

CONSIDERATIONS FOR AN INTERNATIONAL DISCLOSURE REQUIREMENT – PANEL 3

WIPO IGC WORKSHOP

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The paradigmatic case

- Sally scientist travels to country X where she **asks** a member of the local community to identify plants used by that community to treat a specific disease. A member of the community travels with Sally scientist **identifying** the plants and, along the way, **shares** details of the application of the plant and various properties used by the community to address other conditions. Sally scientist, armed with this **knowledge**, returns to country Y where she isolates an active compound, **develops** a drug, and obtains a **patent** for having invented something “novel” “useful” and “non-obvious.” The patent does not disclose origin of the plant or the contributions of the local community.

Key Inquiries for the WIPO IGC

- What are the underlying principles/justifications for international disclosure
 - Knowledge diffusion is global
 - Stakeholders are diffuse
 - Cross-border innovation increasingly the norm
 - Multiple fora and different regimes address GRs/ATK
 - Moral/ethical imperative
- The challenge of negotiating an optimally designed international disclosure system
 - An international rule provides a global **baseline**, harmonizing **boundaries** and sets rules of the **global** game
- What national implementation challenges (risks) can reasonably be addressed?
 - National patent offices as gatekeepers of the patent system

Some Advantages/Benefits and Disadvantages/Concerns Related to a Mandatory Disclosure Requirement

Pros

- International baseline promotes certainty, coherency
- Spreads knowledge
- Promotes competition
- Reveals information unknown to others
- Ensures appropriate property right boundaries
- Explains invention
- Rewards all true stakeholders
- Increases actual and perceived legitimacy of the patent system

Cons

- An additional requirement for patent/IP applicants
- Design of the requirement may affect validity of patent rights
- Design/implementation may discourage research in some fields
- Systemic inequalities will remain, disclosure will not 'fix' everything

Concluding thoughts

- The vast majority of the world's population already live under some disclosure requirement. Disclosure – both in its traditional sense as the sine qua non of patent law, and in its narrow sense as related to GRs/ATK – is here to stay.
- The patent system is not always “pro-innovation” and certainly can contribute to welfare loss. Improving the patent system is important for both national innovation efforts and in considering new frontiers of global innovation, especially in biotech, that rely on access to natural products.
- A mandatory disclosure requirement is an improvement to the international IP system that benefits innovation and creativity in a responsible way. Such a requirement could encourage less reliance on secrecy by disperse communities thus fostering a more inclusive, transparent and accountable global patent system.
- Patent offices' practices and rules do not exist only to serve applicants; they exist to serve the public interest. They should serve as natural gatekeepers of a mandatory disclosure requirement.
- The value of GRs/ATK arises throughout the innovation cycle, before and after a patent is granted. The scope of the IGC process is quite **narrow**, and suggests genuine efforts to establish a minimum standards instrument on disclosure while the landscape is still in flux. As national practices regarding access and use of GRs/ATK harden, and as local norms become more entrenched, expectations about the nature and scope of the rules that govern GR/ATKs will become more institutionalized, making international harmonization more difficult.

Concluding thoughts

- The elemental question for the IGC could be framed as follows:

Will we adjust/improve something that is imperfect (the patent system) but widely perceived as valuable in order to accomplish something that is widely perceived as morally and legally necessary?

We can. And we should.

Thank you.