prepared to travel to do so. This is much easier if he is involved with a substantial firm with world-wide interests. It is a long way from the small independent breeder of 60 years ago. The stakes are high, because a good new cultivar will soon sell in many millions per year. Because the cost of the breeding programme is also high, there are relatively few breeders of year-round chrysanthemums.

The main lesson I have learned is that one must find out what is required before one makes a cross. Then one must select and trial the seedlings to meet modern specifications without personal preference. From the very short list emerging, the industry must finally choose the cultivars to keep it viable.

Intellectual Property Rights for Plant Raisers

Peter Hillier
Reginald Barker & Co., Chancery House, 53-64 Chancery Lane, London, WC2A 1QU

INTRODUCTION

This paper will look at different forms of intellectual property, that is patents, designs, copyright, and trade marks. Particular attention will be given to trade marks, contrasting this form of protection with variety rights and varietal names. The information contained in this paper is based on U.K. practice, although customs and laws in other countries and states are much the same.

Patents relate to inventions, that is the way things work, as opposed to how they look. The typical cartoon showing a line of people queuing outside the Patent Office with contraptions they have invented is apocryphal but incorrect. The Patent Office only deals with written documents (though sometimes machinery is demonstrated to an examiner in order to persuade him or her of the merits of a particular invention). To gain a valid patent an invention has to be novel and non-obvious.

Generally you must file a patent before you disclose your invention to the public anywhere in the world. Patents have a maximum term in the U.K. of 20 years, after the expiry of which the invention is free for everyone to use.

Designs and Copyright, which are closely allied, relate to the appearance of "art works". The artistic content need not be high. The way something works is irrelevant to design and copyright protection. Copyright can vest in films, drawings, books, true art works, mass-produced articles of "pleasing" shape and, of particular relevance to industry (including the nursery industry), plans, and diagrams.

DIFFERENT FORMS OF INTELLECTUAL PROPERTY

There are three forms of intellectual property which plant raisers need to consider: copyright, design right, and registered design.

Copyright and Design Right. These two forms of intellectual property are automatic in that as soon as you make an original sketch (not copied from any other work) you have copyright and/or design right. When you make a sketch, for example of a new shape of plant container or box for carrying such plant containers, or a new watering can, copyright subsists in such a sketch.

You should sign and date your sketch and all original sketches should be retained in a safe place. Because this form of intellectual property is automatic you have to

be in a position to demonstrate that you own the copyright as this may be required if a court case arises. One way is to take a copy of your sketch and post it to yourself by registered mail and, when the packet arrives, do not open it but store it for future use. You can then, if necessary, open the officially dated packet in Court.

Copyright and Design right have finite fixed terms varying from 10 to 15 years for design right, up to the length of the author's life plus 70 years for author's copyright. Other fixed length terms apply to related rights such as those relating to performers, phonograms, films, and broadcasts.

One U.K. exception is the copyright in the book *Peter Pan* which is without limit, proceeds going to Great Ormond Street Children's Hospital.

In copyright and design right, appearance is everything. If you paraphrase a written article in which copyright resides and thus convey the same information using different words, copyright will not be infringed.

Trade Marks. These are different from many points of view. Firstly, they are renewable *ad infinitum*. U.K. registered trade mark No.1 is still in force having been registered at the end of the last century. It is, incidentally, a Bass beer label. Secondly, although trade marks are assignable property they are, in essence, attached to the goodwill of a business. Their *raison d'etre* is to form a link between goods or services to which they are attached or associated and the owner of the trade mark who is normally, but not always, the manufacturer of the goods or provider of the services.

For example, having purchased Kodak film and found it to be of good quality I may select Kodak film in the future expecting consistent quality from the same source. Or, having had my clothes cleaned at Sketchley Cleaners I may choose another branch of Sketchley and expect to receive the same standard of service.

Trade marks are of two general kinds, house marks and product marks. Either can relate to goods or services. For example the trade mark "Boots" is a house mark. One finds many products at Boots stores which are both "own brand" goods and other manufacturers goods. Boots also functions as a product mark on their own brand goods.

For service, "Sketchley" is a house mark, whereas "Sketchley Gold Service" would function as a product mark.

The most important point about trade marks is that they must be distinctive of the goods or services for which they are to be registered. Some marks, especially logos, are distinctive *per se*. An example is the Lloyds Bank Black Horse or the mark "Gales Force 8" registered by brewers George Gale & Company Limited for one of its beers. Other marks become distinctive by long use. An example is "Draper" for tools. Draper is a fairly common surname and thus not distinctive per se but it has been used for many years by Draper Tools Limited and has become distinctive for their tools. Under our new Trade Marks Act a trade mark may consist not only of a word or logo but of a smell or a sound. For example a recently registered trade mark is "The smell of bitter beer applied to the flights of darts". The "Classic FM" radio station and "Direct Line Insurance" jingles are also trade marks.

Trade marks can be registered for goods or services or both. However, because a trade mark must be distinctive it must not constitute the name of the goods or services for which it is to be used. One could not therefore expect to register the word "paint" for paint. That would not be a trade mark. It might however, be registered

for other goods of which it is not descriptive, for example laser lightshow equipment might be given the trade mark "Light Paint".

Moreover, everyone must be free to use the word for the goods. Slightly more subtly one could not register "Green" for green paint, nor probably for paint of any other colour since the mark would be wholly descriptive of green paint and deceptive when used on any other colour.

THE RELATIONSHIP BETWEEN INTELLECTUAL PROPERTY AND PLANT BREEDERS RIGHTS

Plant breeders rights are similar to patents in that they relate to a particular product — in this case a plant variety — just as a patent relates to a particular invention. *Both have a restricted term of protection.*

Plant variety names, of their very nature, cannot be trade marks. One chooses a plant variety name to define and label a particular kind of goods i.e. plants of a particular variety. This is almost like the inventor of the first ever paint choosing to call it paint, and so defining its name for the future. It is the name of the goods. The name is exactly co-terminous with the variety and vice versa. In choosing a plant variety name one has in fact chosen the name of the goods in much the same way as an inventor may once have chosen to name his invention a vacuum cleaner. Moreover, the name will stay with the variety and, when any variety or breeders rights have expired the name will still be the name of the goods, irrespective of the origin of the particular plants sold.

Thus vacuum cleaners are still being made but a trade mark is the common way to associate products with manufacturers. One may, therefore, look for a Dyson vacuum cleaner or a Miele or a Hoover one. The mutual exclusivity of trade marks and varietal names is recognised by UPOV, the international agreement on plant variety rights. In all member states of UPOV it is prohibited to register, as trade marks, varietal names of plant varieties that appear in the common catalogue of varieties of agricultural plant species. Therefore, to try to prolong a plant variety registration in this way would be inappropriate and artificial.

There have been few relevant cases in the United Kingdom but the leading one is Wheatcroft Brothers Limited's trade marks (71 RPC 43). Wheatcroft registered as trade marks names for roses which were already registered under the variety names. The trade mark registrations were expunged as lacking distinctiveness for the goods.