



North Carolina Cooperative Extension Service

NORTH CAROLINA STATE UNIVERSITY
COLLEGE OF AGRICULTURE & LIFE SCIENCES

NC
STATE

ECONOMIST

Agricultural and Resource Economics

July/August 1998

INTELLECTUAL PROPERTY Is Important to North Carolina Agribusiness*

Theodore A. Feitshans, J.D.
Extension Specialist and Lecturer

Introduction

Intellectual property is a generic term for intangible personal property that includes patents, trademarks, copyrights and trade secrets. For innovative businesses, intellectual property is frequently the most valuable asset, often more valuable than plant and equipment. Intellectual property is essential to innovation and economic prosperity. Without Intellectual Property protection, companies can not profit from research and development and might have the good name they spend years developing plundered by imitators selling inferior products. Intellectual property has a new importance today to agribusiness due to a number of factors including the development of new plant varieties with biotechnology and increased emphasis on the sale of branded agricultural products. This article will provide a general introduction to intellectual property and issues specific to agriculture.

Patents

Congress has authorized the U.S. Patent and Trademark Office to issue a patent to any person who invents a product or process that is novel, nonobvious, and useful. Such patents are utility patents and are distinguished from other special types of patents discussed later in this article. The utility patent is by far the most important type of patent both in numbers issued and economic value. For a product or process to be novel, it must be new, meaning that no other person made, sold, or published a description of the product or process prior to the application. The courts and the Patent and Trademark Office determined a living organism or a part of a living organism may be patented. Indeed, patents are granted for genes (a component of genetic code) of particular organisms. For example, plant varieties, like Roundup Ready soybeans and Bt cotton, contain patented genes. Conventional agricultural products and processes that embody patentable innovations are also subject to patent protection. Common examples include food products, agricultural equipment, pharmaceuticals, new chemicals, and new uses for

*Adapted in part from: **Limiting Infringement Liability for Handling Protected Seed Varieties**, T.A. Feitshans, J.D., and Dr. Jan Spears, NC Cooperative Extension Service, AG-543.

existing chemicals. An important limitation on the availability of patent protection is that the inventor must file a patent application with the Patent and Trademark Office within one year of the first commercial use or publication of the invention. Another limitation is a patent issued by the Patent and Trademark Office is effective only within the United States. To obtain patent protection in foreign countries, an application must be filed in each country where protection is desired. The United States is party to international agreements that facilitate this process. However, most foreign countries are more restrictive than the United States regarding prior use or publication of the invention. Foreign rights may be lost as a result of any prior commercial use or publication of the invention anywhere prior to filing a foreign patent application.

Patent protection is available for a specific number of years. During this period, the patent owner has the exclusive right to make, use, or sell any product or process that contains or uses the patented technology. A patent does not confer the right to use, for example, a patented pesticide banned as hazardous to public health or the environment. Any other person who makes, uses, or sells any part of that patented technology is an infringer. An infringer is liable to the patent owner for damages even if the infringer was unaware of the patent or the infringement. A court may treble (triple) damages and award attorney fees against one who knowingly infringes a patent.

If a plant variety is patented or contains a patented gene, a farmer can not save any seed for planting purposes. Likewise, a custom cleaner or conditioner may not clean any seed of patent protected varieties. To do so is an infringement of the patent. Some companies that sell patented seed require growers to sign

contracts permitting company representatives to enter farms and search for illegally reproduced seed or plants.

A special type of patent is available for new varieties of plants found in cultivated areas. These are called plant patents and are available for asexually reproduced plants. The new plant must be a distinct variety. Another special type of patent is a design patent. Design patents are available to protect the aesthetic design of the product. For example, a design patent may protect a manufacturer's unique and decorative design for a tractor grill.

Trademarks

Trademarks and service marks are words, designs, pictures, and, under appropriate circumstances, even colors and sounds, that the public associates with goods or services from a particular source. Trademarks allow companies to differentiate their products. Without protection of trademarks, competitors can benefit from the reputation developed by a market leader, and consumers lack the protection associated with buying from a known source.

There are two types of trademarks: federal and common law. A federal trademark is obtained by filing an application and registering with the Patent and Trademark Office. Applicants must show that no one else is currently using the mark; that it is not confusingly similar to another trademark; and that the public associates the applicant's mark with products produced by the applicant. Infringers may be sued in federal court. The U.S. Customs Service will assist in preventing the importation of foreign goods that infringe on the mark. State courts protect common law trademarks, created through use as an identifier of the mark holder's goods.

As with patents, trademarks are only enforceable within U.S. territory. When foreign protection is necessary, applicants must file for protection in the applicable country.

Trademarks are of increasing importance to agriculture. Trademarked fruits and vegetables are now the norm. Almost everyone has seen the little stickers on apples and other fruit that identify the fruit by brand. Trademarks help consumers differentiate the products of one producer (or group of producers) from others.

Failure to consider trademark issues can have serious consequences for agricultural producers. Use of a mark already used by another can result in legal action and damages. The court can force the infringing producer to destroy the product, labels, packaging and other materials that display the infringing mark. Before adopting a name for one's product or business, a trademark search conducted by a trademark attorney is usually money well spent. Filing of the name that one intends to use with the secretary of state or other state authority is not sufficient because state authorities generally are not authorized to conduct a thorough search to determine whether the mark is already in use.

Trade Secrets

Trade secrets include any information not generally known, that a business takes efforts to protect, and that has commercial value to the business. Trade secrets protect valuable technology that for one reason or another is not subject to patent protection. Trade secrets are either technical information, including methods of doing business; or marketing information such as customer lists, lists of suppliers, and price lists. Trade secret protection is a matter of state law.

In order to preserve trade secrets, information should be limited to those with a need to know. Those with a need to know should sign nondisclosure agreements whereby the employee, contractor

or customer agrees not to disclose the trade secret. Trade secrets are also protected from employee misappropriation by requiring them to sign, in addition to nondisclosure agreements, noncompete agreements. In noncompete agreements, employees agree not to work for competing businesses for a specific time or in a specific location.

As farmers increase the use of technology and direct marketing, trade secrets become more important. The importance of trade secrets to some businesses and the measures used to protect them are legendary. One of the nation's most legendary trade secrets is the beverage formula for original Coke®. Allegedly, the formula is in a vault in Atlanta, and only a handful of key employees has access to it.

Copyrights

Copyright protection is available for written composition, pictures and drawings, and computer software. Although copyright protection is available for computer software, the general consensus is that patent protection provides greater protection, particularly for the functionality of the software. Unlike patent protection, there must be actual copying for an infringement to occur; however, circumstantial evidence may be used to prove copying. A copyright exists as soon as a work is fixed in a tangible medium of expression. However, it is advisable to register the copyright with the U.S. Copyright Office since this improves the ability of the copyright owner to enforce the copyright. To register, applicants file with the Copyright Office.

Plant Variety Protection Act

The Plant Variety Protection Act (PVPA) protects plant varieties that reproduce either by seed or by tuber propagation. The PVPA is administered by the Plant Variety Protection Office, a part of the U.S. Department of Agricul-

ture. Certificates of plant variety protection are currently issued for 20 years for most crops. Infringement occurs when the variety is reproduced, sold, or offered for sale, without the permission of the variety owner. Other acts, including cleaning seed for others, may also constitute infringement of the PVPA.

Related Web Sites

U.S. Patent and Trademark Office
<http://www.uspto.gov>
U.S. Copyright Office
<http://lcweb.loc.gov/copyright/>
American Intellectual Property Law Association
<http://www.aipla.org/>
(The AIPLA is an organization of more than 10,000 attorneys who practice intellectual property law.)
Intellectual Property Owners Association
<http://www2.ipo.org/ipo/index.html>
(The IPO is an organization of intellectual property owners.)

N.C. State Economist

Published bi-monthly by the Dept. of Ag. and Resource Economics and the Coop. Ext. Serv. Address correspondence to:
The Editor, N.C. State Economist
Box 8109, N.C. State University
Raleigh, NC 27695-8109

The Department of Agricultural and Resource Economics, N.C. State University, prepared this publication as a public service. It is designed to acquaint you with certain legal issues and concerns. It is not designed as a substitute for legal advice, nor does it tell you everything you may need to know about this subject. Future changes in the law cannot be predicted, and statements in this publication are based solely on the laws in force on the date of publication. If you have specific questions on this issue, seek professional advice. If you need an attorney, you may call the North Carolina Lawyer Referral Service, a non-profit public service project of the North Carolina Bar Association, toll-free: 1-800-662-7660 (Wake County residents call: 677-8574).

The N.C. State Economist is now on-line at:
http://www2.ncsu.edu/ncsu/cals/ag_rec/virtual_library.html

Published by
North Carolina Cooperative Extension Service

Distributed in furtherance of the Acts of Congress of May 8 and June 30, 1914. Employment and program opportunities are offered to all people regardless of race, color, national origin, sex, age, or disability. North Carolina State University, North Carolina A&T State University, U.S. Department of Agriculture, and local governments cooperating.

**NORTH CAROLINA
COOPERATIVE EXTENSION SERVICE
NORTH CAROLINA STATE UNIVERSITY
AGRICULTURAL AND RESOURCE ECONOMICS
BOX 8109
RALEIGH, NORTH CAROLINA 27695-8109**

NON-PROFIT ORG.
U.S. POSTAGE
PAID
RALEIGH, NC
PERMIT #2353