

GROWERTALKS

Features

12/15/2009

Property Worth Protecting

Jennifer Zurko

Do your eyes start to glaze over when you hear the words “plant patent”? Let me put it into terms that many can relate to: Illegally propagating a patented plant is like illegally downloading music off the Internet. It’s a no-no.



Plant patents do the same thing that copyrighting music and trademarking a brand name does—it protects the creator’s property from being illegally sampled or used. It gives the inventor of the product, whether it’s a song, movie or plant, the right to prevent anyone from using it and lets the world know, “Hey, I made that.”

Who started them?

In the horticulture industry, it’s usually the breeders that file for patents to prevent growers from propagating their own stock, while maintaining the integrity of the original cultivar. For almost 80 years, plant finders and breeders have been protecting their varieties. So, what led the charge down the plant patent path?

Since the 1700s, other industries had been using patents to protect their products, however, plant patents weren’t considered until 1892. It took another 38 years for Congress to enact the U.S. Plant Patent Act of 1930, which gave plant breeders control over their discoveries and financial incentive to develop more varieties. The Act was motivated by the work of many horticulturalists, including Luther Burbank, who was granted patents for his edible and ornamental strains even after his death.

Even Thomas Edison knew it would give the agriculture and horticulture industries a jump-start. Testifying before Congress in 1930, Edison said, “This [bill] will, I feel sure, give us many Burbanks.”

Geoff Needham, president of PlantHaven, credits Mr. Burbank and the foresight of Congress for the hundreds of high-quality plants we see today. PlantHaven is an independent agency that helps breeders patent and market a new variety by working with nurseries for testing, filing the patent application, and handling the licenses to various propagators and distributors.

“On the face of it, people might think the law was enacted to reward and incentivize breeders, and I’m sure that’s true, but actually Congress’ intention was to stimulate the industry,” Geoff explains. “They realized that industries aren’t guaranteed a stream of innovative products. Then the industry suffers and therefore our

whole economy suffers. So Congress provides patents actually to stimulate and protect American industry. The expectation would be, that by having a stream of new plants over many years, the industry will benefit enormously.”

Since then, more than 20,000 plants have been awarded patents. The process has become so vital to introducing new products, that an amendment to the original Plant Patent Act was enacted in 1998 to include the plant parts in an attempt to block the illegal importation of patented cut flower varieties from outside of the U.S.

Why should you care?

Here’s a burning question: Do the people in the hort industry really care if a plant is patented? The answer to that is yes ... and maybe.

Once a breeder goes through the trouble of patenting a plant—which usually takes at least a year and can be quite costly if patenting many varieties (\$2,000 per patent for the government fees; does not include attorney and agent fees, which vary)—growers are expected to comply with the terms that come with growing those plants. Royalty fees and deterrence from self-propagation are the primary stipulations of growing patented plants, but breeders believe the benefits far outweigh the legal compliance; such as knowing you will be growing a trialed and proven variety from that seed packet or box of cuttings.

Audrey Charles is the state-registered patent agent for Ball Horticultural Company and Rúza Leslie handles patent licensing for Ball FloraPlant. After dealing with more than 300 patented varieties, they know you can’t just patent any old plant. It has to be worth it to everyone who touches the plant, from breeder to grower to consumer.

“[Patented varieties] should have a greater value in the marketplace,” says Audrey. “The owner of the variety invested time and money to patent their product. The goal is for that value to be recognized with more end consumer purchases.”

However, some industry pros feel many breeding companies have gone a little overboard with patents, causing growers to be skeptical because there are so many, says Geoff. On the surface, it appears breeders are pinning a patent on a plant with little to no differentiation just to squeeze more royalties out of it. But it really boils down to quality, and a majority of the patented plants in the marketplace have truly earned their legal status.

“I think the industry’s support of patented plants has very much to do with the quality, uniqueness and the benefits of the plants themselves,” Geoff clarifies. “A good example would be in the rose world, which is so demanding. If the plant is diseased or has any deficiencies, it’s just not going to get picked up. But if you’ve bred something of quality, like Knock Out roses, which are disease resistant and great performers, then the industry will support the patenting of that.”

Then you get those that try to go through the back door by self propagating patented plants. Breeders have had to deal with a handful of customers who continue to illegally propagate regardless of the law. Thankfully, those incidents have been infrequent, says Rúza.

“We’ve always tried to resolve issues without compromising our relationship with our customers,” she says. “In the end, it’s to provide a fair playing field for everybody.”

And that’s what plant patents really do for the industry—give growers a large supply of high-quality, high-performing products—which even the most skeptical cynic can support.

“I couldn’t imagine having an industry where everything was commoditized and there were no such things as color breaks or plants that were suddenly disease resistant when they’d always been diseased,” states Geoff. “So I think the industry should care because it’s good to have a guaranteed stream of good, new plants. And I see that across the board, from tropicals and annuals through perennials, shrubs and trees.”

How is it done?

Applying for a plant patent is a tedious process and can be a complicated one if you’re a rookie. Any slight mix up can mean additional back-and-forth dealings with the U.S. Patent Office, which could delay when you receive the patent.

Breeding companies may have their own in-house resources, like Audrey and Rúza, or hire an outside resource to handle their patent filing. Having someone dedicated to the paperwork and dealing with the examiner from the Patent Office takes the pressure off the breeders, so they can focus on what they do best—developing more plants.

The process can be intimidating because it’s difficult to figure out every detail, says Audrey. And Geoff agrees that a breeder who’s never filed a patent before should get some advice before plunging into the treacherous sea of patents. At the very least, breeders should seek legal advice or consult an agent.

“A breeder who’s never done it before should definitely get advice,” Geoff affirms. “And that advice could range from anyone in the industry who’s done it before, an agency or the company you propose to work with. When it comes to strategizing how to get the plant out there and how to make the contracts and the licenses with the right people, then I would say an independent plant breeder absolutely needs advice because it’s a minefield.”

If you’re interested in learning the specifics on how to file for a patent, the U.S. Patent Office has extensive patent information on www.uspto.gov.

What’s next?

As new varieties are introduced, you can bet that most of them will be protected. As we move forward into the second decade of the 21st century, we’ll continue to see upgrades on standard classes and never-before-seen novelties that will be the talk of Spring Trials. And the U.S. Patent Office will continue to get those plant patent applications.

So—will we ever see a time when our planet just runs out of new plants for breeders to patent?

Geoff chuckles and says, “Every time I think that might be the case, breeders surprise me completely by coming up with an entirely different look or new characteristic. I don’t think there is the slightest risk of us running out of great, new plants. I think that the industry’s demands are increasing and these demands are far

more likely to be met with professional breeding programs. The industry requires people who are really dedicated to solid, long-term breeding.”