

2018 Farm Bill Enacted With Important Provisions for Plant IP and Cannabis-Related Business

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The \$867 billion farm bill ("Agriculture Improvement Act" – House Res. 2) was signed into law by the president on December 20. The new farm bill law contains several important provisions relating to intellectual property protection for plant-based inventions. It also includes important relaxations on laws relating to hemp production and, effectively, CBD.

Amendments relating to hemp

A new Subtitle G "Hemp Production" was added to 7 U.S.C. § 1621, the statute describing legislative purposes and definitions of the code regarding distribution and marketing of agricultural products. "Hemp" is now defined as *Cannabis sativa L.* plants or plant-parts, extracts, etc., containing no more than 0.3% dry weight of THC. The Secretary of Agriculture was given sole authority to promulgate regulations relating to hemp production, and the right to ship hemp and hemp products in interstate commerce is now protected against potentially contrary provisions of state law. The amendments also renew and extend support for hemp-related research and newly include hemp in crops eligible for the Federal Crop Insurance Act. Finally, and potentially most noteworthy, the new law confirms a change to the Controlled Substances Act that removes "hemp" (as defined above) from the definition of "marihuana." This likely amounts to an effective legalization (at the federal level) of CBD, *provided* it is produced from hemp that complies with these new provisions of the farm bill.

Amendments to Plant Variety Protection Act

Prior to the new law, plant patents provided protection only for specifically described varieties (one per patent), and only when those varieties are asexually reproduced. PVP certificates, which are a distinct and non-overlapping form of intellectual property, are issued by the USDA, not the Patent Office, and provide robust protection (with certain important exceptions) for new and distinct varieties. PVP certificates, however, were previously available only for sexually reproduced varieties – leaving an important loophole open for plant types of increasing value such as flowers, which could be asexually propagated and utilized to induce a sport or mutant to derive a new variety that was not prohibited by the old regime.

The new amendments to 7 U.S.C. § 2401 (the PVP statute) expressly expand PVP to cover asexually reproduced varieties. They also modify § 2541 to establish that asexual reproduction of a PVP-protected variety is an act of infringement. These changes extend the reach of Essentially-Derived Variety (EDV) protection, which provides for coverage of new varieties that were "essentially derived" from the protected variety, even if those varieties were asexually reproduced. Such EDV protection is not provided by plant patent. Overall, this new legal reality creates the potential for overlapping coverage of the same plant by all three of Utility Patent, Plant Patent, and PVP Certificate in a wider variety of plants and agricultural products.

Key takeaways

Companies pursuing agricultural inventions and new plant varieties should reevaluate the potential benefits of pursuing PVP protection for discoveries created through asexual reproduction. These plants could previously only be covered by utility or plant

patent protection, which have several important distinctions from that provided by a PVP certificate. These new provisions should be especially beneficial to the flower industry.

The important new changes legitimizing large scale hemp production follow a successful pilot program initiated in 2014, and should be a boon to the rapidly-growing CBD-extract industry (US CBD sales are estimated to exceed \$1 billion in 2020). These changes will also allow US farmers to meaningfully compete with Chinese hemp production for the first time – in 2017 total hemp acreage in the US was only 25,000 acres, while \$100 million worth of hemp was imported.

In addition, the hemp and PVP amendments have important overlap in that they should allow PVP protection for hemp varieties for the first time, especially since the changes in law should enable depositories to accept complaint hemp seed per PVP requirements.

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