Legal Elements of the "Ayahuasca" Patent Case

The challenge to the patent on the Amazon rainforest plant used for ayahuasca is being brought by:

- the Center for International Environmental Law (CIEL), on behalf of
- the Coordinating Body of Indigenous Organizations of the Amazon Basin (COICA); and
- the Coalition for Amazonian Peoples and Their Environment (Amazon Coalition).

Shamans of many indigenous tribes of the Amazon collect the plant — which has the scientific name *Banisteriopsis caapi* — and process it with other rainforest plants, according to traditional techniques, to produce a ceremonial drink —"ayahuasca," also called "yagé". The shamans (traditional healers and religious leaders) use ayahuasca in religious and healing ceremonies to heal the sick, meet with spirits, and divine the future. According to tradition, ayahuasca is prepared and administered only under the guidance of a shaman.

Plant Patent No. 5,751, issued to Loren Miller on June 17, 1986, claims rights over a supposed variety of *B. caapi*, which Mr. Miller dubbed "Da Vine."

Our request to the Patent and Trademark Office (PTO) has two parts, described below. The request for reexamination seeks cancellation of this particular patent. In a letter to the Commissioner, we call for a more general review of the treatment of traditional knowledge and biological diversity under United States patent laws.

The Request for Reexamination

To obtain a plant patent, an applicant must show that the plant is a new variety; that it is distinct from existing forms; and that it is not found in an uncultivated state (35 U.S.C. § 161). Such patents are authorized under a 1930 law designed to reward efforts of growers who develop new varieties of crops such as fruit trees or grapevines.

Plant Patent 5,751 implies that "Da Vine" is novel because of its medicinal qualities. In fact, these characteristics of *B. caapi* were already well known — i.e. part of "prior art," in terms of patent law — long before the patent was issued: indigenous people have known of the plant's medicinal and psychotherapeutic uses for many generations.

The patent claims to have identified a variety of the species with new and distinctive physical features, particularly flower color. But according to Professor William A. Anderson of the University of Michigan — a leading expert on the plant family to which *B. caapi* belongs — the features described in the patent are typical of the species as a whole, and are documented as "prior art" in the records of major herbariums.

By law, plant patents cannot be awarded to plants "found in an uncultivated state." But this plant grows naturally throughout the Amazon basin.

Intellectual property rights (which include patents) are designed to further the public good by striking the right balance between private rights and the public domain. They are intended to reward those who contribute a new invention to society — not those who merely register something they did nothing to create.

There is a limit to what should be claimed as private property under United States patent laws. This patent crosses that limit. It seeks to privatize something that is held sacred by many indigenous peoples of the Amazon rainforest. A private intellectual property claim should be denied when it offends deeply held moral and cultural values. As the PTO itself recently noted, the utility requirement of 15 U.S.C. § 101 permits it to deny patents to inventions deemed "injurious to the well being, good policy, or good morals of society" (Media Advisory 98-6, April 1, 1998).

For all these reasons, we have asked that the PTO cancel this patent, using the procedure for reexamination of patents that is defined by law.

Letter to the Acting Commissioner

The challenged patent is not an isolated problem. It illustrates more general issues of concern for indigenous peoples and the rest of the public. Thus, CIEL, COICA and the Amazon Coalition have submitted a letter to Acting U.S. Patent and Trademark Office (PTO) Commissioner Todd Dickinson. The letter supplements our request for reexamination. In the letter, we call for a public review of the implications of the PTO's practices and policies for two areas of concern, detailed below. The first concerns knowledge of traditional cultures of indigenous peoples. The second involves biological diversity — the variety found in life on Earth, including genes, species and ecosystems.

Patents and Traditional Knowledge

This patent exemplifies the problems that can arise when the Western patent system encounters the radically different systems for creating and managing knowledge that have been developed in many other cultures. The turmeric patent cancelled in 1997 is another controversial patent that fueled doubts about the adequacy and fairness of United States intellectual property laws.

Such cases raise concerns that conventional patent systems do not treat traditional knowledge equally or fairly. In fact, the obvious weakness of this patent suggests that the United States system has difficulty in recognizing the contributions to science and technology created and sustained by traditional knowledge systems, especially those outside the United States.

As globalization brings more and more cultures and economic systems closer together, the number and intensity of these controversial encounters continue to grow. The result will be continued misunderstanding and unnecessary conflict, unless national intellectual property authorities engage the public, including all stakeholders, in a careful review of these issues, at a general level rather than case by case.

The 1992 Convention on Biological Diversity, signed by over 170 countries, recognizes that the genetic and chemical information found in biological diversity is a valuable natural resource that is a heritage of the countries and communities where it is found. Much of the world's biological diversity is found in the territories of indigenous peoples, where they have maintained and conserved it through their traditional systems of stewardship of land and natural resources. Concerns are growing that this biological diversity, like traditional knowledge, is being appropriated as resources for patented technologies, without consent or adequate compensation.

We call on the PTO to develop principles and procedures that address concerns about traditional knowledge, biological diversity, and moral values, in the context of patenting. The PTO needs to ensure that the United States' intellectual property system maintains the proper balance, in a changing world, between exclusive rights and the public domain.

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