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CONTRALES



CONGRESS OF TRADITIONAL LEADERS OF SOUTH AFRICA

**SUBMISSION BY CONTRALES ON
INTELLECTUAL PROPERTY AMENDMENT BILL FOR THE PROTECTION
OF INDIGENOUS KNOWLEDGE**

03 NOVEMBER 2010

1. Background

The rampant exploitation of Indigenous Knowledge (IK) through the Intellectual Property (IP) system has created a need for protection of IK. If not addressed, this exploitation of indigenous rights without consent, recognition or benefits will continue to impoverish communities, most of which happen to be rural. Having explored the opportunities presented by the advent of commercialization of IK, particularly in the IP area, Contralesa believes that sufficient protection will advance the interests of many communities, alleviate poverty and stimulate economic activity in most communities.

Contralesa acknowledges that balance need to be found between protection and promotion of IK such that the protection does not result in the stifling of creativity, promotion of cultures or further innovation within communities. Contralesa subscribes to the purpose of the Bill as summarized below:

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

Having engaged in consultation with the Department of Trade and Industry on this Bill, Contralesa welcomes and supports the above purpose of the Bill and wishes to commend government for the effort to advance economic development of rural communities who are rich in culture and diversity. Commercialization of the people's knowledge will help achieve sustainability of these communities.

Contralesa wishes to make the following contribution in order to enrich the Bill that is in front of Parliament to sufficiently extend protection to communities:

1.1 Definitions

The definitions in this Bill need to be revised for alignment and consistency with other laws and the Constitution. For instance, the definition of "community" and "beneficiaries from IP/IK" need to be revisited. In particular, the definition of "a community" should be

constructed in a manner that indicates "progressiveness" of communities and should not be bound or limited to time and/or age.

The definition should be inclusive to allow for sub communities such as the Christians, healers and other contemporary communities. Issues such as "culture" and "allegiance" need to be added in the definition of a community. The identification of communities should also recognize and follow the "hierarchies" defined in communities, which can also be verified by traditional authorities who keep these records as part of their functions.

Contralesa does not have a specific definition to recommend, but recommends that Parliament takes into account the above mentioned factors in finalizing the definitions to ensure communities that are deserving of this protection are not excluded.

1.2 Representation on the National Council

The Bill should be improved to include reference to "traditional leaders" in the composition of the National Council. Involvement of traditional leaders through existing structures will advance the implementation of the legislation, especially in the areas of registration, complaints and dispute resolution. The role of National Council can also include investigating and verifying lawfulness of benefit allocation to ensure that rightful holders do get access to such benefits. Contralesa is also of the view that the existing traditional structures can be used to decentralize services to communities in a manner that leverages on the proximity of existing traditional structures to communities.

Contralesa recommends that the Bill be revised to expressly include "representation of traditional leaders" to the National Council.

Contralesa recommends that the existing traditional structures be recognized in the Bill to improve accessibility, effectiveness and efficiencies in protecting IK and IK holders.

Contralesa recommends that provision be made in the Bill for the creation of an effective dispute resolution structure for speedy resolution of disputes. This structure can be complemented by the role of existing traditional structures in communities.

1.3 Royalties and Community Trusts

Contralesa is of the view that the role of trusts is crucial for facilitating identification of beneficiaries and benefit allocation. Representation by traditional leaders should also be introduced in community trusts. Contralesa recognizes that trustees will be elected by communities and therefore the participation of traditional leaders is important during the formation of trusts or any relevant structures to administer IP in relation to IK.

Contralesa believes that it is important that proper identification of communities be made with the assistance and facilitation of traditional leaders. It further believes that royalties from trust funds should accrue to communities directly and not to municipalities or any other structure. Trusts that are created should assist in training and developmental of communities to advance the welfare of communities that are beneficiaries of such trusts.

Contralesa believes that royalties of unidentified beneficiaries should be used to develop communities through programmes and initiatives that seek to advance community needs. Contralesa also suggests the creation of the innovation fund by government to support ideas that community members have for them to develop into businesses that can generate revenue and income.

Contralesa recommends the involvement of traditional leaders in identification of communities and creation of trusts for distribution of royalties to beneficiaries.

Contralesa recommends that the trusts should play a role in training and development of communities and should advance the interests of those various communities they represent.

Contralesa recommends the creation of the innovation fund to stimulate and advance ideas and creations of community members into business ideas that will generate income to sustain communities.

1.4 Databases

Contralesa acknowledges the benefit of a database and is willing to assist with the development and maintenance of the database envisaged in the Bill. A distinction should however be clearly drawn between databases for IP/IK and those for preserving information or culture so that the role of this database is not lost in the confusion.

Contralesa believes that government databases must be better coordinated as the fragmented manner is likely to compromise the integrity and confidentiality of information belonging to communities. A comprehensive database must be created so that it can be used to verify rights ownership for purposes of consent and compensation for use of rights by others. The database must include adequate and clear confidentiality levels to effectively control accessibility and protect confidential information of communities and community members that community members may wish to protect through IP while at the same time preserving the secrecy thereof. The possibility of linking up the databases for proper protection of IK must also be explored.

Contralesa recommends that the Bill must include provisions that deal with confidentiality levels of the database to ensure protection of information that individuals or communities do not wish to be accessed by the public.

Contralesa recommends that government database be coordinated and streamlined in the Bill to minimize confusion and creation of multiple databases that could pose a risk of possible abuse of information that belongs to communities.

1.5 Term of Protection of IK under the Bill

Contralesa has noted that the Bill has no provisions for application retrospectively. It is acknowledged that a presumption exists in law against retrospectivity, but that this is not an absolute concept. Therefore, Contralesa believes that there may be a compelling case for retrospectivity in some instances where the knowledge of indigenous communities has been misappropriated unlawfully and without compensation of respect.

Contralesa further notes the difficulty that may exist with limiting the period for protection of IK under the IP laws. Contralesa believes that while there is protection proposed under IP system, this should not preclude any other form of protection under other legal systems. These systems can co-exist to afford a better protection of IK.

Contralesa recommends that Parliament consider the possibility for retrospective application of this legislation in instances of unlawful misappropriation.

Contralesa recommends that the period included in the Bill for the protection of IK be carefully considered to ensure that it does not unreasonably exclude work that is deserving of protection. Further, Contralesa recommends that protection outside the period afforded by IP be catered for in other pieces of legislation to sufficiently protect IK further beyond the IP system.

1.6 Regulating collection and distribution of royalties

Contralesa notes that there are existing problems currently with the framework and model for the collection and distribution of royalties on behalf of beneficiaries. The administration of this area needs to be carefully looked at to prevent a similar situation in regard to IK. If the ability to collect and distribute effectively is a concern currently, this must be addressed in this Bill to ensure the same problem does not affect IK.

Contralesa believes that there are those traditions that are still practiced and when contemporary music is based on such traditions, the holders of rights to such traditions should be consulted, acknowledged and benefit from the scheme. This cannot be so if the collection and distribution scheme that exists is not properly administered.

Contralesa recommends the inclusion of provisions to tighten and properly regulate the process of collection and distribution of royalties to ensure that IK holders do get compensation for their rights.

2. Coordination among government departments

As a matter of advice, Contralesa is of the view that government programs should talk to each other in order to afford more streamlined and efficient services, protection and access by communities. IP matters in relation to IK are currently handled by various departments, which has previously created confusion among stakeholders.

3. Conclusion

Contralesa welcomes and support the Bill and thanks Parliament for the opportunity to comment on it. Contralesa recommends that the Bill be amended to take into account comments made herein. Where necessary, Contralesa is willing to make itself available