The Limited Monopoly™

Patented or Not, This Christmas Give Plants

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Luther Burbank and The Plant Patent Act of 1930

The Plant Patent Act of 1930 made it possible to patent new varieties of plants that are asexually reproduced, with the exception of tuber propagated plants (such as potatoes, Jerusalem artichokes, etc.). The work of Luther Burbank, the "wizard of horticulture," created the interest necessary for this piece of legislation to become law. Even Thomas Edison testified before Congress in support of the bill, saying "This will, I feel sure, give us many Burbanks." For those who don't know about Luther Burbank, he was an American botanist, horticulturalist, and agricultural scientist that lived from 1849-1926. He created hundreds of new varieties of plants, including the Russet Burbank Potato, the Shasta Daisy, the Fire Poppy, the Freestone Peach, and many more.

Plant Patent Basics

A plant patent protects an asexually reproduced distinct and new variety of a plant, other than a tuber propagated plant or a plant found in an uncultivated state. The grant of a plant patent lasts for 20 years from the date of filing of the patent application, and protects the inventor's right to exclude others from asexually reproducing, selling, or using the reproduced plant.

In addition to plant patents, utility patents may also be granted having claims to plants, seeds, genes, etc.

The law behind plant patents is Title 35 United States Code, Section 161, which states:

"Whoever invents or discovers and asexually reproduces any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings, other than a tuber propagated plant or a plant found in an uncultivated state, may obtain a patent therefor, subject to the conditions and requirements of this title. (Amended September 3, 1954, 68 Stat. 1190)."

The invention or discovery of the plant that is the subject of the plant patent application must have occurred in a cultivated area. Asexually reproduced tuber plants such as potatoes are excluded by statute. The plant cannot have been sold or released in the United States more than a year prior to the date of the application. The plant cannot have been enabled to the public by, for example, description in a printed publication in this country more than a year before the application for patent. The plant must also differ from related plants by at least one distinguishing characteristic which is more than a difference caused by growing conditions, and the plant variation must not have been obvious.

It should also be noted that algae and macro fungi are regarded as plants, but bacteria are not.

Asexual Reproduction

Asexual reproduction is the propagation of a plant to multiply the plant without the use of genetic seeds, assuring an exact genetic copy of the plant being reproduced. Only asexually reproduced plants are covered by plant patents. Techniques of asexual reproduction include rooting cuttings, grafting and budding, apomictic seeds, bulbs, division, slips, layering, rhizomes, runners, corms, tissue culture, and nucellar embryos.

The Plant Patent Application

With a few exceptions, a plant patent application is subject to the same requirements as a utility patent application, and should contain as full and complete a botanical description as reasonably possible. The application should contain the title of the invention, statement regarding federally sponsored research and development, the Latin name of the genus and species of the plant claimed, variety denomination, background of the invention, field of the invention, description of relevant prior art, summary of the invention, brief description of the drawings, detailed botanical description of the plant (including such things as growth habit of the plant, winter dormancy characteristics, description of bark, buds, blossoms, leaves and fruit), one claim (a plant patent is limited to one claim), and an abstract of the disclosure.

One of the challenges with plant patents is describing in the specification plant characteristics which are not capable of definitive written description such as fragrance, taste, productivity, vigor, etc. Detail must be sufficient to prevent others from attempting to patent the same plant at a later date by simply describing the plant in more detail and with the allegation that the original patent did not state the characteristics being further described.

Drawings for plant patents are normally photographic, but may also be presented in other media such as permanent water color or oil paint renderings that faithfully present the appearance of the plant. These drawings are not mechanical drawings, and should be both artistic and competently rendered. Drawings may be in color, especially where color is a distinguishing characteristic of the new plant. Drawing margins for plant patent illustrations are the same as with other patent drawings. As the claim incorporates the drawing by reference, the drawing requirements are strict. Photographs are by far the most common form of present day plant patent drawings. Good planning is essential to ensure that photographs are taken at the proper time in the growing season to ensure adequate plant patent drawings.

The Plant Variety Protection Act

The Plant Variety Protection Act, under 7 U.S.C. §§2321-2582, provides for a system of protection for sexually reproduced plant varieties, for which protection was not previously provided, under administration of a Plant Variety Protection Office within the Department of Agriculture. The Plant Variety Protection Act gives breeders up to 25 years of exclusive control over new, distinct, uniform, and stable sexually reproduced or tuber propagated plant varieties. The Plant Variety Protection Act is separate and distinct from plant patent statutes, and is administered through the Department of Agriculture, and not the United States Patent and Trademark Office.

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