

Study Finds Pirating of African Heritage

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The speed of negotiations to combat biopiracy is not keeping up with the number of new suspected cases of biopiracy.

A recent study by the African Centre for Biosafety revealed seven potential cases involving African biological resources and traditional knowledge. In each case, there are applications and grants for patents in the United States, Europe and elsewhere.

The report, *“Pirating African Heritage: The Pillaging Continues”* by the South African NGO, the African Centre for Biosafety, is a continuation of its 2006 joint study with Edmonds Institute, *“Out of Africa: Mysteries of Access and Benefit Sharing”* which found 36 suspected cases of biopiracy across the continent.

It found that African terrestrial and aquatic biodiversity, and even human biological samples, continue to be claimed as the exclusive intellectual property of corporations and other institutions. Adding to the exploitation and gross inequity, these African resources are often patented for use in expensive luxury goods or healthcare products that relatively few Africans can afford and which do not serve most Africans’ needs.

The seven new cases are based on a preliminary study of patent applications lodged and patents granted in the US, EU and elsewhere. The study calls for further investigation by African governments to determine conclusively whether biopiracy has occurred and what action to take.

The cases include claims from universities, government departments as well as small and large companies. The claims relate to a wide range of products including for anti-aging (for example by luxury goods maker Louis Vuitton under its Christian Dior label), skincare, sexual dysfunction, viruses and vaccines, insect repellents and possible cancer treatments.

The study states that the case studies on patent applications or patents granted do not meet the fundamental requirements of patentability: novelty (the invention cannot duplicate something that already exists) and



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inventive step. The key question that must be asked is whether a patent examiner would have granted the patent had the existence of prior art been disclosed to them [as this obviates novelty].

Patent applicants, the scientific community, business and industry and government agencies in the North generally, the report states, do not disclose the existence of prior art in their patent applications.

Furthermore, patent examiners rarely consider the traditional knowledge held by local and indigenous people and published in journals, databases and periodicals. The report charges that the patent system in Europe and the US are “being used to promote the misappropriation of traditional knowledge and biological resources from the South”. The report contends that the illegality of a patent cannot be cured by the existence of prior informed consent, benefit

sharing or so-called fair trade agreements.

The case studies have patents pending or granted before the US Patent and Trademark Office (USPTO), the World Intellectual Property Organization (WIPO), or the European Patent Office (EPO) and some include stated potential applications in South Africa and the regional patent offices of the African states that are Parties to OAPI and ARIPO.[1]

In one case, Bayer Consumer Care (Germany) is seeking patents on the Madagascan Vernonia Extracts for skin treatments. The claim is to the **use of any extract** from any plant of the Vernonia genus in Madagascar for “improving the skin status”. In addition Bayer makes specific claim to eight Vernonia species. The plant extract is wholesaled by Bayer to companies that use it as an ingredient in upmarket retail products. The creams with a small amount of extract sell for between US \$49-79 for a one half to one ounce (14 – 28 gram) container. With Madagascar’s per capita gross domestic product of US \$377 (2007) it implies that an average Malagasy could exhaust his or her entire annual income on seven jars of the cream containing about 2 grams of the relevant ingredient (“Ambiaty”).

On the alleged novelty of Bayer’s patent claims, the study found documented traditional use of the ingredient in herbal steam baths, and its use in dyes. Bayer’s patent application makes no reference to these and other traditional uses of Ambiaty.

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The Two Row Wampum Treaty and the International Regime

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On November 8, 2009, the Mohawk Nation hosted delegates to the Working Group on Access and Benefit Sharing (WGABS) in Kahnawake, which constitutes their national territory, situated just across the St. Lawrence seaway from Montreal. The Convention on Biological Diversity headquarters here in Montreal, in fact, lies upon the vast traditional territory of the Mohawk Nation. Over centuries, the Mohawks have been forced to fight for their rights to land and natural resources, protection of their unique culture and language, and recognition of their sovereignty in the face of various colonial government invasions. Thus, it is appropriate that the WGABS take pause to reflect upon the Kaswentha - Guswantah – the Two Row Wampum.

The Two Row Wampum is an international treaty first established in 1514 between the Haudenosaunee and the Dutch, and subsequently with other governments that have entered their territory. While the agreement was first recorded in writing in 1664, its terms were first descriptively beaded on a belt made with two parallel rows of purple wampum on a bed of white beads. The white beads symbolize the purity of the agreement. The two separate rows of purple beads, were made to symbolize and encompass the custom and laws of the Haudenosaunee and Europeans. Between the two rows of purple beads, three rows of white beads were placed, which stand for the friendship, peace and respect between the two nations.[1]

Within the context of International law, the Guswantah, has been explained as follows:

You keep your laws, ways and traditions in your vessel, and we will keep our laws, ways and traditions in our vessel; we will travel the River of life side by side in parallel paths (Two Rows) which never meet, in peace and friendship, never interfering with one another. Legally, it means that each of the two nations retains its own perspective laws and constitution, and maintains its own respective jurisdiction. Neither of the two nations can apply or impose its laws over the other...The Two Row Wampum Belt Agreement, in terms of government, calls for the separate jurisdictions of the two nations. Neither the Six Nations nor the Dutch, neither the Six Nations nor the French, neither the Six Nations nor the English, neither the Six Nations nor the Americans, neither the Six Nations nor the British Colonial Dominion of Canada, were to make laws or force our respective ways on each other. We were to live in peace and friendship, fully respecting each other's right to exercise one's own jurisdiction and sovereignty.[2]

The Two Row Wampum Treaty is a particularly useful example of an international Agreement that recognizes the legitimacy of Indigenous peoples' own laws. It embodies the understanding that the Indigenous peoples are in our canoes, symbolizing their culture, laws, traditions, customs and other lifeways. The non-Indigenous people are said to be in their own ships, symbolizing their culture, language, their laws, their traditions, their customs and their lifeways. It states that, each nation shall stay in their own vessels, and travel the river side by side and neither nation will try to steer the vessel of the other, or interfere or impede the travel of the other.

It is important to highlight that this treaty is an agreement between six Indigenous Nations of the Iroquois Confederacy and other nations, some of whom are Parties to the CBD. It is an excellent example of the recognition of Indigenous peoples' customary law that has continued application in the contemporary context of ABS.

Within the CBD context, the first breach of the Two Row Wampum occurred when the Convention was originally developed establishing national sovereignty over genetic resources. While Article 15 protects states sovereignty over the biodiversity within their borders, it makes no clarification that many Indigenous peoples still retain sovereignty and ownership rights over the biodiversity within their traditional territories, lands and waters.

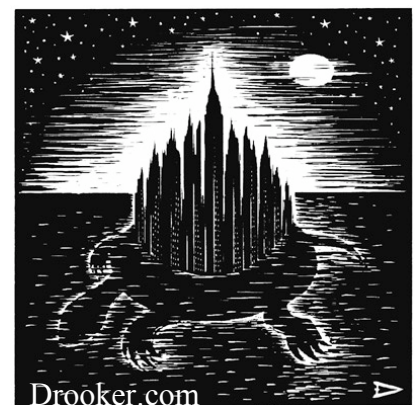
As Article 15 is implemented through the development of an international regime on ABS, new invasions of Indigenous peoples' rights loom close downriver. If the international regime were to become legally binding, it will seriously impact on Indigenous peoples' rights. Based on the ABS negotiations to-date, the regime will ram (impose) foreign laws into the canoes (jurisdictions) of Indigenous peoples.

For example, if the international ABS regime establishes that TK that is now publicly available is part of the public domain, it enforces foreign intellectual property law in a way that undermines Indigenous peoples' rights and laws that protect our TK in perpetuity as an inalienable part of our cultural property. To be clear, the concept of the public domain in IP law serves to create a category of TK that is no longer owned, controlled or protected by Indigenous peoples. In reality, much of this publicly available Indigenous TK were taken without the free prior and informed consent of the appropriate Indigenous peoples. In terms of the Two Row Wampum, the public domain is a law from the colonial governments' ship, shot through the bow of the Indigenous nations' canoes around the world.

It is time to polish the Silver Chain Covenant (three rows of white beads representing respect, peace and friendship), which means that it is a renewal of the understanding of peaceful co-existence. Accordingly, any international regime must:

- 1) **Recognize Indigenous peoples' sovereignty over, and rights to genetic resources;**
- 2) **Recognize the right of Indigenous peoples to own and protect TK in perpetuity; and**
- 3) **Recognize the right of Indigenous peoples to self-determination and the corresponding principle of free prior and informed consent, which includes the right not to participate in the commercialization of the genetic material and TK that they hold sacred and inalienable.**

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The relevance of the UNDRIP in the CBD process: Canada needs to uphold its legal obligations

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In a time of great concern for environmental and human rights issues, Canada is playing an obstructionist role by refusing to recognize the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in general, and in particular within discussions at the UN Conference on the Convention on Biological Diversity (CBD). This stance has been hindering the progress of negotiations on the recognition of the rights of indigenous peoples within both the working group on article 8(j) and on Access and Benefit-Sharing. Canada ratified the Convention in 1992, and as such is obliged to respect and promote its principles by which it recognizes the rights of indigenous peoples over their traditional knowledge, innovations and practices, their rights to participate in benefit-sharing and their rights to free, prior and informed consent. Each of these rights is however enshrined in the UN Declaration.

Although Canada had been supporting the negotiations on the UN Declaration on the Rights of Indigenous Peoples for the past two decades, even facilitating meetings between Indigenous peoples organizations and States representatives. Since its adoption, it has however been constantly opposing every mention of the UNDRIP as the minimum standard on the rights of Indigenous peoples, which the vast majority of the Parties have endorsed. *Against any democratic principles and international rules, to accommodate just one Party, the UNDRIP standard setting is being challenged in every forum where indigenous rights are at stakes.*

Yet, Canada's opposition to the UNDRIP goes against its international obligations as well as its own constitutional obligations and rule of law. At the international level, when it was elected as a member of the UN Human Rights Council, Canada agreed to uphold the highest standards of Human Rights. During its term, Canada opposed the UN Declaration. In relation

to Indigenous Peoples' Rights, the latest highest standards have been set in the UNDRIP, not to mention the previous Human Rights Instruments to which Canada adhered to such as both International Covenant on Political, Civic, Economical, Social and Cultural Rights, or the UN Declaration on Human Rights.

At the national level, in 2008, the House of Commons passed a motion urging the government and Parliament to adopt the UN Declaration. Many national courts have, as well, started to use the UN Declaration as a standard setting on Indigenous peoples' rights. At the constitutional level, as it is stated in the Section 35 of the Constitution Act of 1982, the Crown has a duty to consult Indigenous peoples on every matter that may adversely impact them. The Supreme Court of Canada, and several subsequent court rulings, reaffirm the right of indigenous peoples to be consulted. Consultation means that it has to be proactive and accommodation must be reached through negotiations.

This duty leads to an obligation to respect the right of indigenous peoples to free, prior and informed consent. So, there are no valid legal arguments, even at the national level, for Canada to be resistant that this right be included in an International Regime on Access and Benefit-Sharing.

The UNDRIP is relevant to negotiations as it encompasses various rights that are affected by the implementation of the CBD. Indigenous peoples have been reiterating their rights to the protection of traditional knowledge and biological resources, which are closely linked to their way of life and should not be separated from their rights that are contained in the UNDRIP.

Therefore it is important that UNDRIP is the basis for discussions, so that Parties are not permitted to undermine international negotiations that impact Indigenous peoples' collective rights.

No narrowing of the definition of TK

Johanna von Braun and Kabir Bavikatte (Natural Justice)

In its discussion on the question 'what is the relationship between access and use of genetic resources (GR) and associated traditional knowledge (TK)?' paragraph 18 of the Technical Expert Group's (TEG) report on TK associated with GR (UNEP/CBD/WG-ABS/8/2) specifically states that Article 8j is a stand-alone provision that was not subservient to Article 15 but in fact they are mutually supportive. It emphasized that as a stand-alone provision Art. 8j protects all TK of indigenous people and local communities within the mandate of the CBD. This includes TK associated with GR but much more, such as TK associated with biological resources relevant in the context of cosmetics or oils.

This view on Art. 8j was reinforced by paragraph 10 of the TEG report, which states: *"In discussing the relationship between traditional knowledge and genetic resources, the history of co-evolution (of biological and cultural systems) reinforces the inseparability of traditional knowledge and genetic resources. Furthermore, co-evolution suggests that there is traditional knowledge which is highly specific, and traditional knowledge which is of a more general nature as the result of co-evolved, bio-cultural systems. Research shows that human ecosystem management and traditional knowledge promotes biological diversity and thus genetic diversity."*

The Working Group (WG) on Article 8j affirmed this interpretation of Art 8j in its sixth meeting and identified this among issues having the broadest support from experts. This was further conveyed to the WG on ABS to be considered as an input into its work in further elaborating and negotiating an international regime/protocol on ABS. This is highlighted in the document UNEP/CBD/WG-ABS/8/7 under point

(i): *"Article 15 and 8(j) are mutually supportive. The development of the International Regime should support Article 8(j) in respecting, preserving and maintaining the knowledge, innovations and practices of indigenous and local communities and encouraging the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. It was further emphasized that Article 8(j) as a stand alone provision protects traditional knowledge relevant for the conservation and sustainable use of biological diversity within the mandate of the Convention on Biological Diversity, including traditional knowledge associated with genetic resources."*

In the meantime, negotiations surrounding GR in the context of the IR are still unresolved. For example, report of the TEG on concepts, terms and definitions advises Parties to work on listing out what constitutes 'utilization of GR' rather than debating on the definition of GR per se. Needless to say this is in the context of the negotiations on the international regime above all a political question, rather than a scientific question.

This emerging understanding of 'utilization of GR' in context of Art. 15 for the purposes of the potential IR on ABS is on the verge of spilling over into Parties' overall understanding of TK in the context of 8j. This would increasingly narrow the scope of TK in the context of ABS considering that most uses of TK would link to TK associated with biological resources (such as essential oils, extracts etc). It will also seriously undermine the importance of Art. 8j in emphasizing the need to respect, preserve and maintain TK, and require the free prior informed consent of IPLCs prior to any access to it irrespective of whether it is related to GR or BRs.

Odds n Ends

Biopiracy in Africa ***continued from front page***

It also criticised the scope of the application as being “remarkably broad” pointing out that *Vernonia* is used all across Africa as medicines.

On the face of it, Bayer’s patent claims appear to be biopiracy, the report states. The company claims that its business is ethical and beneficial for Africa, its Malagasy corporate collaborators plants are sustainably harvested and that a “premium” over market price is paid for the raw plant material. A “premium” is paid in the form of new classrooms and school supplies for children.

The study noted also that Serdex, Bayer’s French subsidiary that produces the extract, is a member of the Swiss-based Union for Ethical BioTrade. This Union is a private outgrowth of the UNCTAD “BioTrade” Initiative and promotes “sourcing [of natural products] with respect”. When accepting Serdex as a member of the Union, BioTrade identified unspecified areas for improvement. While the Union has a specialist in intellectual property issues, it is unclear if its audit extended to analysis of the ethics and novelty of Bayer’s patent claims, which appear dubious, according to the report.

The study recommended that Bayer be asked to back its fair trade claims with real numbers – what prices are paid per kilogram to plant collectors, what is the yield in plant extract, and how much income does the company and its corporate customers derive from sales.

On Bayer’s patent applications, the report concluded that there is strong evidence the company is patenting traditional medicinal knowledge and resources. The claims are also very broad, applying to many species that are also found in other parts of Africa and which may also constitute biopiracy.

Another case, ‘Prettier Skin for the Conspicuous Consumer from Patented African Cardamom’ cites Moët Hennessey Louis Vuitton LVMH (France) as the applicant claimant on ‘The comprising of an Extract of *Aframomum angustifolium* or Longoza Plant’.

Through its cosmetics brand Christian Dior S.A., LVMH is selling products with the seed extract such as “Dior Capture Totale Multi-Perfection Correction Serum”. The “serum” costs US \$135 for a one ounce (28 gram) container. Marketing material states that the “secret” of the expensive product is *A. angustifolium*, which is described as “a rare revitalizing plant grown only in Madagascar”, a claim that is patently not true, according to the study.

These plants have a number of food and traditional medicinal uses in various parts of Africa, although it is unclear if it is used as a skin treatment as well. But LVMH’s patent claims are broadly written, and cover any extract from the plant’s seeds used in cosmetics and may additionally infringe on traditional knowledge.

Even though LVMH attended a recent CBD ABS Working Group meeting, the study authors were not “able to find any information to indicate that LVMH has a benefit sharing agreement in place to share the profits from its *A. angustifolium* products.”

On the study ‘New Drugs from East African *Cussonia* Trees’, the applicant claimants are the Universities of Basel and Bern and the Swiss Tropical Institute. The claim is on drugs from *Cussonia zimmermannii*, a tree found in Tanzania, Kenya, Uganda, Mozambique, and other countries in East and Southern Africa. Extracts are active on the human central nervous system’s

GABA(A) receptor and may be of use in treating a variety of diseases, including epilepsy and mental disorders such as anxiety.

The Swiss “inventors” concede that “Kenyan researchers noted in 1986 that the plant is traditionally used to treat mental illness and that in 1964 noted its traditional use in treating epilepsy”. The study questioned the basis of the claim that the drug is novel and inventive. “It appears that it would be more accurate, however, to say that the Swiss institutions have used their own Western methods to confirm African traditional knowledge about the plant – rather than inventing something themselves – when it already existed!”, the report stated.

The other cases in the report are: ‘Better sex with Malagasy biodiversity’; ‘Lice Treatment from Africa’s Lemon Bush’; ‘Africa’s Marine Resources Up for Grabs’ and Viral Prospecting: Looking for Vaccines in the Blood of African Hunters’.

The study concluded that biopiracy in Africa remains a huge problem and “there is little to suggest that the true owners of these resources have consented to the patent claims. In most cases there is even less evidence that sharing of benefits is taking place, much less equitable plans that have been negotiated with Africans as equal partners”.

More in-depth research is recommend to confirm, challenge and further document misappropriation of African resources.

The full report is available at:

<http://www.biosafetyafrica.net/index.html/index.php/20090810233/Pirating-African-heritage-the-pillaging-continues/menu-id-100029.html>

[1] **OAPI** - Organisation Africaine de la Propriété Intellectuelle (African Intellectual Property Organization), based in Yaoundé, includes Benin, Burkina Faso, Cameroon, Central African Republic, Congo, Cote d’Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Mauritania, Niger, Senegal, Chad, and Togo. **ARIPO** - African Regional Intellectual Property Organization, based in Harare, includes Botswana, the Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe.

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The last of these is extremely important because many Indigenous peoples oppose the entire concept of the commercialization of genes and traditional knowledge. These peoples do not want to patent their genetic material or consider their TK as a commodity to be sold/relinquished in exchange for monetary or non-monetary benefits. They understand that these aspects of their cultural heritage are not theirs to sell because they are gifts from the Creator intended to benefit their future generations. Furthermore, they realize that a certificate of compliance with national law is not a real form of protection because their governments do not recognize their sovereignty or rights.

Given that Canada is most immediately responsible for upholding the treaty obligations of the Two Row Wampum with the Iroquois Confederacy, we believe that Canada must abide by the rule of law and ensure that Indigenous peoples’ rights are not undermined by the international regime.

[1] Information from Degiyagoh Resources, http://www.degiyagoh.net/guswenta_two_row.htm

[2] Sovereignty position of the Kanienkehaka (Mohawk Nation), Kahnawake Territory of the Haudenosaunee Six Nations Iroquois Confederacy, (Kahnawake, Kanienkehaka Mohawk Nation Office, 1988).

