

Fighting Against Biopiracy: Does the Obligation to Disclose in Patent Applications Truly Help?

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ABSTRACT

*In the global fight against biopiracy, one of the key issues is to prevent the grant and exploitation of patents on traditional knowledge and genetic resources by requiring that patent applicants for inventions involving traditional knowledge and genetic resources disclose the source of those resources and provide evidence that the prior informed consent of the local owners of such resources has been obtained and that benefit-sharing agreements have been entered into with those owners. **This Article argues that a legal discussion of biopiracy should analyze the obligation to disclose the use of traditional knowledge and genetic resources in an invention beyond the sanctions that are attached in case of violation of such obligations as previously discussed at the international level. These issues should be addressed in light of the key objectives to be achieved: to ensure the effective sharing of benefits resulting from the use of such resources with the local communities that own them, and to implement appropriate mechanisms for this purpose.** In the course of the analysis, this Article adopts an interdisciplinary approach by referring to rules governing the legal protection of tangible and intangible cultural property in order to explore the extent to which they could be used as models for a regime of protection against the misappropriation of traditional knowledge and genetic resources. This approach is inspired by the similarity between biopiracy and the misappropriation of cultural property goods, which constitutes a kind of “cultural piracy.” This Article concludes that balanced, flexible, and interdisciplinary solutions are required in order to ensure that the interests of local communities are protected without unduly threatening the interests of their commercial partners.*

In the global fight against biopiracy,¹ one of the most important issues—as identified in the report entitled *The Protection of Traditional Knowledge: Draft Objectives and Principles*; ² prepared under the auspices of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore—is to “[p]reclude the grant of improper [intellectual property] rights to unauthorized parties.”

According to the Draft Traditional Knowledge Principles, “[t]raditional knowledge shall be protected against misappropriation.”

... Various countries have formulated proposals advocating the inclusion of such a disclosure obligation in a variety of international patent law conventions.⁷ Others have adopted, or are discussing, national regulations to the same end.⁸ **Three different proposals for implementing this obligation at the international level can currently be identified: 9 (1) the TRIPS Disclosure Proposal; 10 (2) the PCT Disclosure Proposal;11 and (3) the Mandatory Disclosure Proposal.12 The most protective of the three is the TRIPS Disclosure Proposal, which was proposed primarily by Brazil and India, with assistance from other countries.13** Under its terms, a patent can be granted only if the patent application includes information regarding or evidence of (1) the source of the invention, its country of origin, and the countries of origin of the biological resources and traditional knowledge used in the invention; (2) the obtainment of prior informed consent from the authorities under the relevant national regime; and (3) fair and equitable benefit sharing under the relevant national regime. (pp. 146-147)

13. Lawrence A. Kogan, *Brazil's IP Opportunism Threatens U.S. Private Property Rights*, 38 U. MIAMI INTER-AM. L. REV. 1, 71–72 (discussing Brazil and India’s involvement and leadership in the TRIPS Disclosure Proposal).