



Union for
Ethical
BioTrade

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A review of patent activity in the cosmetics sector in the context of the ethical sourcing of biodiversity

Information note 4 of 4

*Issues and possible next steps for the
cosmetics and perfumes sectors*

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Introduction

Biodiversity is recognized as a source of innovation in the cosmetics sector, and is an important element in increasingly active patenting strategies. Looking at how companies seek and exploit intellectual property protection in relation to natural ingredients is important in light of the complex and often controversial relationship between patents and biodiversity.

Concerns that patent rules and practices do not adequately support the implementation of the Convention on Biological Diversity (CBD) have led to negotiations in several international fora, including the CBD, the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO). In addition, a growing number of companies engaged with the ethical sourcing of biodiversity are seeking to ensure that their own patent and biodiversity policies and practices recognize and advance CBD principles, particularly in relation to access and benefit sharing.

To contribute to efforts towards a more mutually supportive relationship between patents and biodiversity, the Union for Ethical BioTrade (UEBT) commissioned an analysis of the patent landscape for natural ingredients in the cosmetics sector, as well as a study of the types and origins of plants referenced in these patent applications and the types of claims being sought and granted. Research was conducted by Dr. Paul Oldham, Research Fellow at the ESRC Centre for Economic and Social Aspects of Genomics at Lancaster University, and renowned expert on patents and biodiversity. Previous information notes in the series provided a summary of the research conducted by Dr. Oldham on behalf of UEBT. This fourth information note highlights his main findings and suggestions on a way forward.

Patent trends and practices in relation to biodiversity

Patents are an important element in innovation, research and development and commercialization strategies in the cosmetics and perfumes sectors. Data over the last 20 years show greater patent activity in the cosmetics sector than in sectors more often linked to the patent and biodiversity debate, including plant agriculture and herbal medicines. The rate of patent activity is also increasing in the perfumes sector, which traditionally favored the use of trade secrets.

Much of the patent activity for cosmetics and perfumes involves ingredients and extracts of natural origin. Indeed, a conservative estimate puts the number of patents linked to plants at approximately 34%. Although the reasons for references to plants vary and do not necessarily entail plant-based products or processes, the growing number of patents linked to biodiversity in the cosmetics and perfumes sector raises a number of questions from the perspective of the CBD. What do these patents say about the growing value of biodiversity and its significance as part of sustainable development strategies? Where do the plants used in the research and development of the inventions come from? Where are they sourced? Have prior informed consent requirements been respected? Are resulting benefits being shared?

At the very least, the findings of these studies, and the questions triggered, illustrate the need for companies in the cosmetics and perfumes sector to consider their engagement and practices on the ethical sourcing of biodiversity, particularly in regards to access and benefit sharing. In addition, companies may need to consider how their patent practices impact the implementation of access and benefit sharing principles. An analysis of patent claims related to biodiversity, for example, shows that some contain long lists of plant species, as well as references to families and genera. Such all encompassing claims to patent protection may affect the rights of countries and communities over biodiversity, and thus prove problematic from a CBD perspective.

The assessment of the manner in which patent documents related to the cosmetics and perfumes sectors address plants also presents some questions for ongoing policy discussions on patents and biodiversity. The country of origin of a plant species, for instance, is information considered critical to determining compliance with CBD requirements on access and benefit sharing, and yet proved difficult to determine. Distributional data for plants – i.e. information on their country of origin and their geographical range – proved available only for 43% of the species identified in the context of the present study. As has been mentioned, patent documents may contain references to a number of species. Moreover, the research conducted showed that patent activity generally refers to, or affects, groups of countries rather than individual countries.

The difficulty in determining, from an analysis of patent documents, the origin of plants at issue supports the need to introduce disclosure of origin requirements for patent applications, as is being discussed in various international fora. Nevertheless, the findings of the study – particularly in terms of references to multiple species and multiple countries – also raise a number of practical questions that will need to be addressed for effective implementation of such requirements. For example, would benefit-sharing agreements be required with regards to all countries of distribution of the plants or only to the individual countries where plant material is being sourced?

Cosmetics and perfumes in the patents and biodiversity debate

The conclusion of the present research on patents and biodiversity is that companies in the cosmetics and perfumes sectors are significantly exposed to criticism regarding inadequate recognition of the CBD principles and rules on access to genetic resources and equitable sharing of benefits. In particular, many companies risk allegations of “biopiracy” – the use, commercialization or appropriation of biological resources or associated traditional knowledge, particularly through patents, without adequate authorization or compensation.

Such criticism or allegations may not always be merited. It is unlikely that, even in cases in which there are infringements, companies are deliberately ignoring CBD provisions on access and benefit sharing or the rights of indigenous peoples and local communities. However, it can be extremely difficult to defend against allegations of biopiracy, as there is no agreed standard of evidence against which these allegations can be judged. Indeed, legislation implementing or providing guidance on access and benefit sharing is limited. Nevertheless, perhaps the biggest problem for companies in these sectors with regards to avoiding or responding to allegations of biopiracy has been insufficient understanding of the issues and potential problems in the link between patents and biodiversity, as well as in the access and benefit sharing discussion more broadly.

There is an argument for significant awareness-raising and capacity-building activities focusing on these sectors. In turn, it would be important for companies to consider a more pro-active approach both towards practical implementation and towards engagement in policy discussions on access and benefit sharing. In terms of practical implementation, it is clearly important for companies, and their suppliers, to gain legal clarity on the origins of natural ingredients used in cosmetics or perfumes, and to be able to demonstrate that they have actively sought to comply with the spirit and the letter of the CBD. At issue here is a need for users of biodiversity and traditional knowledge to follow, and as necessary push the boundaries of, existing good practices in regards to research and development, sourcing and marketing.

Engagement with the development of the legal and policy framework on access and benefit sharing is important to clarify and facilitate practical implementation. It is also essential to address problems that cannot be resolved within one single supply chain. For instance, distributional data suggests that companies – whether they are engaged in patent activity or not – will potentially be exposed to allegations of biopiracy from multiple sources. That is to say, while bilateral contracts are the favoured vehicle for access and benefit sharing in the context of the CBD, there may be questions that arise around the use of genetic resources in several countries. This is particularly true in cases where the knowledge and resources of indigenous peoples are involved. These issues may be addressed in the context of international or national policies, for example through trust funds or other such mechanisms.

Looking forward: A pro-active approach to patents and biodiversity?

In taking a pro-active stance in addressing ethical issues linked to biodiversity, the findings of this study point to two sets of actions that could be taken by companies in the cosmetics and perfumes sectors concerned with compliance with the CBD, particularly in relation to their approach to patents. The first recommendation is that companies engage in a review of their patent portfolios, assessing levels of exposure and possible options. This review should be guided by critical assessment of why the company is patenting in this area and whether the pursuit of particular patents is vital for the company, relative to other considerations. In practice, companies and institutions may engage in patent activity for a variety of reasons, from preventing copying to pursuing licensing revenue. Similarly, the importance of intellectual property protection will vary by technology sector, the size of firms and the evolution and development of business strategies.

In considering the emergence and growth of patent activity for cosmetics and perfumes over the last 20 years the most important question to ask companies is why they are engaged in patent activity? That is, are cosmetics and perfume companies engaged in patent activity primarily for defensive purposes? Is patenting simply a matter of routine, particularly for large multi-sector companies? Do companies see themselves as involved in “patent races” where they feel obliged to submit patent applications because others are aggressively pursuing protection? Alternatively, are companies pursuing patent protection for other reasons i.e. as a basis for future negotiations, to enhance reputation as an innovative firm, to pursue licensing revenue or as an indicator of performance for staff?

The answers to these questions are likely to vary between firms and may also vary within firms. For example, it is conceivable that company staff, including staff at senior level, are not fully aware of the wider patent portfolios established by the company. Intellectual property may be handled by a specialist unit or outsourced to a patent agent or law firm. In other cases, company staff may be well aware of the reasons for patent activity. In either case, the links to the debates on access and benefit sharing and biopiracy may not be known or fully understood. Thus, it may be that companies are pursuing patent protection as part of a strategy to enhance reputation, for example, without adequate awareness of the potential reputational harms that could result from allegations of lack of compliance with CBD principles. These potential problems highlight the need for a company-wide approach to ethical sourcing practices for biodiversity.

In the context of patents and biodiversity, it is really a balance that needs to be sought – a balance between the identifiable benefits of pursuing patent protection against the potential or actual risks of reputational harms arising from, for example, claims of biopiracy. The review process could actively consider whether the patent protection granted, or being pursued, has generated actual benefits for the company, is likely to generate future benefits, or is effectively dead. In cases in which the patent is not being exploited, it would be fairly simple to take action within the patent system to either inform the relevant patent office that a patent application is dead or voluntarily offer to surrender the patent¹. Even in cases where patents are identified as vitally important, a range of options may in fact be available to patent holders to ensure these patents support and do not run counter to CBD objectives. Options here include offering open licenses to patents to avoid affecting producers in developing countries or limiting the countries where patent protection is in force.

The second set of recommended actions for companies involved in patent activity linked to biodiversity is to carefully review their supply chains. In this regard, whether patents are used or not, the use of biodiversity should comply with any relevant access and benefit sharing rules and principles. Yet supply chains, particularly those linked to biodiversity, are often complex and lack full traceability. For instance, companies specializing in supplying ingredients to companies in the cosmetics and perfumes sectors, which this study has identified as involved in plant-related patent activity, tend to work with a large number and variety of ingredients from different origins.

The key issue here is the need to examine the supply chain to determine the origin of materials, as well as the terms and conditions under which these materials are obtained. The objective of this exercise would be to review the supply chain in light of the provisions of the CBD, including the new protocol on access and benefit sharing, to assess current practices and to identify appropriate strategies and actions. Otherwise, companies would find themselves at the risk of unknowingly working with biodiversity in breach of CBD principles.

The aim of reviewing company patent portfolios and supply chains linked to biodiversity should not be purely defensive. That is, there may be positive business benefits from promoting active compliance with the terms of the CBD in terms of reputational gains and market differentiation. What needs to be done, however, is to identify such positive opportunities. Certainly, there are a number of challenges linked to the practical implementation of access and benefit sharing. Nevertheless, the international protocol on access and benefit sharing, expected to be finalized in Nagoya, will raise awareness and intensify scrutiny from governments and non-governmental organizations. A pro-active stance that attempts to address these questions according to best practices, is the most likely to yield positive benefits for companies. The reviews of patent portfolios and supply chains proposed here would provide basic ways forward in moving from a defensive to a positive position on access and benefit sharing.



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Endnotes

- i. There are several precedents for withdrawal of patent applications or surrender of patents, including a surrender of a patent grant relating to a Cupuaçu extract by The Body Shop and the withdrawal of patent applications on Sacha Inchi by Cognis and Greentech.

For more information

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