

## **Basic Facts about United States Plant Patents, Trademarks, and Brands<sup>®</sup>**

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The United States nursery industry is experiencing rapid changes in the way new plants are introduced into the market. As the industry evolves, the use of plant patents linked with a marketing campaign and branding is becoming necessary for consumers to connect to the value of the plants.

### **UNITED STATES PLANT PATENTS**

To obtain a U.S.A. plant patent, an application with photo(s) of the plant, detailed specifications, and claims are needed. This information is filed with the United States Patent and Trademark Office. Under U.S.A. law, the individual filing the patent application has a duty to disclose all information known to be important to the patentability of a plant. The information disclosed must include prior patent applications overseas, publication, prior public use, sales, and offer of sale. In other countries, Plant Breeder Rights are used with similar protection. For this paper, I want to focus on U.S.A. plant patents.

Prior to application, criteria should be developed by you or your company to base decisions on whether to apply for a plant patent. A plant patent offers you legal protection from unlawful propagation by others for 20 years. The challenges you face are how to monitor illegal propagation and are you willing to take legal steps to protect your invention. Applying for U.S. plant patents such as protection of market share, supports the price of the product in the market and support independent plant breeders for the work they have accomplished.

As of 1 Oct. 2006, approximately 10,728 plant patents were active in the United States. Of these, 53% are annuals (including pot crops and tropical plants for interior use), 15% roses (shrub, climbers, cut, tea, pot, etc.), 13% fruits (apples, citrus, blueberries, etc.), 7% other (turf, etc.), 7% woody plants (trees and shrubs used in the landscape), and 5% perennials. In reviewing the 7% woody plants, less than 10% (approximately 80 plants) are available in general commerce for purchase by a consumer from mail order, retail garden centers (both independents and mass merchants/home centers), or a landscape contractor. These patented woody plants have not been maximized for their sales potential in the United States. The opportunity for these patent holders is to work in conjunction with companies that provide a national marketing and distribution network.

### **DISTRIBUTION**

Many of the plants on the plant patent list may not be available due to the patent holder not maximizing the sales potential due to limited market distribution. Few nurseries in the United States have national distribution. Even nurseries with national distribution have a limited number of customers that purchase plants from these growers. A greater number of wholesale nurseries have the ability to sell

and distribute regionally but have not, historically, worked towards licensing their products to a national sales/distribution organization. New sales/distribution models are beginning to take place in the United States. Examples are companies such as Bailey, which are licensing key growers nationally and leveraging marketing to consumers. The successful consumer marketing program is Endless Summer® hydrangea. Other companies such as Ball Ornamentals are working on behalf of the grower through national product distribution and support breeders' world wide in patenting, sales, marketing, and product distribution. This sales/distribution model is advantageous to both the wholesale nursery and breeders. The nurseries have a source for new plants, with consumer marketing. The distribution is of the breeders in expanded market share, increased margin, and royalties direct to the breeder.

### CRITERIA FOR APPLYING FOR U.S.A. PLANT PATENTS

Development of criteria for applying for a plant patent should be undertaken by companies prior to application. There are significant costs associated with application, infringement monitoring, enforcement, distribution, marketing, branding, and sales to achieve a return on the investment. There are other ways for the breeder to achieve monetary goals. Few companies choose to offer or are willing to pay a voluntary royalty for products. These royalties are usually for 3 to 5 years, because the nursery industry in the United States will often begin to self-propagate open sourced, unpatented products. As I mentioned earlier, for breeders to maximize their investment, look for companies that manage the entire supply chain including patenting the plant, marketing, distribution, and sales. This will offer the greatest return on investment. Some of these companies pay royalties in full to the breeder; others take a percentage of gross royalty income to cover overhead.

If you are applying for a U.S.A. plant patent, you should consult an attorney that has specialized in plant patents, employ a patent agent, or work with a sales/distribution company. Prior to making claims on the validity of patented plants, individuals should review the existing U.S.A. plant patent rules with an attorney that understands the nuances. The process and definitions change frequently for applying for U.S.A. plant patents, leading some individuals in the industry to have misunderstandings of the validity of a U.S.A. plant patents.

### TRADEMARKS

A trademark is a name, word, symbol, package design, or any combination that distinguishes a product in the market place. In the United States, trademarks are used, and misused, in a variety of ways. Below are the most popular ways to denote a trademark. The trademark is not part of the botanical name and needs to be used as noted below.

#### Stand Alone Products.

- Common Law Trademark
  - Cracklin' Red™ red tip
  - *Photinia* 'Parred' PPAF (botanical name)
- Registered Trademark
  - Tiger Eyes® cutleaf staghorn sumac
  - *Rhus typhina* 'Bailtiger' PP#16,185 (botanical name)

### Products as Part of a Brand Program.

- **Happy Ever Appster™ Daylilies**
  - *Hemerocallis* 'Just Plum Happy' PP#14,841
  - *Hemerocallis* 'Red Hot Returns' PP#13,499
  - *Hemerocallis* 'Romantic Returns' PP#13,481
  - Other cultivars of *Hemerocallis* are part of this program

### BRANDS

There is a range of brands used within the nursery industry in the United States. Most of them are well known by people within the industry but may not be recognized to the general consumer. Some consumer brands are channel specific (Simply Beautiful® or Monrovia for independent garden centers) others are developed for products sold to independent garden centers, mass merchants, and home centers (Proven Winners®). A brand is a promise from the supplier for quality, service, experience, or other consumer expectations.

### CONSUMERS

The consumer makes the decision about what to purchase. Consumers have little time to spend on a shopping experience that does not fulfill their expectations. The average consumer in the U.S.A. has few gardening skills; they do not know plants (nor do they care what the plants are). Consumers are focused on service and having an entertaining shopping experience that fulfills their expectations. The outdoors is the new kitchen and living room. Outdoor patios with grills, hot tubs, and outdoor fireplaces are a growing segment for homeowners. Plants are an afterthought that is used as decoration or to fill a functional need (screen plants). Linking the product to the consumer to meet their needs is critical if our industry wants to experience future growth.

### SUMMARY

The past 10 years have been a time of tremendous growth in the nursery industry in the United States, with significant amount of acreage developed to service the home centers and mass merchant growth. During these years, plant-buying trips overseas have brought many new plants to the United States, often without the inventor gaining credit or compensation for their breeding/selection work. I believe the next 10 years the nursery industry will experience the need to have our products connect with the consumer. Conducting a professional approach to plant exploration will be used by more nurseries. Using patented plants and launching a marketing campaign will be critical to have consumers understand the value of these new products. A professional method in which plants are sourced, marketed, and introduced by the nursery industry will become the standard.