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Plant intellectual property

The nursery and garden industry has the highest percentage of plant varieties protected by intellectual property rights both in Australia and overseas. In this nursery paper, Jay Sanderson and Kathryn Adams of the Australian Centre for Intellectual Property in Agriculture (ACIPA) introduce readers to the field of intellectual property.

Some understanding of intellectual property is essential for all sectors of the nursery and garden industry including growers, wholesalers and retailers, who routinely deal with intellectual property protected plant varieties. Understanding intellectual property principles can not only help you to understand your rights and responsibilities but can also assist you in maximising your business opportunities.

Plant intellectual property

The nursery and garden industry has the highest percentage of protected plant varieties both in Australia and overseas. As a consequence, there are benefits to understanding (at least some) intellectual property principles. Understanding intellectual property principles may be one way to maximise your commercial advantage. You could also be disadvantaged if you are uninformed, particularly if you do not understand your rights and obligations under plant breeder's rights, patents and/or your contracts. Additionally, the use of plant varieties in nursery and garden businesses is increasingly being controlled by contracts - often referred to as 'Agreements' or 'Licences'. It is therefore vital that you are familiar with the terms of any contract, especially as the contract relates to intellectual property, access to property and auditing requirements. Importantly, you don't even have had to sign a contract to be bound by its terms.

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What is intellectual property?

Intellectual property is a general term for various legal regimes, including:

- Plant breeder's rights
- Patents
- Trade marks
- Copyright
- Trade secrets, and
- Designs.

Intellectual property has developed as a means of giving creators and innovators an opportunity to obtain a return on their investment. In this way, intellectual property rights are said to provide incentive for creation and innovation.

Intellectual property rights are a type of property that can be bought or sold. Intellectual property may allow a person to own certain types of innovation, control its use (for a limited time) and to be rewarded for its use. Because of the commercial implications, it is vital that users and licensees of protected varieties understand the reasons for providing protection as well as any rights and obligations that may arise.

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Plant intellectual property

There are two main forms of intellectual property that protect plants and plant products: plant breeder's rights and patents. There are also a number of supplementary methods of protection, including contracts, trade marks and trade secrets.

An important distinction needs to be made between intellectual property rights and the physical object in which they are found. For instance, a new plant variety may contain a number of intellectual property rights – a patent over a particular gene, plant breeder's rights over the variety itself and/or a trade mark over a name.

In addition to these areas of intellectual property, access to (and collection and use of) plant genetic materials may be governed by national and state biodiscovery regulatory frameworks. The term 'biodiscovery' generally refers to the process of collecting and analysing biological resources (eg. plants, animals, micro-organisms) in the search for new varieties, new traits, active compounds or ingredients that can be developed into useful (commercial) products. Currently in Australia, laws are in place for biological materials found in Commonwealth and Queensland areas.

Protected plants and the nursery and garden industry

Why does the nursery and garden industry need to know about the plant intellectual property? Put simply, plants are at the core of our business and the nursery and garden industry has the highest percentage of protected plant varieties. These varieties will have been developed in Australia or overseas.

When dealing with protected plants, you can maximise your business opportunities in a number of ways. For example, you may become the exclusive licensee in Australia for particular overseas varieties and in the process, develop business relationships with the breeder to obtain special royalty rates based on the volume of sales. It is important to understand how plant intellectual property systems work to be able to capitalise on these opportunities.

Businesses in the nursery and garden industry and their clients must be aware of their rights, duties and obligations. What are the restrictions on using a protected variety? Can you save (and use) propagating material? Does the licensor have the right to enter your property? Are you paying an up-front royalty or an end-point royalty? If so, how much is the royalty and when is it be paid? These are the kinds of questions that all industry operators should consider.

David Austin's Graham Thomas™ - a protected plant variety, this plant is also trademarked in some countries by David Austin Roses Ltd.

Patents

In broad terms, patents can be defined as the grant of a 'monopoly' to an inventor who has used their knowledge and skills to produce a product (or process) that is new, involves an inventive step and is capable of industrial application. This monopoly is limited in time (usually 20 years) and allows the patent holder to exclude others from making, using or selling the invention.

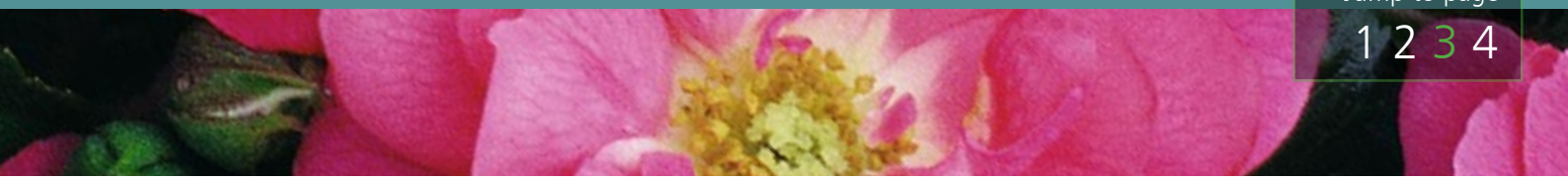
In Australia, the Patents Act 1990 (Cth) allows all technologies to be patented (except 'human beings and the biological processes for their production') provided there is an invention. Potentially, a patent can be sought for plant material as well as for the processes used to produce the plant material.

The criteria for patent protection of plants include:

- Technical intervention and not a 'discovery'
- Inventive when compared to the prior art
- Fully described, and
- Has a demonstrated use.

In Australia, both plant breeder's rights and patents may apply to the same plant variety provided all the relevant criteria are met. At this time, plant breeder's rights are more common but as the use of biotechnology in plant breeding increases, so may the number of patents over plant varieties (or parts of plant varieties). Generally speaking, plant related patents may be obtained over a plant variety, a process for producing a plant variety or biological information (eg. a DNA sequence).

Anthony Tesselaar's Cordyline Red Fountain. A new plant variety may contain a number of intellectual property rights including a patent, plant breeder's rights and/or a trade mark.



Plant Breeder's Rights

Plant breeder's rights (PBR) are a form of intellectual property protection designed to protect new varieties of plants by allowing plant breeders to:

1. Control the use of the plant variety, and
2. Gain commercial benefit from investment made in the development of new plant varieties.

Therefore, if a person purchases a protected variety they may face restrictions on its use.

In Australia, plant breeder's rights are governed by the Plant Breeder's Rights Act 1994 (Cth). In order to be protected, a plant variety must have a breeder, be new, distinct, uniform and stable (See Table 1 below). The duration of plant breeder's rights is 25 years for trees and vines and 20 years for all other plants, starting from the date the plant breeder's right is granted.

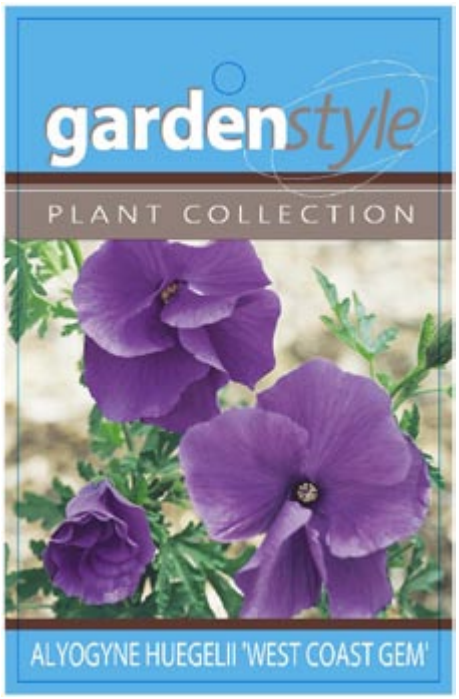
A valid plant breeder's right gives the owner (initially, the breeder or discoverer) a number of rights. For example, holders of plant breeder's rights have exclusive rights to:

- Produce or reproduce the propagating material
- Sell or offer for sale, and
- Import or export the variety.

While these rights are primarily in relation to the commercialisation of propagating material, they may also apply to harvested material and to derivative varieties in certain circumstances. There are penalties for infringing plant breeder's rights - up to $75,000 for individuals and $275,000 for businesses – but more likely, civil action will be brought by the owner of the plant breeder's right, resulting in injunctions and/or damages payable.

An important feature of the plant breeder's right system is the way the interests of breeders, growers, and researchers have been accommodated through the use of exceptions to the scope of the breeder's right, including:

- Private or non-commercial purposes
- Experimental purposes
- Plant breeding, and
- Farm-saved seed.



The trade mark 'GardenStyle Plant Collection', registered by NGIV, has become an easy to recognise 'sign' for consumers.

Breeder	Breeding means to produce or develop new varieties. Breeding also includes "discovery". In the absence of information to the contrary, the "discoverer" is the first to file for PBR protection. A person cannot normally be considered the "discoverer" of a plant if someone else provides the particulars of its existence to that person.
New	A variety is new if it has not been sold (with the breeder's consent) for longer than: one year in Australia, or four years outside Australia (except trees and vines which is six years).
Distinct	A variety is distinct if it is clearly distinguishable by one or more characteristics which can be clearly described from any other variety whose existence is a matter of common knowledge at the time of application.
Uniform	The requirement that the variety be uniform means that a variety must be sufficiently consistent in those characteristics that make it distinct.
Stable	A variety must remain true to description after repeated propagation or reproduction.

Table 1. Requirements for protection under the Plant Breeder's Rights Act 1994 (Cth).

Protected varieties are denoted by this logo and a full list of protected varieties is available from the Plant Breeder's Rights Office website www.ipaustralia.gov.au/pbr

Trade marks

Trade marks are 'signs' that make particular goods and services distinguishable from other goods and services. In this way, trade marks can play an important role in ensuring brands are known in the marketplace. A trade mark can be registered under the Trade Marks Act 1995 and has the advantage that protection can last forever if the fees are kept up to date.

Trade marks are often used in the nursery and garden industry to denote a 'series' of plants varieties from the same breeder. Each variety may then also be protected by PBR and/or a patent.

For example, the trade mark "GardenStyle Plant Collection" registered by the Nursery and Garden Industry Victoria is used on a number of different plant varieties, offering promotional benefits and an easy to recognise "sign" for consumers.

Trade secrets

A trade secret can be a formula, practice, process, design, instrument, pattern, or compilation of information. This secret is often used by a business to obtain an advantage over competitors within the same industry. In some jurisdictions, such secrets are referred to as 'confidential information'. Trade secrets are not covered by special legislation. Breach of a trade secret is dealt with under the common law.

A trade secret is some sort of information that:

- Is not generally known to the relevant portion of the public
- Confers some sort of economic benefit on its holder, and
- Is the subject of reasonable efforts to maintain its secrecy.

Importantly, the information must be kept from the public and from competitors. This is usually done by the use of confidentiality agreements.

Contract

Plant breeder's rights, patents and registered trade marks are established by rules set out in the relevant legislation, giving exclusive right to the grantee to commercialise their invention. However, if the grantee wants to obtain a greater return by allowing others to use the invention, a licence agreement (or contract) is entered into between the grantee and the user.

A contract will set out the terms and conditions under which the grantee will allow use of the invention. In legal terms, parties are generally free to agree on those conditions although there are some laws that protect against unduly harsh or unconscionable contracts. The contract may be included on the bag or pot label and the purchaser may be agreeing to those terms simply by opening the bag of seed or by purchasing the propagating material. Therefore, it is important that all parties are aware of the specific terms and conditions of their contract; ignorance is not an excuse at law.

In relation to plants and propagating material, specific clauses may relate to your ability to terminate the contract, price, reporting and auditing requirements, access to property and terms of use (for example, non-propagation).

The bottom line

Most commercial nursery and garden businesses today would routinely use plant varieties that are protected by (at least) one form of intellectual property. Nurseries need to be able to advise their clients, who are buying protected varieties, about possible restrictions on commercial use of those plant varieties. If you are looking to become the Australian licensee of overseas varieties, you need to know the Australian plant intellectual systems (so that you can negotiate the license agreement).

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If you have specific questions or concerns you should seek further advice.

Acknowledgements

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