

IP systems meet indigenous knowledge and genetic resources

by Janusz F Luterek

Protecting a country's indigenous knowledge or indigenous genetic resources and their use has become a matter of urgency for most developing countries. These countries are now implementing policies to achieve this.

Historically, an invention held no benefits for the originators of indigenous knowledge or the owners of genetic resources unless they also happened to be the inventors in the strict sense of patent law. The result was bioprospecting and biopiracy. This led, in turn, to the benefits of the genetic resources of a country or region accruing to third parties. The situation was very similar in respect of indigenous knowledge, sometimes also coupled with indigenous genetic resources. A recent example is the patents filed for Hoodia – an indigenous South African cactus species – which the local people had used for millennia as an appetite suppressant when going on extended hunting trips or when food and water were scarce.

Through a somewhat complex chain, Pfizer gained ownership of a patent portfolio for the isolation of the active compounds of Hoodia, as well as its use in the treatment of various diseases, including obesity-related diseases. The field of ownership of and the rights flowing from genetic resources and indigenous knowledge is now enjoying considerable attention.

Much debate has been stimulated, with the result that several countries, including South Africa, have passed laws to protect indigenous genetic resources that require bioprospectors to obtain the consent of the owners of genetic resources. Finally, the lacuna relating to patents has also been recognised. In December 2005, the South African government enacted an amendment to the Patents Act to prevent the patenting of inventions derived from indigenous knowledge or indigenous genetic resources without the consent of the indigenous people whose knowledge and/or genetic resources were involved in the invention. A benefit-sharing arrangement is now also required before such patents may be granted.

In the case of Hoodia, such an agreement was entered into voluntarily with the San people – not as a result of legislation, but rather as a result of moral pressure to share the wealth generated from resources identified and owned by the San.

The amendment to the patent law of South Africa effectively prevents the patenting of subject matter that derives from indigenous genetic resources or from indigenous knowledge unless certain preconditions are satisfied.

The amendment includes three new and very important definitions:

- *Indigenous biological resource or genetic resource* means an indigenous biological resource or a genetic resource as defined in Section 1 of the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004).
- *Traditional knowledge* means the knowledge that an indigenous community has regarding the use of an indigenous biological or genetic resource.
- *Traditional use* means the way in which or the purpose for which an indigenous community has used an indigenous biological or genetic resource.

Anyone who lodges an application for a patent with the registrar, regardless of the field of technology, must include a declaration as to whether or not the invention is based on/or derived from an indigenous biological or genetic resource or traditional knowledge/use. If an applicant acknowledges that the invention is based on or derived from an indigenous biological or genetic resource, or is based on or derived from traditional knowledge or traditional use, he will have to provide proof to the registrar of his right and/or consent to use these. The penalty for false statements may be the revoking of a patent.

The amendment is based on several common misconceptions. In the first instance, that it is possible to patent 'traditional knowledge' and deprive 'owners or holders' of such knowledge the right to continue using that knowledge. Secondly, that ownership in genetic materials existing in South Africa vests in government. Constitutionally, this cannot be correct. For example, what if questions arise in a number of areas such as if the genetic material was imported, is common to many

jurisdictions, is a marine organism, or if it resulted from a breeding or biotechnical process even if performed in South Africa. Finally, what if the genetic material is derived from specimens of unknown origin collected either in this country or elsewhere before any law was passed restricting its ownership.

The pool of indigenous knowledge among those who hold that knowledge is rapidly diminishing. To counteract these trends, a crash programme is needed to record the traditional knowledge and to identify the species and varieties involved, including their habitat, their climatic requirements and their proven or conceived value to mankind. Steps must be taken to preserve or conserve the species or varieties involved and – where necessary – to take artificial steps for intensified propagation.

A greater involvement of more people and capital must be encouraged to save a more substantial part of South Africa's biodiversity and indigenous knowledge for future generations, wherever these may be, by all possible means, but not by coercion. Incentives are needed rather than restrictive policies.

What the future holds is unknown. However, it is certain that countries like South Africa, Brazil, China, and India intend to drive the indigenous knowledge and genetic resources agenda. ➔

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