among the somewhat smart and arrogant. However, after spending some thirteen years in public and commercial broadcasting (and earning their meager paychecks), it finally occurred to me that perhaps being a lawyer would not be such a bad thing.

But what kind of law would I practice? And who would hire a law school graduate and Kansas bar admittee who had not even spent a summer clerking for a judge or law firm?

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Intellectual property (IP) called me with its siren song. As a television producer,¹ I had some familiarity with clearing copyrighted music and photos for broadcast. The Internet in the early to mid-1990s was in some ways still just a toy, but people could see its potential. Intellectual property captured my fancy. It was brainy, it was hip, and it attracted me.

After going into hock and leaving my family (a wife, a two-year-old, and a seven-year-old) in South Dakota during the worst winter in a generation, I went to get a Master of Laws in intellectual property at the University of Houston Law Center. At Houston, I loved my classes—copyright law, trademark law, patent law, Internet law, and communications law. I even wrote the equivalent of a book for my master's thesis.² I was the third or fourth LL.M. student graduated from the still-new IP program. I loved it, I loved my fellow IP students, and I loved the possibilities of prosecuting trademarks, writing licensing agreements, and litigating IP cases.

A big firm in South Dakota hired me. South Dakota is not exactly the IP capital of the Midwest, let alone the U.S. Nonetheless, my niche was intellectual property law. I was lucky. At that firm, I was Mr. IP.

My clients were primarily companies, such as advertising firms, retailers, computer-based companies, and other small businesses, all very corporate. Aside from a few poor artists and songwriters, intellectual property is primarily the domain of big companies such as Disney, which had enough clout to get copyright terms extended to keep little Mickey Mouse out of the public domain.³ IP law is the domain

1. I had a good run as a broadcast journalist. Here is my TV career in a nutshell: Producer/reporter, KTWU-TV (PBS), Topeka, Kansas, 1983-86; Producer, South Dakota Public TV (PBS), Brookings, South Dakota, 1986-94; Executive Producer and Director of TV Production, SDPTV, 1994-95; Executive Producer, KSFY-TV (ABC), Sioux Falls, South Dakota, 1994-95; and Weekend Anchor and Producer, KDLT-TV, 2001. I keep a hand in the business now as a "spin doctor" on politics for KSFY-TV, and I host a monthly legal issues radio show, "Law Talk," on KELO-AM, Sioux Falls, South Dakota. I have covered the Kansas and South Dakota legislatures. I have also covered Senators Bob Dole, Nancy Kassebaum, and Tom Daschle, interviewed countless famous and not-so-famous people, and traveled to Taiwan, Jordan, Israel, and Panama because of TV news.

2. Todd D. Epp, *From Dirty Letters to Naughty GIFs: A Look at the History of Federal Regulation of Obscene Private Mail and Federal Regulation of Obscene E-mail and Other Computer-Transmitted Images* (1997) (unpublished Master of Laws thesis, University of Houston Law Center) (on file with author).

3. See Chris Sprigman, *The Mouse That Ate the Public Domain: Disney, The Copyright Term Extension Act, and Eldred v. Ashcroft*, at http://writ.news.findlaw.com/commentary/20020305_sprigman.html (Mar. 5, 2002). Sprigman notes,

Rather than allow Mickey and friends to enter the public domain, Disney and its friends—a group of Hollywood studios, music labels, and PACs representing content owners—told Congress that they wanted an extension bill passed.

Prompted perhaps by the Disney group's lavish donations of campaign cash—more than \$6.3 million in 1997-98, according to the nonprofit Center for Responsive Politics—Congress passed and President Clinton signed the Sonny Bono Copyright Term Extension Act.

of Sony, protecting its music and movies. It is the domain of Microsoft, protecting its software empire.

IP law is also the domain of chemical, seed, and fertilizer companies such as Monsanto, which seek to protect its biosphere of genetically manipulated plants such as corn, wheat, and of course, soybeans. This version of intellectual property consists of many other things, including Roundup Ready soybeans and their progeny, which is why I was bouncing along on the back of a four-wheeler on a dirt road in a nameless tract of South Dakota, looking for volunteer soybeans on a hot summer day.

That may have been the day when I first became a “simple country intellectual property” attorney. Maybe that’s when I also really became the lawyer I wanted to be—when I discovered that intellectual property law was capitalism’s toady.

A couple of weeks earlier, my good friend (and now present law office partner), former U.S. Senator James G. Abourezk,⁴ called me at my big firm and said he was representing a farmer from the Milbank, South Dakota, area who was being sued for patent infringement. Yes, patent infringement. I do not exactly remember my conversation with Jim, but I could not understand how a farmer from northeast South Dakota could possibly be sued for patent infringement. I wondered, “Had he built some corn-picker contraption in his pole barn that infringed on New Holland’s or John Deere’s designs?”

No, Jim said, his client was reusing “saved seed” from his previous year’s soybean crop. As far as Jim understood, that was somehow illegal. Another term for this practice is “brown bagging.” For centuries, farmers have kept some of their seeds from a harvest to use as seed stock the following seasons.⁵

Even in as fine a program as Houston’s, we couldn’t cover everything, particularly in a survey patent law class. We spent no more than

The CTEA extended the term of protection by 20 years for works copyrighted after January 1, 1923. Works copyrighted by individuals since 1978 got “life plus 70” rather than the existing “life plus 50.” Works made by or for corporations (referred to as “works made for hire”) got 95 years. Works copyrighted before 1978 were shielded for 95 years, regardless of how they were produced.

Id.

4. Democrat, U.S. Congressman from South Dakota, 1971-73 and U.S. Senator from South Dakota, 1973-79.

5. See Elton Robinson, *Movement Protests Loss of Saved-Seed*, SOUTHEAST FARM PRESS, Apr. 18, 2001, http://southeastfarmpress.com/ar/farming_movement_protests_loss/. As the article notes, “[a]s long as farmers have tilled soil, they have had the right to save seed for their own use, often sealed deals with a handshake and enjoyed their sense of independence. Then one day, they were asked to sign a contract which illegalized the saving of certain patented seeds.”

Id.

For a time in the late 1990s/early 2000s, there was a movement called “Save Our Seed” or “SOS.” *Id.* One of its adherents felt strongly about the righteousness of his cause: “Saving seed for replanting is a ‘God-given right that’s being taken away from farmers,’ SOS founder Mitchell Scruggs contends, because seed and biotechnology companies are now patenting their varieties through the U.S. Patent and Trademarks [sic] Office.” *Id.*

twenty minutes in one class talking about the Plant Variety Protection Act (PVPA).⁶ The concept of patented soybean seeds seemed a foreign notion to me, Mr. IP, LL.M. Anyway, though Jim has made a career out of helping people fight corporate power, Jim said this was beyond his area of knowledge, so he turned the client over to me. It seemed like a good deal—an intriguing area of patent law, the parameters of which were still unclear as of 2001, with a client who would pay hourly and provide a nice retainer. Heck, I might even help make some new law and at the same time help my client, whose farm had been in his family for over one hundred years.

My first trip to the client's farm near Milbank was to meet him, a sixtyish man of German heritage who had been a farmer all his life. He proudly took me around the numerous fields he owned or rented and showed me the homeplace.⁷ Each field had a name, kind of like a pet, based on the history of the parcel. He told me of the former FBI man who first watched him come and go from his place, then stopped and asked him if he was saving seed. He told me of his suspicions that one of his neighbors may have ratted him out for planting saved seed. He talked about pressure from Monsanto to settle the suit. He said he didn't understand what was going on as he was simply doing what he had done in the past—saving some seed from the previous year and replanting it the following season.⁸

I drank coffee with him at the local diner in Corona, South Dakota, along with ten or so other farmers. The threatened lawsuit and his problems were a big topic of conversation. Corona was clearly a one-horse, one-dog town, and like most small farm towns, its glory days were long in the past. Over the decades, fewer and fewer farmers have survived, and thus fewer and fewer farmers come into the café and drink coffee and buy supplies at the local elevator and stores. Debt, low prices, consolidation, and age have driven many of them

6. 7 U.S.C. §§ 2321-2582 (1970).

7. Out of concern for client privacy, I have decided not to mention my client's name in this essay.

8. The seed industry and groups like the South Dakota Crop Improvement Association believe, probably rightly, that "saved seeds" are inferior to scientifically developed and controlled hybrids. See, e.g., *Kussmaul Seed Company's Position on Farmer Saved Seed!*, at <http://www.kussmaulseeds.com/info/article3.htm> (last visited Mar. 1, 2004). Excerpts from the Kussmaul website lay out the case:

1. Bin run seed costs the grower more money, not less.
 - A. Tests show that new seed will almost always out-yield bin run seed.
 -
 - C. New release varieties will always be an improvement over what's in the farmers [sic] bin, whether it be improved disease resistance or higher yielding.
 -
 - F. Varieties and hybrids can lose their vigor from one generation to the next, making plants susceptible to insects and diseases.
 -
2. Pirated seed is bad for business.

out of business. Farming is a big business, an agri-business. Someone such as my client, who farmed with the assistance of a thirty-something son, was beginning to be a thing of the past, kind of like Corona itself.

A week or so after meeting him, I was back in my client's fields, bouncing along in the dirt on a four-wheeler and looking for volunteer soybean plants. Monsanto's lawyer, Jim Brown, a genteel Louisianan from a large firm in New Orleans, had made arrangements (as well as having filed an emergency discovery motion) to have an Indiana testing lab come to my client's fields. Representatives of the South Dakota Crop Improvement Association, composed primarily of biologists and professors from nearby South Dakota State University (SDSU) in Brookings, were our "neutrals" who would gather plants for analysis. The technicians from Indiana, a couple of guys in their twenties, very polite and very skilled in the sampling and cataloguing process, brought their four-wheelers to help in the gathering process. They also had freezers for the samples. Monsanto would take half of the frozen samples for analysis; my client's testing lab in Brookings would get the other half.

Just after sunrise that day, I arrived at my client's homeplace. About a half-hour later, Jim Brown, the technicians from Indiana, and the SDSU folks showed up. Jim got out of a rented sedan, walked up, introduced himself, and we shook hands. I couldn't resist commenting that he "must have purchased those boots yesterday at Wal-Mart in Sioux Falls." Meanwhile, I conspicuously displayed the toes of my well-scuffed, pull-on boots so the Louisianan could see them. Fortunately for our professional relationship, Jim Brown was too much of a gentleman to reply in-kind to my attempt at legal one-upmanship.

Our band of farmers, lawyers, scientists, and technicians then spent the next eight hours driving from field to field, gathering soybean plants. Monsanto wanted "volunteer" plants to see if they were indeed progeny of the previous year's Roundup Ready crop. They also wanted representative samples from growing soybeans to see if they too were saved seed.

My job, on this day, was to make sure the gathering of samples was done fairly. If the South Dakota Crop Improvement Association were United Nations Peacekeeper troops in the Blue Helmets, the Monsanto folks were like the Turks, and my client and I were like the Greeks on Cyprus. Instead of fighting over land, however, we were fighting over seeds, or perhaps more accurately, what was engineered in the seed.

I would get off of my four-wheeler and kick the dirt in a quest for "volunteers." I'd look at emerging plants under clods of dirt while the

scientists determined whether it was a soybean or a weed. Was this the culmination, I thought, of the years of studying I had gone through to become an IP attorney—staring at weeds in the dirt in South Dakota and getting sunburned? What would my chums in cushy IP jobs in Houston, Dallas, Seattle, and Washington, D.C. think?

However, I did not spend all of my time in the dirt during the course of this case. I had a theory. While I had read *Diamond v. Chakrabarty*,⁹ where the United States Supreme Court found that even microbes could be patentable subject matter,¹⁰ I thought that another pending United States Supreme Court case, *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International*,¹¹ would be my client's salvation.¹² In *J.E.M. Ag Supply*, the issues facing the Court were whether seeds were patentable subject matter, and even if they were, whether the PVPA, with its own scheme of limited protection, preempted the Patent Act.¹³ Why else would the Supremes take this case unless they were going to make a distinction between seeds and microbes?

Why indeed.

Later, the United States Supreme Court issued its opinion in *J.E.M. Ag Supply* and found, probably not illogically, that seeds were indeed patentable subject matter and that Congress did not preempt the provisions¹⁴ of the Patent Act¹⁵ with the PVPA.¹⁶ My defense vanished, much like a bat flying about in the moonlight. My client

9. 447 U.S. 303 (1980).

10. *Id.* at 309.

11. 534 U.S. 124 (2001).

12. I also thought that state and federal anti-trust law would be good affirmative defenses. See generally RICHARD G. SCHNEIDER & ELIZABETH C. BENTON, AMERICAN BAR ASS'N, THE ANTITRUST COUNTERATTACK IN PATENT INFRINGEMENT LITIGATION: A PROJECT OF THE TASK FORCE OF PRIVATE LITIGATION COMMITTEE AND THE INTELLECTUAL PROPERTY COMMITTEE, SECTION OF ANTITRUST LAW (1994). However, with settlement, I didn't have the opportunity to litigate these defenses.

13. Pub. L. No. 106-113, 113 Stat. 1536 (codified as amended in scattered sections of 35 U.S.C.). See DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW, § 6C[2][a] (1992). Chisum and Jacobs note, "The PVPA covers seed-bearing plants but excludes fungi, bacteria, and first generation hybrids. To be eligible for PVPA certification, the subject matter must be a 'novel variety.' The novelty requirement includes statutorily defined distinctiveness, uniformity, and stability criteria. Patent law's nonobviousness requirement does not apply." *Id.*

14. See *J.E.M. Ag Supply*, 534 U.S. at 143. The Court held,

PVPA protection still falls short of a utility patent, however, because a breeder can use a plant that is protected by a PVP certificate to "develop" a new inbred line while he cannot use a plant patented under § 101 for such a purpose.

For all of these reasons, it is clear that there is no "positive repugnancy" between the issuance of utility patents for plants and PVP coverage for plants. Nor can it be said that the two statutes "cannot mutually coexist."

Id. (citations omitted).

15. Pub. L. No. 106-113, 113 Stat. 1536 (codified as amended in scattered sections of 35 U.S.C.).

16. See *Diamond v. Chakrabarty*, 447 U.S. 303, 313 (1980). The Court parsed the distinction when it first considered the issue: "[S]exually reproduced plants were not included under the 1930 Act (PVPA) because new varieties could not be reproduced true-to-type through seedlings. . . . By 1970, however, it was generally recognized that true-to-type reproduction was possible and that plant patent protection was therefore appropriate." *Id.*

settled. My client and I are under a confidentiality agreement¹⁷ as to the details so I can not share what Paul Harvey would say is, “the rest of the story.”

Well, actually, I can tell you at least another, related story—perhaps a bigger story. I’ve been telling it in bits and pieces so far.

On a recent comedy special, I believe Bill Maher said something to the effect, “And God knows corporations need even more protection against individuals,” regarding the record industry suing individuals for copyright infringement for illegally downloading music. There’s nothing like suing the customers to build goodwill.

In addition to my work in farm fields, I do have an intellectual side. That side of me was nurtured in Houston on the principles of intellectual property law, principles speaking to me in a clear voice. Like creators of tangible property, the creators of what really gives value and meaning to life—music, poetry—as well as new economic opportunities—new processes, new products—should receive legal protection.

The classic example is that I light a candle, and then you take a candle and “borrow” my flame. I still have my flame, but you have it too. While I may have worked long and hard to get that flame to burn (think “idea”), someone should not just be able to freeload off of my hard work and innovation. That is an elegant analogy, unless you are the one riding around on a four-wheeler in the dirt on a summer day under a blazing sun looking for soybean plants. Modern societies like the United States have moved from making stuff such as cars, computers, and steel (and have moved those jobs offshore) to making dreams into entertainment or even reality in the form of video games, movies, and genetically altered plants and animals. Now does the paradigm of the candle still work?

In my client’s case, Monsanto was simply playing by the rules. It developed a “better mousetrap”—a soybean plant that can kill weeds and still withstand the popular herbicide, Roundup, which has made life easier for farmers because fewer applications of herbicides are necessary.¹⁸ There is less fuel used. There is more peace of mind. While yields may be somewhat better (my client insisted they were worse than nonRoundup Ready seeds), Roundup Ready has taken

17. Confidentiality provisions in the settlement agreements appear to be typical in these cases. See *Nipping It in the Bud* (Univ. of Tex. at Dallas, Dallas, Tex.), at http://www.utdallas.edu/~liebowitz/knowledge_goods/monsanto.html (last visited Sept. 30, 2003).

18. See MONSANTO COMPANY, 2001 ANNUAL REPORT (2001), http://www.monsanto.com/monsanto/content/media/pubs/2001/2001-Monsanto_Annual_Report.pdf. Monsanto claims that “[b]iotechnology traits, such as herbicide tolerance in *Roundup Ready* soybeans and insect protection in *YieldGard* corn, give farmers more input options to produce crops more efficiently.” *Id.* at 3. Monsanto traits help farmers “reduce[] pesticide use and expan[d] . . . conservation tillage techniques.” *Products & Solutions*, <http://www.monsanto.com/monsanto/layout/products/default.asp> (last visited Apr. 17, 2004).

over the soybean market.¹⁹ Monsanto has profited handsomely. Isn't this the American way?²⁰

The intellectual property attorney in me understands that. But was the patent law established to crush small family farmers?²¹ My client's case was not unique. Monsanto brought several other cases against individual farmers. They too have confidentiality agreements. Unlike most patent infringement suits, there was no "knock off." Farmers have simply replanted the offspring of seeds they had already planted.²² Monsanto and other companies have licensed the seed and limited its use to only one growing season.

Not being particularly religious, I would nonetheless have to ask, "If anyone owns a thing of nature, particularly a foodstuff, wouldn't it

19. See Tina Hessman, *Monsanto's Roundup Victim of Its Success: Widespread Herbicide Resistance, More Diseases*, ST. LOUIS POST DISPATCH (May 3, 2001), <http://www.mindfully.org/GE/GE2/Monsanto-Roundup-Victim.htm>. The article notes,

Roundup, a herbicide produced by Creve Coeur-based Monsanto, has been hugely successful in recent years. Since the introduction of crop plants that resist the chemical, sales of the product have skyrocketed. Roundup and other glyphosate products made up \$ 2.6 billion of Monsanto's \$ 5.5 billion in sales last year. Glyphosate is the herbicide's generic name. Farmers have flocked to the technology, buying and spraying more Roundup and planting more herbicide-resistant crops each year. Most of the beans are "Roundup Ready"—Monsanto's designation for crops that have been genetically modified to withstand herbicide treatment. Last year, 54 percent of the U.S. soybean acreage was genetically engineered. This year soybean farmers say that 63 percent of their soybean fields will be genetically engineered—most of that being Roundup Ready soybeans.

Id.

20. Monsanto contends that the "theft" of their Roundup Ready seeds hurts all farmers. See *Nipping It in the Bud*, *supra* note 17. "Scott Baucum, Monsanto's intellectual property protection manager, says when farmers illegally pirate patented biotech seed such as Roundup Ready soybeans and cotton or Bollgard cotton, everyone loses. 'Monsanto invests many years and millions of dollars in biotechnology research to bring growers new technologies sooner rather than later,' Baucum says." *Id.*

21. My dealings with Monsanto and their attorneys were professional and polite. We worked through a number of contentious discovery issues and settlement issues without any dust-ups or harsh words. However, Monsanto is not beyond playing tough. According to one report, Monsanto's attorneys in a North Dakota case wrote at least twenty-three letters to seed distributors in North Dakota and Minnesota to avoid selling their Roundup Ready seeds to Roger, Rodney, and Greg Nelson, who Monsanto was suing over saved soybean seeds. See Robert Schubert, *Monsanto Still Suing Nelsons, Other Growers*, CROPCHOICE NEWS, May 21, 2001, at <http://www.nelsonfarm.net/issue.htm>.

22. "Brown bagging" is strictly forbidden under the licensing agreements commensurate with the Roundup Ready seeds. See Wayne Board, *Monsanto May Take Legal Steps Against Catching Soybean Seeds* (Univ. of Tex. at Dallas, Dallas, Tex.), at http://www.utdallas.edu/~liebowitz/knowledge_goods/monsanto.html (last visited Sept. 30, 2003).

U.S. patent laws extend beyond the Plant Variety Protection Act, which prevents anyone from "brown bagging" seed varieties covered under PVPA. That means that growers can't save and replant Roundup Ready soybean varieties on their own farms.

When growers buy Roundup Ready soybean seed, they sign a statement on their seed order/invoice acknowledging that they will not save the soybeans.

"We believe most growers are honest business people who will not illegally save Roundup Ready soybeans," [Doug] Dorsey [Roundup Ready soybean manager for Monsanto Company] says. "But growers have told us they expect us to keep the playing field level."

"If they can't save Roundup Ready soybeans, they don't want their neighbors to save them either. We view it as our responsibility to ensure there is a level playing field."

Id.

be God"? Or at least humanity? Those are naive thoughts under the patent law of most developed nations.²³

If General Motors develops a better way of steering, the likely infringer is going to be Ford, DaimlerChrysler, or Toyota. To take advantage of that technology, it takes money and technical know-how. Even in the genetically modified seeds, intellectual property protection seems reasonable for Monsanto and other companies that develop the "technology." It seems that patent law, in particular, contemplates big fighting against bigger, if not equals. Patent fees are too expensive for some inventors. The research and development to come up with "things" like Roundup Ready soybeans is expensive. To use patent law against farmers, however, is the legal equivalent of using a hammer to kill ants. For the past several years, Monsanto has been very busy busting patent-infringing farmers.²⁴

Perhaps it is corporate structure and power that is the problem, not intellectual property law. Corporations are state-created, state-regulated entities. Even in American colonial times, there was resentment of British-chartered companies such as the British East Indies Company and the power that it accumulated.²⁵ Nineteenth-century American state law was extremely restrictive on corporate power and even on the number of corporations.²⁶

23. For example, India, a developing country, takes the opposite approach to the United States. See *Going to Seed: Farmers Rights in Patent Laws*, ECON. TIMES (Jan. 16, 2002), http://www.kisanwatch.org/eng/cur/cur_an_farmer_patentlaws.htm. The article notes,

The US Supreme Court[']s judgment upholding utility patents (there by [sic] denying US farmers the right to save seeds) over plant varieties comes at a time when, at the other end of the spectrum, India recognises the right of the farmer to save seed under a newly formulated Plant Variety Protection and Farmers Rights Act, 2001.

In the Indian context, the farmers['] right to not only save seed but also to share and sell is essential, considering that a majority of the estimated 110 million farming families comprise small and marginal landholders. In America, in contrast, agriculture is an industrial activity.

It is only a matter of time before the two diverse and diametrically opposite systems clash. The conflict that arises will surely have a profound impact on farming communities in the entire Third World. With the biotechnology industry throwing its weight behind any and every move that strengthens monopoly through a patent control over plant varieties and its genes and cell lines, it may not be long before the trade-related intellectual property rights (TRIPs) under the World Trade Organisation are reinterpreted.

Id.

24. One source puts the number of cases Monsanto has prosecuted against infringers at 475 based off of more than 1800 leads. See *Nipping It in the Bud*, *supra* note 17. Growers from twenty-one states were caught in the Monsanto dragnet. See *id.*

25. See generally Brief of Amici Curiae Community Environmental Legal Defense Fund, Inc. in Support of the Intervenors' Motion for a Rehearing En Banc at 16-18, S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583 (8th Cir. 2003) (No. 02-2366); Richard L. Grossman, *Wrestling Governing Authority from the Corporate Class: Driving People into the Constitution*, 1 SEATTLE J. FOR SOC. JUST. 147, 149-50 (2002); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987). In full disclosure, I am local counsel for the amici curiae in an appeal of a District of South Dakota's decision finding an initiated measure called "Amendment E," which limited corporate farming in South Dakota.

26. See *supra* note 25.

Today, however, the mega-corporations—the Microsofts, the Wal-Marts, the General Motors, the Enrons, the Monsantos—seemingly swallow everything in their path. As Enron and even NorthWestern Corporation²⁷ in my home state of South Dakota have shown, bigger does not always mean better. Bigger often means just greedier. All tools—particularly legal tools like IP law—are brought to bear in the name of profits—and power.

Thus, intellectual property law has become, on the one hand, just another tool in the capitalist's Gucci belt. It is, on the other hand, the means to protect the noble works of John Steinbeck, the ears of a beloved American icon like Mickey Mouse, or a lifesaving cancer drug (which, by the way, can also be used as a means to oppress those who cannot afford the drug while it is under patent, but that is the topic for another seminar and another paper).

I can not claim to know the answer to the dilemma. All I know is that I entered law school in Topeka in 1981 with a desire to help people, not hurt them. I like how I practice and who I practice with—now. My clients now are primarily people who are hurt by “the system,” “the Man,” or whatever you want to call George W. Bush's pro-corporate, anti-worker America. My clients' legal problems are not just theoretical problems to kick around in a law school seminar. They are often faced with life-threatening, life-changing, life-debilitating issues that mean the difference between dignity and dismay, hope and hopelessness, livelihood and poverty.

My current practice is approximately one-third intellectual property law, which in Sioux Falls, South Dakota, is no small accomplishment. The journey I have taken to get where I am today has been one across some bumpy personal and professional landscapes. The view from here, however, is great, much like a golden summer evening at a South Dakota farm slough, watching the ducks and geese glide across glass-like water after the day's last feeding foray. Maybe my career hasn't been extremely lucrative, but it's certainly “right” as far as my life is concerned.

But let's face it, much of the law is a sword for the mighty, not a shield for the poor. Intellectual property law is a toady—the bitch of corporations to enhance their profits and, alas, to slay their enemies, no matter how puny. Sitting on a four-wheeler in the middle of a dirt

27. A major shareholders' class action lawsuit is pending in federal court in South Dakota over the once-proud natural gas company's rip-off of investors, many of whom were South Dakota customers of the company. See *In re NorthWestern Corp. Secs. Litig.*, 2003 DSD 997. NorthWestern Corporation has also filed for bankruptcy protection. See Press Release, Glancy & Binkow, LLP, NorthWestern Corporation Securities Litigation, http://www.glancylaw.com/amazing_case_press.php?caseid=28 (last visited Apr. 17, 2004). In full disclosure, I am local counsel for Glancy & Binkow, LLP, the law firm noted hereto, that is attempting to represent at least part of the class in the pending litigation.

field on a hot summer Dakota day makes you think, "Has my journey as a lawyer and our nation's legal journey brought us to the right economic and moral decisions?" Where I sit in the dirt, I have my doubts.