

American Intellectual Property Law Association (AIPLA) Statement

WIPO 36th Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) June 25 to June 29, 2018 (Geneva, Switzerland)

Thank you, Mr. Chair. I am speaking on behalf of AIPLA. Our members represent both users and owners of intellectual property. Our mission includes helping to establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness. We would like to thank WIPO for its continued focus to provide a global policy forum to address evolving IP issues.

AIPLA has been following with interest the discussions and proceedings of the IGC. Over at least the past three years, AIPLA has been seeking to collect practical experience of patent practitioners and companies on compliance with disclosure requirements for patent applications involving genetic resources. Recently, AIPLA's Biotechnology Committee published in its monthly newsletter findings on the experience before the Swiss Patent Office and of Swiss patent practitioners with the Swiss Patent Law disclosure requirements.

- Art. 49a of the Swiss Federal Act on Patents not only *requires* that the applicant provide this information, but Art. 59(2) and 59a(3) also provide *pre-grant penalties*, including rejection of the patent application, if the applicant fails to comply.
- Furthermore, Art. 81a of the Swiss Federal Act on Patents provides a *post-grant penalty* in that any person, who willfully provides false information under Art. 49a PatA is liable to a fine of up to 100,000 CHF, and the Court may order the publication of the judgment.

To learn more about the experience of the Swiss Patent Office and patent practitioners with the disclosure requirements, AIPLA sought information from the "*Sustainable Development and International Cooperation*" Division of the Swiss Patent Office, and from Swiss patent attorneys. AIPLA sought to determine how patent applicants have dealt with the Swiss mandatory disclosure requirements and whether the Swiss Patent Office has ever invoked the sanctions for failure to meet the disclosure requirements in accordance with Art. 81a of the Swiss Federal Act on Patents.

AIPLA's study found *no practical impact* has come to the attention of either the Swiss Patent Office or Swiss patent attorneys that we have contacted:

- There has been no rejection of any patent application based on violation of Art. 49a PatA, nor has there been any publication of a judgment in accordance with Art. 81a PatA.
- The provisions of the Swiss Federal Act on Patents as discussed above only and exclusively apply to "*national*" Swiss patent applications, that is, applications that are *directly* filed with the Swiss Patent Office.

- The provisions do not apply to European patent applications which are then validated in Switzerland. They are governed by the European Patent Convention, which does not include any disclosure requirements corresponding to Art. 49a and 81a PatA.

According to statistics obtained from the Swiss Patent Office:

- the number of patent applications that are directly filed with the Swiss Patent Office is typically between 1,000 and 3,000 applications per year.
- These “national” applications typically originate from small Swiss companies, and also from specific areas of technologies typically not including biotechnology.
- By contrast, about 100,000 patents per year are validated in Switzerland via the European Patent Office system. These “EP-CH” patents include essentially all applications filed by biotech companies and essentially all applications filed by “multinational” companies.

Thus, one can conclude that about 1-3% of Swiss patents are subject to the disclosure requirement, and, of this small fraction, there are few or none in the biotechnology arts.

Swiss patent attorney colleagues interviewed by AIPLA Biotechnology Committee members were not aware of any company that has or would file directly with the Swiss Patent Office, which is the only way in which a company would be subject to the mandatory disclosure requirements of the Swiss Patent Office.

In summary, AIPLA has not been able to identify or collect any practical experience in complying with the Swiss disclosure requirement.

AIPLA would also like to thank the WIPO IGC Secretariat for connecting AIPLA with the Swiss Patent Office. In addition, we would like to thank the Swiss Patent Office for providing AIPLA with helpful information regarding the disclosure requirements for use of genetic resources under Swiss Patent Law.

AIPLA is currently collecting practical experience on compliance with mandatory disclosure requirements to enable assessment of the potential impact of mandatory disclosure requirements in other jurisdictions.

Thank you for this opportunity to speak.