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Protection of Traditional Knowledge Bill

Introduced by Dr Wilmot James, MP

1. Introduction

1.2 Intellectual Property in Brief

Intellectual property (IP) is the product of human creative activity. It is intangible. Unlike real property and personal property which is often protected with a physical security device eg a fence, intellectual property is protected by sets of enforceable legal rights which are given to the "owner".

The purpose of the protection of intellectual property is to encourage innovation and creative works because they are beneficial to society. If these works were not protected, there would not be an incentive to create them, because the creator would not be financially rewarded. Intellectual property protection means that the owner of the right gets financial reward when his creation is used. Often the creator has to invest time, labour and money, and the protection of IP gives certainty that such investments will be rewarded. The protection of IP rights ensure that the owner is rewarded and that society gets the types of IP works that it requires.

Each country has its own laws that protect IP. But because countries trade and interact with each other, it is very important that countries cooperate and agree with regard to IP protection. International IP protection is regulated by multilateral and bilateral agreements which set certain standards and requirements that have to be met in order for IP protection to be recognised internationally. It is fundamentally important that South Africa complies with these international obligations.

The three main forms of IP protection are patents, copyright, and trademarks.

1.3 Traditional Knowledge is Different

The motivation for protecting Traditional Knowledge (TK) is entirely different. The protection of this type of work does not and cannot serve as an incentive for the creation of new works, because by their very nature, traditional works already exist and are already being used by others. The origin of TK works cannot be dated and is not ascribable to an identifiable creator. The protection of TK seeks to address the immoral/unethical misappropriation of such information, to promote the commercialisation of traditional intellectual property, and to ensure that indigenous communities accrue economic benefit from commercialisation of their traditional IP.

1.3 Overview of the current legislative landscape

In 2004 the Cabinet approved the adoption of a policy on Indigenous Knowledge Systems, known as IKS Policy. Pursuant to this the Department of Trade and Industry formulated a policy document on the protection and commercialisation of Indigenous Knowledge. This policy sought to recognise and protect Indigenous Knowledge as a form of intellectual property and to enable and promote the commercial exploitation of such material for the benefit of the indigenous communities from which the material originated.

On 28 January 2010 the Department of Trade and Industry introduced the Intellectual Property Laws Amendment Bill (IPLAB) to give effect to this policy. This bill proposed to amend the Copyright, Designs, Trade Marks and Performers Protection Acts respectively, to introduce into them special provisions applying the subject matters of those acts to what it termed "Traditional Knowledge" (but what can more correctly be described as "Cultural Expressions", i.e. folklore, traditional music, traditional designs and signs and performances of traditional works).

The IPLAB has a number of serious failings in respect of its designed purpose and objective. Not only will it never achieve its objective, but it also jeopardises our existing national intellectual property (IP) system. The bill attempts to protect TK in a manner which is, for reasons set out below, technically incorrect. TK cannot be sufficiently protected in this manner and thus the bill is set to fail from the outset, bringing down our IP system with it. Despite an outcry from the national and international IP fraternity, as well as a DTI commissioned regulatory impact assessment report advising against this approach, the DTI has none-the-less forged ahead with this bill.

The internationally agreed upon mechanism to protect TK is by means of legislation which is specially drafted to deal with the unique nature of TK (a *sui generis* approach). As a result of the Constitutional Court case won by Dr Mario Ambrosini, MP, Dr Wilmot James, MP, was able, on 16 April 2013, to introduce the Protection of Traditional Knowledge Bill (PTK Bill) which presents an alternative, *sui generis,* approach to the IPLAB. The PTK Bill has been overwhelmingly favoured over the IPLAB in public submissions.

The President, due to incorrect tagging and thus no proper consultation with the National House of Traditional Leaders, rescinded the National Assembly's passing of the IPLAB on 14 March 2013 and referred it back to the Portfolio Committee on Trade and Industry to be dealt with as a Section 76 Bill. The IPLAB has subsequently been adopted by the committee despite irregularities raised by Dr James, passed by the NA, and is currently before the relevant NCOP portfolio committee.

2. The PTK Bill

2.1 The PTK Bill Gives Effect to the IKS Policy

The PTK Bill is a piece of legislation which aims to give effect to the government's IKS Policy. It is simply an alternative and far more effective way of achieving the outcomes of the IPLAB. Instead of amending existing IP laws, the PTK Bill offers the same level of protection in a single piece of legislation. It does so without involving other laws which do not fit the needs of TK.

2.1 The PTK Bill offers *Sui Generis* Protection

The internationally recognised most appropriate way of protecting TK is a form of protection which is specifically drafted to deal with the special nature of TK – it is referred to as a *sui generis,* or stand-alone form of protection, tailor made for TK.

For this reason, in a hope that Parliament would see reason, the PTK Bill was introduced to offer an alternative to the IPLAB, a bill which will achieve exactly what the IPLAB aims to achieve, but in a more appropriate manner.

A *sui generis* approach to the protection of TK is supported at both a national and an international level and also in foreign jurisdictions. It gives legal certainty, is simple to administer, and it has the overwhelmingly important attribute that it does not intrude directly into the existing South African IP statutory law.

2.3 Universal Support for *Sui Generis* Approach

The South African Department of Science and Technology has made it unequivocally clear that it supports a *sui generis* approach. The Department of Science and Technology *"notes and applauds the sui generis approach to the protection of TK".*

The DTI commissioned regulatory impact assessment report favoured a *sui generis* approach; this report was ignored and replaced with an internal regulatory impact assessment.

Summary conclusion of the Regulatory Impact Assessment commissioned by the DTI
A sui generis approach appears to offer the best option for a comprehensive, tailor-made solution, sensitive to community requirements and amenable to cross-departmental cooperation and support.

WIPO (World Intellectual Property Organisation) favours a *sui generis* approach. South Africa is even part of the group of developing nations at WIPO where it has in the past supported a *sui generis* approach.

ARIPO adopted a *sui generis* approach contained in the Swakopmund Protocol (ARIPO's member countries are Botswana, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Namibia, Rwanda, Sierra Leone, Somalia, Sudan, Swaziland, Uganda, United Republic of Tanzania, Zambia and Zimbabwe.) To date, half the members of ARIPO have adopted the Protocol. The Protocol has the full support of WIPO. Other countries in Africa have also adopted their own *sui generis* laws to protect TK, such as Tunis, Bangui, and the Agreement of OAPI (the regional IP system in Africa of French speaking countries).

South Africa is not a member of ARIPO. However the Swakopmund Protocol is relevant to SA because we share borders with several ARIPO member states and our traditional communities have very close affinity with similar communities across these borders and may even own TK jointly with these neighbouring communities.

Going against the grain of the international and regional community will jeopardise our IP protection and makes no sense.

3. Problems with the IPLAB

3.1 Amending Existing Laws is the Incorrect Approach

The IPLAB cannot achieve the object of protecting TK. Not only will it not achieve its objects, but it will affect aspects of our IP laws which have been developed over hundreds of years and are in line with our international obligations.

The existing IP system is an inappropriate mechanism for the protection of TK. Due to the fact that it is an inappropriate mechanism, and due to the complexity of amending the existing IP laws, there is

a real fear that the IPLAB will not be implementable and will thus never achieve the aim of protecting TK. Not only this, but the amendments will also give rise to a great deal of unwanted uncertainty in the existing IP system, which will have catastrophic effects.

The IPLAB has been described by the Deputy President of the Supreme Court of Appeal as *fundamentally flawed and incapable of delivering any protection to traditional cultural works.*

The Law Society of South Africa has called for a *sui generis* approach since 2007; *"TK simply does not equate with conventional forms of IP and the requirements of the IP Acts for granting protection for IP".*

> *"More especially we exhort Parliament not to try and attach such an important Bill to other existing Acts, such as IP Acts, be they trade marks, patents, designs or copyright.... The whole concept of TK is in conflict with these IP pillars." – Don MacRobert, Edward Nathan Sonnenbergs.*

3.3 Licensing

IPLAB

The IPLAB makes licensing of the traditional works subject to onerous formalities and conditions. The circumstances for licensing are not at all in accordance with the realities of the market place in the licensing of works of intellectual property and they are likely to prove to be a strong disincentive to anyone contemplating acquiring a license.

PTK Bill

Licensing of TK property takes place on a simple, uncomplicated and user-friendly basis in keeping with standing commercial practices.

3.2 Expropriation by the State

IPLAB

The IPLAB is further monstrously problematic in that it purports to create a system which in certain circumstances will confer ownership of the property created in the State, and not in the communities themselves. Such property will be commercially exploited by the State and royalties flowing to the State from the use of the works will accrue to a trust fund administered by the State. The trust operating the fund has discretion as to how the money should be spent or allocated and no obligation is placed on it to transfer any such money to any community. Royalty payments could be viewed as a sort of tax, somewhat along the lines of the e-tolls to be extracted from motorists for the use of Gauteng highways.

PTK Bill

The PTK Bill provides for protected traditional knowledge to be owned by the community that originated it and for that community to exploit the works commercially to its own advantage. No deprivation or expropriation of a community's property thus takes place.

Payment of royalties for use of the property can be made to a trust fund operated by the state but such moneys are specifically directed to be paid to the relevant community owning the work being exploited. Provision is made for the state to enforce rights in protected works, at the election of the owner and on its behalf. All existing intellectual property rights currently available to communities are preserved and not taken away.