

Use of Expired Plant Patent Numbers Prohibited by U.S. Law: Legal Ramifications[©]

H. William (Bill) Barnes

Barnes Horticultural Services LLC, 2319 Evergreen Ave., Warrington, Pennsylvania 18976 U.S.A.
Email: Bhs16@verizon.net

Many nurseries sell patented plants and they are required to place plant patent tags on plants with active patent numbers. However, it has been an industry trend to publish in catalogs, internet ads, print ads, plant descriptions, and listings with not only active plant patent numbers but also plant patent numbers that have expired. It is legitimate and proper to publish active plant patent numbers with the associated plant but according to a Wall Street Journal article (Searcey, 2010) it is not appropriate to do so with expired plant patent numbers. In fact the article points out that it is a violation of U.S. patent law to publish in any form other than information of a plant name with an expired patent number.

United States federal law bars companies from marking products with erroneous or expired patent numbers. A recent federal appellate court upheld a citizen's (read any U.S.A. citizen) right to sue in federal court for the transgression of publishing or printing an expired plant patent number with the plant or plant name. The use of expired plant patent numbers is considered to be a false entity and therefore illegal.

Attorney Raymond E. Stauffer maintains that a plaintiff who brings suit against a company for using expired patent numbers is acting as a "private attorney general on behalf of the people of the United States." The Wall Street Journal article (Searcey, 2010) further states that any person can file a claim on behalf of the U.S.A. government and the plaintiff (person filing the claim) is required to split the settlement proceeds with the U.S.A. government on a 50/50 basis. Violators (defendants) if found liable can be fined up to \$500.00 per instance of transgression. An instance of transgression is defined as an expired patent number applied to one product or listing. For simplicity, if there are 500 trees in stock and each has an expired number on it, each tree is considered a separate transgression. This could become a costly fine if fully levied.

The position of the federal courts is that by publishing or marking or printing a package or other object identifiable with the product with an expired patent constitutes fraud and such actions are considered to be a veiled attempt at stemming or inhibiting competition as well as misleading the public and preventing the introduction of new products or varieties that could displace the older product.

From a practical interpretation such a publication of an expired patent number could prevent a plant developer from introducing a new plant or a propagator for pursuing an otherwise legitimate plant, which is exactly what the law is designed to protect.

Many large companies in the U.S.A. have been hit with these lawsuits, and most settle out of court to prevent costly legal action. Companies such as Bayer, Johnson and Johnson, and Ames Tools are among those that have been successfully sued by private attorneys trying to cash in on this failure to follow the law. As a practi-

cal matter it is best not to use any expired plant patent number unless doing so is legitimate in terms of an informative or educational literature.

As a convenience, plant patents with numbers below PP07341 have expired as of 2 Oct. 2010. Anything higher than PP07341 will still be in force at the time of this paper. A full listing of all plant patents by number can be found at: <http://patft1.uspto.gov/netahtml/PTO/srchnum.htm>.

LITERATURE CITED

Searcey, D. Sept 1, 2010. New breed of patent claims bedevils product makers. *Wall Street Journal*, pp. A1, and A14. Dow Jones & Co. New York, New York.