

Appendix 1: NLA – AU Information and Recent Press Releases

Protecting Patented Fruit

[American Fruit Grower, Apr 2003](#)

Infringement of patent and trademark property rights is an important issue in the fruit industry, and the National Licensing Association is addressing it.

THE NATIONAL Licensing Association (NLA) was founded in 2002 by the commercial nursery industry. The mission of the NLA is to create a new agribusiness environment that does not tolerate infringement of intellectual property rights (patents, plant patents, and trademarks). Patrick Ballew, an attorney representing the NLA, says, "The NLA is going to fulfill its mission by tracking the location and intellectual property status of blocks of permanent crops throughout the world." Ballew emphasized that the real benefit of the NLA's activities is the protection of agricultural markets.

How does patent and trademark infringement impact ag markets in the U.S.? The NLA estimates that about 30% of all commercial fruit trees in the ground infringe either a plant patent or a trademark. "If you look just at patented and trademarked varieties, that figure may be as high as 60% in some parts of the country," Ballew says. "In apples, for example, growers say that if Washington only produced 70 million boxes of apples the price would be higher and more stable. But Washington has the capability to produce over 100 million boxes of apples, and so the price is lower and less stable. So, there is an oversupply rate of 30% and an infringement rate of about 30%. This suggests that the cheap infringing trees should not have been planted in the first place, because they damaged the U.S. apple market."

Safeguarding The Future

"The hard lesson U.S. growers have learned is that infringement by anyone is bad for agricultural markets," Ballew says. He explains, "Why do U.S. growers fear China? They fear China because China has historically disregarded intellectual property laws - they have copied everyone's technology, then they manufacture it cheaper than we can and ship it back to us at a price we cannot compete against. They are doing that with fruit and other ag products right now."

It is not just China that is causing U.S. growers heartburn. The NLA believes that a considerable portion of the fruit exported into the U.S. from Chile and other Southern Hemisphere countries also infringes U.S. plant patents and trademarks.

Because of the linkage between cheap infringing goods and market oversupply, the NLA's mission is proving to be very attractive to companies managing agricultural intellectual property rights. "The NLA has received inquiries from several companies that license the importation of patented and trademarked fruit and other ag products for entry into the U.S.," Ballew says.

Working For You

By assisting those companies, Ballew says that the NLA helps U.S. growers by reducing the importation of infringing fruit from foreign countries. This can reduce the supply of foreign fruit that U.S. growers are competing against. "The NLA will be working through U.S. Customs and the Federal Trade Commission to exclude infringing fruit and other ag products from entry into the U.S.," Ballew says.

Another recent development in ag that illustrates the need for the NLA is the increasing importance of ethical business practices to retailers and certification companies. This focus on business ethics is in part the result of the recent publicity about ethical lapses in U.S. business. It is also an excellent risk management tool for retailers and packinghouses. If the

people they deal with are ethically well grounded, then the possibility of legal or business problems is greatly reduced.

The NLA is continuing its activities with respect to domestic U.S. infringement. "Education, and not litigation, is the focus of the NLA," says Rex Stratton, a Seattle attorney that also represents the NLA. Stratton says, "The NLA uses the fewest number of litigation cases to achieve the maximum educational benefit." On the educational side, the NLA has made a number of presentations to various groups around the country, including the recent IDFTA meeting in Syracuse, NY. But, the NLA has been busy litigating also.

"Over the last 12 months, our firm has collected slightly less than \$1 million for our clients in patent and trademark infringement cases involving commercial fruit varieties," said Stratton. "We have about 100 NLA cases ready to go, and we hope to resolve most of those cases without having to file suit. We have just under 400 additional cases pending investigation."

This article? was prepared by the Nursery Licensing Association based in Seattle, WA. E-mail questions or comments about this article to afg_edit@meisternet.com.

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NLA – Australia Pty Ltd
P.O. Box 470, Salisbury
QLD 4107
AUSTRALIA
Phone: (03) 9016 3478
Email: nla-au@callatg.com

Why the NLA?

In an ideal world, commercial growers of permanent crops would purchase only licensed plants from legitimate sources. Current industry practice is far from ideal – infringement of proprietary plants is common, and until recently, accepted. The National Licensing Association (NLA) concept started in the United States in 2002 as the NLA-US. The NLA-AU was established as a separate company in Australia in 2005. Since its inception, the NLA program has challenged industry practices by speaking out against infringement of intellectual property rights in plants, promoting ethical practices in agriculture, and taking enforcement action against infringers.

The NLA is not the first or only organization to join industry members together to enforce intellectual property rights. Well known examples include the music copyright licensing associations such as ASCAP (American Society of Composers and Performers), and BMI (Broadcast Music Industry). Within the agricultural industry, Monsanto Corporation has filed dozens of lawsuits against growers for infringement of its seed patents in the United States and Canada. The Canadian Supreme Court recently upheld a decision favorable to Monsanto in one of these infringement cases.

The NLA promotes and facilitates the licensing of infringing plants through voluntary compliance by growers, while at the same time educating the growing community regarding the legal and economic benefits of purchasing licensed plants to begin with. NLA is showing infringers that it costs much less to buy legal trees in the first place than to buy “bootleg” or illegal trees, and then defend themselves in an intellectual property infringement lawsuit later.

Current industry practice places a grower who purchases licensed plants -- and pays the required royalty -- at a competitive disadvantage as compared to one who grows unlicensed plants for which no royalty is paid. The NLA’s enforcement activities help to level the playing field among growers by creating a business climate where all growers of a proprietary variety pay an honest royalty for the plants they purchase or propagate.

The NLA’s ultimate goal is to foster ethical behavior in the agricultural community. When growers respect the intellectual property rights of nurseries and breeding programs, everyone wins: Breeding programs receive the royalties that support their ongoing research and development of valuable new varieties; nurseries have access to those varieties, and use their expertise to provide quality, true to type virus free plants to growers; and growers remain competitive in the global agricultural community by producing crops from the new varieties that are in demand in global markets.

The NLA-US’s experience in the United States suggests that since the formation of NLA-US in 2002, U.S. member nurseries have generally experienced an increase in both

overall nursery sales and the granting of propagation licenses. This increase suggests that awareness of and respect for intellectual property rights in permanent crop agriculture is increasing. The NLA-AU believes the U.S. nursery industry's experience may be indicative of what is yet to come in Australia. Certainly, the NLA-AU and its members anticipate a day when the ultimate goal of the NLA is met, and the services of the NLA are no longer necessary.

The NLA-AU Structure

The concept of the National Licensing Association is simple: Breeding programs and nurseries that exclusively control intellectual property rights in plant varieties join the NLA-AU as members, under the terms of the NLA membership agreement. The members appoint the NLA as their attorney in fact for the purposes of enforcement of the right, title and interest of the intellectual property rights of each variety. Under this authority, the NLA takes action as necessary to enforce the members' intellectual property rights, through investigation of infringing plantings, contact with infringing growers, settlement discussions and resolution, and, when necessary, litigation. NLA actions are taken in the name of the member(s) whose rights are being enforced.

Historically, holders of intellectual property rights in permanent crop plants, especially nurseries, have been slow to enforce those rights against infringers, because the infringers are often their customers who buy *some* legal plants. If an infringement action is pursued, the nursery risks losing what business it does get from that customer. To alleviate this problem, the NLA has relieved individual members of decision making authority when it comes to enforcement. Members transfer their enforcement rights to the NLA, and can then honestly tell their customers that the decision to enforce is out of their control. Under the terms of the NLA membership agreement, individual nurseries cannot dictate the course of action taken by the NLA in a given case.

Competing nurseries licensed to sell the same variety have been loathe to share sales information with one another, making it impossible to determine whether a given planting contains plants legitimately purchased from one or more licensees, or from none of them. The NLA structure allows each member to disclose sales and customer information to a central confidential source, for inclusion in an infringement evaluation, without fear that the information will be accessed or misused by a competitor.

In return for the assignment of enforcement rights, each member receives a percentage of the proceeds from enforcement of that member's intellectual property rights (60% of net recovery). Additionally, all NLA members share equally in 10% of the net recovery obtained by the NLA in the enforcement of all member intellectual property rights, regardless of whose rights are enforced.

The NLA-AU Infringement Policy

The NLA-AU Infringement Policy rewards voluntary compliance. Infringers pay less, and NLA members recover more, when infringement claims are voluntarily and amicably resolved. An incremental fee schedule reflects the additional costs associated with a litigated resolution.

The incentive to the grower that has planted infringing trees is to come forward and license the trees without the forceful urging of the NLA. The most cost effective path is for all growers to initiate early licensing of infringing plantings. The more action the NLA is

called upon to initiate to obtain licensing of infringing trees, the greater the cost is to the grower. The NLA initiates litigation as a last resort.

In bringing enforcement actions for intellectual property infringement, the NLA looks not only to the infringing grower, but also to the entities that are in privity with the infringing grower, such as farm management companies, real estate companies, banks and any others that directly infringe, or who indirectly infringe, by aiding and abetting infringement through inducement of or contribution to infringing activities.

NLA-AU begins fruit orchard inspections in Australia

News Release

For Immediate Release

Release date: 30 November 2006

NLA-AU begins fruit orchard inspections in Australia - (National Licensing Association – Australia (NLA-AU))

The National Licensing Association – Australia (NLA-AU) will begin fruit orchard inspections this season in Australia on behalf of plant breeders. The purpose of the NLA-AU inspection program is to work cooperatively with growers and packers to resolve any orchard planting irregularities affecting plant breeders' rights. The NLA-AU believes that this inspection program will help the Australian fruit industry remain competitive in the international market.

“Most of the fruit and vegetables you see in the produce section of any grocery store in the world are protected by plant breeder's rights, or by trademarks used with branded produce items,” said Patrick Ballew, a Managing Director of the NLA-AU. “Most of the profit margin in grocery store sales comes from the produce section, and the major grocery retailers do not want to have any problems with their largest profit centres,” said Ballew.

The unauthorized reproduction of new protected plant varieties is a violation of plant breeder's rights in Australia. The legal liability of infringement doesn't stop with illegal trees, however, it also extends to sales proceeds from fruit of illegal trees.

There are several food retailer certification programs now in operation, and their goal is to help the grocery retailers to avoid or limit the retailers' liability that may arise because of their suppliers' activities. EurepGAP is operated by European retailers. The Safe Quality Food (SQF) Program, originally developed in Western Australia, is now operated by the Federated Marketers Association (FMA) in the United States. “The existence of EurepGAP and SQF suggests that retailers do not want any problems from their supply chain,” explains Ballew.

The NLA-AU does not believe that there is a significant problem with unauthorized plant varieties in Australia. “Our only job is to make sure that plant breeders recover their fair share of the cost of bringing new plant varieties to market. It takes ten years or more of highly detailed technical work with very little cash flow to create a new plant variety. It's a risky, slow and expensive process. If plant breeders cannot be paid for their contribution in Australia, the industry here will lose access to the best new varieties.

The NLA-AU will be contacting Australian growers during this season to arrange orchard inspections. The resolution process will be cooperative and as grower friendly as possible. Growers who voluntarily contact the NLA-AU will have an opportunity to resolve any irregularities in their orchards for much less than growers who wait to be inspected.

NLA – Australia Pty Ltd
P.O. Box 470, Salisbury
QLD 4107
AUSTRALIA
Phone: (03) 9016 3478
Email: nla-au@callatg.com

NLA-AU resolves two cases of PBR infringement in Australia

News Release

For Immediate Release

Release date: 7 December 2006

NLA-AU resolves two cases of PBR infringement in Australia - (National Licensing Association – Australia (NLA-AU))

The National Licensing Association – Australia (NLA-AU) has now resolved two cases of Plant Breeders Rights (PBR) infringement in fruit orchards in Australia. Both cases involve summerfruits (peaches, nectarines, plums, apricots and cherries). It is the NLA-AU's policy not to publicly identify any growers that are involved in any cases of infringement.

The first of the resolved cases was a voluntary acknowledgement of infringement by a grower. This grower resolved over 25,000 infringing trees. In accordance with the NLA-AU Infringement Resolution Policy, this grower paid the royalty and an administration fee, for a total of \$7.75 AUD per tree. This total, typical for certain summerfruit varieties, results from payment for each tree of a \$6.00 AUD royalty and \$1.75 administration fee.

In the second case, the grower refused to voluntarily resolve the infringement, and a lawsuit was filed. After the investigation was completed in the case, the court set a mediation date, and the case was settled through mediation.

The NLA-AU believes that there is not a significant infringement problem in Australia. "From all indications, the Australian fruit industry appears to be committed to respecting plant breeders rights, trademarks, and non-propagation agreements. The growers appear to understand the value of Australian and international plant breeders rights in maintaining innovation and competitiveness in the world market," said Patrick Ballew, a managing Director of NLA-AU.

"Resolving what few PBR issues that exist in Australia will help keep the Australian fruit industry attractive to the major grocery retailers and export markets," said Ballew. The NLA-AU is currently conducting inspections of orchards in Australia. Growers who voluntarily contact the NLA-AU prior to receiving an inspection notice and who fully cooperate with the NLA-AU, will always receive the best resolution terms that the NLA-AU can offer.

NLA – Australia Pty Ltd
P.O. Box 470, Salisbury
QLD 4107
AUSTRALIA
Phone: (03) 9016 3478
Email: nla-au@callatg.com

ENDS

PRESS RELEASE

For Immediate Release February 26, 2007

The National Licensing Association (NLA) concept started in the United States in 2002 as the NLA-US. The NLA-AU was established as a separate company in Australia in 2005. Since its inception, the NLA program has challenged industry practices by speaking out against infringement of intellectual property rights in plants, promoting ethical practices in agriculture, and taking enforcement action against infringers.

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2007 Inspection Program

The National Licensing Association - AU (NLA-AU) is participating in an Inspection Program this season, a cooperative effort involving the NLA, its Australian member nurseries, breeding programs, and growers. The inspection will serve to monitor the conditions agreed upon in the "Non-Propagation Agreement" (Agreement) growers have entered into with NLA member breeding companies and nurseries to protect the growers' valuable investment from overproduction.

According to the terms of the Agreement, the grower has agreed that the breeder, nursery, or their appointed agents may enter their property to examine all plants and propagation materials for the purpose of confirming that they have complied with the terms of the Agreement. The proposed inspection program will exercise this right.

For growers that contact the NLA-AU first to request an inspection on a voluntary basis, this will be dealt with promptly in the interest of the party. The NLA-AU will accommodate their schedule and treat their property with the utmost respect, with the least amount of disruption to their normal farm activities whilst the inspection is underway. In this regard, please see the standard NLA RESOLUTION POLICY AUSTRALIA AGRICULTURAL INTELLECTUAL PROPERTY CLAIMS (Pome and Stone Fruit Varieties).

NLA – Australia Pty Ltd

By: Patrick Ballew, President.

Phone: (03) 9016 3478

NLA – Australia Pty Ltd, P.O. Box 470, Salisbury QLD 4107 - AUSTRALIA

Phone: (03) 9016 3478 Email: nla-au@callatg.com