What does it mean when nursery plants are patented or trademarked?

AURORA - You might have noticed plants for sale labeled “patented” or “trademarked” at your local nursery or garden center. Why would the nursery industry patent or trademark plant varieties?

“Plant patents or trademarks develop an incentive for creative design and innovation by plant breeders and the horticulture industry,” explained James Altland, nursery crops specialist at Oregon State University’s North Willamette Research and Extension Center in Aurora.

The nursery and greenhouse industries have long struggled with the issue of appropriate pricing for their products, said Altland. Patenting or trademarking gives plant varieties more value in the consumer marketplace. Consumers will pay more for a product they perceive as premium.

“In the hope of financial payback, plant breeders, ranging from scientists and professional nursery people to the backyard orchardist, try again and again to breed that perfect plant,” he said. “I think patents are one of the cornerstones of capitalism. Without patent protection, there would probably be much less innovation in our economy in general, and certainly many fewer new introductions in horticulture.

“With plant patenting, if a ‘premium product’ is created in the customer’s eyes, then a grower will be able to set prices more in line with other leisure industries, such as golf, tennis or camping.”

Patenting a plant is just like patenting any other invention or product. Once a plant variety is patented (or has a patent pending) a royalty is paid to the owning nursery on the basis of each plant sold.

Patenting may be an expensive, risky and time-consuming process. The cost to patent one variety may be thousands of dollars.

“There’s no guarantee that gardeners will love the new patented varieties right away,” said Altland. “So costs may never be recouped during the life of the 20-year patent.”

A patent legally prevents others from reproducing the protected plant variety by cuttings, tissue culture or any other method of asexual propagation without the written authorization or licensing of the patent holder. Possession of improperly propagated plants of patented varieties constitutes infringement, even if an illegal propagation was inadvertent.

Though asexual reproduction may be prohibited on a patented cultivar, there is no regulation against using the plant in sexual reproduction. In other words, the seed or pollen from a patented variety may be used without permission of the patent holder. The offspring are free of patent regulations.

To determine if a plant is patented, look for a patent number on the tag, or PPAF (plant patent applied for) or PVR (plant variety rights) after the name of the cultivar. Or sometimes there are other indicators that a patent has been applied for, such as "patent pending."

If a plant is patented, a license is required from the patent holder in order to make cuttings of that plant, even if it is planted in your own back yard. Unlike with a copyright, there is no concept of "fair use rights" for patents in the United States.

You may have seen on a plant tag, the statement, "Asexual reproduction of this plant is prohibited." Licensed propagators of patented plants such as roses are generally required to tag the plant with that warning.

Not everyone is happy with the concept of patented plant cultivars. Some plant lovers say that plant patents could lead to the extinction of some plant varieties. Some worry that a company could own a patent to a variety, but never propagate it or grant anyone else license to do so. It is unlawful to reproduce the variety even to save it from extinction without the permission of the patent holder.

Trademarking is another way that the nursery industry gets recognition for its varieties, explained Altland. It's faster, easier and cheaper than the patenting process for a nursery company and is renewable every 10 years. A trademark helps consumers associate certain varieties with a company name, much like "Big Mac" is associated with McDonald's. Trademarking helps companies build customer loyalty.

A trademark on a plant protects only the plant's name, not the plant cultivar itself, as with a patent. Another person could propagate a trademarked plant, but not call it the same variety name. Examples of trademarked varieties include the popular "Wave" series of petunias.

Unlike a patented plant, if you buy a trademarked plant, you can propagate it asexually by taking cuttings. You can even sell the propagated plants for profit, but you can't call those plants by the trademarked name or acquire your own trademark for those same plants. You can, however, use the plant's cultivar name if it has one (shown in single quotes) – assuming that it isn't also patented.

Trademarked plants are labeled with one of two symbols. An "R" within a circle by the variety name means that a particular cultivar has been officially registered and trademarked. A "TM" by the plant name means that the trademarked name has been claimed but not officially registered.

Author: Carol Savonen

Source: James Altland