International Chamber of Commerce
Policy and Business Practices

DIGITAL SEQUENCE INFORMATION

Prepared by the ICC Commission on Intellectual Property

Summary and highlights

- Importance of legal certainty and transparency for users and providers
- Digital sequence information and genetic resources
- Digital sequence information for innovation

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Background

The **Convention on Biological Diversity** (CBD) has been in force since 1993 and has three objectives: the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilisation of genetic resources. In order to further implement the third objective of the CBD, the **Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity** (Nagoya Protocol) was adopted in 2010 and came into force on October 12, 2014. The Nagoya Protocol aims at increasing legal certainty and transparency for both providers and users of genetic resources. Importantly, for the matter discussed below, the Nagoya Protocol is explicit that the "terms defined in Article 2 of the Convention shall apply to this Protocol".

ICC supports the objectives of the CBD and the Nagoya Protocol and agrees that legal certainty and transparency are essential for the implementation of their objectives. ICC also strongly believes that the objectives of the Nagoya Protocol can only be achieved when the underlying procedures are clear and effective.

Digital sequence information and genetic resources

As part of the ongoing discussions of the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA), a draft proposal that was not agreed upon and was therefore bracketed invites the thirteenth conference of the parties of the CBD "to clarify if and how the use of digital sequence information on genetic resources relates to access and benefit-sharing."[1] ICC would like to remind the Parties that the question of whether digital sequence information obtained from a genetic resource should be considered to be part of the definition of genetic resources was already extensively discussed during the negotiations of the Nagoya Protocol. Importantly, the definition of a "genetic resource" - as provided in Article 2 of the CBD and referred to in Article 2 of the Nagoya Protocol - is "genetic material of actual or potential value" with "genetic material" being defined as material of biological origin containing functional units of heredity. Functional units of heredity are usually referred to as genes. The term genetic resource therefore covers materials such as organisms, or parts thereof, in which genes are present. In other words, the term refers to tangible genetic material which must physically contain genes. It therefore follows from the definition of genetic material that intangible digital sequence information cannot constitute a genetic resource as defined by the CBD.

Adhering to the literal understanding of the definition of genetic resource, as outlined above, however, does not preclude benefit sharing from products developed using digital sequence information. Information generated by utilising a (physical) genetic resource might be covered by an agreement (Mutually Agreed Terms) between the user and the provider of the genetic resource. This may include conditions on how the intangible digital sequence information can be used and may include an obligation to make the data public or keep it private. In such case, a user (and all entities further down the value chain) will have to comply with the contractual obligations related to digital sequence information pursuant to the Mutually Agreed Terms, including potential benefit sharing provisions.

[1] UNEP/CBD/NP/COP-MOP/2/1/Add.1: https://www.cbd.int/doc/meetings/abs/np-mop-02/official/np-mop-02-01-add1-en.pdf

Digital sequence information for innovation

Freely accessible digital sequence information encourages innovation through natural product research, stimulates scientific collaboration and promotes publications. Exchange of digital sequence information is also essential to achieve the objectives defined in Article 12 of the CBD, which are to promote and cooperate in scientific advances in biological diversity research and to develop programs for scientific and technical education, as well as promote technology transfer, collaboration and capacity building. The draft “Cancun Declaration on mainstreaming the conservation and sustainable use of biodiversity for well-being”[2] recognizes this by a commitment to “promote the generation and use of biodiversity-related knowledge and information and make it readily available to society to support decision making at all levels.”

To include digital sequence information in the definition of genetic resources under the Nagoya Protocol would not only increase legal uncertainty but also attach indefinite access and benefit sharing obligations to the use of such information. In addition, the resulting system would be unworkable, because monitoring and checking compliance would be extremely burdensome or even impossible to achieve.

[2] https://www.cbd.int/cop/preparation/cop13-hls/default.shtml

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