

IP: 10  
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 pctrade 110817

RESPONSES FROM EXPERTS TO QUESTIONS POSED BY THE COMMITTEE ON 29 JULY 2011

Questions	Ntuli	Shabangu	Von Braun
<p>General comments on the module proposed in the bill to protect TIP</p>	<p>I think the drafting team has so far performed a sterling job. They have captured the essence of issues to be foregrounded.</p>	<p>At the outset, I wish to record that the creation of laws that will give protection to indigenous or traditional knowledge is to be welcomed and has my complete support.</p> <p>The Bill in its present form recognises that the manifestations of indigenous knowledge ("IK") are by their nature not adapted to being treated purely as the existing forms of intellectual property and require customised or special provisions dictated by the natures of the various manifestations. This recognition has given rise to the approach of dealing with the various manifestations of IK in separate chapters of the various intellectual property statutes. The recognition of IK having such a nature as to require special treatment in customised chapters is to be welcomed. An alternative, and a preferable approach in my view, would be to deal with the various manifestations of IK in a separate customised statute as this would be simpler, more effective, and would avoid a lot of the duplication that currently appears in the Bill. It would also avoid some of the fundamental difficulties which I will discuss below. However, for the present purposes I will go forward on the premise that the legislation is to take the form set out in the Bill and will deal with the matter as best I can in the circumstances.</p> <p>There is a fundamental difficulty in the way in which the Bill deals with the various manifestations in separate chapters of the various intellectual property statutes. This stems from the fact that, while recognising that customised treatment of the</p>	<p>This draft bill is a significant improvement from the previous draft! However, one thing to bear in mind is that even though some protection of IK from misappropriation can be achieved through amending national IP legislation, due to the particular nature of IK and the inherent nature of IP a substantial amount of IK cannot be protected through these mechanisms. It is therefore important to see this process as a necessary step but not sufficient on its own for the purpose of protecting all TIP from abuse. It may be useful to state this in a preamble.</p> <p>It is possible to include a statement to this effect in the preamble</p> <p>"WHEREAS <u>one of the manifestations of indigenous knowledge is the outcome of the creative ability of the human mind and in that context constitutes intellectual property, so that the intellectual property laws of the country may be used as an initial step towards protection of indigenous knowledge as a whole by providing the legal dispensation and legal tool to provide protection for appropriate manifestations of intellectual property within the body of indigenous knowledge; and"</u></p>

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		<p>manifestations is necessary, and special provisions are contained in the new chapters, the Bill nevertheless in each instances seeks to apply the provisions of the existing statues to the new chapters. In other words, while recognising that the manifestations require special treatment because they are different in nature to the existing forms of intellectual property, the Bill nevertheless seeks to apply the provisions of the Acts designed for conventional intellectual property to the subject matters of the new chapters. Not only does this create undesirable uncertainty and confusion, but it also means that contradictory provisions are applied to the subject matters of the new chapters. We need the actual instances of uncertainty, confusion and contradictions before we can address this point. Examples of this are the principles of "originality" in copyright law, "novelty" in design law and "distinctiveness" in trade mark law. These concepts are made applicable to the relevant new chapters but the subject matter of the chapters is not suitable for the application of these principles. This requires further explanation. Copyright TIP, TM TIP and Design TIP are being treated differently due to the presumption that they are different forms of TIP. Accordingly you would not expect these terms to necessarily be the same. However, provided that the term applied describes the criteria for the type of TIP, there is no problem to use the exact same terminology.</p> <p>The approach of the Bill to performers' protection is conceptually unsound. The existing Performers Protection Act grants a <b>performer's right</b> (not copyright) to each and every performance of a performer. It</p>	

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		<p>does not matter what the subject matter of the performance is. In other words, a performer's performance is protected whether he is performing an item of classical music, a Shakespeare play or a work of IK. The nature of the subject matter or the work that is being performed is irrelevant. Does this mean that traditional performances are already protected and accordingly that the Act need not be amended?</p> <p>It is the performer's rendition and presentation of whatever the work may be that is protected. If a performer performs a particular work at hourly intervals, each of those performances is a separate performance enjoying protection under the Act and a licence granted by a performer to use a particular performance will not normally extend to a subsequent identical performance because it is a fresh subject matter of protection.</p> <p>The Law Society of South Africa (LSSA) commented that each performance is a new work making recordal within the database and the proposed royalties to be paid to the fund by the persons receiving the commercial benefit meaningless. This seems to be the opposite of what Tshabangu is saying. It seems that Tshabangu is saying that each new performance must be protected / allowed, whereas the Law Society seems to say that it is too big a burden to have to record every new performance in order to get a royalty.</p> <p>When a performer gives a performance of, for instance, a song, he does two things, namely he performs a musical/literary/indigenous work in public (which is an activity controlled by the copyright in the work in question) and at the</p>	

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		<p>same time he creates his own separate and distinct property, namely his performer's right in his performance of that work. His performer's right (the essence of which is to control the making of a fixation and/or a broadcast of his performance) is not a copyright in a work or in performance but is an item of intellectual property, namely a <b>performer's right</b> in respect of a performance. The extent of the misconception of the nature of the performer's right in the Bill is illustrated by referring to that right as "copyright" in a performance.</p> <p>The right in the Performer's Protection Act can be amended to read "Performer's right" There simply is no such thing as copyright in a performance. Accordingly, the provisions of the Bill dealing with performers' protection require to be substantially rewritten. These provisions ought to deal with the performer's right in respect of a <b>performance</b> of a particular subject matter, namely a work of indigenous knowledge.</p> <p>If specific clauses can be pointed out, the necessary changes can be made.</p> <p>The law of intellectual property is based on a fundamental principle or theory. This is that in order to reward or incentivise a creative person he is given a qualified monopoly in the commercial use of his work for a limited period on condition that, upon the expiry of that period, the work falls into the public domain and is free for use by all. The trade off for the granting of protection to enable commercial utilisation is the surrendering of the work in due course to the public for its free use. Granting perpetual protection to hereditary traditional works is an anathema</p>	

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		<p>to the fundamental principle of intellectual property and it should not be countenanced in the intellectual property statutes. Also, this would give rise to unhappiness amongst owners of copyright in non-traditional words which has a limited lifespan and may be seen as discriminatory.</p> <p>"Public domain" is the <i>de facto</i> status once protection ends (i.e. by default). It is not a protected right. HTIP is unique. Given that the works (etc) are held in trust for future generations, it does seem logical to allow that right to exist long enough for all future generations to enjoy it. This is the move internationally and is how WIPO is proposing the protection should be. However, this remains a policy decision. From a legal point of view there is no legal prohibition on allowing these rights to be indefinite.</p> <p>Virtually all performances of traditional works and a large proportion of literary, music and artistic works, as well as designs, which have traditional subject matters are currently capable of enjoying protection under the existing intellectual property statutes. The ownership of these works, their duration, their infringement and all other aspects of them are regulated in the existing statutes. In the Bill, the creation of works of indigenous knowledge in the new chapters will put in place additional and parallel protection for the same works, but their ownership, duration and content may be different to their existing protection. To have two forms of protection, with different characteristics, running parallel with each other is a recipe for confusion and may well create a situation where the works are not capable of being exploited commercially and</p>	

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		<p>generating revenue, by virtue of the conflicting rights of the different property owners. Thus, far from promoting the use of indigenous knowledge and enabling such use to generate revenue, the Bill could have the result of making it practically impossible for the works to be used at all. This statement is unfortunately vague. Does this refer to derivative TIP? Should the amendments for example only provide for Hereditary TIP and have normal IP apply to derivative TIP?</p> <p>The excessive conditions applicable to the use of TIP in the Bill will have the same work. The practical problems created in the Bill for the use of TIP will make using it unattractive to potential users. They may opt instead to use works that do not have these problems attached to their use, such as foreign works. This statement is also unfortunately vague. What practical problems are created and how can they be solved?</p> <p>The purpose and effect of the database is obscure. At best, from the point of view of the rights owner, it will create a situation where <i>prima facie</i> proof of the subsistence of the property can be obtained. In the case of designs and trade marks, however, registration under the relevant IP statutes creates the rights and already provides strong proof of them. As registration under the statutes is indispensable for the creation of the rights, and already provides all the benefits to be obtained from registering the database, it is not apparent why a rights owner would want to go to the trouble and expense of additionally registering the subject matter in the database. Performers' rights and copyright come into existence</p>	

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		<p>automatically and literary thousands of new properties are created every day in South Africa. It is inconceivable that a significant number, if any, of these items of property would be registered in the database given the very limited value of registration weighed up against the cost and trouble involved in obtaining such a registration. There is thus a strong risk that the database will be a white elephant that has been set up at considerable expense. There has also been comments that this database is duplicating the DST database, which would work on a different basis, namely DST will go out and source TIP, rather than an artist (etc) coming to register his work on the database.</p> <p>Notwithstanding the introduction into the Bill of provisions aimed at potentially granting protection to foreign IK, the failure of the Bill to grant automatic protection, or the right to obtain protection, for foreign works will nevertheless breach South Africa's obligations under the various intellectual property treaties, including the Paris Convention, the Berne Convention and the TRIPS Agreement. Once protection for IK is brought under the aegis of performers' protection, copyright, trade marks and designs, the principle of so-called "national treatment" will apply and South Africa is bound by obligation to automatically grant such protection, or the right to obtain that protection to all members of these various treaties. The principal Acts do not provide for automatic protection at the moment and no argument have been made that the principal acts currently contravene international agreements. Why does the protection of TIP contravene this and how would Tshabangu</p>	

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		<p>suggest this be rectified?</p> <p>These are but a few of the fundamental problems posed by the Bill and, with respect, they and other problems which circumstances do not allow me to address in this document, require the Bill to undergo intensive consideration and re-evaluation before it should be allowed to proceed. This will be part of the deliberation process.</p> <p>The Bill in its present form differs substantially and in critical respects, from the original version of the Bill which was published for public comment. It seems to me that, with respect, the Bill should be readvertised for public comment before it can proceed further. The failure to do so creates the strong risk, in my view, that it will not meet the constitutional requirements of adequate consultation with stakeholders.</p> <p>CvdM: This is not a requirement. Public comment was taken into account, which gave rise to the bill in its present form. There is no step in the legislative process that requires a bill to be readvertised if public comment was taken into account. It is not illegal to obtain further comment, but it is not a requirement and will not render the bill unconstitutional.</p> <p>MK: In terms of section 59 of the Constitution the National Assembly must facilitate public involvement in the legislative processes of the National Assembly and its committees. The Portfolio Committee published the Intellectual Property laws AB, receive written public submissions, held public hearings scheduled for several days, heard oral submissions (and experts), considered the written and oral submissions and based on</p>	



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		<p>these public submissions the Committee made the decision to redraft the Bill. The redraft is substantially based on these public submission. Parliament therefore complied with public consultation. However, nothing in terms of the Constitution precludes Parliament from engaging in further public involvement if it feels that they are necessary. In the constitutional court in <i>Doctors for Life v Speaker of National Assembly</i> it was held that while section 59 of the Constitution imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement but leaves it to Parliament to determine what is required of it in this regard. In the <i>Minister of Health v New Clicks</i> case the constitutional court decided that- "The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."</p>	
<p>Definitions: Comments on sector specific definitions</p>			
<p>Definition: "Cinematograph film": The Performers Protection Act's definition differs</p>		<p>The word "fixation" is suitable and pertinent for the Performers Protection Act which has to deal with creating a tangible representation of the act of making a performance of a work by a performer. It is a broad term which would include the making</p>	

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<p>from that of the Copyright Act specifically relating to the word "fixation". Is this difference material in respect of the different subject matter of the Acts, or should it read the same?</p>		<p>of a visual recording, an audio recording, a photograph, etc of a performer giving a rendition of a work. In the Copyright Act, this situation does not really arise and a cinematograph film is a subject matter which is capable of being the repository of copyright. It is a term which is derived from the Berne Convention and is recognised as having the meaning given to it in the Copyright Act throughout the world. It is therefore not correct to equate the two terms or to make them synonymous. This seem to resolve this question</p>	
<p>Definition: "Collecting Society": This is a new proposed definition – Does it accord with practice i.r.o. the subject matter of all 4 principal acts?</p>	<p>I would go along with the term "Collecting Society" it is precise and covers what it intends. This seem to resolve this question</p>	<p>In broad terms, and on an initial reading, the proposed definition appears to be acceptable.  This seem to resolve this question</p>	
<p>Definition: "Derivative Traditional Performance" as well as "Hereditary traditional performance"/ "Hereditary traditional work" are new definitions that form the crux of the proposed model in that TIP. Please also refer to the definitions for "Derivative" and "Hereditary" TIP in</p>	<p>My understanding of "hereditary traditional" is as ff:  (a) Hereditary refers to genetic inheritance (b) Traditional refers to that acquired through practice over time, from one generation to the other. That whereas there are purely hereditary practices and purely traditional practices There are also those that combine these two historically linked concepts and practices, if that is what is meant then I can go along with it.  Tracing what has been developed through culture and what is genetic is not difficult.</p>	<p>I have discussed the problems above in granting perpetual protection to hereditary TIP. The principle which I have discussed impacts upon these two definitions. In my view, the distinction should not be made and the subject matter of the protection should be something which is wholly or substantially an item of IK. In other words, this combines the two concepts embodied in the separate definitions. It is an option to only deal with hereditary TIP and provide that derivative TIP is dealt with as normal IP  One cannot help but ask the question why, if an inspired literary work by Zakes Mda, which is brilliant and creative, only enjoys protection for his lifetime and a period of 50</p>	<p>"Derivative Traditional Performance" as well as "Hereditary traditional performance"/ "Hereditary traditional work" are new definitions that form the crux of the proposed model in that TIP. Please also refer to the definitions for "Derivative" and "Hereditary" TIP in the amendments to the Copyright / Trade mark / Designs Acts.  <b>The definition of HTP is currently as follows: " <u>'hereditary traditional performance'</u> means a performance which is recognised by an indigenous community as a performance having an indigenous origin and a traditional character and which has always existed in the memory of the living members of the indigenous community</b></p>

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<p>the amendments to the Copyright / Trade mark / Designs Acts. Will we in practice be able to distinguish between hereditary TIP and derivative TIP? Does this differentiation solve the problems associated with treating TIP as a unique form of IP? See the following sections i.r.o. how the differentiation will work:</p> <ul style="list-style-type: none"> <li>• Performers Protection: SS8B(4); 8D; 8F; 8G(7) and 8I</li> <li>• Copyright: SS28B; 28D; 28F; 28H(5) and 28J</li> <li>• Trademarks: 43B(7); 43E(1); 43F; 43G(4); 43I</li> <li>• Design: 53B(4); 53F(1); 53G(4); 53I</li> </ul> <p>Problems identified were for instance:</p> <ul style="list-style-type: none"> <li>• “New” as a requirement for designs, does not fit with TIP;</li> </ul>	<p>Many practices in indigenous communities have a clear distinction between the two. The differentiation does in my opinion solve the problem.</p> <p>“New” as in new traditional designs:</p> <p>This can be dealt with in conjunction with “Indigenous community”</p> <p>In the sector we draw a distinction between “Indigenous” and “Endogenous”.</p> <p>“Endogenous” has reference to “indigenous” products and practices that have since been developed but still have distinctive traces of their indigenous source.</p> <p>Could “endogenous” be an acceptable alternative for “derivative”?</p> <p>Using WIPO’s definition: <u>Traditional works/designs/TM are works/designs/TM -</u></p> <p>(i) <u>in any form, tangible or intangible, or a combination thereof,</u></p> <p>(ii) <u>in which traditional culture and knowledge are embodied; and</u></p> <p>(iii) <u>have been passed on from generation to generation, notwithstanding that it could have skipped one or more generations</u></p> <p><u>and includes (to be used as is relevant to each Principal Act):</u></p> <p><u>(aa) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;</u></p> <p><u>(bb) [musical or sound expressions, such as songs, rhythms, instrumental music, and sounds which are the expression of rituals;</u></p>	<p>years after his death, should a work which has been handed down over generations, and is possibly less creative, enjoy perpetual protection under a body of law that presupposes that the reciprocal concession for the granting of protection is the placing of the work in the public domain after a reasonable period of protection. This argument does not seem in line with the arguments for protection of TIP</p> <p>It is difficult to justify why a work of IK that has been created by unidentified persons within a community should, in contrast to all other works of intellectual property, not be capable of being assigned. One can conceive of circumstances in which it would be expedient and useful for a community to assign the ownership of a work of TIP to another entity, perhaps of its own creation, which is better able to manage and enforce the rights in it. Assignment to entities that can manage the right obo the community can be added to the right to assign to a collecting society</p> <p>It is quite correct, in my view, that “novelty” as a requirement for designs does not fit with TIP. I have referred to this anomaly above. This illustrates the point that the law of designs is not really a suitable vehicle to apply to items of TIP. TIP in the nature of designs requires its own criteria or conditions for subsistence and such criteria should be determined on a customised basis. The criteria that Tshabangu is proposing is requested so that these can be incorporated into the relevant section</p>	<p><u>and was passed down from a previous generation;</u></p> <p><b>I am struggling a little with the term ‘always’ in this definition – as it is very hard to define in practice.</b> This appears to be a very valid comment. “always” should be deleted. <b>Also some members of the community may remember a performance their parents generation has created, but not their grandparents. So this would fail the ‘always’ criteria. Furthermore, the committee may consider the policy implications of limiting the ownership of such performances / marks / designs which are remembered.</b> What limitations are referred to and what are these policy implications? <b>It may be the case that through early anthropological study performances / designs etc were recorded even though none of the living members still remembers them. Would that mean they don’t have a right to the TIP of their ancestors?</b> This appears to be a very valid comment. Perhaps deleting the reference to “living memory” as a requirement and leaving only “passed down from a previous generation” would work? Or could this jeopardize this definition in another way?</p> <p>Will we in practice be able to distinguish between hereditary TIP and derivative TIP?</p> <p><b>Yes, it will be difficult to distinguish between the two but it may be necessary due to the limitations of IP law which requires clarity on what is new (DTIP) and what is old (HTIP).</b></p>

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<ul style="list-style-type: none"> <li>TIP that was handed down from generations before, should be protected for generations to come – the period of protection can thus not be limited;</li> <li>TIP that was handed down from generations before, should not be transferrable</li> </ul>	<p><u>(cc) expressions by action, such as dances, plays, ceremonies, rituals, rituals in sacred places and peregrinations, sports and traditional games, puppet performances, and other performances, whether fixed or unfixed;</u></p> <p><u>(dd) tangible expressions, such as material expressions of art, handicrafts, architecture, tangible spiritual forms and sacred places."</u></p>		<p>In reality a lot of IK even when passed through generations is always changing and adapted – often of incremental nature. It will therefore be difficult to then decide of what constitutes hereditary TIP and what is of more contemporary (derivative) nature – or how much change in designs, marks, performances etc has to incur in order to be considered sufficiently 'new' to be classified as derivative.</p> <p>Particularly for copyright protection derivative work must display some originality of its own. It cannot be an uncreative variation on the earlier, underlying work. The latter work must contain sufficient new expression, over and above that embodied in the earlier work for the latter work to satisfy copyright law's requirement of originality. This could be incorporated in the definition. Thus, what is at issue is to determine what will be a "sufficiently new expression" and what will be the threshold for determining that an adaptation of a IK into a different medium (performance) will qualify as original. On top of that the term derivative is confusing – especially as in the biodiversity related legislation a derivative is referred to as a product that was derived from national biological resources even though it doesn't contain them anymore (e.g. genetic information copied through biotech inventions and replaced by artificial substitutes). I would therefore suggest an alternative term – maybe 'concurrent' – or 'recent' – which is then defined in terms of what</p>

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			<p>constitutes 'recent' and what constitutes 'hereditary'. Von Braun uses the term "contemporary" earlier. Would this term be suitable? "Concurrent" could be interpreted as having been developed at the same time as HTIP. "Recent" could also work.</p> <p>Generally speaking, legislation surrounding genetic resources in the context of ABS suffer a similar problem - i.e. how much of a genetic resource should be used for it to constitute 'utilization of a genetic resource' (and thus deserve protection) - what about the third or fourth removed user down the line i.e. derivatives of derivatives. Currently the criteria for saying something is a DTIP is to say that 'a significant portion or an essential feature was derived from HTIP'- but this in itself is not a sufficient distinguishing criteria. Perhaps it would be better to use the 'utilization approach' from the Nagoya Protocol- an approach that says that any new work that utilizes HTIP will be a DTIP and then provide an indicative list of the kind of uses either in the main body of the text or in an annex. For e.g. any song where the tune or theme is based on a hereditary traditional performance. This could provide a good solution. More examples are needed for each type of DTIP in order to populate a list.</p> <p>Does this differentiation solve the problems associated with treating TIP as a unique form of IP? See the following sections i.r.o. how the differentiation will work:</p>

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			<p>ers Protection: SS8B(4); 8D; 8F; 8G(7) and  ght: SS28B; 28D; 28F; 28H(5) and 28J  arks: 43B(7); 43E(1); 43F; 43G(4); 43I  : 53B(4); 53F(1); 53G(4); 53I</p> <p>Problems identified were for instance:  as a requirement for designs, does not fit with</p> <p><b>Agreed</b></p> <p>TIP that was handed down from generations before, should be protected for generations to come – the period of protection can thus not be limited;</p> <p><b>Agreed. With TIP, communities have always wanted to hold rights in perpetuity since they are not motivated by the same incentives as other developers of knowledge are i.e. they don't produce their TIP or disclose it only when they have the incentive of monopoly rights for a period of time. So this is not a problem but a reality of TIP and the law can adapt to take it on board.</b></p> <p>TIP that was handed down from generations before should not be transferrable.</p> <p><b>This will be very difficult to implement in practice because of above mentioned reasons. Furthermore, as with other property, the committee may consider leaving it up to the community whether they want to transfer their TIP or not.</b>  Does this include transferring HTIP to e.g. a third party outside of the community?</p>

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<p>Definition: "Indigenous Community" – This has been amended, but we need confirmation that this definition now affords protection to the intended communities.</p>			<p>Another option is to only deal with HTIP and provide for DTIP to be dealt with as normal IP. Is this desirable?</p> <p>The current definition highlights the common ethnological origin – I believe this definition on its own is too limited. In many communities in South Africa people of different ethnic background and different language now live in close proximity and have developed joint cultural practices. In the bioprospecting legislation the definition of an indigenous community is not linked to ethnicity but common cultural practices</p> <p>Also, not all communities- some communities are local and others are not – see for example the San who have distributed themselves widely within Southern Africa. This should be reflected in the bill.</p> <p>The CBD for example overcame this problem by referring to indigenous AND local communities to deal with precisely this issue that not all TIP comes from ethnic groups but also from local communities living together in a socio-economic-ecological region having common practices. Could Von Braun perhaps suggest the wording of a definition that addresses all these issues?</p>
<p>Section 8B of the amendments to the Performers Protection Act:</p> <ul style="list-style-type: none"> <li>• A general comment on protection afforded in this section;</li> <li>• 8B(1): The concept of</li> </ul>	<p>(a) Section 8B of the amendment to the PPA: The protection adequately covers the gaps that were outstanding.</p> <p>(b) "Fixation" the concept does for me capture the nuances and the wording accords with what I stated above re: endogenous.</p> <p>(c) 8B2 I am not sure of this.</p>	<p>I refer to my comments above regarding the skewed conception of the true nature of the performers' protection right and the consequential need to redraft the provisions of the Bill dealing with performers protection radically.</p> <p>As explained above, "fixation" is the correct concept for use in relation to the performers' protection right.</p>	<p>8B(2): Would the concepts of "heritage, agriculture or bio-diversity laws" be applicable to Performers' Protection and to Copyright (section 28B(4))?</p> <p><b>Yes. In fact the committee should discuss whether the same principles should not be applied to any application for TIP that does not originate from the communities. TIP that is utilised without the prior informed consent of communities or that</b></p>

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<p>"fixation": Is this relevant here, and if so, is this wording the correct wording to use. See for instance the use of fixation in the Copyright Act.</p> <ul style="list-style-type: none"> <li>• 8B(2): Would the concepts of "heritage, agriculture or bio-diversity laws" be applicable to Performers' Protection and to Copyright (section 28B(4))?</li> </ul>		<p>The concepts of "heritage, agriculture or biodiversity laws" are totally misplaced in dealing with the performers' protection right and copyright. These terms and concepts have no applicability to the subject matters of the performers' protection right and copyright. This directly contradicts Von Braun and should perhaps be fleshed out so that the two experts can understand each other and confirm / amend their opinions</p>	<p><b>is utilised without respecting mutually agreed terms should be conferred protection through registration.</b> It is possible to extend these 3 requirements to all third party TIP applications.</p>
<p>Section 8C of the amendments to the Performers Protection Act's: (Section 28C of the Copyright Amendments deals in full with the database)</p> <ul style="list-style-type: none"> <li>• It is of concern to the Portfolio Committee whether the database will duplicate the register of the Companies and Intellectual</li> </ul>	<p>The database will not duplicate the register. There are many issues that to date have been overlooked, neglected or misunderstood. The database is essential especially now in the global world where different cultures begin to value, exploit and develop their indigenous knowledges.</p> <p>8c. Indigenous knowledge systems are invariably based on secrecy, mystery and the need to know. So declaring portions as confidential accords with practice.</p> <p>Would it not be the responsibility of the National Council to develop structures in line with indigenous practices and in consultation with traditional leadership, healers associations and experts in the field?</p>	<p>As mentioned above, I believe that the database has very little, if any, applicability and relevance to the performers' protection right, or copyright. In regard to designs and trade marks, it is totally superfluous and duplicates, in an inadequate manner, the existing registers of trade marks and designs. As mentioned above, it is debatable whether a significant number, if any, registrations of the thousands of performers' protection rights or copyright works will take place under the database as presently envisaged. Accordingly, the creation of the database does not warrant the costs and administrative measures which will characterise its creation. To go to the cost and lengths that registration in the database will entail is not warranted or</p>	<p>The database should be integrated in the database that is being developed by the DST. It will be confusing to have too many databases. The concept of a database per se, however, is useful – also for proving prior art or the existence of TIP in a case of conflict.</p> <p>However there must be clarity about what the rights of communities will be over the database- viewing, managing rights etc. This is always a problem with databases.</p>



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<p>Property Commission ('CIPC') and furthermore, whether any benefit could be derived from the database.</p>		<p>justified by the meagre benefits of such a registration to the rights holders.</p>	
<ul style="list-style-type: none"> <li>The risk of disclosure in the database is managed by providing for the registrar to declare portions confidential (8C(3))</li> </ul>		<p>It is difficult to understand what risks there are of disclosures in the envisaged database. The database is ostensibly aimed at nothing more than providing a means of presenting <i>prima facie</i> proof of the subsistence of, and title to, TIP registered in it. In the event that a TIP owner seeks to enforce its right and to prove the subsistence and ownership of the property, it would be necessary for him to present to the court any and all of the information which he would be likely to place on record in the database. The omission to prove the essential elements of the TIP to the court would lead to the right not being established before the court and to the case failing. In other words, what is the point of keeping information confidential in the database which would in any event have to be presented to the court in any litigation?</p>	<p>Yes. Furthermore, the content in the database can be protected through different forms of IP protection. Contract, trade secret and unfair competition laws provide an additional layer of protection for databases irrespective of whether the compilation is copyrightable. If confidentiality is a concern, trade secret and unfair competition could be used to ensure that some information in the database are kept confidential. I am not very familiar with those but it may be worthwhile looking into.</p> <p>Another issue is that the entire discretion of what is confidential is with the Commission- what if a section of the community wants it to be confidential. There has to be some obligation on the Commission or the Registrar to actively consult the community before they record the knowledge or declare it open- otherwise it will become a situation where someone declares some knowledge and the Registrar records it and the Commission declares it public, all completely delinked from the community on the ground.</p>
<ul style="list-style-type: none"> <li>8C(2)(b) and (c): It is a concern that these sections could allow persons not duly authorised (b),</li> </ul>	<p><u>"(2) Any —</u>  <u>(a) indigenous community; or</u>  <u>(b) person or juristic person authorised to act on behalf of an indigenous community, may submit to the registrar of copyright a request together with the appropriate information for a traditional performance to</u></p>	<p>The Committee's concerns in respect of Section 8C(2)(b) and (c) are well founded. It is unprecedented in intellectual property law that anyone else besides the owner of the right of property in question should be entitled to seek registration of that right. It is difficult to envisage in what circumstances a</p>	<p>The other problem is who is entitled to submit to the Registrar of Copyright that e.g. a traditional performance should be recorded. Currently it is wide open in 8C(2)- it doesn't say that only the indigenous community that is the originator of the performance should submit but rather under</p>

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<p>or not connected with the community at all (c) to apply for registration on the database of TIP. The committee feels that this sets the entry bar too low and needs to be tightened up. Given the structure of communities, who can be expected to be the applicant?</p>	<p><u>be recorded in the database, whereupon the provisions of the said section 28C shall, with necessary changes, apply.”</u></p>	<p>non-owner of the right or property should be entitled to seek registration, or what legitimate purpose would be served by obtaining a registration on the application of a non-owner.</p>	<p>8C (2)c says 'any person, institution, body or agency' . This makes it quite tricky because the person may not be authorized and the knowledge could be secret and the database is by default an open database unless declared confidential. This is different from the TKDL which is purely there to establish prior art and has different layers of automatic confidentiality.</p> <p>In this sense it would be important to demand from anybody who is not the indigenous community submitting TIP to the database to demonstrate that they have the prior informed consent and a benefit sharing agreement from the community. The community should also have a right to indicate whether they want something to be declared confidential or not.</p> <p>I agree – it could be prevented maybe by applying the above mentioned principles regarding PIC, and benefit sharing agreement into the process of applying for registration.</p> <p>The question of who within a community can apply for registration could be resolved by using a concept which features in the bioprospecting framework. Here anybody who negotiates (in this case registers) TIP should have with them a community resolution that identifies him or her as the appropriate representative. Perhaps one way to do this is for there to be a community resolution (or better still a protocol) regarding their TIP and then an explicit authorization about which of their TIP can be registered and who can submit it and what can be disclosed etc. It won't be easy in practice but</p>

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<ul style="list-style-type: none"> <li>S8C(2): Should it be a requirement that an indigenous community set up a trust or other juristic person before they are allowed to register a TIP on the database? The committee is concerned that although this will allow control over ownership etc, it could interfere with current structures of indigenous communities and be unacceptable to structured indigenous communities. However, would this proposal not assist unstructured communities?</li> </ul>	<p>S8C(2) can viewed as above. I concur with requirement for a trust or juristic person before applying for TIP.</p>	<p>The real issue in connection with Section 8C(2) is not the issue of whether an indigenous community should set up a trust or other juristic person in order to obtain registration. The true issue is whether a non-juristic person can own TIP. It is a foreign concept in intellectual property law (if not in the law generally) that something besides a natural or juristic person can be the owner of property. The owner of intellectual property is invariably the person that enforces the rights embodied in that property and our legal system does not allow a non-juristic person to institute litigation for the enforcement of any right. Thus, the Bill should make provision for the owner of TIP to always be a juristic person. If this situation is attained, the question of the nature of the entity that can seek registration ceases to be pertinent.</p>	<p>from a policy perspective better than the current situation where anybody can come and submit TIP for registration.</p> <p>I agree – this is a very burdensome requirement for a community. One option could be that they commit themselves to establishing a trust in due course or other collective frameworks of their choice (more research would be needed on what could be alternative options). In the meantime assistance would have to be provided to communities to do so.</p>
<ul style="list-style-type: none"> <li>S8C(4): Repeat live performances are all regarded</li> </ul>	<p>S8C(4) I concur.</p> <p>I would suggest that we follow the draft (WIPO). There has been endless and</p>	<p>With regard to Section 8C(4), it is in a sense correct that repeat live performances are all regarded as new. In fact the true position is that each and every performance (even if it is</p>	

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<p>as new. This subsection attempts to avoid each live performance having to be registered. Will this suffice in practice to avoid having each new (repeated) performance regarded as new?</p>	<p>continues to be exploitation of indigenous performances by outside persons or individuals.</p> <p>If we read "Hereditary" as stemming from genetic sources it then rules out third parties exploiting it.</p>	<p>identical to an earlier performance) creates new subject matter for the existence of a performer's right. Since each and every performance is a separate subject of a performer's rights, each of such performances is entitled to registration. Once again, it is not really a registration issue. Registration simply records the existing situation under the law and since the law grants a separate performers' right in each and every performance, there is no basis on which registration of each and every performance should not be possible. Put differently, if a performance held on 1 August is registered and then an identical performance held on 2 August is broadcast without the authority of the performer, action could not be taken on the unauthorised broadcast relying on the broadcast of the 1 August, because that is not the right which is being exercised by the broadcaster, without authority. With respect, this comes back to the point that there may have been a misconception of the nature of what is being protected under the Performers Protection Act in drafting the Bill. How can repeat performances be protected, without increasing the burden of registration on the database in case the database is retained?</p>	
<p>Section 8F of the amendments to the Performers Protection Act's: This section is already included under the discussion of hereditary v traditional TIP. Specifically</p>		<p>I have already dealt with the incompatibility of perpetual protection for hereditary TIP and the principle of IP protected works passing into the public domain. I must point out that the WIPO drafts deal with customised legislation for TIP and not with protecting TIP under the Performers Protection Act, or the Copyright Act, or any other existing IP statutes. Dealing with TIP in customised legislation, separate and apart from the existing IP statutes, grants the freedom and</p>	<p>Some IK experts refer to the need to differentiate between the 'public domain' and 'public availability' – referring to a notion that even though something is publically available doesn't mean that its free for all to use according to their interest. I believe this distinction is very useful and applies to this context as it allows us to accommodate the particular nature of IK. Only because their knowledge is publically available and has been for a long time does not mean it should</p>

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<p>however, please comment on section 8F(2) – The prohibition against use of hereditary TIP by third parties is perpetual. Although this concept is in accordance with the WIPO drafts, the question has been raised whether such perpetual protection conflicts with the principle of “public domain” in IP.</p>		<p>latitude to offer differing forms of protection to that which is contained in existing IP statutes. This is one of the reasons why at the outset of this comment, I suggested that the better approach would be to deal with TIP in customised legislation. However, in any event, as a matter of principle, I have difficulty in seeing and justifying why so-called hereditary TIP, in contrast to other forms of intellectual property, should be granted the benefit of indefinite protection.</p>	<p>be available for anybody to use against the rules of the community (which often means commercialising it against their will).</p> <p>Indeed, the notion of public domain becomes relevant only if someone had the benefit of exclusive use rights due to IP. In the case of HTIP, as far as I am aware, a community has never claimed exclusive use rights in the commercial sense nor does it need these exclusive use rights that IP provides to incentivize generation of HTIP- what is being asked for is respect for a set of rules of use (which can be provided through PIC, MAT and benefit sharing). So it is important to note that conventional IP models are based on a market logic or incentivizing innovation. The same logic does not apply when it comes to IK - so we have to think differently here.</p>
<p>Sections 8G(3) to (5) of the amendments to the Performers Protection Act's: The concept of royalties to be paid is still not clear enough to committee members. What is the opinion of the experts i.r.o. questions such as:</p> <ul style="list-style-type: none"> <li>• Who should be paying royalties?</li> <li>• When should royalties be paid?</li> </ul>	<p>Would it not be the task of Trusts or juristic persons in conjunction with the National Council to work out a formula for these?</p>	<p>The way in which intellectual property laws work is to grant exclusive rights in respect of certain activities (being essentially the manners in which the particular form of intellectual property is capable of being commercially exploited) to the owner of the intellectual property. This places the owner in the position where he can, at his discretion, allow or disallow the exercise of the exclusive rights by others. This power enables the intellectual property owner to require the payment of a fee or a royalty in exchange for the opportunity to exercise the right in question and to use the intellectual property in the desired manner. It follows from this that the royalty or fee is payable by the person who is allowed, and to whom the opportunity is given, to use the work in the desired manner. It follows from this that the</p>	<ul style="list-style-type: none"> <li>- Who should be paying royalties?</li> </ul> <p><b>Royalties should be paid by the party applying for TIP protection should it not be the community itself and who is commercialising the TIP. Para's 8G(2)(a) (exempted from royalties) and 8G(2)(b) (obliged to pay royalties) are useful in this context.</b></p> <ul style="list-style-type: none"> <li>- When should royalties be paid?</li> </ul> <p><b>This should be up to the community and could possibly be defined in a benefit sharing agreement. One option could be to add a list of options (milestone payments, upfront payments, royalties, non-monetary benefits) in the Act/Regulations as it has been done with</b></p>

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<ul style="list-style-type: none"> <li>• To whom should royalties be paid (WIPO suggests a central body, but this may speak against self governance)?</li> <li>• Who should determine how funds received by a central body is utilised and distributed for the benefit of the indigenous communities?</li> <li>• What should be the role of the community in determining royalties and how they should be utilised?</li> </ul>		<p>person who is entitled to receive the royalty is the intellectual property owner. In general a licence agreement is entered into between the intellectual property owner and the aspirant user of the intellectual property. In the licence agreement the owner grants permission to use the work in the envisaged manner and in return the user pays a fee or royalty to the intellectual property owner.</p> <p>In the case of the performers' protection right, a licence would usually be granted by the performer, being the owner of the performer's right, to a broadcaster who wishes to broadcast the performance, or to a record company that wishes to make a CD or other record of the performer's performance.</p> <p>In this situation it is often expedient for performers to transfer their right to authorise uses of their performances to a collecting society. The collecting society then removes the administrative burden of having to enter into agreements and make collections of payments regarding permissions to use the performer's performance from the performer. The same principle applies to composers and authors who licence the public performance and/or reproduction of their copyright works. The collecting society operating in these circumstances is a common-place business model that is used throughout the world in relation to performers' performances and in relation to copyright works.</p> <p>Royalties are paid for the benefit and right to use a performance or a work. It follows from this that the royalty would thus normally be paid when the user makes the use in</p>	<p><b>the bioprospecting regs.</b></p> <p><b>Perhaps it would help to make the same kind of distinction the NEMBA makes between the 'discovery phase' and the 'commercialization phase' - though in this case it could be referred to as a 'experimental phase' and a 'commercialization phase'. During the 'experimental phase' when someone is not sure as to whether they will be able to develop any DTIP of value, they should just inform the Council/Commission of their intention. The moment they undertake certain activities like for e.g. marketing or signing an agreement with a recording company etc. then it should be deemed that they have entered into a 'commercialization phase' during which they are bound to negotiate a benefit sharing agreement or will at least have enough information based on which one can reasonably estimate the percentage of royalties.</b></p> <p><b>Having said that – the length of time that passes between the discovery phase and commercialisation phase in the context of NEMBA (like pharmaceuticals) is much longer than in the recording / copyright / design industries. So the implication of such differentiation would have to be thought through carefully.</b></p> <p>- To whom should royalties be paid (WIPO suggests a central body, but this may speak against self governance)?</p> <p><b>It should be paid to the community trust</b></p>

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		<p>question of performance or of the work. The royalty or fee is the compensation paid for the right to use the work. Sometimes payment for the right to use the work or performance is made in advance, alternatively it can be made at specified periods, such as the end of the week, month, etc in respect of the accumulative use of the work or performance during that period.</p> <p>A collecting society can take the form of a private organisation which enters into a contractual arrangement with performers or authors of copyright works in order to administer the use of the properties. This is the model most commonly used.</p> <p>Alternatively, a statutory body could be created to perform this function. There are considerable administrative and managerial functions concerned in the management and execution of a collecting body and whether a statutory body is best equipped to perform this role is debatable. The other question which arises is whether performers and copyright owners should have the freedom to choose for themselves whether to appoint a collecting society to act on their behalf or whether it should be mandatory for them to pass on their rights to a collecting agency.</p> <p>There is merit in collecting agencies operating in this field on behalf of performers and/or copyright owners because economies of scale can be achieved if a multiplicity of persons are represented, and performers and copyright owners are freed of the obligation to conduct administrative chores. From the point of view of users of performances and copyright works it is also beneficial to be able to work with a collecting</p>	<p><b>fund or other community managed collective body (see above). If no such thing exist a central body could be dedicated who would manage the income on behalf of the community or help the community to set up such mechanims.</b></p> <p><b>If the TIP cannot be attributed to one or several communities a central body should be receiving the funds.</b></p> <ul style="list-style-type: none"> <li>- Who should determine how funds received by a central body is utilised and distributed for the benefit of the indigenous communities?</li> </ul> <p><b>If the community where the TIP originated is known the funds should go to the community and not to 'all' indigenous communities. If the TIP cannot be attributed to one or several indigenous communities but is broadly known then the central body's council should decide how the resources should be spent in the interest of indigenous communities.</b></p> <ul style="list-style-type: none"> <li>- What should be the role of the community in determining royalties and how they should be utilised?</li> </ul> <p><b>The role should be central.</b></p> <p><b>All these questions will only be resolved if there is a good process in terms of how TIP can be submitted to the Registrar. There should be a process that involves consultation within the community at the outset that is facilitated by the Registrar's office, a clear resolution about what can be public and what is confidential and</b></p>

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		<p>agency because a “one stop” source of licenses can be utilised instead of the users having to seek out and approach each individual performer or copyright owner.</p> <p>Generally speaking, the rights holders or property owners should be the ones who dictate how the revenue generated through the use of their materials should be distributed because it is their property that is generating the revenue and it is their permission, whether given directly or indirectly, which is enabling the revenue generating activity to be carried out. Against this background it would be unnatural for a collecting agency, whether a private or statutory body, to determine how the available revenue should be distributed. Depriving the property owner of the right to determine the distribution of the revenue arising from the exploitation of its property actually amounts to a form of expropriation. In the present situation it is a matter of policy to decide whether a central collecting agency should be given the facility to execute this form of expropriation.</p> <p>Shabangu argues that the rights holders or property holders should decide how benefits derived from royalties should be distributed and if this is done by a private body or statutory body this amounts to expropriation because this is depriving property owners of the right to determine the distribution of revenue. Expropriation is the compulsory deprivation of ownership or rights usually by a public authority for a public purpose. What is envisaged by the Bill is not to use the benefits derived from exploitation of IK for a public purpose but for a specific indigenous community. The owner of a copyright in a</p>	<p><b>who is authorized by the community to submit the knowledge and negotiate royalty agreements etc. And in cases where there is no clarity about who the community of origin of the TIP is, then of course anyone can submit the information into the database and the royalties can be negotiated by the Fund.</b></p> <p><b>Another policy option in scenarios where no community can effectively claim TIP is of course to record it as ‘prior art’ and deem it in the public domain like it was done with yoga. If the intention of the amendments was above all to protect the interests of living communities in whose lives the TIP play an integral role, then the government may consider putting knowledge of long extinct communities into the public domain.</b></p>



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		<p>traditional performance is not deprived of ownership but grants rights to individuals to use the IK but require royalties in return.</p> <p>One can understand the underlying sentiments of Section 8G(6) of the Performers Protection Act but in practical terms it would be unworkable and undesirable for the Council to vet every single licence agreement granted in respect of a performer's right. These rights are frequently granted on the spur of the moment and if an involved bureaucratic process had to be entered into before the right to, for instance, broadcast a live performance could be granted, it is quite likely that many revenue generating opportunities could be lost. However, if the model of a collecting agency is utilised, the position can be elevated because typically such agencies use standard contracts and the Council could vet and approve such a standard contract, which could then be utilised in the future without any intervention from the Council. It should be appreciated, however, that the right of an intellectual property owner to grant to another the right to use his property is essentially appropriate subject matter for the exercise of freedom of contract.</p>	
<ul style="list-style-type: none"> <li>• S8G(6) of the amendments to the Performers Protection Act's: Communities need to be protected against unscrupulous companies exploiting their</li> </ul>	<p>I do not think it would in any way limit indigenous communities' opportunities to exploit their TIP. Once more the role of the trust that would be appointed or established by the community itself or the juristic person in conjunction with necessary structures can address such issues.</p>		<p>I think this is important and the council should take on a certain guardian position towards communities in helping them to protect themselves against abuse. However, any such guardian position should not be confused with managing it on behalf of communities but rather in collaboration with communities.</p>

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<p>innocence in the world of commerce. A proposal is made that the Council should assist by vetting the contract. Is this workable in practice, or will this severely limit indigenous communities' opportunities to exploit their TIP?</p>			
<p>Section 8H of the amendments to the Performers Protection Act's: The trust and fund</p> <ul style="list-style-type: none"> <li>Section 28I of the Copyright Act amendments deal in full with the Trust and the Fund. A number of comments were made relating to the role of the trust and fund as well as the interaction between the indigenous community and the trust and fund. The fund's role has been changed in the</li> </ul>	<ul style="list-style-type: none"> <li>There is bound to be teething problems. The fund would be sustainable at some point.</li> <li>The requirements of PFMA Must be built into the constitution or make up of the Fund.</li> <li>When communities apply for TIP they need to specify how they would use the funds for the benefit of their communities. That Must be a specific requirement.</li> </ul>	<p>As a basic principle, I do not believe that it is appropriate that the Trust should own TIP. Indeed, there are very limited circumstances in which the present Bill provides for the Trust to own TIP. Such ownership would be limited to the circumstance where it is not possible to identify the owner of the TIP according to normal principles. Given the broad nature of the category of persons qualifying as authors, and thus initial rights owners, in the Bill, it is likely to be relatively rare that it will not be possible to identify the owner. One questions whether it would be warranted to set up the whole mechanism of the Trust and the Trust Fund to deal only with this relatively exceptional circumstance. This in turn calls into question the sustainability of the Fund.</p> <p>The Bill in reality contemplates that the Fund will act as a statutory collecting society. The desirability of having a statutory collecting society, as distinct from privately operated collecting societies, perhaps under State supervision, is really a policy issue. I refer to</p>	<ul style="list-style-type: none"> <li>Whether this fund would be sustainable from the start or would become sustainable at some point?</li> </ul> <p><b>Depends on what the policy intention is with the fund. The fund could be used to support initiatives that valorize traditional art and expression. If that is the case, then it can become like the fund of the International Treaty for Plant Genetic Resources for Food and Agriculture- into which not only royalties go but also government contributions. So I would argue for making it sustainable from the start by asking government to contribute to it until it becomes financially sustainable. It would definitely raise its political profile.</b></p> <ul style="list-style-type: none"> <li>How to use funds "for the benefit of indigenous communities"?</li> </ul> <p><b>The fund can be a vehicle for the distribution of monetary and non-monetary benefits to indigenous and local</b></p>

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<p>IP redraft so that it is only owner where the original owner cannot be determined and accordingly it will only receive royalties on those TIP usages.</p> <ul style="list-style-type: none"> <li>• Other questions are: <ul style="list-style-type: none"> <li>○ Whether this fund would be sustainable from the start or would become sustainable at some point?</li> <li>○ How will this fund link to the requirements of the Public Finance Management Act?</li> <li>○ How to use funds "for the benefit of indigenous communities"?</li> </ul> </li> </ul>		<p>my comments above regarding the whole issue of collecting societies and their role.</p> <p>Since the Fund will be administering the "property" of individual communities and the system is based on the premise that the owner of the property should enjoy its commercial fruits, it seems undesirable that the funds should be unilaterally empowered to decide how the funds are employed. Furthermore it seems only fair that the funds derived from the use of a particular property should be channelled to the benefit of the particular community from which the work comes. Otherwise, the whole purpose of setting up a system for generating revenue out of the use of IK seems to be defeated.</p>	<p><b>communities. It would help to have discussions with organizations in the country supporting traditional performers and artists and ask what their needs are. The monies could be used to set up bursaries, exhibitions, training centres, etc.</b></p>

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<p>Section 8I of the amendments to the Performers Protection Act's:</p> <ul style="list-style-type: none"> <li>Although "assignment" and "licensing" are established legal terms, a question was raised whether these should be specifically defined in each act's amendment. A concern was raised that a definition could limit the general application of the words</li> </ul>	<p>I think a definition would limit the general application of the words.</p>	<p>The questions of "assignment" and "licensing" of intellectual property are so integral to intellectual property in general, and are universally understood and clarified by judicial precedent and other legal authorities, that it is most undesirable and unwarranted to attempt definitions of them. If such definitions purport to deal with intellectual property as a whole, they will be at best superfluous and at worst damaging to legal certainty, and if they are to apply only to TIP, it would equally create confusion and uncertainty as to why TIP licenses and assignments should be different from licences and assignments in respect of all other forms of intellectual property. An argument that special definitions of assignments or licenses are required for TIP would be an argument in favour of dealing with TIP in customised legislation.</p>	
<p>Section 8J of the amendments to the Performers Protection Act's:</p> <ul style="list-style-type: none"> <li>A submission indicated that a customary dispute resolution mechanism should be incorporated in the dispute resolution mechanism created by this act. Advice is</li> </ul>	<p>Definitely there Must be a customary dispute resolution mechanism and as this is always based on consensus the resolutions reached are often binding and involve a wider participation by each community.</p>		<p>There is no need for a customary dispute resolution mechanism simply because we are dealing with traditional art and expression. The disputes that occur will be between two parties- the provider and user (who may not be traditional) and can be resolved in accordance with the agreement that is entered into between the community providing the HTIP and the user. The community in the agreement could say that they want the dispute to be resolved according to their customary mechanisms and if the user agreed to it at the time of entering in the agreement, then that is what it should be. If not, then it should be treated as a dispute arising from any other normal contract and the authority designated by the</p>

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<p>required on whether this is feasible and if so, how to incorporate such a traditional mechanism</p>			<p>amendment should deal with it.</p> <p>What could be highlighted is that any dispute should be dealt with taking into account the customary and community practices of local and indigenous communities.</p>
<ul style="list-style-type: none"> <li>S8J(3) of the amendments to the Performers Protection Act's: There are examples of dispute resolution methods in SA Law where no legal representation is allowed, for instance, the Commission for Conciliation, Mediation and Arbitration's (CCMA) conciliation and mediation process and the small claims court. Should this also be the case with the dispute resolution for TIP?</li> </ul>	<p>I concur. No legal representation.</p> <p>A review process is essential.</p> <p><u>"(3) No person appearing in proceedings before an institution contemplated in subsection (1) shall have the right to legal representation unless -</u></p> <p><u>(a) the adjudicator and all other parties consent; or</u></p> <p><u>(b) the adjudicator, after considering-</u></p> <p><u>(i) the nature of the questions of law raised by the dispute;</u></p> <p><u>(ii) the relative complexity and importance of the dispute; and</u></p> <p><u>(iii) the comparative ability of the parties to represent themselves in the adjudication, concludes that it would be unreasonable to expect the party to deal with the adjudication without legal representation."</u></p>	<p>Intellectual property law is a highly complex and specialised branch of the law. Such is the complexity of intellectual property disputes that many countries have instituted specialised intellectual property courts in which senior judges with special expertise can adjudicate intellectual property matters. Against this background, it seems to be most undesirable that a form of dispute adjudication can be contemplated where participants are specifically denied the right of legal representation. Apart from any questions of the constitutionality of such a measure, it seems patently unfair to expect lay persons, and possibly persons who are commercially naive, to argue their own cases in respect of intellectual property rights. This is particularly true where, as previously mentioned, the Bill in its present form requires the normal principles of the various branches of intellectual property law to apply to TIP over and above the specific provisions in the respective chapters. In other words, it is being expected of lay persons, who may, for instance, be performing artists with limited education, to present arguments dealing not only with specific TIP law, but with intellectual property law in general.</p>	<p>The aim of this alternate dispute resolution (ADR) approach is to ensure that communities will not have to get expensive lawyers they cannot afford to resolve disputes thereby facilitating access to justice. So it would be great to have a ADR mechanism which provides effective representation for the community, understands its concerns and is able to provide a fair hearing to the user also. The goal should be a system that is inexpensive, easily understandable, efficient and culturally sensitive.</p>
<ul style="list-style-type: none"> <li>A proposal was made for the dispute resolution</li> </ul>		<p>With respect, I believe that there is considerable difference between, on the one hand, mediating a dispute as to whether there has been an unfair dismissal under</p>	<p>The most efficient way is a 2 step process- 1. Mediation 2. Arbitration. Both can be done by a designated body under the amendment.</p>

Questions	Ntuli	Shabangu	Von Braun
<p>mechanism to be amended so that it reflects closer on the CCMA's conciliation and mediation processes, followed by arbitration if this was not successful. The committee also commented that a method must be provided for to revisit the arbitration decision. The current IP redraft provides for a review procedure (S8J(4)) by stating that the dispute resolution mechanism is an administrative action or decision. A review process is less expensive than most other court processes. What would the experts regard as being an acceptable and efficient method</p>		<p>labour law on a given set of facts, and, on the other hand, deciding issues of authorship, ownership and subsistence of rights in a particular work, as well as issues such as originality, novelty and the like. At best, alternate dispute resolution methods could be used to adjudicate an issue like the amount of a royalty that should be payable in particular situation. Many issues in disputes in respect of intellectual property require the presentation of expert evidence in order to be properly resolved and this situation does not lend itself to disputes being argued by lay persons.</p> <p>I agree that, if some form of alternate dispute resolution is resorted to and a decision is rendered by an administrative person, such decision should not be final. There must be some form of further recourse to the court. I do not necessarily agree that a review process is the best form of further recourse. To begin with, it is not true to say that review proceedings are often less expensive than other forms of proceedings. This is not borne out by practical experience. Furthermore, review proceedings do not necessarily address the pertinent issue in dispute. Instead, they are aimed at ascertaining whether the proper procedures were followed and whether the adjudicator applied his mind correctly, not necessarily with deciding whether the correct decision was reached. A better approach would be to provide for a simplified appeal procedure to the High Court, or to a properly appointed arbitrator.</p>	

Questions	Ntuli	Shabangu	Von Braun
of dealing with disputes?			