

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of trademark Registration No.: 2,666,400  
For the mark: "K 326"  
Date registered: December 24, 2002

CROSS CREEK SEED, INC.	)
	)
and	)
	)
COATING SUPPLY, INC.	)
	)
Petitioners,	)
	)
v.	)
	)
F.W. RICKARD SEEDS, INC.	)
	)
Respondent.	)

Cancellation No. \_\_\_\_\_

TRADEMARK FEE PROCESS  
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 US PATENT &  
 TRADEMARK OFFICE

**PETITION TO CANCEL**

Pursuant to 15 U.S.C. § 1064 and 37 C.F.R. § 2.111, Petitioners Cross Creek Seed, Inc. ("Cross Creek") and Coating Supply, Inc. ("Coating Supply"), by and through undersigned counsel, believing that they are now and will in the future be damaged by the referenced mark registered by F.W. Rickard Seeds, Inc. ("Rickard"), hereby seek cancellation thereof. The grounds for this petition are set forth below.

1. Petitioner Cross Creek is a North Carolina corporation with its principal place of business located at 2000 Vass Road, Raeford, NC 28376. Petitioner Coating Supply is a Florida corporation with its principal place of business located at 3379 B2 Southwest 42nd Avenue, Palm City, FL 34990.

2. Upon information and belief, Respondent Rickard is the current owner of the registered trademark "K 326" and its principal place of business is located at 4330 Colby Road, Winchester, KY 40391.
3. Petitioners Cross Creek and Coating Supply are in the business of propagating, processing and marketing seed, including tobacco seed. Respondent Rickard also engages in such business.
4. K326 is an alphanumeric code name for a tobacco varietal for which the United States Department of Agriculture ("USDA") issued Plant Variety Protection Certificate No. 8300070 on March 26, 1984, pursuant to section 81 of the Plant Variety Protection Act, as amended (the "PVPA"), 7 U.S.C. § 2481. Functioning much like a patent, a certificate issued pursuant to the PVPA gives its owner, for a specified length of time, exclusive rights to produce, process and market the plant variety for which the certificate is issued.
5. The PVPA certificate for K326 (the "Certificate") covered the propagation, processing and marketing of the K326 variety of tobacco for a period of eighteen years from the March 26, 1984 date of issuance. See Certificate information for K326, found at USDA webpage "[www.ars-grin.gov/cgi-bin/npgs/html/showpvp.pl?8300070](http://www.ars-grin.gov/cgi-bin/npgs/html/showpvp.pl?8300070)," a copy of which is appended hereto as Exhibit 1. The Certificate for K326 expired on March 26, 2002. *Id.* Rickard and/or its affiliate(s) owned the rights provided under the Certificate at the time it expired. Upon expiration, Rickard and/or its affiliate(s) lost the exclusive rights to the propagation, processing and marketing of K326.
6. As stated in the Trademark Manual of Examining Procedure ("TMEP") § 1202.12 *Varietal and Cultivar Names (Examination of Applications for Seeds and Plants)* (3d ed. 2002):

If the examining attorney determines that wording sought to be registered as a mark for live plants or agricultural seeds comprises a varietal or cultivar name, the examining attorney must refuse

registration, or require a disclaimer, on the ground that the matter is the varietal name of the goods and does not function as a trademark under §§ 1, 2 and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052 and 1127. *See Dixie Rose Nursery v. Coe*, 131 F.2d 446, 55 USPQ 315 (D.C. Cir. 1942), *cert. denied* 318 U.S. 782, 57 USPQ 568 (1943); *In re Hilltop Orchards & Nurseries, Inc.*, 206 USPQ 1034 (TTAB 1979); *In re Farmer Seed & Nursery Co.*, 137 USPQ 231 (TTAB 1963); *In re Cohn Bodger & Sons Co.*, 122 USPQ 345 (TTAB 1959). . . . A varietal or cultivar name is used in a plant patent to identify the variety. Thus, even if the name was originally arbitrary, it “describe[s] to the public a [plant] of a particular sort, not a [plant] from a particular [source].” *Dixie Rose*, 131 F.2d at 447, 55 USPQ at 316. It is against public policy for any one supplier to retain exclusivity in a patented variety of plant, or the name of a variety, once its patent expires. *Id.*

(Emphasis added; bracketed material in original.) As identified by USDA, “K326” is the *name* of a particular sort of tobacco, and the K326 Certificate *has expired*. *See Exhibit 1*. Put in trademark language, K326, as a varietal name, is plainly a generic term and is therefore not capable of being registered. Consequently, it was clear error for the examining attorney to accept Rickard’s mark, which should have been refused as a matter of law.

7. Section 1202.12 of the TMEP also directs the examining attorney to—

undertake an independent investigation of any evidence that would support a refusal to register, using sources of evidence that are appropriate for the particular goods specified in the application (*e.g.*, laboratories and repositories of the United States Department of Agriculture, plant patent information from the United States Patent and Trademark Office, a variety name search of plants certified under the Plant Variety Protection Act listed at [www.ars-grin.gov/npgs/searchgrin.html](http://www.ars-grin.gov/npgs/searchgrin.html)).

(Emphasis added.) Had the examining attorney conducted the required search at the referenced website, he would have discovered that K326 is a tobacco variety name, and determined registration to be improper.

8. Furthermore, on November 25, 2002—a month prior to registration—the USDA issued a warning letter pursuant to section 412 of the Federal Seed Act, as amended (the “FSA”), 7 U.S.C. § 1602, to Gold Leaf Seed Company (“Gold Leaf”), an affiliate of Rickard, for falsely advertising, after Certificate expiration, that K326 was a protected variety under the PVPA. The warning letter, which was copied to Rickard, expressly states that—

it is a violation of section 201(d) of the FSA for [Gold Leaf], or any company, to now label and advertise that using “K326” as a tobacco variety name is strictly prohibited without expressed written permission from [Gold Leaf]. . . . FSA regulations [require] that the name given by the originator [i.e., K326] shall be used when seed of that variety is labeled as to variety or the seed is advertised by variety name. Once a variety name has been used in channels of commerce it becomes public property. . . .

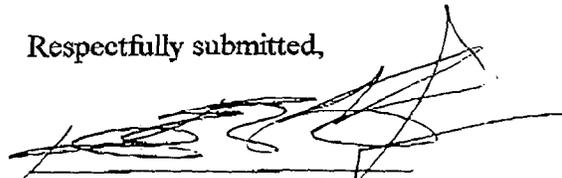
(Emphasis added.) The referenced warning letter is appended hereto as Exhibit 2. Upon information and belief, Rickard obtained the registration for K 326 through fraud, as evidenced by its willful and knowing failure to inform the United States Patent and Trademark Office of the warning letter, the facts set forth therein, and that it was seeking to register a plant varietal name (presumably in an improper attempt to extend by other means the effective life of the expired Certificate).

9. The K326 variety of tobacco represents approximately 25% of the flue-cured tobacco acreage in the United States. Cross Creek and Coating Supply are now and will in the future be damaged by the trademark registration for “K 326.” Pursuant to section 201(d) of the FSA, 7 U.S.C. § 1571(d), and USDA’s implementing regulations at 15 C.F.R. § 201.34d, Cross Creek and Coating Supply are required to use the name “K326” in order to identify the K326 varietal as such in their product labeling and advertising. Cross Creek and Coating Supply, as well as all other entities engaged in propagating, processing and marketing K326, will likewise suffer economic harm if they are forced by the chilling effect of Rickard’s mark to refrain from engaging in such business.

WHEREFORE, Petitioners Cross Creek Seed, Inc. and Coating Supply, Inc. pray that Registration No. 2,666,400 for the mark "K 326" be canceled, and that the Board award whatever additional relief it deems mete and just.

January 22, 2003

Respectfully submitted,



Kenneth S. Kaufman, Esq.  
9400 Reach Road  
Potomac, MD 20854  
301/285-0110

Counsel for Petitioners  
Cross Creek Seed, Inc. and  
Coating Supply, Inc.

Plant Variety Protection Number: 8300070

Ex.1

Plant Variety Protection Number: 8300070

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Variety: K326

Taxon: Nicotiana tabacum L.

Crop: Tobacco

Applicant: Novartis Seeds, Inc.

Date filed: 02/25/1983

Status: Certificate Expired

Status date: 03/26/2002

Date issued: 03/26/1984

Years protected: 18

Number of pages: 11

Certified Seed Only - To be sold by variety name only as a class of certified seed.

Show GRIN Data

Plant Variety Protection Office

USDA-AMS, Beltsville, MD

Home Page

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USDA - ARS - GRIN

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CROSS CREEK SEED

PAGE 05

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**Ex. 2**

United States  
Department of  
Agriculture

Agricultural  
Marketing  
Service

Livestock  
and Seed  
Program

Seed Regulatory and Testing Branch  
Room 209, Building 306, BARC-East  
Beltsville, MD 20705-2325  
301-504-8490, FAX 301-504-8098

**WARNING—APPARENT VIOLATION OF THE FEDERAL SEED ACT**

NOV 25 2002

In reply refer to:  
FSA 03-0013

Marion Hawkins  
Gold Leaf Seed Company  
900 South Fourth Street  
Hartsville, South Carolina 29550

Dear Mr. Hawkins:

We have information that in the year 2002, Gold Leaf Seed Company distributed or caused to be distributed advertising materials ("Top Growers Use The World's Best Varieties," brochure) by the U.S. mails and electronic transmission (the internet). This brochure indicates that the 'K326' variety of tobacco seed is protected under the Plant Variety Protection Act and Title V of the Federal Seed Act (FSA), and the variety name is a trademarked (™) term, therefore, its "use is strictly prohibited without expressed written permission."

We have information that Plant Variety Protection (PVP) Certificate No. 8300070, issued for K326 tobacco seed, expired on March 26, 2002. It is a violation of sections 201(d) and 501 of the FSA and section 201.36b of the FSA regulations, once the certificate of plant variety protection has expired, to advertise or label K326 tobacco seed as being "a protected variety having protection under the PVP Act." It is also a violation under Title V of the FSA once the certificate of plant variety protection has expired to specify that K326 tobacco seed is required to be sold by variety name only as a class of certified seed.

The variety name given to the K326 tobacco variety was designated in the application for a PVP Certificate by the originator, Novartis Seeds, Inc. The variety name of this seed when introduced into channels of commerce was K326. Section 201.34(d)(4) of the FSA regulations specifies that the status of a variety name is not modified by the registration of the name as a trademark. It is a violation of section 201(d) of the FSA for the Gold Leaf Seed Company, or any company, to now label and advertise that using "K326" as a tobacco variety name is strictly prohibited without expressed written permission from Gold Leaf Seed Company. It is required under section 201.34(d) of the FSA regulations that the name given by the originator shall be used when seed of that variety is labeled as to variety or the seed is advertised by variety name. Once a variety name has been used in channels of commerce it becomes public property and trademarking any part of the terms used in a variety name does not modify this requirement.

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CROSS CREEK SEED

PAGE 06

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P.03.03

Marion Hawkins

Page 2

The brochure states that seed of 'RG 17,' 'NC 72,' and 'NC 100' tobacco varieties have been granted protection under the PVP Act, or protection has been applied for. It further states that each variety must be sold by variety name as required under Title V of the FSA. We have information that no application has been made to the PVP Office for the RG 17 and NC 100 varieties. Title V applies only after the PVP certificate has been issued, therefore, it appears that the RG 17 and NC 100 varieties were falsely advertised as having been issued PVP certificates and being protected under Title V of the FSA, in violation of section 201(d) of the FSA. We have information that there is a PVP application pending for NC 72, however, the request for Title V protection under the FSA was not made in the application, therefore, NC 72 was falsely advertised as being protected under Title V of the FSA.

The brochure states that 'RG H4,' 'RG H51,' 'NC 71,' 'Oxford 207,' 'RG 81,' and 'CU263' tobacco varieties are protected under Title V of the FSA. Applications are presently pending for each of these varieties and the Title V option has been requested, however, to date no PVP certificates for these have been issued. Title V applies only after the PVP certificate has been issued, therefore, the above listed varieties were falsely advertised as being protected under Title V of the FSA, in violation of section 201(d) of the FSA.

The brochure also indicates that other tobacco variety names: 'Coker 371 Gold,' 'K 394,' 'K 730,' 'K346,' and 'K358' are trademarked. As explained above, variety names become public property when the variety is introduced into channels of commerce and trademarking the terms in a variety name does not modify the required use of that name by any person selling or advertising the variety.

The Federal Seed Act and its Regulations are available on our home page:  
<http://www.rms.usda.gov/lsp/seed.htm>

This warning is issued under Section 412 of the Federal Seed Act, which provides that in certain circumstances a suitable warning may be issued instead of other action. This warning completes the Federal regulatory action on these violations; your company should make any necessary procedural corrections to prevent future violations.

Sincerely,

Harold W. Laswell  
Seed Marketing Specialist

cc: E. Martin (NC Department of Agriculture and Consumer Services)  
James Head (F.W. Rickard Seeds, Inc.)  
Sam C. Baker (Cross Creek Seed Company)

~~BJ'S KENSINGTON PHARMACY~~  
~~3737 UNIV BLVD WEST,~~  
~~KENSINGTON, MD 20895.~~  
~~TEL: 301 933 9474~~  
~~FAX: 301 933 9478~~

**FAX COVER SHEET**

TO: *George Woods*

FROM: *Ken Kaufman*

FAX.: (703) 308-9333

PHONE: (301) 285-0110

DATE: *13 March 2003*

URGENT :  
CONFIDENTIAL :  
CONFIRM RECEIPT :

NUMBER OF PAGES :  
(INCLUDING COVER)

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REPLY TO :  
REPLY TO :

REMARKS :

*George - Please call me to confirm service, one done. Thanks*  
*Ken Kaufman*