

PLANT PATENTS, TRADEMARKS, AND OTHER VARIETY PROTECTION DEVICES

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What is a patent? Why do we have patents? What can be patented? What do you mean by a plant patent? All of these are questions of interest to plant breeders and plant propagators. Today I will give you a few answers I hope may clarify these questions and stimulate your interest in plant patents and other forms of breeders' rights.

PLANT PATENTS

The Constitution of the United States gave Congress the power to enact laws relating to patents in Article I, which reads, "Congress shall have the power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The first patent law was enacted in 1790. It has been updated and modified several times; the last general revision was in 1952.

In the language of the law any person who "invents or discovers any new and useful process, machine, manufacture or composition of matter, or any new and useful improvements thereof may obtain a patent." This statute specifies that the subject matter must be "useful".

Who may apply for a patent? Only the inventor. If two or more persons make an invention jointly, they apply for a patent as joint inventors. A company or organization may not apply for a patent. A financial backer of an inventor may not apply for a patent or be a joint inventor.

Originally, it was felt that plants were not covered by existing patent laws and regulations. To correct this the Townsend-Purnell Plant Patent Act was enacted by Congress and signed into law by President Hoover, May 23, 1930. In 1931 plant patent number one was granted to the discoverer of a climbing rose, which was named 'New Dawn'. The plant patent for 'New Dawn' has long since expired. Since then over 5300 plant patents have been granted. The law specifically provides the granting of a patent to anyone who has invented or discovered and asexually reproduced a distinct and new variety of plant, including cultivated sports, mutants, hybrids and newly-found seedlings other than tuber-propagated plants or plants found in an uncultivated state. All patents, including

plant patents, are for a term of 17 years and may not be renewed or extended. The purpose of plant patents is to afford agriculture, so far as is practical, the same opportunity as industry to participate in the patent system. Plant patents provide incentive for achievement in plant breeding, gardening, and agriculture. A plant patent is no guarantee. It is not an endorsement by the government of quality or merit. All the plant patent says is that the invention is distinct, new, and useful.

The rights granted for a United States patent extend throughout the territory of the United States. It has no effect in a foreign country. An inventor who wishes patent protection in other countries must apply for a patent in each country where he wishes protection. Almost every country has its own patent laws, although many do not have plant patent laws as such. They may have breeders' rights, or they may accept plants under their regular patent law. In the United States an inventor, regardless of his citizenship, may apply for a patent on the same basis as an American citizen. One of the most critical and important points in filing a plant patent application is that no United States patent can be obtained if the invention is already patented abroad, or if a foreign application has been filed more than one year before filing the U.S. application. That is, if any plant patent or breeders' rights application is filed in any other country, a U.S. plant patent application must be filed within one year of the earliest filing in any other country.

The patent laws are found in title 35 of the United States Code with Plant Patents found in Chapter 15. Section 163 reads, "In the case of plant patents the grant shall be of the right to exclude others from asexually reproducing the plant or selling or using the plants so reproduced for 17 years." This gives the patent owner the right to license others to reproduce asexually or sell or use the plants covered by the plant patent, and this exclusive right lasts 17 years from the date the plant patent is issued. When granting any of the these rights the patent owner, as the licensor, may charge a fee (royalty) to the licensee. Although it is legal to charge a royalty on each one of these rights, it is customary to charge only one royalty.

Among the prerequisites for filing an application for a plant patent are:

1. The new plant must have been asexually reproduced by the applicant and must retain the same characteristics through successive generations of asexual reproduction.

2. The new plant must not have been described in a printed publication, nor introduced to the public nor placed on

sale more than one year before the filing of the application and, as mentioned earlier, a foreign application for a plant patent or breeders rights must not have taken place more than one year prior to filing the application in the United States.

3. The new plant variety must have originated: (a) as the result of some act of cultivation by the applicant such as cross pollination, treatment, selection and/or breeding efforts; (b) as a seedling found by the applicant in a cultivated area or; (c) as a sport found by the applicant.

PLANT VARIETY PROTECTION ACT

In the 1960's a move was begun by the seed breeders of the U.S. to obtain legislation giving seed breeders the same basic rights and opportunities as other plant breeders. On December 24, 1970 the "Plant Variety Protection Act" was approved by Congress and was signed into law.

It was cited as an act: "To encourage the development of novel varieties of sexually-reproduced plants and to make them available to the public, providing protection available to those who breed, develop or discover them, and thereby promoting progress in agriculture and in the public interest."

The PVPA, as it is commonly called, is administered within the Department of Agriculture, unlike the Patent Law administered in the Department of Commerce. The PVPA now covers all types of seed-propagated plants although there were originally six exceptions.

COPYRIGHTS

Some persons are confused by patents, trademarks and copyrights. There may be some resemblance in the rights of these types of intangible property, but they are very different and serve different purposes.

Copyrights protect writings of an author against copying. Literary, dramatic, musical and artistic works are included within the protection of the copyright law. And in some cases copyright law confers performing and recording rights. A nurseryman's use of copyrights would be for a catalog and perhaps photographs and sales aids. Obtaining a copyright is simple and economical. Copyrights are registered in the Copyright Office of the Library of Congress.

TRADEMARKS

A trademark, as defined by Section 45 of the Trademark Act of 1946, popularly known as the Lanham Act, "includes any work, name, symbol or device, or any combination thereof adopted and used by a manufacturer or merchant to identify

his goods and distinguish them from those manufactured or sold by others.”

The primary function of a trademark is to indicate origin. However, trademarks also serve to guarantee quality.

In order to qualify for registration a mark must be used in interstate commerce. That is, rights in a trademark are acquired only by use and use must continue if the rights are to be preserved. Registration of a trademark in the Patent and Trademark Office does not in itself create or establish any exclusive rights. It is, however, recognition by the government of the right of the owner to use the mark in commerce to distinguish his goods from the goods of others.

A few generalities about a trademark: It may not be a descriptive term, such as blue, large, superior, or best; it may not consist of geographically descriptive terms such as Rocky Mountain, Carolina, or Arctic, except as indication of regional origin; it may not consist of or comprise the name, likeness or signature of a living person except by written consent; it may not resemble a mark already in existence and still in use if it could cause confusion and be deceptive.

A trademark must be registered within one or more classes of good established by the Patent and Trademark Office. Class 31 covers “agricultural, horticultural, and forest products and grains not included in other classes; living animals; fresh fruits and vegetables; seeds; live plants and flowers; foodstuffs for animals, malt.”

Once a trademark is issued it will be cancelled at the end of six years unless the owner shows that it is still in use. Once that requirement is satisfied the term of the trademark is 20 years from date of registration and may be renewed for periods of 20 years unless it is cancelled or surrendered.

ENFORCING YOUR RIGHTS

When you own a plant patent, breeders’ right, trademark or copyright, you have lawful rights and duties. First of all, when you own a plant patent, trademark, copyright, or breeders’ right, it is your obligation to put everyone on notice. In the case of patents, the plant patent number should appear with the variety name in all printed matter originating from the patent owner and all licensees. Each plant should have a tag or label giving the name, plant patent number, and a statement to the effect that asexual propagation is prohibited.

If a person is found making or selling a patented plant without a license or that was made without a license, it is an infringement of the patent. The patent owner may immediate-

ly bring suit against the infringer stopping such action and seeking triple damages in federal court.

Canada does not offer any sort of plant protection or breeders' rights. Accordingly, any plant protected in the U.S. can be freely grown in Canada. However, a plant grown in Canada may not be brought into the U.S. when it is patented in the U.S.

Once a sale of a patented and properly licensed plant is completed, there is no further control of its use or further sales. But making the patented plant is still forbidden. Likewise, a plant that is propagated under license while the patent is still in force and not sold until one or two years after the patent expires is still subject to royalty payment.

With respect to registered trademarks, it is mandatory to put public on notice that the trademark is registered. This is done by use of the letter "R" in circle, ®, which must appear with the trademark.

A trademark may be licensed by the owner in much the same way a plant is licensed. This is common practice in the world of fashion and is gaining a foothold in horticulture.

When a registered trademark is used with a plant there is only a restriction on the use of the trademark. Any infringement of the trademark by an unauthorized person can be stopped immediately with relative ease. However, the trademark itself carries no restriction on the making, using or selling of the plant.

Incidentally, all of these rights can be bought, sold and transferred just as the title to any piece of real property can be bought, sold and transferred. When a transfer takes place an assignment is registered in the proper government office.

BENEFITS OF PATENTS, TRADEMARKS, AND BREEDERS' RIGHTS

The public will benefit from new and improved forms of plants for their use and enjoyment. Increased research can be financed by the royalties collected on plant patents. The public has a better chance to see improvements in the form of plants; vigor in plant growth, hardiness and disease resistance; new flower colors, form, fragrance and lasting quality. Many new plants have come into existence in recent years that have completely replaced those grown 40, 30 or only 20 years ago.

The Plant Patent Act has given the consumer protection from unscrupulous promoters in two ways. The patent owners within certain limits can keep a patented plant from being produced and sold by growers not qualified to produce the quality to which the public is entitled. Before the days of plant

protection, an unscrupulous grower could easily take a superior new variety, rename it as his own and freely enjoy the benefits of someone else's work.

In addition to the stimulus given the professional plant breeder, plant patents and breeders rights have offered encouragement to amateurs and those of less experience who had curiosity and the powers of observation. Plant Patent 2463, now expired, was granted to the rose variety named 'Sea Foam.' This was the development of an automobile mechanic whose plant breeding was a hobby. In 1971 the rose 'Portrait', covered by plant patent number 3097, won the coveted All-America Rose Selection Award. It was created by a pipefitter in a Cincinnati meatpacking plant. He, too, enjoyed roses as a hobby. Each had the ability to recognize something that was distinctive, new and different and useful. For this they were granted plant patent on their inventions, and they were well rewarded financially for their efforts.

A housewife became curious as to why the native holly didn't have nice glossy leaves and why the hollies that did have a nice glossy leaves did not survive the winters. Her curiosity led to research and breeding hollies in her kitchen. Kathleen Meserve went on to develop hybrid hollies such as 'Blue Girl', 'Blue Boy', 'Blue Maid®', Blue Stallion®, 'Dragon Lady®', 'China Girl®', and 'China Boy®'. All were or are patented and some of the names are trademarked. She has been well rewarded for her work, and American gardens and yards are much prettier as a result.

Without plant patents these superior new cultivars might have become known only to very narrow local circles. Some of the royalty is invariably spent for advertising and publicity. This gets new cultivars into use much more quickly.

At the same time a plant patent is no seal of approval. The marketplace is still the proof of whether a new plant has merit.

Do the plant patent, trademark and breeders' rights systems work? You bet they do. Of the well over 5,000 plant patents issued there has been very little litigation. And no litigation has, to the best of my knowledge, invalidated any plant patent. These laws work. They have upgraded the nursery industry in many respects. First of all, before the days of NMC and Fall Is For Planting, it was primarily patented plants that were advertised directly to the consumer. This enhanced and benefitted the entire industry, not just the patent owners or licensees. As the result of plant patents, grades and standards have been significantly improved so consumers have benefitted from better-quality nursery stock and have had

more satisfactory experience with gardening and landscaping. And, as mentioned earlier, it has stimulated the search for new plants within our industry and by consumers.

It's not just a matter of what's new in the way of propagating techniques but what new plants are there. We all talk about new plants, new techniques, what's new! Our landscape would be much less colorful if it were not for plant patents, plant breeders' rights, and trademarks.

FORECASTING FAST TURNOVER CROPS

CYNTHIA J. STAHA

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Tatterson Greenhouses is a wholesale operation growing in 28 quonset greenhouses. Our greenhouse area equals 100,000 ft², and we have 60,000 ft² in outside growing areas equipped with sprinkler irrigation. We are located in Mathews County, Virginia, located about 60 miles east of Williamsburg, Virginia.

Our product line consists of, in order of volume, bedding plant flats, 10-inch hanging baskets, 4-in. annuals, hardy garden mums, poinsettias, 4-in. perennials, and zonal geraniums.

The spring season is our busiest, and accounts for 75% of our annual sales. In five months we turn over 800 different crops, and sell 300,000 units—all on 160,000 ft.². So, from our perspective, we think our crops can be classified as fast-turnover crops.

Now, I would like to share with you how an operation like Tatterson Greenhouses plans, grows, and prevents total chaos in the bedding plant season, or in other words, "how do we forecast fast-turnover crops?"

We have two types of forecasting: long-term and short-term.

LONG-TERM FORECASTING

Long-term forecasting is done in advance. Our analyzing, planning, and ordering for a future season occurs when the present season is finished. For example: the 1986 bedding-plant season was forecast in June, 1985, and our 1986 poinsettia season was forecast in January, 1986. The following is the process we go through, and the factors we consider when forecasting our bedding-plant season.