

**WIPO SEMINAR ON INTELLECTUAL PROPERTY AND
GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND
TRADITIONAL CULTURAL EXPRESSIONS:
REGIONAL, NATIONAL AND LOCAL EXPERIENCES**

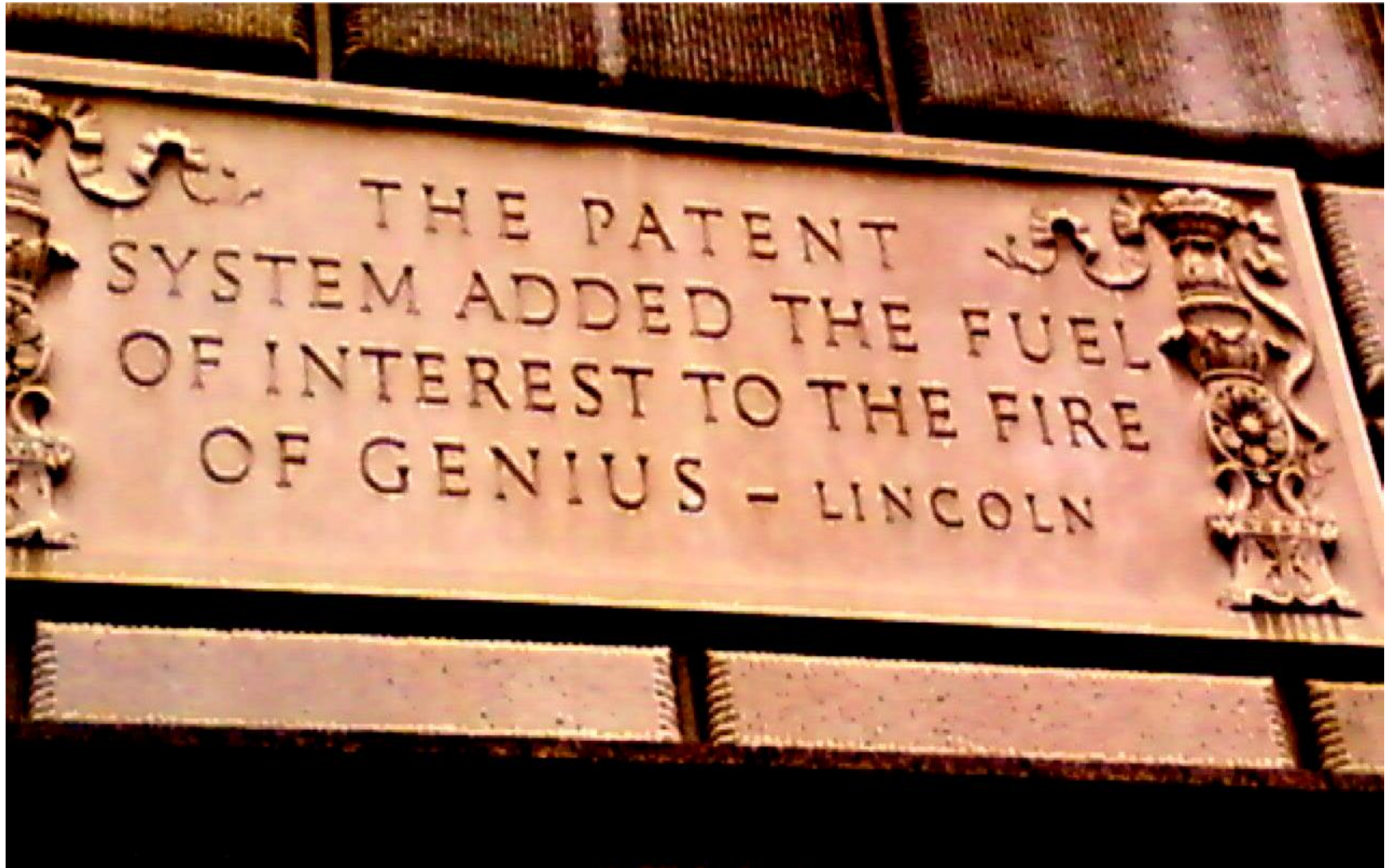
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**Roundtable 4: National Experiences with Disclosure
Requirements related to Genetic Resources and Associated
Traditional Knowledge**

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**You want to patent what?
Where did you get that?
Who said you could use it?**

IP rights reward innovation...



... but “innovation” is changing

- Public funding for research
- Academic R&D, private sector up-scaling and commercialisation
- Open-source models
- In some jurisdictions mere discoveries can now be claimed as protected innovations (e.g. micro-organisms, gene sequences)
- Some “innovations” are not novel – just misappropriated TK
- Genetic resources as pure information

Fundamental “enabling” disclosure

- Patent grants a time-limited monopoly in exchange for disclosing sufficient details of the claimed invention to enable others to work it
- Social contract, increasingly undermined by
 - industry preference for trade secrets
 - ever-greening of patents
 - standards-essential patents
 - patent trolls using IP to block benefits to public
- Would be foolish to assume all is well in the IP world

Additional disclosure as policy tool

- US Bayh-Dole Act of 1980
- Attempt to maximise economic impact of inventions funded by Federal government
- Includes obligation to disclose residual government interest in patent
- Include in each patent a statement identifying the applicable government grant
- Has been shown to enable easy use of international IP system to track use of patents

Origins of Disclosure of Origin/Source

- CBD Article 3: *“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies...”*
NB: this sovereign right predates the CBD; common heritage of mankind doctrine never applied
- CBD Article 15.1: *“Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.”*

Clarified in Nagoya Protocol

- In general, access to GR for their utilisation is subject to PIC of country of origin or a Party that has acquired the GR in accordance with the CBD
- If IP&LCs have established legal rights to grant access to GR, such access is subject to their PIC
- Parties to “take measures as appropriate with the aim of ensuring” that aTK held by IP&LCs is accessed with their PIC or approval and involvement, and MAT established
- Subject to domestic ABS legislation or regulatory requirements

Disclosure in Nagoya negotiations

- “ABC of ABS”
- C = Compliance, incl. through checkpoints
- Monitor/track utilisation (including subsequent/derivative utilisation)
- Many countries see IP offices as potentially effective and cost-efficient checkpoints, if disclosure is made mandatory in applications
- CBD can't make IP rules, so deferred to IGC
- Small group of user countries remain against
- Nothing prevents national disclosure rules

Disclosure requirements

- [African Union]
- Andean Community
- Belgium
- Brazil
- China
- Costa Rica
- Cuba
- Denmark
- Egypt
- European Union
- Germany
- India
- Italy
- Kyrgyzstan
- Norway
- Peru
- Philippines
- Romania
- South Africa
- Sweden
- Switzerland

Approaches to disclosure

- “No PIC, no patent” (e.g. Andean Community, Brazil, China) – incl. revocation of granted IP
- Administrative requirement, penalties for false declaration (e.g. Norway)
- Application rejected or considered withdrawn (e.g. Egypt, Switzerland)
- Grounds for opposition (e.g. India, SA)
- No consequences (e.g. Belgium, Denmark, EU, Germany, Sweden)
- As “tracer” in summary/abstract, from MAT (AU Guidelines)

Scope of disclosure requirements

- GR and aTK – origin and/or legal access
- GR only – origin/source and/or legal access
- aTK only – origin and legal access
- “Collective knowledge” (if not in public domain) – legal access
- Indigenous biological material – legal access
- Biological material of [human,] plant or animal origin – legal access
- “biological, plant or animal product, or traditional medicinal, agricultural, industrial or handicraft knowledge, cultural or environmental heritage”

Disclosure requirements & population

- *Andean Comm.* (~100 Mn)
- *African Union* (~1.1 Bn)
- Belgium (11,144,420)
- Brazil (202,033,670)
- China (1,393,783,836)
- Costa Rica (4,937,755)
- Cuba (11,258,597)
- Denmark (5,640,184)
- Egypt (83,386,739)
- *EU* (~740 Mn)
- Germany (82,652,256)
- India (1,267,401,849)
- Italy (61,070,224)
- Kyrgyzstan (5,625,015)
- Norway (5,091,924)
- Peru (30,769,077)
- Philippines (100,096,496)
- Romania (21,640,168)
- South Africa (53,139,528)
- Sweden (9,631,261)
- Switzerland (8,157,896)

(Total >> 3'357'460'895 pax; >50%)

Unresolved issues around disclosure

- Mandatory or voluntary
- National and/or international
- Triggers/proximity
- Exceptional cases where origin/source is unknown
- Administrative or substantial
- Acceptable evidence (IRRC, SMTA, sworn statement, ...)
- Additional burden on applicants
- Additional burden on patent examiners

Unresolved issues around disclosure

- Sanctions:
 - Failure to disclose
 - Fraudulent disclosure
 - Sanctions within patent system
 - Sanctions outside patent system
 - Preventing publication of stopped applications into public domain
 - Effect on priority date
 - Revocation
 - Assignment of rights
 - Civil sanctions
 - Criminal sanctions

National and local experiences of ABS: IPRs (esp. patents) = bio-piracy

- “Bad news is better news than good news” – positive cases do not get the same coverage
- “Perception is reality” – IPRs are perceived as robbing States of their sovereign rights, and IP&LCs of their moral and economic rights
- Committees for the Prevention of Bio-piracy are far more common than Committees for the Promotion of Access and Utilisation

What is at stake?

- Coherence and credibility of global IP system
- Developing country commitment to IPRs
- Ability of patent examiners to work effectively
- Ensuring fair and equitable benefit sharing
- Ensuring utilisation of GR and aTK contributes to sustainable use of natural resources, conservation of biological diversity and maintenance of the traditional lifestyles of IP&LCs (which is key to saving biodiversity)
- Legal certainty for all, across jurisdictions

Maybe most importantly...

- Overcoming the suspicion that IP is a tool used by the powerful to steal from the weak
- Refuting allegations that IP makes the rich richer and everyone else poorer
- Stimulating the use of IP as a powerful tool for inclusive sustainable development
- And, as Lincoln said, “adding the fuel of interest to the fire of genius” ----

... on a level playing field

