

Public Submissions
on the
Traditional Knowledge Private Members
Bill

18 October 2013

The Law Society of South Africa

- Strongly and fully supports the broad principle and intention of the PTKB, viz to provide sui generis protection for TK
- LSSA since 2007 have decided that TK should be protected and that the best method of such protection is sui protection
- LSSA has consistently and strenuously opposed the principle of the DTI IPLAB that proposes to protect TK by way of inclusion in, and amendment of, our existing IP Acts.

The Law Society of South Africa

- TK simply does not equate with conventional forms of IP and the requirements of the IP Acts for granting protection for IP
- LSSA supports the sui generis approach adopted by developing nations regarding the protection of TK and Folklore Expressions / Traditional Cultural Expressions (TCEs) at WIPO in Geneva
- South Africa is part of the group of developing nations at WIPO where it has in the past supported this approach.

The Law Society of South Africa

- ARIPO adopted a sui generis approach -The Protocol has the full support of WIPO, which was instrumental in its drafting
- Other countries in Africa have also adopted their own sui generis laws to protect TK,
- It is appropriate that SA should come in line with its neighbouring countries and other African countries
- Supports the broad principle of the PTKB – such customized legislation, with appropriate amendments, is warranted

The Law Society of South Africa

- Extensive reference to existing IP laws is not the correct approach – the approach taken in the Swakopmund Protocol is preferable (although it is understood that the Protocol is regional)
- The nomenclature / terminology used in SA for TK is incorrect
- Draws attention to the different uses for the term Traditional Knowledge vs Traditional Cultural Expressions (TCEs)

Department of Science and Technology:

National Indigenous Knowledge Systems Office (NIKSO)

- Intellectual property rights relating to IK have never been more economically and politically important
- The proposed chapters and sections are very focused in nature in attempting to address issues and deficiencies of the DTI IPLAB

Department of Science and Technology:

National Indigenous Knowledge Systems Office (NIKSO)

- NIKSO is in a position to accept the general intention of the Bill, but not necessarily agree with it – in some cases further consultation is required
- -specific comments further

Department of Science and Technology:

National Intellectual Property Management Office (NIMPO)

- Notes and applauds the *sui generis* approach to the protection of TK.
- specific comments further

Edward Nathan Sonnenbergs:**Don MacRobert**

- Fully supportive of the proposed bill and its objectives
- It is our **emphatic** plea that any bill which deals with TK recognises its importance and grants its status as a stand alone or independent bill
- More especially, we exhort Parliament not to try and attach such an important Bill to other existing Acts, such as Intellectual Property Acts, be they trade marks, patents, designs or copyright. The very essence of these Intellectual Property Acts is originality, or novelty, such as in the form of patents; originality for designs; distinctiveness for trade marks.
- The whole concept of Traditional Knowledge is in conflict with these Intellectual Property pillars.

Sadulla Karjiker (BSc, LLB, LLM, Dipl Adv Co. Law, LLC)**Member of the IP Unit at the Faculty of Law, Stellenbosch University**

- *“the justifications for protection of traditional knowledge are fundamentally different to that which underlies the exiting forms of intellectual property protection, in particular, copyright and patents. This fundamental distinction requires that traditional knowledge should be protected by legislation which has been specifically drafted to deal with the peculiar nature of TK.”*

Competition Commission of South Africa

- The fundamental difference between the IPLAB and the PTKB is the sui generis approach of the latter.
- The introduction of a Bill which is exclusively focussed in traditional knowledge matters is welcomed.
- The PTKB provides a dedicated piece of legislation to recognise and protect traditional or indigenous knowledge, thus providing a clear legislative framework to give effect to the goals of the government on TK.

Competition Commission of South Africa

- The Commission embraces the spirit of the PTKB as legislation that seeks to protect the exclusive control of rightful owners, stimulate innovation and incentivize investment in Research and Development of TK.
- However, like the IPLAB, the bill raises a number of competition concerns

DM Kisch Incorporated

- Fully support the broad intention of the Bill viz to provide *sui generis* protection for so-called Traditional Knowledge in South Africa.
- The PTK Bill takes the wrong approach in its linking much of the protection, and referring extensively, to the existing IP Acts – the correct approach to providing *sui generis* protection is encapsulated in the ARIPO Swakopmund Protocol (2010) which has the support of WIPO.

DM Kisch Incorporated

- The term “Traditional Knowledge” is incorrect - internationally the term TK is used to refer to the technological traditional matters only ie caring for, selecting and processing genetic material and treatment of patients with plants, bark, roots, etc.
- The term “Folklore” (or folkloric expressions) or traditional cultural expressions (TCE’s) is used internationally to refer to all the other aspects of ceremonies, music, songs, poems, patterns, designs, etc.
- Specific comments further

Intellectual Property Services

- IPS (International) Limited is an in-house intellectual property subsidiary of a well-known listed Group of Companies. The submission is on behalf of their team of fully qualified IP attorneys with a collective trade mark experience of many decades
- Existing laws do already provide all the protection warranted to traditional knowledge.

Intellectual Property Services

- If specific protection is required to further the protection of traditional knowledge, consideration should rather be given to a customized *sui generis* statute such as the Draft Traditional Knowledge Bill.
- The DTI IPLAB is strongly opposed on the basis that it is completely unworkable and not in line with the informed international view.

Bryce Tyler Matthewson
(BSc (Chem., App. Chem)LLB. LLM.)

- The South African legislature has a duty to provide adequate means for the protection of TK - should we fail to establish adequate yet balanced protection at this early stage then any hope we have of holding onto this knowledge in the future is undeniably lost.
- A sui generis approach is favoured
- It is now accepted among the majority of academics that the existing IP regime is inappropriate for the protection of TK because of the unique characteristics of TK

Bryce Tyler Matthewson
(BSc (Chem., App. Chem)LLB. LLM.)

- As a result of the unique character of TK the PTK Bill proposes a unique system of protecting it by providing three types of property, each which is dealt with separately in the PTK Bill,
 - Traditional Works, akin to Copyright
 - Traditional Marks, akin to Trade Marks
 - Traditional Designs, akin to Designs
- A sui generis approach to the protection of TK is supported at both a national and international level and also in foreign jurisdictions, the Department of Science and Technology supports it, ARIPO follows it.

Bryce Tyler Matthewson
(BSc (Chem., App. Chem)LLB. LLM.)

- It would be inappropriate for SA to adopt an approach which is contrary to that which is being promoted at an international level, especially as traditional communities could be split across national borders in circumstances where SA shares a border with a member of ARIPO

Jean Mcivor

- Admitted attorney with 30 years' experience practising IP Law.
- SA has a proud record and a reputation and has even been a leader in some fields of IP protection.
- SA has the opportunity to be a front runner yet again in the field of traditional knowledge protection – but this will only happen if our legislation has the support of all stakeholders and sets up a workable system.

Jean Mcivor

- The PTK Bill is a preferable option to the cumbersome IPLAB.
- It is not clear why the approach embodied in the IPLAB has been favoured
- ie four existing statutes which provide for long established categories of IP rights and which are tried and tested, are now to be distorted to accommodate principles which are out of place or even fundamentally at odds with the existing subject matter, and which were never contemplated when those statutes were originally adopted

Jean Mcivor

- The proposed amendments to the existing statutes will impair them, create uncertainties, and will not only cause collateral damage to those existing laws, but will fail to achieve the present objectives.
- The IPLAB approach must be vigorously probed to understand what the perceived advantages are compared to a new, dedicated TK law

Jean Mcivor

- The approach of a dedicated stand-alone law is clearly the ideal one

Tim Burrell: Burrells Intellectual Property Legal Practitioners

- The sui generis Bill has the overwhelming important attribute that it does not ingress directly into the existing South African IP statutory law.
- The IPLAB torpedoes the existing South African IP statutory provisions which have been developed since the 1850s and crafted into their present form following thousands of hours of research and debate.

**Tim Burrell: Burrells Intellectual
Property Legal Practitioners**

- The IPLAB has, very correctly, been rejected in the round by the legal profession. One can but hope that Parliament will have appropriate regard to that rejection.
- The PTK Bill as it stands adequately meets the Memorandum of Objectives as set out.
- The PTK Bill is framed unduly widely and requires the inclusion of some detail and checks and balances.

**National Organisation for
Reproduction Rights in Music in South
Africa**

- Negotiating and licensing body
- Unequivocal support to the PTK Bill and the idea that there should be a separate and unique statute enacted for the protection of TK

**Denise Nicholson (BA HDip Lib
(Unisa), LLM (Wits))**

- The PTK Bill provides a more practical "sui generis" solution to traditional knowledge issues than the IPLAB.
- Omission of attention to limitations and exceptions for research, education, libraries, & archives and persons with sensory disabilities.
- Does not address the digital environment, is lacking in adequate and appropriate limitations and exceptions for the abovementioned, as well as for access to TK works.

Louis van Wyk

- Partner at law firm in South Africa, practiced in the area of Intellectual Property since 1976
- South Africa has a unique opportunity of implementing a legal system that will protect TK
- If the system to be implemented does not allow for the development of the TK, it will remain stagnant and therefore become extinct.

Louis van Wyk

- In view of the unique nature of TK, the fact that it is not individualistic, but vests in a community and its association with religious and cultural values, it cannot be protected under IP laws.
- The IPLAB may result in the breach of SA's international obligations by its inclusion of TK in existing IP Laws.

Louis van Wyk

- The IPLAB is cumbersome and unworkable.
- Not only will the IPLAB not achieve its objects but it will also affect aspects of the IP laws which are working very well and are in line with our international obligations

Louis van Wyk

- The PTK Bill is the type of Bill that will provide protection without damaging SA's IP Laws.
- Certain aspects in detail can be stated differently or with greater particularity. However it is in principle the correct way to move forward.
- Trying to graft TK protection onto existing IP Laws such as IPLAB is trying to do, will be futile.
- The only solution is a sui generis law protecting TK

ANFASA

- ANFASA is SA's first national association for authors of general non-fiction works, textbooks and academic books. Its members write scholarly works, academic textbooks, school textbooks, manuals, biographies, histories, works of general interest, articles and essays.
- ANFASA welcomes the introduction of the PTK Bill

ANFASA

- ANFASA's submission only extends to how this Bill will affect Copyright ownership of TK in literary works
- The PTK Bill seeks to provide legal recognition and protection of TK through sui generis legislation and this is good initiative

ANFASA

- A sui generis approach would alleviate the issue of authorship and ownership of copyright – these are critical to ensuring that the correct person has protection.
- Another issue is the underlying requirement of copyright ownership that the work needs to be in material form, but most TK is not. Therefore a sui generis legislation is able to go into detail on how to address the peculiar nature of TK.

ANFASA

- The PTK Bill addresses other critical issues around IKS, which IPLAB fails to do, eg defining a traditional community
- The PTK Bill, just like the IPLAB needs to address TK protection in more detail than it does

Dramatic Artistic and Literary Rights Organisation Limited

- DALRO is a multipurpose copyright society established in 1967 which administers various aspects of copyright on behalf of authors, artists and publishers.
- Welcomes the fact that the PTK Bill sets out to provide sui generis protection of traditional knowledge

Dramatic Artistic and Literary Rights Organisation Limited

- Existing IP law framework, especially copyright, cannot be appropriated for the protection of traditional works as attempted by the IPLAB.
- Would like to make detailed comments when the Bill is subject to public hearings in Parliament.

Dramatic Artistic and Literary Rights Organisation Limited

- However in order for that to be meaningful, we respectfully request Parliament to suspend work on the IPLAB until such time as the PTK Bill has received a full hearing, in order to facilitate a sensible debate as to how the protection of TK in South Africa would best be served.

Western Cape Government, Office of the Director-General

- The intention of the PTK Bill to protect TK via a stand-alone law is a good one – but it needs to be drafted in a clearer fashion

Caroline Ncube (LLB, LLM, PhD) Intellectual Property Law Unit, Department of Commercial Law, Faculty of Law, University of Cape Town

- 11 years and research and teaching in IP Law
- Sui generis protection is tailor made protection that is fashioned to cater for a specific right or asset that is worthy of protection.

Caroline Ncube (LLB, LLM, PhD) Intellectual Property Law Unit, Department of Commercial Law, Faculty of Law, University of Cape Town

- It exists outside and parallel to conventional IP protection
- Conventional IP laws are not suited to TK for several reasons:
- Key point 1: It is necessary for SA to adopt a sui generis approach to cater for the unique characteristics of TK

Caroline Ncube (LLB, LLM, PhD) Intellectual Property Law Unit, Department of Commercial Law, Faculty of Law, University of Cape Town

- Key Point 2: South Africa has adopted sui generis approaches to IP in the past and should do so now because it is appropriate to do so
- Key point 3: The adoption of a sui generis approach has the endorsement of other national departments in SA. It is also endorsed by international and regional IP organisations.
- Key Point 5: It is better to enact a separate piece of legislation to cater for the sui generis IP protection of TK so that the law is both more accessible and comprehensive

SAMRO
South African Music Rights Organisation

- "We remain convinced that the existing IP law framework, especially copyright, cannot be appropriated for the protection of traditional works, as has been attempted by the IPLAB, 2010. The comments to it made by the WIPO and commentary by many lawyers and academics bear out our conviction."
- "We respectfully request Parliament to suspend work on the IPLAB until such time as the PTKB has received a full hearing."

International Trademark Association

- Supports the recognition of traditional knowledge.
- Strongly believes that any protection afforded to traditional knowledge must not prejudice existing trademark rights.
- Strongly opposes any proposal that would seek to grant special trademark status to traditional marks.

International Trademark Association

- Any new system introduced should be consistent with the well-established IP principles of territoriality, exclusivity, priority, and notice. Any new system should include a process where the owner of an existing trademark right will receive notice and be given the opportunity to object to the granting of a new right. This helps prevent abuse and enhance reliability and confidence in the system.

Department of Environment Affairs

- The National House of Traditional Leaders as well as provincial Traditional Houses must be involved in this process from inception
- The definitions used do not coincide with Department of Traditional Affairs legislation

Department of Environment Affairs

- The bill appears to disregard existing legislation on traditional customs
- No mechanism to deal with illegally registered TK
- The bill does not specify the involvement of vulnerable tribes or communities before a TK right is registered

Mankoe Incorporated

- The PTK Bill deals with “traditional communities” as the only grouping which has knowledge about “traditional work” which requires protection
- Drafters failed to recognise that indigenous traditional knowledge about medical plants is not the preserve of traditional communities but that of “traditional families”, and should be classified as such.

National House of Traditional Leaders

- On 3 July 2013 the PTK Bill was presented to the National House of Traditional Leaders at Durban.
- There was an opportunity for questions and discussion.
- The NHTL deliberated on the PTK Bill at a formal sitting.
- Comments were submitted to Parliament.

»Thank you