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Rooted in rights: Lessons from plant patent infringement and invalidity cases

From public use and foreign sales to the challenges of proving infringement, plant patents present unique legal opportunities—and pitfalls—for the agricultural industry, explain Bree Vculek, Gaby Longsworth, and Robert Millonig of Sterne Kessler.

Utility patents are commonly perceived as safeguarding high-technology and life science inventions. However, agriculture has its own unique forms of intellectual property protection, including utility patents, plant patents, and/or plant variety protection certificates.

This article focuses on the role plant patents play in the agricultural industry—to safeguard new plant varieties, encourage innovation, and help growers, breeders, and companies cultivate competitive advantages.

When an individual invents or discovers and asexually reproduces a new plant variety, the law may grant the owner exclusive rights to control the use and sale of the plant for a term of up to twenty years.

This protection originates from the Plant Patent Act of 1930 (PPA), now codified in 35 USC § 161. Since its adoption, the number of plant patents has steadily risen over time to over 37,000, as well as private investments in the field.

As food systems evolve, understanding how plant patents operate—and how courts interpret them—can provide a meaningful commercial advantage.

Requirements

To qualify for plant patent protection, the plant must meet five key requirements: it must be novel, distinct, nonobvious, asexually reproduced, and adequately described in the patent.

“Asexual reproduction” means the plant must be produced through methods like cuttings or grafting so that every plant is genetically identical.

“The written description requirements for plant patents are applied more flexibly than in utility patent practice and must be satisfied by a description that is as complete as reasonably possible to distinguish the claimed plant variety from others (***Application of Greer,*** No. 9080, 484 F.2d 488 (CCPA, September 20, 1973)).

Thus, the written description must clearly explain the plant’s unique features.

One of the key advantages of plant patents is that they offer a more flexible path to protection than traditional utility patents. For growers and breeders, this means a more accessible, cost-effective form of IP protection that still provides meaningful commercial exclusivity.

Easy to grow, easier to lose: Patent pitfalls in the real world

Even when a plant breeder meets all the basic requirements of a plant patent, patent protection can be lost or denied through technical missteps. This section examines the most common reasons plant applications are denied, or patents invalidated, including public use, enabling disclosures, and early sales.

Public use

Under 35 USC § 102(a)(1), a plant can be barred from patent protection if it was publicly used more than a year before the application was filed. Courts typically look at whether the prior public use of the plant was accessible to the public and unrestricted, even if it occurred behind closed doors or in another country.

For example, in ***Delano Farms v California Table Grape Comm’n*** (778 F.3d 1243 (Fed. Cir. 2015)), the Federal Circuit upheld the validity of plant patents where third-party growers cultivated the plants secretly and without public accessibility, finding no public use despite pre-filing activity.

In contrast, in ***Bourne v Jones*** (114 F.Supp. 413 (S.D. Fla. 1951), the court invalidated plant patents where unrestricted distribution to independent growers constituted a public use, even though the breeder only sought experimental data.

Similarly, in ***re WinGen*** (2023 WL 1459288 (Fed. Cir. 2023)), a Federal Circuit case involving an ornamental plant and a utility patent, rather than a plant patent, the court found

that simply displaying an ornamental plant at a public event alongside marketing materials, with no confidentiality restrictions, constituted an invalidating public use.

The court emphasised that disclosure is not required to trigger public use and that mere accessibility and normal, intended use are enough to trigger the bar.

Key takeaways

To preserve patent rights, breeders must take affirmative steps to control access to new plant material before filing. This may include confidentiality agreements, labelling test plants, or limiting who can propagate the plants. Even informal growing for experimental purposes with trusted partners can destroy patentability if those partners are not restricted in their use of the material.

The on-sale bar

Another mistake is selling a plant variety more than one year before applying for a patent. This is patent defeating even if it is your own sale. Courts tend to have a strict interpretation of this bar (a sale prior to filing by a third party is typically patent defeating).

In ***Cole Nursery v Youdath*** (17 F.Supp. 159 (N.D. Ohio 1936))***,*** the court invalidated a plant patent where the Japanese barberry variety had been sold commercially more than one year before filing, holding that even a single uncontrolled sale may trigger the on-sale bar.

Key takeaways

So, what counts as an invalidating sale? Selling or offering for sale plants to customers or growers may be invalidating. Even sales in small quantities or for limited experimental use can trigger the on-sale bar if there is no effort to control the sale or use.

Prior written disclosure

Another way novelty can be lost is if the plant is described in writing by the inventor more than a year before filing or, with limited exceptions, by a third party before filing, and if that description is “enabling.”

Two key cases further define the limits of enabling disclosure: ***In re LeGrice*** (301 F.2d 929 (C.C.P.A 1962)) and ***In re Elsner*** 381 F.3d 1125 (Fed. Cir. 2004)).

In ***LeGrice***, the court held that non-enabling publications identifying a plant by name and image did not bar patentability where reproduction was not possible. However, ***Elsne***r distinguished ***LeGrice***. In ***Elsner***, the court held that such publications may become enabling when combined with sales that allow skilled growers to reproduce the plant.

Subsequent decisions have confirmed that foreign sales—even under different trade names—may enable an otherwise non-enabling disclosure (***Ex Parte Anthony Robin White***, 2007; ***Ex Parte Mark Roland Boeder***, 2009; and ***Ex Parte Alain A Meilland***, 2013).

Key takeaways

The prior printed description does not need to include step-by-step propagation instructions to render an otherwise non-enabling disclosure enabling. If a person of ordinary skill in the

art could obtain the plant and reproduce it easily, courts may treat the publication and the sale as a bar to patentability and validity.

Further, accessibility to US growers is not required to invalidate a patent and public use by anyone in the world can invalidate the patent. Plant breeders who sell abroad or participate in foreign trials should assume those activities could be used against them in a US patent proceeding, including when combined with published descriptions or plant variety protections overseas.

Practical advice

File early: If a plant you cultivated is new and distinct, consider filing for a plant variety protection certificate, provisional or nonprovisional utility patent and/or plant patent application before testing or marketing the plant.

Use NDAs and contractual agreements: If third parties are permitted to grow and test the plant, they must agree in writing not to propagate, disclose, or sell the plant.

Track foreign activity: Keep detailed records of any overseas sales, plant variety protections, or trials because foreign activity can be patent defeating or enable an otherwise non-enabling publication.

Control marketing and displays: If you plan to exhibit the plant before filing, clearly label it as “confidential” and avoid dispensing propagating material.

Clones and copycats: What counts as infringement in plant patent law?

Plant patent infringement occurs only when a genetically identical plant is produced through direct asexual reproduction.

The Federal Circuit made this clear in ***Imazio Nursery v Dania Greenhouses,*** where they confirmed that phenotypic similarity alone is insufficient; infringement requires proof of genetic identity through asexual reproduction.

Similarly, the court in ***Driscoll’s v California Berry Cultivars*** found that there was no infringement where the plaintiff failed to provide clear evidence that the defendant used the patented plants as parents in a crossbreeding.

Even if the offspring might have inherited some of the traits of the patented plant, without proof of asexual reproduction directly from the patented plant or the use of the patented plant as is, infringement cannot be found.

Courts have also drawn the line in cases of independent development or materially distinct species. In ***Pan-Am Plant v Matsui*** (433 F.Supp. 693 (N.D. Cal. 1977))*,* the accused infringer developed a yellow chrysanthemum that physically appeared similar to the patented variety.

However, the court found that the accused plant had significantly better disease resistance and fewer malformed flowers than the patented variety, making it a different plant variety under the PPA.

Even though both plants descended from the same parent and shared visual traits, the court emphasised that a plant patent does not cover general characteristics—it protects only the specific variety described and claimed in the patent.

Thus, substantial differences in key traits, such as performance or health, can be enough to avoid infringement. Further, independent breeding or spontaneous mutation, even if it results in a similar plant, does not rise to the level of infringement (***Kim Bros v Hagler,*** 167 F.Supp. 665 (S.D. Cal. 1958)).

Because plant patents protect only the specific asexually reproduced variety—and require proof of genetic identity for infringement—breeders seeking broader protection against close variants or functionally equivalent plants may find a utility patent advantageous, as it can cover a wider scope of traits and may allow for enforcement under the doctrine of equivalents.

Patent enforcement frequently fails due to procedural missteps rather than weaknesses in the underlying plant innovation.

Courts have dismissed plant patent enforcement actions where patentees failed to plead facts showing asexual reproduction (***David Austin Roses v GCM Ranch,*** No. 3:24-CV-0882-B, 2025 WL 317569 (N.D. Tex. January 28, 2025)) or failed to provide statutory notice (***Nicholson v Bailey,*** 182 F.Supp. 509 (S.D. Fla. 1960)) underscoring the importance of disciplined labeling, recordkeeping, and pleading.

When asserting infringement, complaints must allege specific facts demonstrating genetic identity or direct asexual reproduction of the patented variety.

Practical advice:

Focus on genetic identity, not appearance: A plant patent only covers the exact asexual progeny of the patented plant. Because similar looks, shared traits, and even common ancestry are not enough to establish infringement, it is important to ensure you have evidence of asexual reproduction before bringing an infringement suit.

Document the plant's lineage: Breeders should keep clear, dated records of propagation. These records may be crucial to defending against infringement claims.

Use labels and notices: Mark patented plants with "US Patent No. PP_____" or "patent pending" to provide notice. Unmarked plants may weaken arguments for enforcement.

Summary

As plant breeding continues to drive innovation in agriculture, plant patents remain a powerful, but nuanced, tool for protecting new plant varieties.

Breeders and plant patent owners must navigate a legal landscape where public use, enabling disclosures, foreign sales, and early commercialisation can quietly invalidate a patent, and where infringement claims depend on genetic identity, not just similarity.

The most effective strategies are holistic and proactive: combine plant patents with plant variety protection certificates and utility patents to layer protection, file early, control access

and distribution, maintain detailed records, and communicate clearly with both collaborators and customers.

Enforcement demands precision, too—mark patented plants properly and build infringement claims on evidence rather than assumptions. Ultimately, plant patents—and complementary IP tools—reward those who pair innovation in the field with diligence in the filing process.

When used strategically, they can preserve market share, support investment, and ensure that the hard work of plant breeding yields not just better crops, but long-term value.

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