DISCLOSURE OF ORIGIN: TIME FOR A REALITY CHECK?

Strategically, disclosure or origin has been extremely useful for those developing countries advocating the requirement, particularly those ones keen to delay or block the adoption of a Substantive Patent Law Treaty that would be based on the most protectionist patent rules of the developed world. Nothing in this brief paper should be construed as a criticism of the strategy as it has been deployed so far. But it is nonetheless suggested that for countries wishing to expand their freedoms under international law to tailor their intellectual property (IP) regimes in furtherance of their economic, social and cultural interests, it may be better to target IP rulemaking in other areas of the law where the stakes are likely to be much higher than to push aggressively for the introduction of an international disclosure of origin rule that may in fact offer little practical benefit to any national economy or population.

Specifically, this paper draws attention to (a) the limitations of disclosure of origin as a practical measure to reform patent law in a way that favours the interests of bio-culturally diverse developing countries; and (b) to the lack of clarity in the whole disclosure of origin concept in order to provoke necessary further reflection.

What should be the underlying objectives of disclosure of origin?

It is often unclear what should be the underlying objectives of disclosure of origin. While it is of course entirely up to the countries advocating the disclosure of origin requirement, it is contended that the objectives put forward tend either to be lacking in ambition or alternatively are based on unsubstantiated assumptions.

One common motive appears to be to prevent "biopiracy". The problem here is that the term, like "intellectual property piracy", is a political one that is "strategically vague", which is to say that coinage and advocacy of the term are intended to embrace to the maximum possible extent business practices that may be perceived rightly or wrongly as being exploitative of developing countries and/or indigenous peoples. The problem is that by lumping together behaviour that runs from extreme ends of a continuum including the highly exploitative and illegitimate at one end (e.g. allegedly the plant patent on ayahuasca and the patents on the "enola bean") to the perfectly legitimate (e.g. Eli Lilly's commercialization of the vinca alkaloids derived from the rosy periwinkle) at the other, policy made on the basis of preventing "biopiracy" could actually hinder economic activities that should be encouraged. So what we need to do is to come to an agreement on where to draw the line between the exploitative and illegitimate and the acceptable and legitimate, and then to consider more deeply whether disclosure of origin would actually prevent the former types of activity without necessarily hindering the latter. (Or do we want to stop the latter as well?) One helpful way may be to

investigate some past "biopiracy" cases and to see whether disclosure of origin would have made any difference. Another is to find out objectively how much genuine biopiracy actually takes place. It is assumed by many that there is some kind of "global pandemic". But it is contended that there is probably a great deal of exaggeration.

In short, how you define biopiracy goes a long way towards determining what, if anything, you should do about it. But disclosure or origin should be more ambitious than preventing unfair practices by foreigners. If biological and cultural diversity are sources of high economic value, surely those countries rich in these assets should be seeking to maximize their own effective exploitation of them, while of course recognizing the rights of indigenous peoples and local communities that have legitimate property claims over them. Or to put it another way, countries should seek to add value to their own biogenetic and cultural resources. If collaboration with foreign institutions and scientists can help in this respect, patent reforms to regulate access to genetic resources and benefit sharing should surely not prevent equitable collaborative research partnership but rather encourage them.

Should we continue to use the term disclosure of origin? Or are there better alternatives?

The origin of a given resource may be very difficult to establish, and there may be many countries of origin. The distinction between provider or source country on the one hand, and origin country as defined in the Convention on Biological Diversity on the other, is significant. Given that a great many species are not endemic to a single country, the origin of a given resource according to the CBD definition may be several or many countries. For the sake of practicality, it may be better to use the word "source" rather than "origin". Alternatively, the term "legal provenance" may be the most appropriate term to use since the country of source may not have acquired the resource legally anyway.

What should be the relationship between the genetic material and the claimed invention, and what terminology should be used?

This is a tricky question. Clarification is badly needed of the relationship between the invention and the biogenetic resource and/or associated traditional knowledge that would render the disclosure or origin requirement applicable. In many cases, knowledge and material relevant to an invention may be manifold. Should all sources of knowledge and material be compensated no matter how distant and tangential? This would be hard to justify. The following terms have been suggested, including "based on", "used in" and "derived from". Each may have specific practical and legal implications. This is far from being a trivial issue and requires an honest and informed debate. Ideally, it ought to be discussed in a multistakeholder setting including with biotechnology firms and patent practitioners as well as providers.

What should be the consequence of failure to disclose origin or to disclosing origin falsely?

Possibilities may vary from return of the patent application to rejection or revocation of the patent to the grant but enforceability of the patent to fines and criminal sanctions. The author of this paper has no strong views either way but sooner or later proponents may have to agree on this if for no other reason that it may have implications for the TRIPS-compatibility of the requirement.

How should disclosure of origin be incorporated into international law, and what might be the implication of the different possible decisions on this?

Probably Article 29 of TRIPS would be the most logical place for incorporating the requirement. But amending TRIPS will likely entail a high cost. Strategically speaking it may be worth mentioning that disclosure of origin is a reform targeted at patent activity in the field of biotechnology and biochemistry. Advocacy of disclosure of origin therefore implies acceptance of patenting in these fields. And yet some countries in favour of disclosure of origin seem to be opposed to - or at least highly sceptical of - the patenting of life forms and natural products. If sound negotiating strategy requires clarity, the fact that this seems rather contradictory is cause for some reflection.

To repeat what was said at the outset, for countries wishing to expand their freedoms under international law to tailor their IP regimes in furtherance of their economic, social and cultural interests, it may be better to target IP rulemaking in other areas of the law where the stakes are likely to be much higher than to push aggressively for the introduction of an international disclosure of origin rule that may in fact offer little practical benefit to any national economy or population.

What practical difference would disclosure of origin make anyway?

This is difficult to answer. At a practical level, most biogenetic material used for commercial research does not lead to a patented invention, even less to a valuable product, and most biotech-related inventions are not closely related to imported biogenetic material. So the requirement may be relevant to a tiny proportion of income-generating life science products.

More fundamentally, the burden of proof should be placed on those advocating a reform. So far, advocates of disclosure of origin have not made a convincing case that disclosure of origin will do anything to improve the social and economic conditions of developing countries or of their indigenous peoples. If it is merely a moral issue rather than an economic one, then this should be made clear.