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The Old Energy Bill Is New Again

Senate Revival of Last Year's Energy Bill Seems Like Good News—But It's Too Early To Tell

by Iain Murray

The last days before Congress' August recess saw some extraordinary scenes in the Senate, as this year's energy bill died, only for last year's bill to rise, vampire-like, from its grave to be passed—again—by the Senate by an 84-14 vote. With both parties claiming victory, it is worth looking at how this strange affair came about, what the prospects are for the bill in conference with the House, and what it means for American energy provision and consumption.

By the time it died, this year's energy bill, S.14, had seen only stuttering progress since its introduction. Drafted by Sen. Pete Domenici (R.-N.M.), it drew strong criticism from environmental groups and their allies in both parties because it did not include any mention of climate change, which is relevant to energy because of the prevailing theory that attributes anthropogenic global warming to greenhouse gases released during the production of energy from coal or oil. As a result of this perceived omission, the bill drew literally hundreds of proposed amendments. Many were simply "markers" from Senators who wanted the issue debated; but there were

also plenty of substantive proposals for capping greenhouse gas emissions, most notably the Climate Stewardship Act sponsored by Sens. Joe Lieberman (D.-Conn.) and John McCain (R.-Ariz.).



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The energy bill stalemate wasn't wholly unexpected. With Senators wanting to debate a wide variety of issues under the energy umbrella—including financial incentives to the nuclear industry, electricity, and tax issues—progress was bound to be slow. And it was not helped by continual pre-emption by other issues like prescription drug benefits or judicial nominations. Each side contributed to the slow progress, and the bill began to run out

of time. Majority Leader Bill Frist (R.-Tenn.) initially suggested that the Senate remain in session until the debate was finished, but as the August recess approached, the prospect of debate ever ending receded. Sen. Frist eventually decided to move for a vote for cloture to end the debate prematurely, but even this plan was to fail.

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FROM THE GENERAL COUNSEL



THE SUREFIRE LITIGATION DIET

by Sam Kazman

For the second time this year, an attempt to sue the McDonald's fast food chain for allegedly deceiving consumers into unhealthy gorging has ended in failure. On September 3, a federal district court judge in New York City dismissed an amended lawsuit that accused the company of misrepresenting its products to several teenage plaintiffs. Earlier this year, the same judge dismissed the original complaint, but gave the plaintiffs a chance to file a new, improved pleading. Now, with this latest dismissal, their gig is up.

Unfortunately, however, there are lots of other plaintiffs—and defendants—in the offing. While we might hope that this ruling marks the end of the anti-food court campaign, it's more likely to simply represent a temporary burp in that campaign's progress. The anti-fast food crusade simply has too much going for it to be stopped so quickly: an abundance of politically appealing plaintiffs (us and our children, not in that order); rich corporate defendants (the entire food and restaurant industry); and an incredibly successful business model—namely, the tobacco lawsuits of the 1990s.

In fact, the tobacco litigation campaign's most significant impact may well be not its effect on the tobacco industry or on smokers, but its creation of a template for attacking other industries. That campaign established several essential factors for these attacks, such as diminished personal responsibility and the "social costing" of products. Call a product—tobacco, casinos, burgers, cars, etc.—addictive, and the notion of individual responsibility for one's lifestyle takes a nosedive. Show that a product imposes "costs" on "society," and you unleash economists eager to calculate those costs, revenue planners devising taxes to offset them, and state attorneys general plotting to "recover" them. Throw child plaintiffs into the mix, and you've got the makings of a winning lawsuit.

The tobacco campaign also demonstrated the usefulness of having public health bureaucrats "medicalize" social issues. Once a problem is classified as an illness, we're far more likely to let government agencies take over. The tobacco wars went into high gear when the U.S. Food and Drug Administration labeled smoking a "pediatric disease." Today, obesity is not only a disease; it's an officially-declared epidemic.

Food companies are already responding—adding even more nutritional information to their websites and brochures, yanking certain products out of school vending machines, and even downsizing some of their products. But these steps do not inspire confidence. Nutritional information is the legal equivalent of a warning label: It may stave off a lawsuit here and there, but it does little to hold back a flood of litigation. Warning labels on cigarettes, for example, were federally mandated decades ago, but they had little impact on the state attorney general suits.

If fatty acid information is worth noting, then why isn't it worth noting in large letters? In large red letters? And if McDonald's knew about all the greasy calories in its burgers and fries—as evidenced by its nutritional charts—then how could it morally run ads showing happy, healthy people enjoying them?

When I was in college, I once worked in the campus grocery store, unpacking boxes and stocking shelves. One day we received a sizable delivery of cookies, but, to my pleasant surprise, the deliveryman began to place them on the shelves himself. I asked him why he did the cookie shelving while stuff like bottled jam and canned soup was left to me. "Cookie placement is real important," he said, "and this here is the prime spot." He pointed to a shelf that was about five feet off the floor. "Eye level for short, chubby coeds," he explained.

I've remembered those words ever since. And today I'd like to announce my availability to trial attorneys as an expert witness. Fees negotiable.

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Energy Bill

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On the Republican side, a variety of competing interests delayed the energy bill. First among these was the ongoing fight over judicial nominations. The leadership interspersed debate on the bill with debates over nominations that were likely to be little more than filibuster fodder. In addition, other measures to which the President attached greater importance, such as prescription drug benefits, demanded time that the leadership was willing to take from the energy bill.

On the Democratic side, Senate Minority Leader Tom Daschle (D.-S.D.) realized the game was up. He had fought

a sense of the Senate proposal warning President Clinton against submitting the Kyoto protocols for ratification—by the stunning margin of 95-0. Lieberman-McCain would institute a “cap and trade” system of permits for greenhouse gas emissions, which, although it does not go as far as Kyoto, would still cost the American economy over \$500 billion by 2025, according to the Energy Information Administration. (The bill does recognize that this would raise household energy bills, so it also establishes a new energy welfare bureaucracy which would compensate the public for the extra expense incurred.)

Lieberman-McCain is unlikely to pass, but the vote will allow the public to see just what Senators’ priorities really are—environmental fears or the American economy? There

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strongly against opposition both from Republicans and more liberal Democrats to insert a provision in the bill mandating that a certain amount of ethanol be added to gasoline in the future. With the prospect of the bill dying, he wrote to the White House suggesting a stand-alone bill on ethanol. This was too much for both the White House and the Republican leadership, who wanted to see some form of energy bill passed. It was at this point that Sens. Daschle and Frist worked out the remarkable compromise of bringing back the Democrat-drafted bill that died in conference last year.

Democrats such as Sen. Max Baucus (D.-Mont.) are happy with the outcome because it reflects their priorities far more than did S.14, while many Republicans are happy because of the boost it gives to the energy industry at a time of rising prices; but the chances of it passing without major amendment are slim. The Republicans control the conference with the House, as Sen. Domenici gleefully pointed out, and the House Republicans are generally more conservative than their Senate counterparts. The revived bill contains three titles on climate change that are unlikely to make it through conference, as well as a provision mandating energy companies to supply at least 10 percent of their energy from “renewable” sources such as wind or solar power. As Cato Institute analyst Jerry Taylor points out, the revived bill is “five parts corporate welfare to one part Soviet-style central planning.” On the other hand, Sen. Daschle’s beloved ethanol provision will probably make it through as the price for allowing the President to sign an energy bill.

However, there is one unresolved issue. As part of the deal to get unanimous consent to reintroduce a previous bill, the Senate leadership agreed to allow Sens. McCain and Lieberman to bring their Climate Stewardship Act to the floor of the Senate for an up-or-down vote. Assuming that this actually happens (Senate promises are often not worth the paper they are not written on), this will be the first time the Senate has actually taken a substantive position on climate change. The last time the Senate looked at the issue it passed

are a lot of Senators trying to ride both horses. It will be interesting to see on which one they finally end up.

Fortunately, with the main energy bill out of the way, environmental issues will have no convenient peg to hang on to and will have to fight for Senate time with other issue areas. Lieberman-McCain may be the last opportunity statist environmentalists will have to see their issues debated in the Senate for quite some time.

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COMPETITIVE ENTERPRISE INSTITUTE



U.S. Challenge to EU Biotech Moratorium will Benefit Poor Countries' Farmers

EU Responds with a Transparent Diversionary Tactic—and More Bureaucracy

by Gregory Conko

After years of waiting, the United States government announced on May 13 that it would file a formal complaint with the World Trade Organization (WTO) against the European Union's five-year-old moratorium on new bioengineered crop varieties. The governments of Argentina, Canada, and Egypt joined the U.S. as co-complainants, and Australia, Chile, Colombia, El Salvador, Honduras, Mexico, New Zealand, Peru, and Uruguay joined as third party supporters—but that didn't stop anti-biotech activists from ridiculing the move as a cynical attempt by American corporations to force biotech-derived products down the throats of skeptical consumers.

Yet, while the U.S. government was surely motivated by a parochial desire to aid American farmers, filing the complaint could, in time, yield benefits far beyond U.S. borders. Not all European consumers are opposed to biotech, so opening the EU to bioengineered foods isn't forcing food down anybody's gullet; it's simply giving consumers expanded choice.

Nevertheless, European governments have long exploited some of their citizens' fears to flout obligations they willingly assumed upon signing four different trade treaties at the culmination of the Uruguay Round of negotiations on the General Agreement on Tariffs and Trade. Consequently, successful resolution of the case should strike a blow in favor of open markets and consumer choice. And the biggest beneficiaries of this case may turn out to be not European consumers or even U.S. agribusinesses, but resource-poor farmers in less developed countries.

Access to Markets vs. Food Today

By now, many readers will be familiar with the story of Zambian president Levy Mwanawasa, who, during the summer and fall of 2002, rejected more than 20,000 metric tons of food aid from the United States in the midst of a years-long drought that threatened the lives of over two million Zambians.

Mwanawasa told audiences at the August 2002 World Summit on Sustainable Development in South Africa that the U.S. aid, which contained bioengineered corn, had not been "proven" safe, even though it had been approved by regulatory authorities in a number of countries. But, in more forthright moments, he and other Zambian government officials conceded that the bigger concern was for future corn exports to the European market, where most bioengineered crop varieties are currently prohibited.

Although the EU approved two biotech crop varieties—one corn and one soybean—for human consumption in the mid 1990s, a coalition of six countries has been able to block the commercialization of any new varieties anywhere in the EU since 1998. More than 50 bioengineered crop varieties,

including more than a dozen of corn, have been approved in the U.S.—all of which get mixed together with non-biotech varieties in the commodity stream. So, if even a little of the U.S. food aid were diverted to seed stock in countries like Zambia, it could potentially threaten the exportability of the entire corn crop and livestock fed with corn, as long as this EU moratorium is in place. In effect, the Zambian government decided that protecting tomorrow's export markets is more important than satisfying the dire need for food today.

Unfortunately, Zambia is not unique. European restrictions on biotechnology have had similar consequences throughout the developing world.

Thai government officials have been warned by European food importers not to authorize any bioengineered rice varieties in that country. Uganda has stopped biotech research on bananas and postponed their introduction indefinitely. Argentina has limited its approvals to the two biotech crop varieties that are already permitted in European markets. Even China, which has spent the equivalent of hundreds of millions of dollars funding advanced biotechnology research, has refused to authorize any new bioengineered food crops since the moratorium began.

The Ugandan example is especially troubling. Uganda's banana crop, the country's primary food staple, is suffering from years of devastation by a difficult-to-control fungus. Until recently, the government encouraged testing bioengineered fungus-resistant banana plants developed by Belgian scientists, but it backed off in the face of the EU restrictions. In Uganda, the banana should cause little worry about access to European markets. It doesn't produce pollen, so the introduced genes cannot be transferred to conventionally-bred plants. The genetic alterations are in the leaves and stem, so the fruit is not affected. And, because Ugandans eat almost all of the bananas they grow, any impact on export markets would be small. But since 90 percent of banana production takes place on small farms, the impact on food security could be dramatic.

Critics often deride bioengineered crops with built-in pest, weed, and disease resistance as helpful only for wealthy farmers in industrialized nations; but developing countries could benefit tremendously from the adoption of bioengineered crops.

As much as 40 percent of conventional crop productivity in Africa and Asia is lost to insect pests, weeds, and plant diseases. But many of the same biotech crops available in North America are already helping poor farmers in South Africa, India, China, and the Philippines combat often-voracious insect pests while reducing the amount of

Continued on next page



insecticides used or eliminating them altogether. Indeed, studies of South African and Chinese cotton growers suggest that small farmers achieve disproportionately higher benefits from biotechnology relative to their larger competitors, because expensive machinery can at times be made unnecessary. And bioengineered crops with added nutritional benefits—such as the much-touted Golden Rice and high protein sweet potatoes—are likely to be available within a few years. Tragically, few governments seem eager to allow farmers to grow these crops as long as it would mean forfeiting the European market.

U.S. Complaint Necessary

The EU moratorium persists after five long years despite copious amounts of evidence that genetic modification does not pose any risks that aren't also present in other crop breeding methods. A 2001 review of 81 EU-funded research projects conducted over 15 years found that GM crops and foods are just as safe for the environment and for human consumption as conventional crops, and in some cases are even safer because the genetic changes in the plants are much more precise.

Dozens of scientific organizations, including the United Nations' Food and Agriculture Organization and World Health Organization, have studied bioengineering techniques and given them a clean bill of health. And in December, the French Academies of Medicine and Science called for an end to the EU's moratorium.

Given all this evidence supporting the safety of biotechnology, the U.S. government could have gone to the WTO years ago. But, at least in part, it was the cascading side effect of EU market restrictions inducing other countries to enact similar restrictions that finally motivated the U.S. government to bring its claim, charging that the EU's failure to even consider two dozen pending biotech variety approval applications—many of which had been approved by the relevant European scientific committees—was a *prima facie* violation of the EU's treaty obligations.

The complaint's May filing by the U.S. Trade Representative initiated a 60-day "consultation" period in which the United States and its allies would attempt to negotiate a resolution to the *de facto* European ban. When that failed, the U.S. formally requested in July that the WTO establish a dispute resolution panel to adjudicate the dispute—a process that could take upwards of 18 months.

Biotech Prohibition by Other Means

In its defense, the EU has noted that it is now in the process of ending the moratorium—which it will do as soon as it can finalize new approval regulations and once member nations implement labeling and traceability rules. So is the Bush Administration risking a consumer backlash at a time when the moratorium's end is within sight? Hardly. The EU's assertion glosses over three important facts.

First, as of August 2003, 11 of the 15 EU member countries had not yet implemented the new biotech rules,

missing an October 2002 deadline and forcing the European Commission to threaten legal action against its own members. Why the delay? Fierce political debates still rage over how governments can ensure the so-called "coexistence" of biotech, conventional, and organic crops. With no end to this debate in sight, how close are they really to ending the moratorium?

Second, the new labeling and traceability rules are hardly an improvement on the current situation. The "traceability" rule would require every single link in the long food supply chain—from seed breeder, to farmer, shipper, processor, and retailer—to keep a paper audit trail of every single biotech crop variety received and sold. For example, if a particular processed food, such as ketchup, were made from a variety of biotech tomatoes, oil derived from three different varieties of biotech canola, and corn sweetener from a dozen different biotech corn varieties, the processor, packager,

and retailer would all be required to track all sixteen bioengineered ingredients, and then do that for every single food product they receive and/

or sell. Growers and sellers of *non*-biotech foods would also have to bear the cost of testing for the accidental presence of bioengineered organisms at every step, lest they unwittingly pass along trace amounts of biotech ingredients. Even if industrialized countries like the United States, Canada, and Australia could comply, the labeling and traceability rules' added cost and complexity would shut poor developing countries out of the system for good.

Finally, special regulations based solely on the process used in a product's creation are just as illegal under the terms of WTO-enforced treaties as is the current moratorium. So, the new biotechnology rules don't even serve to bring the European Union into WTO compliance. Nor are they needed, since voluntarily labeled non-biotech foods can be found in almost every shop in Western Europe, giving consumers the choice European politicians claim as their primary goal.

Studies of consumer behavior show that, where both labeled biotech and non-biotech foods are available, most European consumers seem indifferent to the "genetic status" of the foods they purchase. Only 3 to 4 percent of consumers actually read the ingredients list and then reject products that include bioengineered components. The best possible scenario for all involved would be to end the moratorium immediately and give consumers genuine choice.

The EU's blatant flouting of scientific assessments is why a WTO challenge is likely to succeed. And the fact that less developed countries are most likely to benefit is why the Bush Administration was right to file it. A decision by the 146-member World Trade Organization would send an important signal from the international community that the EU's groundless and genuinely harmful biotechnology restrictions must go.

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European governments have long exploited some of their citizens' fears to flout obligations they willingly assumed



Q & A with C.S. Prakash:

A Leading Expert on Agricultural Uses of Biotechnology Talks about Biotech's Promise for Feeding People around the World—and the Irrational Fears Holding the Technology Back

Dr. C.S. Prakash, professor of plant genetics at Tuskegee University in Alabama, spoke with CEI recently about his efforts—and what other scientists can do—to counter unfounded fears about biotechnology. At Tuskegee University, Dr. Prakash oversees research on food crops of importance to developing countries and the training of scientists and students in plant biotechnology. He is a co-founder, with CEI's Gregory Conko, of the AgBioWorld Foundation, a network organization that brings together scientists and members of the policy community interested in agricultural applications of biotechnology. Dr. Prakash's "Declaration in Support of Agricultural Biotechnology" has received endorsements from over 3,300 scientists from across the world, including 22 Nobel laureates, such as Dr. James Watson, Dr. Peter Doherty, and Dr. John Boyer—and Nobel Peace Prize winners Dr. Norman Borlaug and Oscar Arias Sanchez.



CEI: What first sparked your interest in doing research in using agricultural biotechnology?

Prakash: I began by studying agriculture in India, then gravitated toward majoring in genetics after hearing a lecture by Dr. M.S. Swaminathan, who was responsible for India's Green Revolution. He helped boost agricultural productivity tremendously with high-yielding varieties of crop plants. I have since been a geneticist and plant breeder. In the mid-1980s, when I finished my Ph.D., biotechnology was on the horizon. Because biotechnology tools represented a logical continuum of the methods we had been using to improve crop plants, it was a natural progression for me to learn these techniques so I could to apply them to my research. I didn't see them as radical, but as a new set of tools in our arsenal to improve varieties of crop plants

CEI: You begin your chapter in *Global Warming and Other Eco-Myths* by quoting former Greenpeace UK director Lord Peter Melchett, who says that Greenpeace's opposition to biotechnology is "a permanent and definite and complete opposition based on a view that there will always be major uncertainties." Why do radical environmentalists refuse to accept that all innovations which benefit consumers involve uncertainties and risks? What is the best way to counteract their arguments that all risks are unacceptable?

Prakash: I think that radical environmentalists have a political agenda rooted in their own self-survival, and it is fueled by fear-mongering in order to appeal to a broad audience. Food is fundamental to our existence, and people genuinely care for the environment. Therefore, the attack on biotech crops can appeal to both those interested in food safety and those interested in environmental sustainability. Practically all radical environmentalists have targeted big business and capitalism, so when genetically modified (GM) crops were introduced, especially in Europe, radical environmentalists could combine food safety concerns, environmental concerns, and fears about globalization to create a platform and attack GM foods. It was very easy and very

convenient.

CEI: In the book, you include a detailed analysis of how labeling requirements for biotech products could actually reduce consumers' access to factual information about food safety. What is the optimal way to ensure that consumers receive the best possible safety information about food choices in the marketplace? What role should regulators play in that process?

Prakash: The labeling system we have in place here in North America provides accurate information about verifiable contents. It is an excellent approach. Consumers must understand that biotech food has been subjected to intense scrutiny by regulators and is as safe as the non-biotech derived food products. And they could be provided with other sources of information, such as a 1-800 number or website address—like McDonald's, where, if I wanted to find out the number of calories in a hamburger, there is always a way I can get it.

However, just labeling GM foods as "GM foods" is discriminatory, because, historically, we do not label a new product if it is nutritionally the same as other products. For instance, if you had a bowl of cereal this morning, you would have no idea what variety of corn was used to produce this product, how the corn was produced, where it was grown, or what chemicals and pesticides were used on it. If companies suddenly started using another type of corn, you would not know—it wouldn't matter from a nutritional, taste, or safety point of view. But if you were to put a big label on the cereal as being a GM-modified food without corresponding information about what it means—in a climate where GM is attacked by activists—it would be like putting a skull and crossbones on the product.

On the other hand, if that product contains nutritionally enhanced ingredients—high-protein corn or heart-healthier oil—then of course it



must be labeled with details on how it was produced. We have a very sensible, pragmatic labeling system in this country that protects consumers and ensures that buyers are not subject to fraudulent, unverifiable claims. They really don't have this kind of system in Europe.

CEI: You conclude your chapter by highlighting the disconnect between anti-biotech activists from NGOs in less developed nations, like Vandana Shiva, and actual farmers in those nations. What can the public and policy makers in wealthy nations do to help give those farmers a voice?

Prakash: Begin by stop funding the activists who are anti-development, anti-progress, and anti-technology, because these radical activists in developing countries, who are hell-bent on stopping the infusion of any technology that helps in development, are really playing into the hands of donors from the West—maybe some governments or even individuals who fund them.

Secondly, these donors and policy makers in developing countries must understand that agriculture is the backbone of most developing countries, employing a majority of the work force and contributing a major share to the GDP and exports of these countries. One cannot develop agriculture with superstition and fear-mongering, but rather by embracing helpful technologies and adopting other policy initiatives that have worked. Some of these initiatives include ensuring that there is a good infrastructure, credit, and free, more open market systems—these are all true and tested instruments.

Many countries, such as the United States, Canada, and Australia, which are really the breadbaskets of the world, have increased productivity almost a dozen-fold compared to what they grew 100 years ago. This is not by happenstance, but rather a concerted effort to make sure we have the highest innovation in science and technology. Activists want to take us back in time

by insisting upon primitive farming practices instead of using available modern technologies. Buzzwords like “sustainable agriculture” are merely euphemisms for primitive agriculture, which has sustained nothing but hunger and misery.

CEI: In your May 13, 2003 *Wall Street Journal Europe* op-ed, coauthored with CEI's Gregory Conko, you note that the European Union's (EU) new biotech labeling and traceability rules will harm less developed nations much

Buzzwords like “sustainable agriculture” are merely euphemisms for primitive agriculture, which has sustained nothing but hunger and misery.

more severely than it will harm the U.S. because poor farmers cannot afford the compliance costs. Why do so many European regulators fail to understand their rules' impact on poor farmers around the world?

Prakash: I see arrogance and self-righteousness in the EU's attitude toward agriculture and food and its non-scientific approach to regulation—it has clearly harmed them. One can see this over the past 20 years with the massive scares, including mad cow disease, foot and mouth disease, and dioxin. They place much emphasis on process-based and non-science-based regulation in Europe, as with traceability and GM labeling.

Taking rice grown in India and exported to Europe as an example of how European regulations harm farmers in developing nations, the Indian Basmati rice exported to Europe is grown on small- to average-sized farms. The average farm in the world is less than two acres. A sack of rice that ends up at Tesco's (British supermarket chain) has been drawn from hundreds of little farms, transported by bullock carts to market, stored in community grain bins, and then processed in a

different place. So, according to the correct traceability regulation, if you wanted to follow this sack of rice from where it was grown to all of the points it has traveled, it would simply be ridiculous, especially in a developing country.

CEI: When United States Trade Representative Robert Zoellick announced the U.S. case against the EU's biotech restrictions before the World Trade Organization (WTO), he asked you to formally present your petition of 20 (now 22) Nobel Laureates and over 3,300 other scientists in favor of biotechnology. What did you stress during your presentation at the USTR's announcement? How did the farmers from less developed nations who discussed their experiences with biotechnology help you drive those points home?

Prakash: I had along with me a farmer and a professor, both from South Africa, and a scientist from Mexico. They all essentially said that this technology is not something to fear, and it presents a safe method of improving agriculture and enhancing our food supply. By placing restrictions on this technology, it will be the people in the developing world who will lose the most. It is in the developing world—countries in Sub-Saharan Africa, Asia, and Latin America—where hunger and poverty persist. There is little rain, poor soils, and increased use of chemicals to control diseases and pests, which can cause environmental harm if they're misused. This technology would obviate many of these problems. But European reluctance to accept the fruits of this technology has driven most developing nations to go slowly with biotech or put a moratorium on growing biotech crops. We have a petition on the AgBioWorld Foundation's web site (www.agbioworld.org), which has broad support from scientific community across the world. It says that GM is a safe method to grow our food and will contribute much to the well-being of humankind.



A Micro View of Copyright

Why Piracy Doesn't "Feel Like" Stealing

by Solveig Singleton

A thorn defends the rose, harming only those who would steal the blossom.

-Chinese Proverb

You can complain because roses have thorns, or you can rejoice because thorns have roses.

-Ziggy

On September 8, the Recording Industry Association of America (RIAA) announced 261 lawsuits against individuals—many of them

These differences are substantial, particularly in the area of enforcement methods. Physical property crimes are dealt with by the public prosecutor in criminal tribunals. Copyright, on the other hand, has relied to a great extent on private enforcement and civil penalties.

Intellectual property (IP) creates the same incentives as a system of physical property rights—but the problem of enforcing copyright law is very, very different from enforcing physical property law. These differences explain

else will get there first. The result is that the commons turns into a bare wasteland. Property boundaries let property owners keep others out, and save resources for later uses. The first property claim is the first step in a creative process that ultimately leaves everybody in society better off. The argument works just as well for copyright.

So why the differences? Although the laws of physical property and IP serve a similar function in making markets, they have a very different

The theft of physical property is much more likely to occasion a "breach of the peace" than is the making of an illicit copy of a book, movie, or recording.

college students—who allegedly pirated music files online. But college students and even some legal scholars just do not see downloading pirated music as theft. For example, my brother-in-law reports that he is the *only* student he knows at his university who thinks it is wrong to download music online. Why? This essay offers a partial explanation.

Several pundits, most notably University of Chicago Law Professor Richard Epstein, have argued persuasively that copyright law is as important to the growth of markets in music, literature, and movies as physical property law is to markets in goods and land. But if this is so, the differences between copyright and physical property law pose a puzzle.

the different history of enforcement methods.

Avoiding the Tragedy of the Commons

Let's start at the beginning of the argument. Richard Epstein argues that intellectual property is different from physical property, but not *that* different. Both intellectual and physical property claims can be justified because they create incentives that make us all better off. This is another version of the familiar constitutional "we need copyright for incentives" argument.

Physical property rights end the threat of the tragedy of the commons. When there are no property boundaries, everyone hurries to strip the commons of its resources—or someone

enforcement history. The usual penalties for violating copyright law have traditionally been civil fines, not criminal charges—so the costs of policing copyright violations have been largely borne by the private copyholders, not by the public prosecutor. (However, in recent decades, the growth of criminal copyright law has begun to change that.)

The tendency to view copyright violation as a civil rather than a criminal matter stems from a simple social fact: The theft of physical property is much more likely to occasion a "breach of the peace" than is the making of an illicit copy of a

Continued on next page



book, movie, or recording. Climbing over somebody's fence to steal her apples may result in a gun fight in the orchard in the dead of night. This difference is crucial.

Preventing violence must be a top public priority of a stable society. But a copyright violator is likely to make an illicit copy at a place remote in time and space from the offended original creator. And the creator, because it leaves him with his own

costs of public prosecutions are held down. But with intellectual property, the copyholder faces no immediate danger or necessary deprivation from copying. The possibility emerges that copyholders will take only incomplete measures—such as flimsy encryption—to prevent illegal copying in the first place, and shift all the policing costs onto the public.

However, this is probably a theoretical risk only. There are unlikely

ground rules that make markets for granted. Terms like “property” and “contract” have an archaic air to them where high technology is concerned, but creative wealth cannot flourish without them.

The best solution available so far is to keep software innovation free and flourishing, so that reasonably effective digital locks can help with the job of making markets. Decisions like that of the French court which

There are unlikely to ever be enough prosecutions to secure the copyright holder's market. Numerous studies show that effective deterrence has more to do with the frequency of enforcement than the severity of penalties.

copies intact, might not even notice. If the copy is made by someone who would never be able to afford to pay for a legal copy, it does not directly affect the creator's sales (though it does affect the size of his potential market). So, at the macro level, the argument about the need for property rules to create incentives is roughly the same for physical property and IP, but at the micro level the problem of conflict resolution is very different.

This helps explain why a lot of ordinary people—college students and peer-to-peer fans generally—feel differently about illicit copying than they do about stealing physical property, and why harsh penalties for illicit copying strike many as unreasonable or unfair.

It also points to a benefit of keeping policing costs on the copyholders rather than shifting them to a public prosecutor. When there is a physical theft, there is always the inconvenience to the property owner of having to find a replacement, in addition to the danger of the physical intrusion itself. So we can trust the owners of physical property to take reasonably competent steps to lock their stuff up. That way, the

to ever be enough public prosecutions to secure the copyright holder's market. Numerous studies of deterrence—such as those by tax lawyer Brian Erard and Erasmus University Rotterdam (Netherlands) Professor Dick Hessing—show that effective deterrence has more to do with the frequency of enforcement than the severity of penalties. A law with a light penalty that is consistently enforced is a far more effective deterrent than a law that is enforced only in a few token cases, even with severe penalties. So copyholders for the most part will have to enforce their own boundaries to make their own market.

Innovation is the Best Solution

As more and more of our vital communications are carried over remote electronic links and IP becomes more and more important to the economy, electronic “breaches of the peace” might potentially be as destructive as physical ones. Things could get nasty, with viruses embedded in MP3 files and endless wars between hackers and coders.

But if more and harsher criminal penalties for copyright won't work, where does that leave us? It does point to a grave need to stop taking the

ruled that copy protection makes a computer disk “defective” are absurd. Not every change in the way goods are packaged is perfectly beautiful or fair. But changes that support markets are linked with the advance of technology—and civilization itself.

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The Good, the Bad, AND THE UGLY

The Good: EPA Acknowledges It May Not Regulate CO₂

On August 28, the Environmental Protection Agency (EPA)—reversing a 1998 Clinton administration position—denied a petition by leftist environmentalist groups to declare carbon dioxide (CO₂) a pollutant under the Clean Air Act (CAA). EPA’s decision frustrates the attempts of radical environmentalists and the attorneys general of Maine, Connecticut, and Massachusetts to implement the Kyoto-style standards. As a result of the decision, the Bush Administration will not be able to use the CAA to set emission standards for motor vehicles and power plants.

EPA acknowledged that Congress has not granted it authority to regulate carbon dioxide and other greenhouse gases for climate change purposes. The AGs and environmentalists had wanted carbon dioxide listed as an air pollutant, which the CAA defines as “any substance or matter which is emitted into or otherwise enters the ambient air.” If CO₂ were classified as a pollutant, environmentalists would be one step closer to implementing their radical agenda of energy rationing, and the AGs—who filed a separate suit in a federal District Court in Connecticut this past June—would gain broad new prosecutorial powers, as formerly law-abiding businesses that emit carbon dioxide would instantly become criminals.

Thankfully, EPA quashed the dreams of both groups. And, as CEI senior fellow Marlo Lewis, Jr. points out, EPA’s decision is sound. “The CAA...authorizes EPA to administer a national ambient air quality standards program, a hazardous air pollutant program, a stratospheric ozone protection program, and so on,” he says. “Nowhere does it even hint at establishing a climate change prevention program.”

The Bad: Failure to Deregulate Electricity Catches Up to Us

Late in the afternoon of August 14, millions of Americans and Canadians found themselves without power, from New York City to as far north as Toronto and as far west as Detroit. The massive power failure—the biggest in North American history—exposed the inadequate state of the nation’s energy infrastructure. Unfortunately, statist politicians have used the blackout to rail against deregulation rather than seek sensible solutions to prevent future power failures.

Within hours of the blackout, Sen. Hillary Rodham Clinton (D-N.Y.) bashed the Bush Administration for pushing energy deregulation and for its alleged ties to bankrupt energy company Enron. Meanwhile, Sen. Charles Schumer (D-N.Y.) ranted: “There is a very simple solution: the grid should be national and governed by not by the utilities and not by certain states which have their own parochial interests...it should be governed by the federal government.”

However, notes CEI President Fred L. Smith, Jr., it was the *incomplete* nature of deregulation that made the conditions ripe for the blackout. “What we did was we deregulated the generation capacity. We created a freer market in that area, but we left the grids totally regulated, and the effect of that was essentially to create one wheel spinning very, very quickly and the other wheel gummed up in bureaucratic regulation,” he says. “The effect of that was the increased demand. It’s a rigid system. And we had the blackout.”

THE UGLY: DEMOCRATS PILE ON BUSH EPA NOMINEE

On August 11, President Bush tapped Utah Governor Mike Leavitt as his choice to head the Environmental Protection Agency. Democratic presidential hopefuls have since been stepping all over each other to attack Leavitt and, by extension, the Bush Administration’s environmental record. It would appear that, if the Democrats on the Senate Environment and Public Works Committee have their way, we could be in for a long confirmation process as they pontificate about Bush’s alleged environmental failures.

“President Bush has the worst environmental record in history,” said Sen. Joe Lieberman (D-Conn), who sits on the committee. “The American people deserve to know whether Governor Leavitt shares the same disregard for clean air, clean water, land conservation, and global warming as the president.” No doubt he will use the hearings to promote his “Climate Stewardship Act,” designed to impose a Kyoto-style emissions trading scheme on the United States. Sen. John Kerry (D-Mass.) proclaimed: “While none of us should be surprised that President Bush has chosen someone who has a record of working to undermine national environmental protections, the truth is that we aren’t going to have a real commitment to the environment until we have a new President.”

Unfortunately, we can expect similar pronouncements as the Leavitt confirmation process goes forward. As CEI senior policy analyst Ben Lieberman points out: “No matter what it does, the current administration will be attacked by Democrats and their allies as anti-green.”



Director of Risk and Environmental Policy Angela Logomasini highlights the unfairly distributed costs of the Superfund toxic cleanup program:

The Superfund tax was created as part of the nation's law to clean up contaminated property. The monies collected were designed for a special fund, euphemistically called "the Superfund."

The Environmental Protection Agency was then to use this money to clean up waste sites. The tax for this fund expired in 1995, but the fund is only now beginning to run low.

Unlike the polluter pays principle, this tax rested on a different principle, which could be called the "tax the innocent principle." This principle allows the government to take money out of the pockets of innocent parties to line the pockets of regulators. Under the "tax the innocent principle," chemical and petroleum businesses are punished for the "sin" of being part of industries that environmentalists don't like. It has nothing to do with their individual actions.

- *Atlanta Journal-Constitution*, September 5

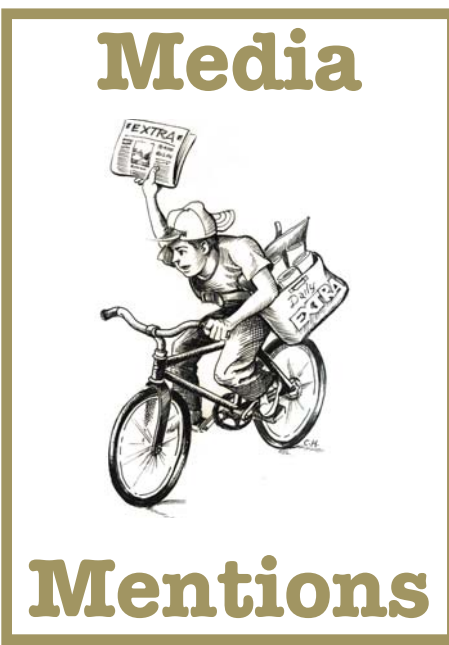
President Fred L. Smith, Jr. and Senior Fellow Iain Murray suggest finishing the job of electricity deregulation in the wake of the summer's historic blackout:

The massive blackout that shut off lights along the East Coast, Midwest, and Canada need not have happened. Yet, because it did, it provides us with a stark warning about how we have allowed minor issues to distract us when it comes to energy generation and distribution. Our economy, lifestyles, and prospects rely on access to energy. But we won't let the electric companies function like normal businesses. Much of North America has grown profoundly anti-energy over the past few years, despite our dependence on it. We don't want nasty power plants, new or old, to pollute the countryside and rivers. We don't want unsightly electricity transmission lines spoiling the view. And we certainly don't want greedy power companies making a profit from giving us all the power we need for our air conditioning, refrigerators, and SUVs. So we've tried to regulate them away.

- *The Wall Street Journal*, August 19

Director of Food Safety Policy Gregory Conko and Senior Fellow Henry I. Miller explain regulatory barriers to agricultural biotechnology and why Europe is falling behind:

Regulatory officials in the European Union seem to be ignorant of the rule of holes: When you are in one, stop digging. Numerous analyses over the past two decades have documented Europe's declining competitiveness in agricultural biotechnology—the use of genetic modification to improve plants, animals and micro-organisms. Recently, for



example, the European Commission's Joint Research Centre reported that two-thirds of large European companies that had been involved in developing GM crops had cancelled substantial projects since 1998. Yet the EU seems determined, through its unscientific, unwise and unproductive approach to regulation, to let the sector fall further behind.

- *Financial Times*, August 14

Senior Fellow Christopher Culp explains the legitimate use of derivatives by corporate risk managers:

Derivatives are financial instruments whose payoffs are based on the performance of an underlying asset, reference rate, or index. Popular types include futures, forwards, options, and swaps. Like all financial instruments, they create potential benefits and risks for their users.

Rather than calling derivatives weapons of mass destruction, we might equally describe them as smart bombs that corporations can use precisely to remove unwanted risks. In most cases, the risks to which a business is naturally exposed are greater than the risks that shareholders perceive as essential to running that business. Derivatives can be used to surgically remove non-essential risks.

- *Financial Times*, August 12

General Counsel Sam Kazman reviews a former New York Times reporter's attack on Sport Utility Vehicles:

SUV critics hold consumers in contempt. Talk about stupidity! What kind of idiot would pay thousands of dollars extra for a poorly designed, uncomfortable, unsafe vehicle that guzzles gasoline and hogs the road? What kind of country would raise so many of these idiots that, in the span of two decades, this vehicle would go from a minuscule market share to nearly one quarter of all new auto sales?

The vehicle, of course, is the sport utility vehicle, and we are the nation of idiot SUV owners. This is the gist of Keith Bradsher's *High and Mighty: SUVs: The World's Most Dangerous Vehicles and How They Got That Way*. Bradsher, a *New York Times* reporter who covered the auto industry for over five years, has written a breathtaking book—breathtaking in the array of arguments he offers against this vehicle, the industry that makes it, the people who buy it, the society that allows them to buy it, the planet that contains that society...you get the picture.

In Bradsher's view, the SUV is a menace to both its occupants and other drivers. Its design is outdated and inappropriate; its size, looks, and four-wheel drive bring out the worst in drivers; it clogs streets and fouls the air. Worst of all, its fuel economy is socially unacceptable.

- *Reason*, August 2003



Poor Workers 1, Rich Liberals 0

WETA, the Public Broadcasting System's flagship station, recently lost a fight to keep a public pavilion to house day laborers out of its neighborhood. "We do not favor this option. It would absolutely complicate our lives and make it difficult for our employees and our guests," WETA President and CEO Sharon Percy Rockefeller—wife of Sen. Jay Rockefeller (D-W.Va.)—told the the Arlington County, VA board. "I don't think it's going to be a very open and welcoming environment for very high office holders in the United States."

...END NOTES



FDA Drops Olestra Warning Mandate

On August 1, the Food and Drug Administration (FDA) dropped the requirement for companies that sell snack foods containing the fat substitute olestra to put labels on those products warning about digestive problems, following a review of new scientific data. FDA mandated the labels in 1996 following a campaign against olestra by the Center for Science in the Public Interest (CSPI)—which also constantly attacks food companies for marketing fatty foods. CSPI Executive Director Michael Jacobson called the FDA decision "a mistake that will inflict needless misery, inconvenience, and embarrassment for countless Americans." But, says George Pauli, associated director of FDA's office of food additive safety: "We found that most studies couldn't even detect a difference from regular chips. The effects that were reported were mild and really didn't have an effect on people's lives."

had no effect on my health. This controversy is more political than scientific."

Activists: No Flush Toilets for the Poor

Activists at the First International Dry Toilet Conference, held August 20-23 in Tampere, Finland, called on developing nations to eschew modern plumbing in favor of dry composting toilets because of potential environmental impact. Larry Warnberg, a featured speaker at the conference who sells manuals on how to build a dry toilet, told *CNSNews.com*: "I think it's a mistake to inflict that convenience on a developing country without realizing what the consequences are." Consequences like sanitation perhaps? As CEI Senior Fellow Christopher Horner notes: "Dry sanitation is oxymoronic because it is not sanitary at all." And, by Warnberg's own estimate, the cost of materials for a do-it-yourself dry toilet is around \$1,000.



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