Plant Patents

The following information dealing with legal aspects of the problem of plant patents has been made available to us and to you from an authoritative source.

Ever since the enactment of the basic patent laws of the United States which go back to over 100 years ago (1836), the courts have been very strict in the application of the statutory bars which determine in part the validity or invalidity of patents. The principal statutory bars are as follows:

(1) The patent application must be filed within one year from the earliest public use of the invention in the United States;

(2) The patent application must be filed within one year from the first sale or offer for sale of the invention within the United States.

(3) The U. S. Patent application must be filed within one year from the patenting or description in a printed publication of the invention anywhere in the world.

If these requirements are not strictly observed, no valid patent rights can be obtained on the invention, and even though a patent may be issued by the Patent Office because of the latter's lack of knowledge of the existence of one or more statutory bars, the patent would nevertheless be invalid and not sustainable in litigation in which proof of a statutory bar is properly made.

In view of the foregoing, it has always been essential and highly important to conduct all preliminary tests of an invention in strict secrecy, and the courts have even gone so far as to accept as valid only such secret tests as are conducted under lock-and-key, so to speak, with access only to employees and agents who are necessarily and directly engaged in performing the tests, and with the exclusion of any knowledge of such tests from all other employees or outside parties. While it is sometimes more difficult to conduct tests of living plants in such absolute secrecy, we have nevertheless felt that this could be done in reasonably strict privacy and without seriously violating the ordinary rule. We have repeatedly warned most of our clients more than one year prior to the filing of the patent application, against the testing of plants in public gardens, since tests would create a statutory bar if they occurred, although there has been no court decision directly dealing with this specific question in connection with plants as distinguished from mechanical inventions.

On the other hand, it is not unreasonable to call upon the assistance of other parties in conducting tests in different geographical locations, which is quite important in the case of most plants; but where such outside assistance is relied upon, the tests should be conducted by the third parties in the same strict secrecy as is required of the inventor or discoverer himself, and in addition, there should be a definite test agreement (preferably written instead of being merely oral and consequently difficult of proof), between each party conducting the test and the party on whose behalf the test is being made, said agreement expressly requiring the observations of appropriate secrecy safeguards, and particularly prohibiting disclosure of the new plant to any other parties, as well as strictly prohibiting the publication

of any information relative thereto without the written approval of the party on whose behalf the tests are being conducted.

So far as experiment stations are concerned, we have been rather strongly opposed to reliance thereon because of their lack of care or their inability to strictly observe the element of secrecy, although there would be no objection to using such experiment stations if appropriate safeguards are observed, as outlined in the fore-going. Our same objections would apply to rose display gardens and private orchards, because in most instances friends and oftentimes the public generally are frequently admitted to such gardens and orchards, in which event, we feel that this would virtually result in a public use or disclosure of the plants being tested. If the test plants could be segregated from all others, and if every outsider who is not directly concerned with the testing operations could be strictly excluded from the test areas, the danger of establishing a statutory bar to the acquisition of valid patent rights would be minimized and probably fully avoided. In this connection, some of our clients have actually taken the precaution of fencing off their testing operations on their own property, as well as on the property of other parties who are helping to conduct such tests, and the fences are strictly controlled by locked gates through which admission can be gained only by keys and by authorized parties who are directly engaged in the test work.

While you may feel that this is going pretty far and a lot of unnecessary trouble, nevertheless we see no alternative without the risk of possible invalidation of the patent rights, and we have long feared that many of the plant patents which have been issued up to date would be invalid if the statutory bars are strictly applied when raised as a defense in litigation. Regardless of whether or not the patent becomes involved in litigation, it should be borne in mind that the original inventor must make an oath in filing each patent application that no statutory bar exists to the best of his knowledge and belief, and if he makes such an oath untruthfully, he may be guilty of perjury.

Strawberry Varieties Recommended for Louisiana

The Louisiana Agricultural Experiment Station is now recommending several newer strawberry varieties to supersede the old Klondike. J. A. Cox and W. F. Wilson, Jr., of the Louisiana Station have the following to say about these varieties:

Klondmore, a cross between Klondike and Blakemore, produces both an early and late crop, is a high yielder, a good shipper, resistant to leaf spot and scorch, and has excellent table quality. It is recommended for southern Louisiana only.

Marion Bell out-yielded Klonmore five out of six years. The fruit has a bright, glossy appearance. It's open foliage may be a factor in keeping down fruit rots. It is resistant to leaf spot and scorch. This variety has not been grown extensively as yet.

Konvoy is a cross between Klondike and Fairmore, with bright red fruit that is excellent for freezing. It has produced more heavily than any other Louisiana variety. Plants of Konvoy are vigorous and resistant to leaf spot and scorch. However, because the fruit is less firm than that of Klonmore, it is recommended mainly for the home garden.