

Legal Context (cont...)

- Health Traditional Practitioners Act - administered by the Department of Health. It seeks to assimilate traditional medicines in the allopathic medicine regime, provided such traditional medicines satisfy the standards of safety, quality and efficacy;
- The Department of Cooperative Governance and Traditional Affairs also administers laws that have bearings in the protection and recognition of IK from a perspective of traditional leaders;
- The Department of Science and Technology also administers the Publicly Financed Research Act which seeks to promote IK innovation



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Level of IK Protection in SA

The approach in the abovementioned pieces of legislation mainly focuses on protection of tangible aspects of IK not the intellectual property component of IK;

Generally, the existing protection of IK may be protected from preservation, health, cultural and governance perspectives;

In the agricultural area registration of hybrid of plants are registered with the department and sometimes may also be registered under intellectual property office provided the new hybrid satisfy the IP criteria;

In some legislation, namely, National Environment Management Biodiversity Act, the IP component is protected to a limited extent and as an ancillary issue;

The common law can also protect IK through the principles of trade secrets and it has its advantages and disadvantages;

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Level of IK Protection in SA

- The importance of IP component of IK needs protection and recognition; hence the proposed legislation;
- The proposed Bill seeks to complement the level of protection given to IK from the IP point of view in order to advance its potential social development benefits to the poor and to local communities;
- It does not replace or duplicate those existing pieces of legislation but will ensure proper policy alignment and integrate into national development process.
- Protection of IK through IP will lead to socio-economic empowerment, recognition of IK to relevant communities, economic development and commercialisation of IK for uplifting the standards of owners of IK.



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Exploitation of IK in SA

- Non protection of IK from the IP perspective renders IK vulnerable to be “poached” by potential “innovators” in the IP system;
- Protection of IK through the IP system does not seek to frustrate innovation, but wants to encourage innovation in a transparent, fair and equitable manner to both parties under these different systems;
- Examples of exploitation of IK in SA without recognition and compensation of IK owners:
 - Patents based on the Hoodia shrub which suppresses hunger and thirst – belonged to Khoi and Sans. CSIR patented this knowledge in SA and in the EU without compensation or recognition to the Khoi and Sans for their contribution. The court ordered the CSIR to negotiate a benefit sharing agreements with parties assisted with the knowledge. This was done in the absence of the Patents Amendment Act, 2005.



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Exploitation of IK in SA

- The Medical Research Council (MRC) also has a database that contain IK from communities and patents have been claimed without appreciating the holders of the IK of such communities.
- Recently a case of modern researchers who also used IK without appreciating IK holders took place in Alice, Eastern Cape, South Africa. They sought a patent based on IK in the UK and other jurisdictions and the local community is fighting it out in the UK.
- Lice treatment from Lemon Bush claimed as a patent by NONits, 11c (US). This IK repels lice and other parasites and it has been used by the Zulus and Xhosas of SA as well as other Southern African tribes. The patent has been claimed in SA, US, EU, former British and French colonies in Africa. No benefit agreements are in place.
- In the area of copyright, Mbube the Song should have appreciated the local community as the song is based on SA folklore.
- Kiba folkloric music should also have benefited the IK holders of that music.
- In the area of trade mark, the Rooibos tea is in point as some people have tried to trade mark the word "Rooibos" tea.



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Foreign Law Using IP for IK Protection

- Egypt-uses the Trade Marks system to protect the Certification Cotton Mark through the Madrid International Registration of Marks
- Tunisia and 14 former African colonies of French- use copyright to protect artistic work derived from folklore and permission has to be asked from relevant authority
- Australia- through courts decisions allow derivative work of copyright based on IK to be protected through copyright
- Australia- also has a Fair Trade Mark (certification mark) under which IK related products are sold
- Turkey also uses IP in general to protect IK
- Mexico- uses geographical indications to protect Olinala crafts as well as Tequila alcoholic drink



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Foreign Law Using IP for IK Protection

- Egypt – uses Trade Marks for protection of certification of cotton marks;
- Tunisia – uses to protect artistic work done on folklore requiring permission before use by third party;
- New Zealand and Colombia- have provisions in the trade mark laws that prohibit registration of “trade marks” that are akin to IK. Patents based on IK also recognised;
- The law of suppression of unfair competition has been invoked to protect IK. Member states of the Lisbon Agreement for the Protection of Appellations of Origin, and the Madrid Agreement for the Repression of False and Deceptive Indications of Source on Goods have been used to curb unfair competition on products;
- Indonesia- puts emphasis on copyright and geographical indications;



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Foreign Law Using IP for IK Protection

- France and Portugal, India, United Kingdom, Italy- put emphasis on collective trade marks and geographical indications for IK protection such as agricultural products
- Malaysia- put emphasis on copyright to protect IK and WIPO-UNESCO Model factored in
- Samoa put emphasis on moral rights under copyright and related rights law to protect IK
- Colombia, Kazakhstan, New Zealand, Russian Federation, Venezuela and Vietnam- use the existing IP (patents and geographical indications and trade marks) to protect IK.
- United States uses geographical indications to protect its oranges and potatoes.
- In view of the preceding paragraph, biodiversity laws, cultural laws, heritage laws and other indigenous laws that purport to protect IK but are not dovetailed with the IP laws may not achieve the desired effect. The converse is also true.



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Purposes of the Bill

Broad objectives of the Bill can be state as follows:

- To improve the livelihoods of IK holders and communities.
- To benefit the national economy
- To prevent misappropriation/bio-piracy
- To provide legal framework for protection and empowerment of local communities to improve their social wellbeing



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Principles of the Bill

- **Recognition** – provide communities the right to claim ownership
- **Commercialisation** – provides opportunity exchange knowledge for commercial purposes and generate income
- **Compensation** – provides the right for a reward to the IK owner for use of the knowledge
- **Empowerment** – raise awareness on importance of IK in economic development process, providing platform for partnership for commercialising the knowledge;
- **Transparency and fairness** – to ensure fair and transparent process for usage and registration of rights



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Provisions of the Bill

Key Interventions contained in the Bill are as follows:

- Registration and identification – facilitates registration of IP component of IK for protection from unlawful use. Registration will be done through the Companies and IP Commission established in terms of the Companies Act of 2008;
- Licensing of IK rights – for assignment of the rights to use IK for commercial purpose and for any development process;
- Exchange of knowledge from the owner to the third party subject to compulsory permission or consent being granted;
- Compensation for use – provides for negotiation of benefit sharing agreement regime on IP embedded on IK in order to fairly compensate and/or recognise the IK owner;



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Provisions of the Bill

Process followed:

- Policy Drafting consultation done with relevant departments and provincial Governments;
- Tribunal and courts to enforce the IK rights including the settlements arising from the Alternative Dispute resolution process;
- Cabinet approved Policy in 2007 provided further consultation with other departments took place;
- Establish the Alternative dispute resolution structure to resolve cases of possible violations in a fair, efficient and speedy manner; the Bill will provide for accreditation of ADR process by the Companies and IP Commission;
- Provision of investigation for possible violation and create inspectorate enforcement model to monitor compliance;
- Penalties – include nullification of the registration and ownership; sue for damages and compliance notices to be issued;
- On 9 December 2008 NEDLAC process restarted and in reality Government presented what transpired during public consultation when NEDLAC process was stalled. The NEDLAC process was concluded in September 2009.



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Outline of Process followed

- Process followed:
 - Policy Drafting consultation done with relevant departments and provincial Governments), Reference Team formed consisting of IP practitioners, SACIP members, Universities (UCT, Venda, North, Pretoria, CSIR and other Government agencies such as the Agricultural Research Council) and WIPO (1987)
 - Cabinet approved Policy in 2007 provided further consultation with other departments took place as they never responded to letters sent
 - Public consultation took place in July 2007 and the bodies consulted include Contralesa (KZN), Contralesa (Eastern Cape), Contralesa (North West), Research and University Institutions, University of Pretoria, UCT, Stellenbosch, Western Cape, Natal Durban Westville and Zululand (combined capacity in research), Wits, Technology universities such as Thswane and Johannesburg Free State, formations of artists through their representatives such as Mushito, Creative Workers Union, collecting societies, recording companies, Free Market Foundation, Non Governmental Organisation, IP practitioners, Librarians and A2K organisations such as Mark Shuttleworths Foundation.
 - The IP practitioners are divided in supporting the Bill but the rest of other stakeholders support the Bill. A2K and librarians are of the view that the Bill should recognise exceptions and limitations as contained in the TRIPS Agreement. Artists and other formations support that the Bill should regulate all collecting societies in all domains of copyright not only in the needle time royalty. One Presentation was done at NEDLAC in 2007.
 - On 9 December 2008 NEDLAC process restarted and in reality Government presented what transpired during public consultation when NEDLAC process was stalled. The NEDLAC process was concluded in September 2009.



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Regulatory Impact Assessment (RIA) conducted in the Bill

- The New Cabinet presided over the Bill and ordered that a Regulatory Impact Assessment (RIA) be conducted. Terms of Reference were drafted and specifically stated that only cost and benefit analysis should be concentrated on.
- The Final Report was inconclusive as it did not have data in particular from NEDLAC.
- National Treasury the dti and Presidency treated the RIA as a research report and they conducted theirs and concluded that benefits may outweigh costs. The information from the analysis of Rooibos industry was very useful in assisting the dti RIA to reach the conclusion it has reached. Cabinet approved the Bill in November 2009 and the Bill as it was originally drafted was certified in March 2010 and introduction to Parliament was done in March 2010.
- Consultations on the Bill has been taking place in various forums such as the Law Society General Council meeting, Free Market Foundations, etc.



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