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USDA Announces Acceptance of PVP Applications for Hemp

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Recent developments following the enactment of the 2018 Farm Bill have now made it easier for hemp growers to protect their genetics. The 2018 Farm Bill removed hemp as a Schedule I substance. (See January 2019 Cooley Alert.) This change created the possibility for the Plant Variety Protection Office to begin processing seed-propagated hemp applications. It also allows for the Plant Variety Protection Office and private depositories to accept and store hemp seeds, as required for Plant Variety Protection (PVP) and for certain Utility Patents claiming plants.

The PVP Office is now accepting applications for seed-propagated hemp

The USDA announced on April 24, 2019, that it would begin accepting PVP applications for seed-propagated hemp varieties. Before the Farm Bill was passed, the agency was unable to process PVP hemp applications, because the legal status of the plant prevented the federal government from accepting and storing the seed deposits required by the PVP Act.

PVP certificates provide patent-like protection to the breeder/inventor of any new, distinct, uniform and stably reproduced plants. PVP certificates offer hemp breeders a 20 year term of protection from the issue of their PVP certificate, which allows certificate holders to exclude others from selling, importing or exporting the variety, or multiplying the variety for marketing (among other exclusivities). These protections also extend to new varieties that are "essentially derived" from the protected variety.

Note that PVP protection is limited by two important exceptions: the "research exemption," permitting the use and reproduction of a protected variety for plant breeding or other research, and the "saved-seed" exemption, which permits bona-fide purchasers of protected varieties to save a limited amount of seed for replanting.

The PVP statutes also include generous grace periods, permitting applicants to file for protection within one year after public dissemination or sale of their variety in the United States, or within 4 years of such activities occurring outside of the country. Applicants whose varieties have already entered into commerce may still benefit from this change in policy if they fall within these grace periods.

For a more detailed comparison of using Utility Patents, Plant Patents, and PVP certificates to protect plant-based intellectual property, see Pomeranz, Knauss, & Veitenheimer, Shoots, Leaves and Money Trees, Intellectual Property Magazine, Dec. 2018/Jan. 2019, p. 45-46.

A domestic depository facility is now accepting hemp seed deposits for utility patents

Another important change stemming from the 2018 Farm Bill also merits report: Earlier this year, the American Type Culture Collection (ATCC) indicated its willingness to accept hemp seeds into its patent depository in Manassas, Virginia. Access to this domestic depository is expected to make it significantly easier for breeders to comply with the deposit requirements for Utility Patent protection for their newly bred hemp varieties. Prior to ATCC's change in policy, the only International Depository Authorized under the Budapest Treaty that had been accepting cannabis and hemp seed deposits was the National Collection of Industrial Food and Marine Bacteria facility (NCIMB) in Scotland – a fact that made it difficult for US-based applicants to pursue patent protection due to the legal challenges of exporting hemp seed.

Key takeaways

Hemp breeders now have more options than ever before for protecting their genetics. In the US, a single seed-propagated hemp variety could now be protected by a PVP certificate, a Utility Patent *and* a Plant Patent. These rights are not mutually-exclusive, and can be used to provide multiple layers of complementary legal protections over important hemp varieties. Breeders who have or are currently planning to license or commercialize their new varieties should seriously consider pursuing one or more of the legal protections described above to protect their investment.

Future prospects

Additional opportunities for protecting hemp varieties are expected to open up in the near future. The 2018 Farm Bill amended the Plant Variety Protection Act to expand PVP protection to cover asexually reproduced plants. The agency is currently drafting regulations to implement these statutory changes and permit breeders to seek protection for plants without the traditional seed deposit. More information is expected later this year, when the PVP Office's new regulations are subjected to the Notice and Comment rulemaking process.

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