



Publishers' Association Of South Africa
Submissions on the Intellectual Property Laws Amendment Bill, No 8 of 2010
Portfolio Committee For Trade & Industry – Public Hearings 19 May 2010

Executive Summary

The Publishers' Association of South Africa (PASA) represents book and journal publishers in South Africa in the field of non-fiction, fiction education, academic and trade publishing. PASA's well over 180 members comprise the vast majority of South African publishing houses, for profit and non-profit, University Presses, small and medium sized companies and multinational publishing enterprises. PASA is committed to creativity, literacy, the free flow of ideas and encourages a culture of reading. More information can be found on PASA's website www.publishsa.co.za.

From the outset in May 2008, PASA has engaged the Department of Trade and Industry (DTI) in the search for the right protection of indigenous and traditional knowledge and has also been an active partner within NEDLAC (see more fully part A. of this submission on PASA's constructive engagement with the DTI and within NEDLAC).

PASA always has and continues to support the goal of protecting indigenous and traditional knowledge.

The principal defect of the Intellectual Property Laws Amendment Bill, No 8 of 2010 (the "Bill") is that **this Bill does not advance the objectives of the DTI's policy on traditional and indigenous knowledge.**

Additional unintended, but no less serious, defects include that **the Bill does cause substantial prejudice to the copyright system:** The Bill prejudices all copyright holders of exclusive rights by introducing unnecessary and confusing amendments to section 9A of the Copyright Act. **The Bill penalises those authors writing within the genres of African story telling and African studies** by suggesting that their rights may be taken away or allocated to a central fund. As a matter of process, the Bill has neither been consulted enough nationally nor at provincial level, even though the Bill may affect provincial matters. To the extent that the DTI has consulted, including at NEDLAC, **the Bill as introduced does not honour or in any way reflect those consultations.** Finally, the Bill may breach the Bill of rights, international treaties to which South Africa is a party and affect the proper discharge of international obligations.

For the above reasons, PASA recommends that Government should consider adopting a much more comprehensive form of protection of indigenous and traditional knowledge by way of so-called "sui generis" protection in line with international developments.

As an immediate action, PASA humbly requests that the Portfolio's Committee should consider these options:

Directing the DTI to remove those provisions of the Bill that are most detrimental to the copyright and intellectual property system, especially those provisions without bearing on the protection of indigenous and traditional knowledge, namely, by deleting the amendments to section 9A of the Copyright Act, No 98 of 1978.

Rejecting this Bill as defective and, should the DTI consider re-introducing the Bill after further consultation with all stakeholders, directing the DTI to mend all obvious defects as have been pointed out repeatedly in and outside NEDLAC; In this regard, the DTI should be directed to work with NEDLAC and the stakeholders represented at NEDLAC.

A. PASA'S POSITIVE AND CONSTRUCTIVE ENGAGEMENT IN SEARCH OF TRADITIONAL AND INDIGENOUS KNOWLEDGE PROTECTION

1. Engagement in process relating to the Intellectual Property Laws Amendment Bill

1.1. The draft Bill preceding the Intellectual Property Laws Amendment Bill, No 8 of 2010 (the "Bill") was published for comment in May 2008. The Bill is, however, substantially the same as the draft (see Annexure A.)

1.2. Comments on draft Bill

PASA, together with Dramatic Artistic And Literary Rights Organisation (Pty) Ltd (DALRO), submitted comments to the draft Bill, a copy of which appears in Annexure B.

1.3. Participation in NEDLAC

In 2009 and 2010, PASA and other organisations participated in negotiations in NEDLAC concerning the draft Bill. Despite the view of PASA and others concerning the draft Bill's severe shortcomings, agreements were reached on certain amendments. The NEDLAC report was signed off in April 2010 and is of record with Parliament.

It is with extreme disappointment and concern that PASA learnt that not one of the amendments agreed to at NEDLAC was incorporated in the Bill.

PASA understands that, on 17 February 2010, this Sub-committee was informed that the NEDLAC process was followed to the letter¹. However, PASA's understanding is also that agreements reached at NEDLAC are binding and that legislation presented to Parliament must, as a rule, be already in conformity with the agreements reached at NEDLAC.

The amendments agreed to by the DTI require extensive and complex revision of the Bill as introduced². In PASA's view, the Parliamentary process is not designed to facilitate this in a suitable way. PASA therefore submits that the Bill must be amended pursuant to the agreements at NEDLAC and that public comment before the Portfolio Committee should again be invited at that time.

1.4. Participation in Regulatory Impact Assessment

PASA and its fellow participants in NEDLAC, together with their advisers, were requested to, and did, participate in a Regulatory Impact Assessment (RIA) on the Bill commissioned by the Presidency. PASA has not had access to the RIA, but questions whether the Bill meets the recommendations of the RIA. The release of the RIA has been requested, as its findings, based on the participation of PASA and its advisers, would have further informed PASA in making submissions to the Portfolio Committee.

1.5. Submission in respect of consultative process

Based on non-compliance with the agreements reached at NEDLAC alone, PASA submits that the Bill should be withdrawn so that all the defects pointed out by stakeholders in and outside NEDLAC may be mended and that the Bill can be redrafted in accordance with NEDLAC agreements. However, PASA also believes that an assessment should be made whether or not the NEDLAC consultations in and of themselves were sufficiently broad-based. The issue of setting the right policy of traditional and indigenous knowledge must meet with full approval of those who stand to gain from such protection, viz traditional communities. Moreover, traditional leadership is a matter of concern to provincial and municipal regulation. For this reason, it may be necessary to hold country-wide consultations and involve the National Council of Provinces in line with the Constitution.

¹ Presentation by the Department of Trade and Industry to the Portfolio Committee on Trade and Industry and the Select Committee on Trade and International Affairs on "Policy on Protection of Indigenous Knowledge using IP System" on 17 February 2010, PowerPoint presentation, p 19.

² Annexure 7 to NEDLAC Report.

B. PASA'S POSITION AND COMMENT ON THE BILL

2. Submissions in respect of the Intellectual Property Laws Amendment Bill, 2010

2.1. General

PASA remains convinced that the Bill (even as amended as agreed at NEDLAC and thereby dealing with some of its immediate concerns) will not achieve its objective of protecting traditional knowledge effectively.

In PASA's view, the Bill is poorly drafted and riddled with poor definitions and other inconsistencies. Samples of these appear in Annexure C. Detailed commentary of a legal-technical nature was given at NEDLAC and forms part of the NEDLAC Report.³

PASA supports the protection of traditional knowledge against exploitation without recognition of the origin of those works, and remains committed to finding a constructive solution. To this end, it, together with other Business representatives, proposed an alternate Bill at NEDLAC as a first step pending resolution of more complex legal issues, such as defining the concept of a "community" and regulating a community's representation.⁴

2.2. Dispossession of authorship and ownership of literary works which are traditional works

PASA's predominant interest in the Bill lies in its proposed amendments to the Copyright Act, particularly those relating to literary works. The further comments in this submission will be confined to that field.

The Bill will create a new form of copyright work, called a traditional work, which will be "a literary work ... which is recognised by an indigenous community as a work having an indigenous origin and a traditional character."⁵ The copyright in that traditional work will belong to the National Trust Fund for Traditional Intellectual Property.⁶ The Fund will not be a juristic person in law.

The business of PASA's members is to deal with authors of literary works for the purpose of the publication and promotion of their works. By virtue of the writing of an original literary work, those authors acquire copyright in the literary works they

³ Section-by-section analyses of proposed amendments to the Copyright Act, 1978, and the Performers' Protection Act, 1967, by Dr OH Dean of Spoor & Fisher in Annexure 5 of the NEDLAC Report. Although those comments were prepared for the draft Bill, they are equally applicable to this Bill.

⁴ Annexure 5 to NEDLAC Report.

⁵ Section 5(g) of the Bill.

⁶ Section 11 of the Bill. Note that the Fund is not a juristic person – section 16 of the Bill incorporating new section 40D of the Copyright Act, 1978- leaving section 11 of the Bill ineffective. In this regard, see the comments by Dr OH Dean referred to in footnote 4.

create.⁷ This business involves dealing in authors' copyrights, whether by way of assignment, licence or another form of contract.

If the Bill were to become law, any literary work, but especially works in the indigenous genre, would become vulnerable to a "recognition" by "an indigenous community", the representation of which is unregulated. The definition of "indigenous community" has no reference to identification by location, language and the like and it could, in practice, be any group of people. There is no provision for the representation of the community, so there is no way of determining who has the knowledge of the work concerned and who is entitled to speak for the community. There is also no provision for the independent verification of the works having indigenous original and traditional character on which any recognition would be based. Finally, the term "recognise" is subjective, as opposed to the terms "copy" and "adaptation", which are objective terms used in the Copyright Act. The result is practical uncertainty surrounding the authorship and ownership of copyright in any literary work, as any literary work will be open to recognition claims, whether well-founded or not, or even fraudulent.

Be that as it may, the effect of a well-founded recognition would be to create a traditional work copyright in a work that is already an original literary work, the copyright of which is not owned by the author, but by the Fund. As a result, publishers will, when dealing with authors, have to include contractual conditions to cater for the situation where the subject work transpires to be a traditional work, which conditions will be adverse to the authors. The risk to publishers in dealing with works which later turn out to be traditional works is also increased, and copyright clearance becomes all the more difficult.⁸

These uncertainties and risks remain with authors who are members of given indigenous communities, because if they create traditional works, they will not be the copyright owners of the traditional works, and if they publish the works for commercial gain, they are subject to a royalty to the Fund.⁹ Even works which were published before will, on re-publication, become subject to a royalty in favour of the Fund,¹⁰ which will result in a reduction in the royalty receivable by the author of such a work.

These provisions increase the commercial risk for publishers. However, in PASA's view, **these provisions also amount to an expropriation of property rights of authors, especially those who work in the indigenous traditional genre.** This expropriation may well be the subject of a separate challenge by authors and other creators of cultural material.

⁷ Section 21(1)(a) of the Copyright Act, 1978.

⁸ Publishers will have an additional obligation in relation to copyright clearance as a result of the implied authority to sell products in terms of section 44 of the Consumer Protection Act, 2008.

⁹ Sections 10 and 13 of the Bill.

¹⁰ Section 13 of the Bill, introducing section 23(5)(b) to the Copyright Act, 1978.

2.3. Proposed amendment to section 9A of the Copyright Act, 1978

Section 8 of the Bill proposes to amend section 9A of the Copyright Act, 1978. PASA submits that section 8 of the Bill must be removed for the following reasons:

- 2.3.1. The matter was fully debated at NEDLAC and it was agreed that it would be removed. Its retention is contrary to what was agreed at NEDLAC.
- 2.3.2. The purpose of Section 9A of the Copyright Act, 1978, is to regulate collecting societies in the field of sound recordings in the administration of "Needletime" rights, namely the performance rights in sound recordings. It cannot be adapted to include other copyright works (e.g. literary works, artistic works, cinematograph films, computer programmes, published editions etc).
- 2.3.3. The rights introduced in respect of the Needletime rights regime are "remuneration rights", as opposed to "exclusive rights". While remuneration rights do not present any problems with respect to the administration of Needletime rights, their introduction in respect of the other copyright works would erode the exclusive rights under the Copyright Act, 1978, which in turn will result in the contravention by the Republic of South Africa of its obligations under the Berne and TRIPS Conventions.¹¹
- 2.3.4. We observe that the issue of collective licensing of "needletime" rights dealt with in section 8 of the Bill is unconnected with the issue of protecting traditional works and falls outside the objects of the Bill. The only extent to which section 9A of the Copyright Act has anything to do with traditional works is that such a work may be embodied in a sound recording. However, the section already caters for this possibility adequately and it is unclear how or why doubts must be cast over the exclusive rights of other types of copyright-protected works by the proposed amendments in section 8 of the Bill.

2.4. Breach of Bill of Rights, international treaties, conventions and obligations

Especially authors and their publishers writing and publishing in the genres of African story telling and African studies may be prejudiced by the proposed forced centralisation of administration, if not confiscation, of their rights by the Fund, as defined in the Bill. The Bill could also amount to expropriation and be the subject of a constitutional challenge on this ground.

Moreover, Article 27(2) of the Universal Declaration of Human Rights states that:

"Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

¹¹ Specifically articles 8, 9, 11ter, 12 and 14 of the Bern Convention (Paris Text, 1971) and thereby article 9 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (1994).

The above provision may be violated by the abrogation and/or re-allocation of copyrights envisaged in the Bill, namely, by changes to section 9A of the Copyright Act and by a new section 40D of the Copyright Act allocating ownership of rights of works created, after their creation by individual authors, to a central fund.

Finally, the Bill may cause South Africa to be in breach of the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). South Africa is a party to both those binding international legal instruments.

2.5. Error in definition of "author" in respect of a traditional work

The definition of "author" in relation to a traditional work in the Bill¹² reads:

"author", in relation to a traditional work, means the work (*sic*) which originated and acquired traditional character from an indigenous community'

In the draft Bill, it read:

"author", in relation to a traditional work, the indigenous community from which the work originated and acquired its traditional character'

Although PASA already raised the problem of having an indeterminate community as an author of a traditional work, this latest change is clearly a mistake.

¹² Section 5(a) of the Bill.

C. CONCLUSION AND RECOMMENDATION

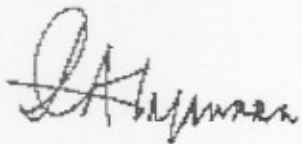
PASA submits that, for the reasons set out above, Parliament and/or the Portfolio Committee should consider:

An approach that secures a much more comprehensive form of protection of indigenous and traditional knowledge by way of so-called "sui generis" protection in line with international developments.

Directing the DTI to remove those provisions of the Bill that are most detrimental to the copyright and intellectual property system, especially those provisions without bearing on the protection of indigenous and traditional knowledge, namely, by deleting the amendments to section 9A of the Copyright Act, No 98 of 1978, and those causing the re-allocation of copyright ownership.

Rejecting this Bill as defective and, should the DTI consider re-introducing the Bill after further consultation with all stakeholders, directing the DTI to mend all obvious defects as have been pointed out repeatedly in and outside NEDLAC; In this latter regard, the DTI should be directed to work with NEDLAC and the stakeholders represented at NEDLAC.

Respectfully submitted



BRIAN WAFAWAROWA

Executive Director

Publishers' Association of South Africa (PASA)

ANNEXURE A – Discrepancies between the Intellectual Property Laws Amendment Bill, no 8 of 2010, and agreements reached at NEDLAC, as set out in NEDLAC Report issued in May 2010

The changes to the Bill required by agreements at NEDLAC are itemised below. The full detail of the agreed amendments was noted in the NEDLAC Report, particularly in para 4 and Annexure 7. None of these items were addressed in the Bill.

- Alternative dispute resolution
Provision for alternate dispute resolution mechanism. A new section 40I of the Copyright Act was agreed upon. These changes would impact on the corresponding proposed changes to the Trade Marks Act and the Designs Act.
- Business Enterprises of Communities
Greater detail of business enterprises which can be established by indigenous community in terms of proposed section 40D(7) of the Copyright Act – specifically that it has to be a registered entity and the interrelation of such an entity with the National Trust Fund as owner of all copyrights in all traditional works. New sections 40G and 40H were agreed upon. These changes would impact on the corresponding proposed changes to the Trade Marks Act and the Designs Act.
- Institutional support to communities
Proposed sections 40A and 40D(3) of the Copyright Act must be added to, to enable the Council and the Registrar to provide support to indigenous communities and their business enterprises to exploit their indigenous knowledge.
- Royalties on needletime rights
Section 8, which would import changes to section 9A of the Copyright Act would be scrapped.
- Regulation of collecting societies
New sections 9B, 9C and 9D of the Copyright Act for the regulation of collecting societies were considered.
- Constitutionality of prohibition of assignment and vesting of copyright in National Trust Fund
Section 12, which prohibits assignment of the copyright in a traditional work, as read with section 11, which vests copyright in a traditional work in the National Trust Fund instead of its author, must be in compliance with the Constitution.
- Duration of copyright in derivative traditional works
Amendment of provisions for duration of copyright in works which are derivatives of traditional works, where it is jointly owned.

- Funding of the National Council and application of royalties received by the National Trust Fund
The National Council will be funded by the fiscus. Significant changes to proposed section 40D of the Copyright Act, especially concerning use and application of royalty income, were agreed to, as well as the inclusion of a new section 40E and 40F.
- Transitional arrangements
Transitional arrangements to be included in the Bill. The appropriate administrative arrangements must be in place before the Bill is enacted. (This applies for instance to the establishment of the National Council, the National Trust Fund and the regulation of collecting societies.)
- Definitions
Further definitions, such as "expressions of culture or knowledge", "indigenous expressions of culture or knowledge", "indigenous or traditional work", and their application to the text, as well as deletion of "traditional intellectual property."
- Layout
Schedule of Contents and headings above sections 1, 5, 17 and 28.

None of the differences between the draft Bill, published in May 2008, and the Bill were agreed at NEDLAC.

ANNEXURE B – Submissions by PASA in response to the draft Bill.

Department of Trade and Industry
Att: MacDonald Netshitenzhe
Brenda Nokuzola Ndlovu

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13 June 2008

Dear Sirs / Mesdames,

RE: SOUTH AFRICA – Policy Framework Protecting Traditional Knowledge through Intellectual Property System - Intellectual Property Laws Amendment Bill 2008 – Public Comments

We refer to your call for comment published in the General Notice 552, Government Gazette 31026, page 3 et seq., together with a Policy Framework for the Protection of Indigenous or Traditional Knowledge through the Intellectual Property System (the “Framework”) and a concomitant copy of the Intellectual Property Laws Amendment Bill, 2008 (the “Bill”).

I act in the name of the Publishers’ Association of South Africa (PASA), and in the name of the Dramatic, Artistic and Literary Rights Organisation (Pty) Ltd (DALRO).

PASA represents trade, educational and academic publishers in South Africa and, with over 115 members, its membership collectively accounts for well over 90% of all trade, educational and academic titles published locally. Moreover, its membership represents in excess of 90% of titles published elsewhere in the world and distributed in South Africa for the benefit of cultural exchange, learning, science, research and education.

As part of its core value system, PASA is committed to:

- o Freedom of expression and freedom to publish;
- o The enactment and enforcement of up-to-date and effective copyright laws - the lifeblood of a viable and sustainable private sector publishing industry;
- o The creation and promotion of a culture of reading and learning;
- o The fostering of an understanding between cultures and contributing to a diversity of national literature, creativity, innovation and progress;
- o The preservation for the future of the oral and written literary expressions of our country.

DALRO represents South African and foreign authors of all literary genres - fiction, non-fiction, poetry, drama, dramatico-musical, etc., as well as their publishers and representatives, and local and foreign visual artists. DALRO's main purpose is to administer copyrights (reprographic reproduction of text-based works, reproduction of visual works and public performance [so-called "grand rights"] of dramatic and dramatico-musical works.) In the reprographic reproduction field, DALRO's remit includes offering collective licences to users of copyright-protected materials, such as the higher education sector and the corporate sector. In addition to its licensing activities, DALRO actively promotes and enhances the literary and artistic life of South Africa in a variety of ways, including through sponsorships, cultural events, debates and conferences.

DALRO and PASA work closely with the Academic and Non-Fiction Authors' Association of South Africa (ANFASA) in the promotion and protection of

scholarly writing. It is believed that ANFASA has also commented on the Framework and the Bill and PASA and DALRO endorse ANFASA's comments in their entirety.

The following comments are submitted on behalf of PASA and DALRO to supplement ANFASA's comments:

A. The Framework

1. PASA and DALRO are in principle supportive of the intention to protect Traditional or Indigenous Knowledge ("TK/IK"). However, in PASA's and DALRO's view, the Framework and the Bill demonstrate that more work and analysis is required to bring about an adequate and effective form of sui generis protection of TK/IK.

The comments made here are restricted to protecting TK/IK through sui generis models and to comments relating to copyright legislation (the Copyright Act and the Performers' Protection Act) and contractual agreements. It is left to other interested parties to comment on aspects relating to patents, trade marks, geographical indications, trade secrets, etc.

2. DALRO and PASA support the "Overall Recommendations" of the Framework on page 23 of the above-cited Government Gazette. It is noteworthy that these recommendations do not include a recommendation to amend the Copyright Act of 98 of 1978 (the "Copyright Act").

3. PASA and DALRO are strongly in favour of exploring sui generis types of protection. They are, however, unconvinced that the changes suggested in the Bill will advance the Framework's overall goal. Instead, the draft amendments in the Bill are likely to cause uncertainty and may prove counter-productive. Such uncertainty may stand in the way of local publishers' accepting manuscripts from authors who are using, or referring to, TK/IK. Since foreign publishers would not

have to contend with the local legal uncertainty created by the Bill, they would be able to accept such manuscripts. Thus, the Bill may unintentionally force publication of works about TK/IK abroad and beyond the reach of a (later) sui generis protection.

3.1 In this regard, it is noted that the Framework contains no specific recommendations relating to the adaptation of the Copyright Act, or Performers' Protection Act, other than stating that TK/IK should be licensed, rather than assigned (paragraph 4.5, page 18). We take this to mean that the Framework makes a value judgment that TK/IK is best promoted through a system of remuneration (royalties), rather than through a system of exclusive rights. PASA and DALRO are of the view that the Copyright Act is not suited to taking on board the responsibility of protecting TK/IK and ANFASA, in its submission, very convincingly reflects on the difficulties and shortcomings of protecting TK/IK under a copyright system. We note that the Framework also supports this view, but that the Bill nevertheless includes numerous changes to the Copyright Act and the Performers' Protection Act.

3.2 We note that the song Mbube is referred to as an expression of Xhosa folklore (paragraph 4.6, page 18). It is our understanding that the case was successfully solved on the basis of the song being copyright-protected under existing laws. Protection of folklore did not play a role and, it is submitted, did not need to play a role, even if elements in the original copyright-protected work may have traceable roots in Xhosa folklore.

B. The Bill

5. Retrospectivity of the Bill – Bill deprives TK/IK holders before 1958 (2008 minus 50 years) of a chance of seeking protection in the future

We note that the Bill will have retrospective effect: lifting “traditional works” out of the public domain and granting them “copyright-like” and “Performers Protection-like” status. To some extent a retrospective effect is probably

unavoidable. However, the Bill then proceeds to declare that TK/IK will only be protected if created during the last fifty (50) years – ie on or after 1958. As a result it would appear that holders of TK/IK who may be beneficiaries of TK/IK created before 1958 will forever be deprived of any form of protection. Their claims will, after enactment of the Bill, be met with the objection that they have been pre-empted by a clear legislative scheme to draw a line in 1958. This seems highly unsatisfactory.

6. Creation of a Database – Unclear rules and effect

Whilst we agree that identification and the creation of a record of TK/IK will be a major task, we are sceptical that sufficient arrangements have been made in the Bill to create a viable database. The idea that any person may apply for the registration of claimed TK/IK in the database is unsatisfactory. How will the database assist in identifying the true beneficiaries of the TK/IK? Will the database create a presumption of accuracy? How will the veracity of any claim of subsistence of TK/IK, or of its ownership, be tested? It is a very real concern that a database that is not well conceptualised could undermine the protection of TK/IK and could create confusion and a litigious environment among users of TK/IK and/or holders of rights of copyright in works derived from, or otherwise connected to, TK/IK. We also note that neither the Bill, nor the Framework, explains how the database will be funded and maintained.

7. Amendments to Section 9A of Copyright Act – Unintended Consequence of Eroding Exclusive Rights of Copyright

We are uncertain as to the effect the proposed changes to s 9A of the Copyright Act are intended to have. It would seem that one possible interpretation could be that a modified section 9A will limit all the exclusive rights contained in the Copyright Act of all copyright-protected works. That would not only be disastrous for the owners of all of those works, but would amount to expropriation and be contrary to the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”).

If this is indeed the intended effect of the amended s 9A, PASA and DALRO are obliged to strongly object to s 8 of the Bill (amending s 9A of Act 98 of 1978). If this was not the intention to limit all the exclusive rights, PASA and DALRO call for clarification of the purpose of the proposed amendment.

8. Introduction of National Council for Traditional Intellectual Property, Section 40A of the Copyright Act - Failure to Identify Beneficiaries Clearly

As stated above, we are unconvinced that the goal of protecting TK/IK can be attained by introducing changes to existing copyright legislation. Even if the Framework states that this would be a temporary measure pending the creation of sui generis protection, the approach is bound to create a series of adverse consequences. One of the shortcomings of the present approach is its failure to identify and clearly describe the beneficiaries of TK/IK protection. With respect, we fail to see how this deficiency might be remedied through the establishment of a 12-member Council.

I take this opportunity to thank the Department of Trade and Industry for the opportunity to comment. Please do not hesitate to contact the writer, PASA, or DALRO, should you wish to discuss any aspect of this submission, or seek further clarification.

With kind regards

[electronic document, therefore unsigned]

Yours faithfully

CARLO SCOLLO LAVIZZARI

ANNEXURE C – Specific deficiencies of the Bill

Existing intellectual legislation is not capable of accommodating a set of mechanically prepared amendments to protect indigenous knowledge of the same basis as other matter protected by the legislation. Specific issues are:

- (a) The definition of “indigenous community” and its application to the creation and holding of rights under the legislation, as well as its representation in order to deal with those rights.
- (b) The definitions of “traditional works” and “traditional intellectual property.” A serious problem with the Bill is that definitions are used inconsistently. This will create uncertainty in the application of the law. There could be overlaps between traditional works and other form of copyright works, which will create a conflict in interpretation and application.
- (c) Copyright is only conferred to a traditional work if it is created after the commencement of the Act or 50 years before. As traditional works are normally understood to have existed for a substantial period of time, this means that the award of the copyright will have minimal benefit to the performers of traditional works.
- (d) Royalties for the use of TK are to be paid to a nationally controlled fund, not to the community. Also, a member of an indigenous community who makes a commercial benefit from the traditional work is liable to pay a royalty on that commercial benefit to the fund. Traditional performers will thereby be deprived of a part of their income through these measures, in return for no apparent benefit.
- (e) The database for traditional works, will probably be redundant and very costly to create and maintain. It will probably become a “first come, first served” solution that will affect ownership claims. As there is not examination procedure or validation for entries in the database until there is a dispute, it would be easy for all kinds of items to be recorded as traditional works.
- (f) An ill-founded definition of traditional knowledge, coupled with a database which is bound to be unreliable, with no funding for the database, and with many or unclear competences, will make indigenous traditional knowledge protection unworkable under this Bill.
- (g) The lack of protection for moral rights.
- (h) The retrospective application of the Bill.