

September 8, 2003

Mr. Andrew Baxley
TTAB
Case Serial #: 76378772
2900 Crystal Drive
Arlington, VA 22202-3514

SEP 10 2003

41792



09-12-2003

U.S. Patent & TMOs/TM Mail Rcpt Dt. #22

Dear Mr. Baxley:

This letter is pursuant to the phone conversation we had on the last week of August. During our phone conversation you refused to take the time to listen to the evidence regarding the improper trademarking of the tobacco varietal name K 326. The serial number for this trademark is 76378772. This situation has gotten completely out of control and the problem falls directly at the feet of the U.S. Patent and Trademark Office along with the Trademark Trials and Appeals Board.

The petitioners that filed to have the erroneous trademark overturned are Cross Creek Seeds, Inc and Coating Supply, Inc. You failed to hear the merits of the case saying the case has been suspended until the outcome of the court case between Cross Creek Seeds and F.W. Rickard Seeds had been handed down. The biggest problem with that line of thought is the court case in Greensboro should have absolutely no bearing on the TTAB hearings. The merits of the two cases are on complete opposite spectrums. The TTAB should only be looking at the merits of whether or not the U.S.P.T.O. made a mistake in registering this fraudulent trademark. Take into account the original examining attorney, Christopher Adkins, has admitted his mistake and says that the varietal name K 326 was mistakenly trademarked. The other issue is why the TTAB did not hear the merits of the case based on the filings of Coating Supply, Inc. They, just like Cross Creek Seeds, Inc., have something to lose from this erroneous trademark. That was the reason they filed to have the mark overturned. It was not by mistake or coincidence that both Cross Creek and Coating Supply sought to have this overturned.

While taking a look at this case, please look closely at one other trademark situation. The serial number: 76453271, is a case identical to the case above. It is concerning a tobacco varietal name Coker 371Gold and the same F.W. Rickard Seeds, Inc. The examining attorney handling this trademark was Mr. David Elton. Unlike the before mentioned Christopher Adkins, Mr. Elton made the proper decision and refused to register the mark for Coker 371 Gold because it is a generic varietal name. It is my hope you will find the same answer for K 326.

September 8, 2003

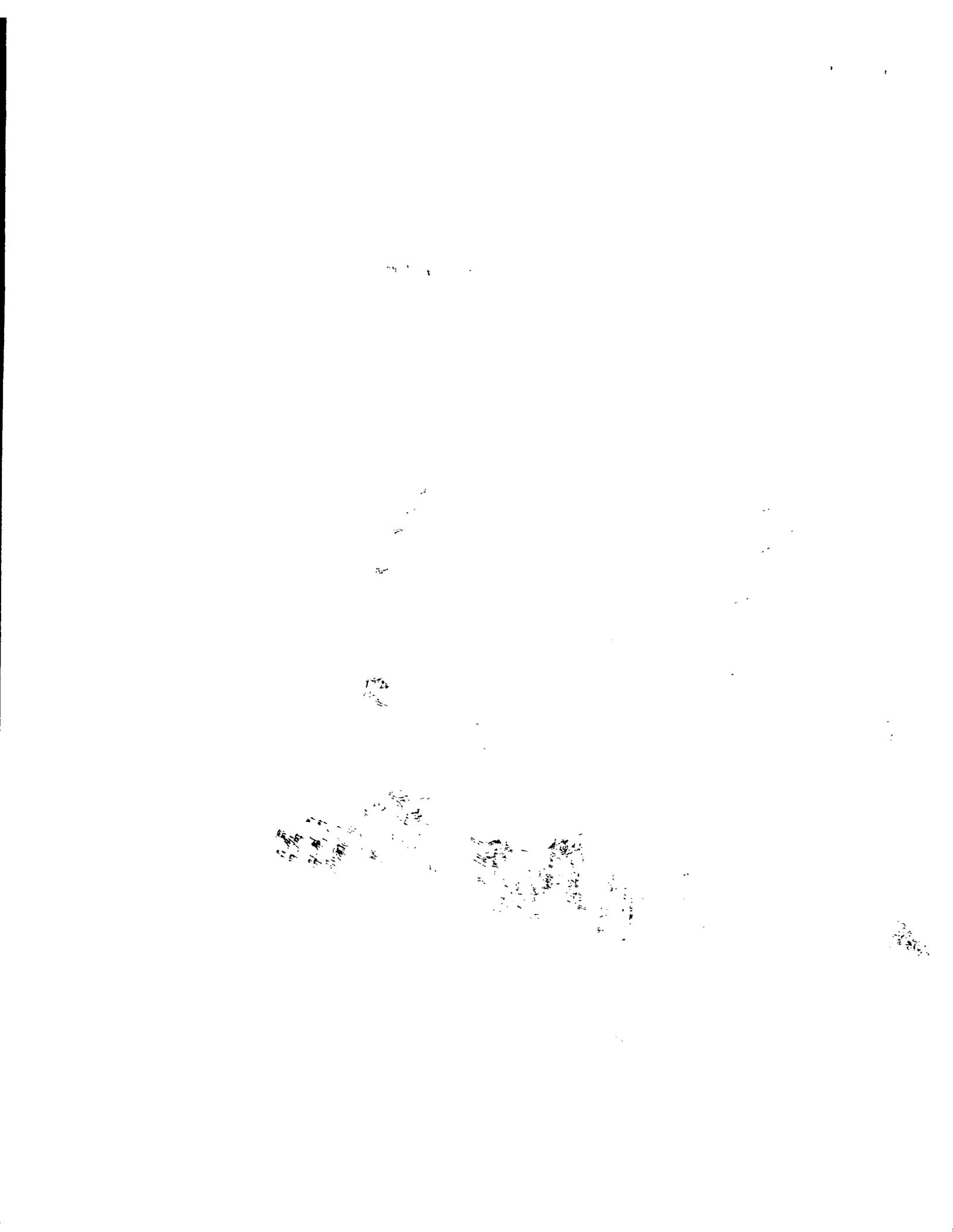
Enclosed with this letter you should find the reasoning that the tobacco variety K 326 should not have been trademarked. The attachments will take you step by step through the Trademark offices own web page to show that this is an unfair, unjust and illegal trademark set forth by the rules that govern the Trademark offices registration process. With this information you cannot ignore the harm that you have caused not only Cross Creek Seeds, Inc. and Coating Supply, Inc. but thousands of others by letting this fraudulent trademark stand.

Respectfully,



Sam Baker
927 Hatley-Burris Road
Stanfield, NC 28163
(704) 485-3167

Enclosures



TMEP Chapter 1200 Substantive Examination of Applications

1202.12 Varietal and Cultivar Names (Examination of Applications for Seeds and Plants)

Varietal or cultivar names are designations given to cultivated varieties or subspecies of live plants or agricultural seeds. They amount to the generic name of the plant or seed by which such variety is known to the public. These names can consist of a numeric or alphanumeric code or can be a "fancy" (arbitrary) name. The terms "varietal" and "cultivar" may have slight semantic differences but pose indistinguishable issues and are treated identically for trademark purposes.

Subspecies are types of a particular species of plant or seed that are members of a particular genus. For example, all maple trees are in the genus *Acer*. The sugar maple species is known as *Acer saccharum*, while the red maple species is called *Acer rubrum*. In turn, these species have been subdivided into various cultivated varieties that are developed commercially and given varietal or cultivar names that are known to the public.

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). Likewise, if the mark identifies the prominent portion of a varietal name, it must be refused. *In re Delta and Pine Land Co.*, 26 USPQ2d 1157 (TTAB 1993) (Board affirmed refusal to register DELTAPINE, which was a portion of the varietal names Deltapine 50, Deltapine 20, Deltapine 105 and Deltapine 506).

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.*

Market realities and lack of laws concerning the registration of varietal and cultivar names have created a number of problems in this area. Some varietal names are not attractive or easy to remember by the public. As a result, many arbitrary terms are used as varietal names. Problems arise when trademark registration is sought for varietal names, when arbitrary varietal names are thought of as being trademarks by the public, and when terms intended as trademarks by plant breeders become generic through

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public use. These problems make this a difficult area for the examining attorney in terms of gathering credible evidence and knowing when to make refusals.

Whenever an application is filed to register a mark containing wording for live plants or agricultural seeds, the examining attorney must inquire of the applicant whether the term has ever been used as a varietal name, and whether such name has been used in connection with a plant patent, a utility patent, or a certificate for plant variety protection. See 37 C.F.R. §2.61(b). The examining attorney should also 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).

Plant Variety Protection Office

Status of Certification (Sept. 2, 2003)

Search by PV Number/Variety Name

Search by Applicant or Owner Name

or Select a Crop:

Agroticum	Cucumber	Potato
Alfalfa	Dahlia	Primrose, cape
Alkaligrass, weeping	Daisy, blackfoot	Primrose, evening
Artichoke	Daisy, english	Pumpkin
Ashitaba	Delphinium	Radish
Aster, china	Dogstail, crested	Radish, fodder
Atra paspalum	Eggplant	Rape
Bahigrass	Endive	Reed canarygrass
Barley	Fennel	Rescuegrass
Basil	Fescue, chewings	Rice
Bean, field	Fescue, creeping	Rye
Bean, garden	Fescue, hard	Ryegrass (lolium x hybridum)
Bean, lima	Fescue, idaho	Ryegrass, annual
Bean, mung	Fescue, meadow	Ryegrass, perennial
Beet	Fescue, red	Safflower
Beet, garden	Fescue, sheep	Sainfoin
Beet, sugar	Fescue, tall	Salicornia
Bentgrass, colonial	Festulolium	Sesame
Bentgrass, creeping	Flaccidgrass	Shallot
Bentgrass, red top	Flax	Snapdragon
Bentgrass, velvet	Florida fingergrass	Sorghum
Bermudagrass	Foxtail, creeping	Sorghum-sudangrass
Bermudagrass (f1)	Gamagrass, eastern	Soybean
Bluegrass, annual	Gazania	Spinach
Bluegrass, glaucantha	Hair-grass, crested	Spruce
Bluegrass, kentucky	Hardinggrass	Squash
Bluegrass, rough	Kikuyu grass	St. augustinegrass
Bluegrass, supina	Kleingrass	Steiroidiscus
Bluestem, big	Kochia	Stevia
Brachiaria x	Laurisagrass	Stock, common
Broccoli	Lawngrass, japanese	Sunflower
Broccoli (f1)	Lentil	Sunflower (f1)
Broccoli raab	Lespedeza, chinese	Sweetpea
Brome, short	Lespedeza, striate	Swiss chard
Bromegrass, smooth	Lettuce	Tanden, festulolium
Bromegrass, sweet	Lobelia, annual	Teff
Bromegrass, thready	Lovegrass, weeping	Thistle
Buckwheat	Lupin	Timothy
Buffalograss	Manna grass	Timothy, turf
Buffelgrass	Marigold	Tobacco

Tobacco Listings between 7200022 and 8700057

PVP No.	Variety/Name	Applicant	Status	Status Date
7200022	Coker 347	Novartis Seeds, Inc.	Certificate Expired	10/27/1993
7200023	Coker 411	Novartis Seeds, Inc.	Certificate Expired	10/27/1993
7200051	Speight's G-33	Speight Seed Farms, Inc.	Certificate Expired	04/11/1994
7200140	Speight G-140	Speight Seed Farms, Inc.	Certificate Expired	04/11/1994
7400007	Speight G-15	Speight Seed Farms, Inc.	Certificate Expired	04/11/1994
7400035	McNair 944	Novartis Seeds, Inc.	Certificate Expired	03/18/1994
7500030	McNair 1040	McNair Seed Company	Application Abandoned	11/18/1975
7500065	Speight G-23	Speight Seed Farms, Inc.	Certificate Expired	04/11/1994
7600004	Coker 86	Novartis Seeds, Inc.	Certificate Expired	10/27/1993
7800008	Coker 48	Novartis Seeds, Inc.	Certificate Expired	09/20/1995
7900035	Speight G-70	Speight Seed Farms, Inc.	Certificate Expired	06/14/1996
7900040	Speight G-52	Speight Seed Farms, Inc.	Certificate Expired	03/11/1997
7900118	Speight G-58	Speight Seed Farms, Inc.	Certificate Expired	02/26/1999
8000060	McNair 373	Northrup King Company	Application Abandoned	12/29/1980
8100048	Coker 51	Novartis Seeds, Inc.	Certificate Expired	02/18/2000
8200001	K399	Novartis Seeds, Inc.	Certificate Expired	07/15/2000
8200038	N77	Newton Seed, Inc.	Application Withdrawn	03/30/1982
8200046	N126	Newton Seed, Inc.	Application Withdrawn	03/30/1982
8300056	Coker 176	Novartis Seeds, Inc.	Certificate Expired	09/29/2001
8300070	K326	Novartis Seeds, Inc.	Certificate Expired	03/26/2002
8500025	Speight-G-80	Speight Seed Farms, Inc.	Certificate Issued	04/30/1986
8500040	Coker 206	Novartis Seeds, Inc.	Certificate Issued	04/30/1986
8700040	K394	F.W. Rickard Seeds, Inc.	Certificate Issued	08/31/1987
8700049	Coker 371 Gold	F.W. Rickard Seeds, Inc.	Certificate Issued	09/30/1987
8700057	Speight G-108	Speight Seed Farms, Inc.	Certificate Issued	08/31/1987

Plant Variety Protection Office
 USDA-AMS, Beltsville, MD
[Home Page](#)

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