

Smörgåsbord



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Editor

**Max-Emerge Planter
Patents Ruled Invalid**

Just about everything John Deere had going for it with its popular and highly profitable Max-Emerge planter was literally "tossed out the window" last month in a bold gamble by the "green giant" that backfired.

The gamble: To take Kinze Mfg., a small Iowa firm headquartered near Williamsburg, to court to settle once and for all a 7-year battle centering around Deere's best-seller Max-Emerge planter.

Ignoring an out-of-court settlement agreement drafted a year ago whereby Kinze would have paid Deere more than \$1 million annually in royalties under a licensing agreement, Deere's top management elected last fall to abandon the agreement and asked for an immediate trial on patent infringement. Kinze then promptly pursued its anti-trust suit already on file, charging that Deere had misused its Max-Emerge patents by "manipulating the supply of Max-Emerge planter units to produce contrived shortages".

Kinze Mfg., the David in this case, literally slew Deere, the Goliath, emerging the big winner last month in Federal Court. Following a four-week jury trial which began last March 7, Federal Judge Edward McManus ruled, based on the nine-member jury's recommendations, that four of the five patents which Deere holds on the Max-Emerge are invalid, and that the fifth patent is unenforceable. This means that, unless Deere's appeal is successful, the Max-Emerge and all its patented features is now up for grabs. It's generic. Any company or individual — including you — can copy any or all of its features for commercial use. Competitors are free to pick and choose whatever Max-Emerge features they feel will improve overall performance of their machines, without paying any heed to patents.

The antitrust suit, which went to court following the patent infringement trial, involved a lot of money. Kinze Mfg. was asking for \$2.3 million in damages which, if Kinze won, would have automatically been tripled, thus pushing Kinze's total possible damages, with attorney fees, to upwards of \$7 million. The trial was only two days old when Deere's lawyers made Jon Kinzenbaw, 38, president, founder and owner of Kinze Mfg., an out-of-court settlement he couldn't refuse. Terms of the settlement are secret but some of his neighbors in Williamsburg are speculating that the grin on Kinzenbaw's face is a multi-million dollar smile.

The Deere-Kinze dispute dates back to 1976 when Kinzenbaw, then 31 years old and owner-operator of a small machine and tractor-repowering shop which he'd launched after graduating from high school, invented a revolutionary tool bar which accommodates from 8 to 36 row units, yet folds horizontally — right from the

tractor seat and without having to remove any row units — in seconds to a narrow, 14.5 ft. for transport. It's generally conceded among farmers that Kinze Mfg. has the best corn-soybean planter tool bar on the market, and that Deere's Max-Emerge is far and away the best corn-soybean planter unit, accounting for well over 80% of total annual planter sales.

What seemed to be the perfect marriage of the best tool bar and best planter unit eventually snagged when Deere, which had been supplying Kinze Mfg. with Max-Emerge units, said it could no longer make "unassociated" row units (those sold separate from Deere's own tool bar) available because of a supply shortage. This forced Kinze's customers to buy complete Deere planters which they then stripped of the row units, leaving them with an expensive Deere tool bar they didn't need or want, according to testimony recorded in court documents.

In April 1977, Kinze Mfg. filed suit charging Deere with violation of the Sherman (anti-trust) Act and the Clayton Act, alleging an illegal tie-in (forcing farmers to buy complete Deere planters when all they wanted was the Max-Emerge units). The issue was settled out-of-court, with Deere agreeing to pay Kinze \$60,000 and to deliver 2,000 row units which Kinze had had on order. Deere also agreed to permit its dealers to place orders against their distribution for "unassociated" row units, which they hadn't been able to do previously.

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That agreement fell apart in Feb., 1979 when Deere told Kinze that his order for 5,000 row units for the 1980 planting season was being turned down because of a shortage of Max-Emerge row units.

Recalls Kinzenbaw: "Deere admitted they had row units available and even reserved for Kinze, yet had refused to sell us units unless we agreed not to sue Deere for any violations of the anti-trust laws that may have occurred since the 1977 Settlement Agreement. This we refused to do. We felt that their so-called shortage was contrived, and that Deere's decision to cut us off left us with only two alternatives:

"1. We could throw in the towel and get out of the planter business since, without Max-Emerge units we had previously been able to buy, there was no longer a viable market for our Kinze tool bars.

"2. The other alternative was to go way out on a limb and attempt to produce our own deliberate carbon copy of the Max-Emerge unit. It had to look and operate like Deere's Max-Emerge if we were to produce them ourselves as proof that their so-called shortage was contrived. Also, copying the Max-Emerge assured our customers that Kinze planter units were proven performers and could go right from our assembly line to the field, and that parts availability wouldn't be a problem since our parts were identical and completely interchangeable with Max-Emerge parts. In deliberately copying the Max-Emerge, we wanted farmers to know that the reason for the shortage of Max-Emerge planters units was Deere's large share of the market, and the exorbitant prices that shortages cause," Kinzenbaw told FARM SHOW.

Fired up by his conviction that Deere's alleged shortage of row units was contrived, and which if true would represent misuse of the patents and put Deere in violation of anti-trust laws, Kinzenbaw set out on the seemingly impossible task of putting together the capital, facilities and tooling to have "carbon copy" planter units rolling off the Kinze assembly line by Feb., 1980.

"Looking back, I'm convinced that Deere completely underestimated our ability to pull it off. But

we did and, in the process, got a crash course in corn planter engineering," Kinzenbaw recalls. He produced right at 4,000 row units for the 1980 planting season, 6,500 for 1981, 10,000 for 1982 and another 10,000 units for 1983.

While the Kinze row units are exact duplicates of the Max-Emerge mechanically and functionally, they are, and always have been, distinctly different in appearance, being colored black and white and carrying the Kinze logo.

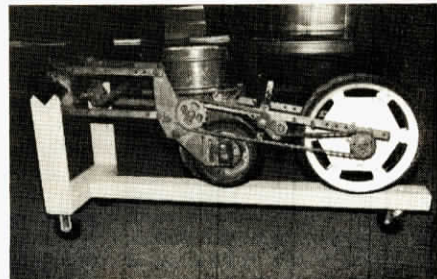
In February 1982, Deere and Kinze were slated to go to trial in Federal court on the 1980 lawsuit involving Deere's patent infringement claims and Kinze's antitrust claims. However, a few days before the scheduled trial, both parties agreed to an out-of-court settlement which had all the earmarks of finally ending the long dispute. Here's a recap of what Deere officials had going for the company under this 1982 agreement which Deere late last year elected to abandon:

- Kinze had agreed to drop the antitrust suit and to pay Deere a substantial royalty — more than \$100 per row unit produced, according to documents considered by the court in August, 1982. Based on Kinze's production of 10,000 units produced annually, Deere would have collected more than \$1 million annually in royalties. What's more, the \$100 royalty assured Deere that Kinze wouldn't be able to substantially undersell Max-Emerge units.

- Deere's Max-Emerge patents would have remained unchallenged and thus still valid, keeping competitors out of the marketplace.

- Deere's pending patent infringement suit against International Harvester and its Cyclo planter would still be "live" and worth pursuing.

"It'll go down as one of the most colossal blunders in the history of agricultural industry," predicts Kinze's attorney James Hill, of Deere's decision to abandon the 1982 agreement and thus put all of its Max-Emerge patents and Kinze's antitrust claims on the line. "It was a greedy and costly gamble on the part of Deere's top management. They ended up getting their corporate knuckles and pocketbook rapped on the antitrust issue, and they've jeopardized one of Deere's most valuable assets — the Max-Emerge planter," according to Hill, a member of the law firm of Emerich, Lee, Brown and Hill of Chicago, who has represented Kinze on patent issues since the Deere-Kinze dispute began some seven years ago.



Deere's appeal will center on the PUST patent. Photo shows the Oliver 340 planter unit which Pust modified by moving the gauge wheels back 2 in. (note old and new mounting and adjustment slot). "We'll be telling the appeals court that this slight modification doesn't constitute new invention and that the Pust patent, along with the other four, covering the Max-Emerge, should be declared invalid," says Kinze's attorney James Hill.

Here are the five key patents covering the Max-Emerge and, excerpted from court documents, the jury's findings on each of them:

1. The KEETON patent (expires March 10, 1984) — Invented by Eugene Keeton, of Trenton, Ky., it covers the mechanical finger-type mechanism. "The engaging of seed by means of gripping fingers, sliding the seed along a relatively stationary plate, and forcing the seed through an aperture." The jury ruled it invalid because it had been described in print more than one year prior to application, a violation of the patent law, and because it

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