

Before the U.S. Patent and Trademark Office

Increasing Research Access to Germplasm

Recommendations of the
U.S. Department of Agriculture

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USDA Recommendations to the USPTO for Increasing Research Access to Germplasm

President Biden’s charge in Executive Order 14036 on “Promoting Competition in the American Economy” encourages a whole-of-government approach to competition and includes initiatives across federal agencies to tackle some of the most pressing issues in our economy. One of the named initiatives is for the USDA, working in partnership with the U.S. Patent and Trademark Office (USPTO), “to help ensure that the intellectual property system, while incentivizing innovation, does not unnecessarily reduce competition in seed and other input markets beyond that reasonably contemplated by the Patent Act.”

The U.S. Department of Agriculture’s (USDA) 2023 report, “More and Better Choices for Farmers: Promoting Competition and Innovation in Seeds and Other Agricultural Inputs” (the Report) called for greater research access to germplasm to deliver the innovation and choices that farmers need in seeds.¹ In developing and implementing that report, the USDA has greatly appreciated the opportunity to engage and partner with the USPTO to make patents more robust and reliable and seed markets fairer and more competitive.

In furtherance of the analysis and recommendations from the Report (pp. 25-26, 28-29, 38-49), the USDA suggests a review by the USPTO to seek to clarify the requirements for plant-related utility patents. The below recommendations seek to encourage the proper balance between incentivizing inventors and promoting innovation for the public benefit by clarifying the information needed for inventors to fully disclose their inventions and ensuring that technology already in the public domain remains available to the public.

Specifically, the USDA recommends the following:

- *Disclosure of breeding history:* USDA recommends that the USPTO review existing guidance and, if necessary, create additional guidance to determine under which circumstances breeding histories or pedigrees back to known and publicly available parents should be required in an application’s original disclosure to satisfy 35 U.S.C. § 112 for utility patents pertaining to plant varieties and traits.
- *Preservation of enabling deposits for functional observation:* USDA recommends that the USPTO review and, if necessary, revise its guidance regarding the conditions that apply to plant-related utility patent deposits pursuant to 37 C.F.R. 1.808—specifically, to ensure that samples deposited to satisfy 35 U.S.C. § 112: (1) are accessible during the pendency of the application provided there are no confidentiality concerns under 35 U.S.C. § 122 and 37 C.F.R. 1.14; and (2) upon patent grant, remain available for public access without restrictions imposed by the depositor.

¹ Available at <https://www.ams.usda.gov/about-ams/fair-competitive-seed>

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jennifer Moffitt". The signature is fluid and cursive, with the first name "Jennifer" and last name "Moffitt" clearly distinguishable.

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