Issues of Disclosure: Australian Indigenous Peoples' Traditional Knowledge and Fair and Equitable Access and Benefit Sharing

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Overview

1. Disclosure requirements of traditional knowledge for access to biological resourCes in the regulatory framework

2. Disclosure requirements of patent process in Australia

3. Perspectives on disclosure: value, content, triggers, non-compliance an risks

4. Case studies: Application for patents by Indigenous communities in partnership with research institutions:

   - Chuulagan Aboriginal Corporation partnership with Griffith University
   - Jarlmadangah Burrru Aboriginal community partnership with Griffith University

Disclosure Requirements for Access and Benefit Sharing of Biological Resources

- Varying legislation regulating access and benefit sharing across Australia
- Commonwealth legislation reflects closely aligns with CBD and Bonn Guidelines
- Disclosure requirements in access applications for biological resources. Verification of disclosure and source of knowledge by statutory declaration
- Commercial vs non-commercial use requirements
- Benefit sharing for commercial use with prior consent and agreed benefits and commitments
- Most applications are for non-commercial
- Very few ABS agreements with Aboriginal communities
- Mutually agreed terms can include joint intellectual property?

Patent Requirements: Australia

- Under Australian Patent Law there is no requirement to disclose where applicants have obtained the biological material or associated TK used

- Constraints of Patent Law
  - Novelty / Prior art constraints
  - Secret / sacred implications of disclosure and customary law

Disclosure: Value, Triggers, Content, Consequences of Non-compliance

- Value: Identify indigenous knowledge holders for benefit sharing; Due recognition of value of TK; promoting compliance; tracking commercialization (UNCTAD Report COP 7).
- Disclosure a trigger at the patent application stage?
- Legal requirement to disclose with the PIC of Aboriginal knowledge holders – where is PIC triggered?
- Proof / Evidence: Material Transfer Agreements (commercial or non-commercial)/ ABS agreements
- Non -compliance: invalidation or refusal to grant IP for fraud or omission.

Consequences of non-Disclosure

- Refusal to grant intellectual property
- Invalidation of intellectual property when information is accidentally or intentionally omitted or when false or fraudulent documentation is submitted
- Due diligence required to be shown
- "Intellectual property applicants should not be rewarded with rights to convey commercial benefits when the subject matter was obtained from TK in violation of CBD PIC requirements and conditions for access to GR".

(UNCTAD Analysis of Options for Implementing Disclosure of Origin Requirements in Intellectual Property Applications, 2006).

Disclosure Risks

- Sacred / secret knowledge should not be made available publicly – customary law and community level procedures may apply
- Risk of misappropriation by third parties
- Knowledge enters the public domain through patent application whether or not ultimately granted

Case Study 1: Chuulangun Aboriginal Corporation and Griffith University

- Queensland Biodiscovery Act (QLD). Voluntary code of ethics recognising TK.
- Collaborative project involving University of South Australia researchers examined pharmacological activities of traditional plants
- Two patents: anti-inflammatory compounds and anti-inflammatory extract.
- Aboriginal elder identified on both patents.
- Aboriginal community research partner and driving the research and commercial decisions
- Commercial benefit sharing arrangements in place
- Both partners benefit
- Demonstrates mutual benefits can arise from effective regimes for engaging with Aboriginal communities and their knowledge resources

Case study 2: Jarlmadangah Burru and Griffith University

- Aboriginal community from Kimberley region of Australia
- Elder lost a finger hunting crocodiles - bark from Marjala plant to dull pain
- Marjala plant used to produce ointment for wounds or ingested to treat joint pain
- Patents for utilisation of native plants for pain treatment: the Marjala plant
- Research determined bioactive chemical for pain relief – 10 year period – researchers from University of South Australia
- Aboriginal elder named as inventor on the patent application on behalf of community
- Equal partnership between Aboriginal community and University
- Range of legal entities required as vehicles.
- Initial secrecy / non-disclosure agreement used before joint venture agreement
- Joint ownership of patent
- Licensed to biotech company for a period
- Follows requirements of EPBC Act for permits to access genetic resources and associated TK.

Close

THANK YOU!