



July 30, 2010

Mr. Francis Gurry
Director General
World Intellectual Property Organization (WIPO)
34, chemin des Colombettes
1211 Geneva 20
Switzerland

Submitted by email to: grtkf@wipo.int

**Re: IPO Submission on WIPO/GRTKF/IC/16/6 (Genetic Resources:
Revised List of Options)**

Dear Director General Gurry:

Intellectual Property Owners (IPO) welcomes the opportunity to submit comments in response to the request for written comments on "Genetic Resources: A Revised List of Options" (WIPO/GRTKF/IC/16/6), which comments were invited in the Sixteenth Session of the IGC, Decision on Agenda Item 10.

IPO is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in intellectual property rights. IPO's membership includes more than 200 companies and more than 11,000 individuals who are involved in the association either through their companies or as IPO inventor, author, executive, law firm, or attorney members.

IPO recognizes the importance of these issues, and has sought to participate in the discussions in a productive manner. We believe the enclosed comments will further aid the IGC in its discussion of options regarding genetic resources, and we hope the comments prove useful to the Member States and other stakeholders.

Please feel free to contact IPO at (202) 507-4500 should you have any questions.

Sincerely,

Herbert C. Wamsley
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**Comments by Intellectual Property Owners Association on
Genetic Resources: Revised List of Options (WIPO/GRTKF/IC/16/6)**

Intellectual Property Owners Association (IPO) appreciates the opportunity to submit comments on the Revised List of Options for continuing or further work on Genetic Resources (GR) by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC). The current working document of revised options is divided into three clusters of options. IPO addresses each cluster of options separately below.

Cluster A: Defensive Protection of Genetic Resources

IPO strongly believes that thorough examination of patent applications is a necessary precondition to obtaining valid, enforceable and meaningful patent protection. Therefore, IPO supports all efforts by the IGC to enhance patent examination and fully supports efforts by WIPO to make all existing prior art available to examiners. Each of options A.1, A.2 and A.3 offer different means for accomplishing these goals, and each of these options is an important step in ensuring defensive protection of genetic resources and thorough examination of patent applications.

WIPO has demonstrated that defensive protection of traditional knowledge (TK) can be improved by addition of periodicals and databases associated with TK to the minimum documentation list under the PCT. Similarly, periodicals and databases and other information resources exist that are commonly associated with disclosure of genetic resources, including, for example, research publications that focus on natural products research. As part of its ongoing work, the IGC should compile these information resources for inclusion in the PCT minimum documentation list.

IPO also supports the proposal in document WIPO/GRTKF/IC/9/13 for a one-stop consolidated portal of databases on genetic resources, which portal would be easily accessible by patent examiners. As noted in document 9/13, although several databases that catalogue genetic resources are in existence, they are either not readily accessible to examiners, or the process of searching multiple databases increases the search burden and the possibility of overlooking relevant prior art. While some concerns have been raised about making such databases widely available via such a consolidated portal, these are issues that should be further discussed and resolved in the IGC, as IPO believes all stakeholders share a common interest in ensuring that patent applications are as thoroughly examined as possible.

Cluster B: Disclosure Requirements in Patent Applications for Information Related to Genetic Resources Used in the Claimed Invention

As a starting matter, IPO wishes to reiterate that the patent system is not the appropriate vehicle for monitoring access to genetic resources or ensuring compliance with benefit-sharing. Proposed requirements for disclosure of information relating to genetic resources in patent applications will not meet either of the desired goals of enabling patent examiners to fully examine patent applications or of ensuring access and benefit-sharing.

As many members and stakeholders have noted in interventions and written comments, the justifications for requiring such patent disclosure are not supported by facts. For example, while some have asserted that disclosure could prevent so called “erroneously-granted” patents, little evidence has been provided to support this. In fact, some of the more notable examples of “erroneously-granted” patents have indeed included detailed information on source and/or origin; however, such information does nothing to enhance the ability of patent examiners to thoroughly examine patents. In contrast, as noted above, the proposals in Cluster A directly address this issue in a more practical and effective manner.

It has also been argued that disclosure will assist in ensuring that benefits from commercialization of genetic resources are shared with the provider country. However, as has been noted repeatedly, this proposal will do nothing to assist access and benefit-sharing for those genetic resources that are commercialized but that are not patented. Furthermore, current proposals for mandatory patent disclosure include sanctions for non-compliance, such as not processing a patent application or revoking a patent that includes incorrect or incomplete information. For these reasons, IPO believes that the justifications for mandatory patent disclosure find little or no practical support.

Many stakeholders, including IPO, have previously expressed concerns about the lack of clarity in current proposals relating to patent disclosure. It is not clear, despite proponents’ attempts to clarify the proposals, what must be the relationship between the genetic resource and the invention, or the extent of information sought about source or origin. Given these uncertainties, a more complete discussion of appropriate sanctions for incorrect or incomplete information is also required. For these reasons, IPO strongly urges member states to thoroughly examine these questions before implementing any such new disclosure requirements.

For the reasons set out above, IPO does not support proposals for patent disclosure of genetic resources beyond those disclosures necessary to support patentability – including novelty, inventive step, and a sufficiently enabling description to allow practice of the invention. Nonetheless, because WIPO is the forum with relevant patent expertise, any issues relating to patentability, including the interface between the patent system and access and benefit-sharing, must be addressed in WIPO, rather than the

CBD. Therefore IPO supports continued discussion of these issues in the IGC, which discussions must include concrete examples and national experiences.

Cluster C: IP Issues in Mutually Agreed Terms for the Fair and Equitable Sharing of Benefits Arising from the Use of Genetic Resources

Because of the issues raised above with regard to patent disclosure proposals, issues of access and benefit-sharing are better addressed at the time of access, via mutually agreed terms. This approach ensures that users and providers negotiate an agreed approach for access and benefit-sharing, which may include conditions for access, specified uses of the genetic resource in question, reporting requirements, and either monetary or non-monetary benefits. Furthermore, because such an approach would not be contingent on IP protection, it would ensure benefit-sharing for uses of genetic resources that do not result in eventual commercialization and for products that are commercialized in the absence of patent protection. Finally, reliance on mutually agreed terms ensures that prior informed consent is indeed prior in time to the access.

IPO has previously stated its support for the WIPO database of existing access and benefit-sharing agreements. The contracts currently available via the database provide excellent examples of both monetary and non-monetary benefit-sharing, while also safeguarding the other two goals of the Convention on Biological Diversity – conservation and sustainable use of genetic resources. Certain contracts available via the WIPO database also provide examples of mutually agreed terms aimed at addressing trans-boundary genetic resources, which is an all-too-real issue that has not been sufficiently addressed.

Guidelines for negotiating mutually agreed terms can assist both users and providers to ensure their rights and interests are protected. Therefore, IPO also supports efforts to further elaborate the draft guidelines for contractual practices.

Conclusion

IPO believes that certain options in each of Clusters A, B and C merit further discussion in the Committee, particularly those options relating to enhanced patent examination and improved tools for negotiation of mutually agreed terms. While IPO does not believe that proposals for patent disclosure will assist the objectives sought, such issues are appropriate for continued discussion, with concrete examples, in the IGC. We support the ongoing work of the Committee on these matters, but without prejudging any outcome. We urge members to ensure that genetic resources issues are allotted equal time to other issues currently being discussed in the IGC, as a means of ensuring complete discussion of all of these options.