



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

IK AND PHARMA

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Background

- This Paper in the main will emphasise an approach of the possibility of protecting and commercialising Indigenous Knowledge (IK) through the orthodox Intellectual Property (IP) system of today. This Paper will appreciate that the IP system is not the only system or the best system to protect IK. Other systems such as Customary Laws may be the best system to do so. However, other laws and IP laws if properly couched and in tandem may protect IK very well. It is against this background that Cabinet instructed the Minister of the dti to consult with Ministers of DST, DOH, DAC, DPLG, Agriculture, DEAT and DWAF. Biodiversity Act supplement the Patents Amendment Act. Agriculture legislation such as Plant Variety Act must also talk to the Patents Amendment Act. DOH must also reconcile each legislation with IP legislation as well as principles governing trade secret and data protection.
- It will be argued in this Paper that the National Heritage Act, 1999 should talk to IP legislation. In that, the Bill will be in a better position to protect folkloric and certain designs that have an IK component. In this regard, it should be said that it is upon the Government to claim paternity over "intangible cultural heritage". People who want to use part of the "intangible cultural heritage" can claim IP on the innovative/contemporary product, but when the IP expires, the intangible cultural heritage revert to the state or the community.
- In general terms, the Paper will discuss national, regional and international instruments that can best inform the Bill to protect and commercialise IK for exploiting its developmental potential. Further, cases will be discussed in various domains of IP where communities like in Tunisia, OAPI, (Australia and New Zealand through common law) may use the IP system to protect and exploit IK.
- There is a need to cooperate at bilateral, regional and multilateral levels if protecting and commercialising IK is to succeed at a large scale. The IBSA Agreement can be a good foundation.
- World Health Organisation (WHO) claims the IP system (pharmaceutical/biotechnology) to be balanced with health issues such as access to health. Food and Agriculture Organisation (FAO) administers International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) that has a bearing on the "protection of knowledge relevant to plant genetic resources for food and agriculture" in part iii. United Nations Environment Programme (UNEP) administers the Convention on Biological Diversity (CBD) and this has a bearing on IP "developed" with the assistance of indigenous knowledge from local communities.
- Each department should be guided by the respective international treaties and effect necessary amendments to their legislation. Protection of IK could have speeded up if a **human right** perspective have been emphasised.

Background

- United Nations Education, Scientific and Cultural Organisation (UNESCO) also deals with IP-type protection for folklore or cultural expressions (1982 Model Provisions) as well as dealing with the "International Convention for the Safeguarding of Intangible Cultural Heritage" adopted in 2003. Accession to this treaties without putting necessary legislation in a harmonised manner will not help South Africa. Heritage Act/Heraldry Act should not only concentrate on **tangible cultural heritage**, and Plant Varieties Act/Health legislation should be informed by these treaties and there must be a harmonised approach at country level.
- Regional organisations such as the African Union (AU), Pacific Region, and Andes Nations also deal with Model legislation that deals with IP and customary laws for protecting TK. The AU has some reservations (correctly so) on the IP system protecting IP.
- If the Bill becomes a law, SACU, SADC and AU at large may be the best forums to follow suit. This may assist since certain tribes and IK are **trans-boundaries**. These international and regional trends are influencing member states to take into account the trends when they legislate for IP. The United States, India, New Zealand, Australia, South Africa and the European Union (EU) have somewhat dealt with IP-type protection for traditional knowledge. In this regard, South Africa has passed the Patents Amendment Act, 2005 due to the fact that discussion on protection of IP, in particular patents in relation to CBD were "concluded" at international level.



Discussion

“INTERNATIONAL IP SYSTEM” INFORMING NATIONAL AND REGIONAL POLICIES LAWS.

Domains of IP:

- A. Trade marks
- B. Patents
- C. Copyright
- D. Designs
- E. Geographical Indications
- F. Indigenous Knowledge
- G. Trade Secret

In the main, in South Africa, we emphasise A to E as domains of IP. Geographical Indications is also dealt with under trade marks law and not as a stand alone category of IP.



Discussion

- It is argued that the first step is to provide protection mechanisms if exploitation is to take place in a secure environment. In this regard the dti will approach Parliament to approve the Bill on the Protection of indigenous knowledge through the IP System. Interdepartmental consultation is complete, national consultation took place, Bill certified by State Law Advisers, depending on the programme of Parliament, the Bill may be processed during 2009/2010 Parliamentary year.
- WIPO Model Legislation and experiences from Australia, Norway, Malaysia and OAPI may help. In the area of copyright, OAPI, Malaysia and Norway have resorted to contemporary work on the “original” folklore and IP can be claimed on the contemporary work, not the original work.
- All member states of WIPO can also do the same in their national legislation.

Domains of IP: A. Trade Marks

- Business enterprises such as cooperatives, trusts and companies will be able to register **IK-type-trade mark** and exploit them. Certain commentators to the Bill suggest that the **State should be the owner of “community” trade marks**, but benefits that flow from exploitation should go to the **relevant community that could claim to have developed the “original” trade mark**. The rationale is that communities do not have capacity to protect their collective IP and negotiate the benefits. Communities that own the “original” IK-Trade mark must do the following: register their trade mark, licence their IK-Trade mark, give a prior informed consent (PIC) before licensing or allowing a third party to use a portion of their trade mark, negotiate for a royalty fee and preferably form an organisation to manage these types of IK-Trade marks. They should also identify sectors that they want to use such a mark when they register. All these activities may be performed by the Delegated/Supervisory Authority if such a decision is taken. **The Delegated/Supervisory Authority may also provide an alternative dispute procedure (ADR) as the target group of this Bill are the “indigent” people of South Africa.**
- From the business perspective, trade marks may be used in all sectors. Nationally trade marks have been used to “promote”/“brand” products. If international markets are to be secured, there is a need to seek protection of trade marks in different jurisdictions. Small businesses can prepare themselves for export markets by securing protection of trade marks in those jurisdictions. This may be started at IBSA jurisdiction. FAIRTRADE example.

- **Certification and Collective Marks** can also be used in this area. Good examples can be found in Mexico, namely Pueblo. Jablonec/Nison are two examples of Crystal Ware from the region of jablonec. Modranska Majolica, hand-painted pottery made in the town of Modra, Slovakia. This is so also in the area of Geographical Indications. Let it be recalled that international agreements are in place to recognise this type of phenomena, namely, the Paris Convention for the Protection of Industrial Property, 1883, Madrid Agreement for the Repression of False and Deceptive Indications of Source of Goods and Lisbon Agreement for the Protection of Appellations of Origin.
- IK holders can also use **cultural names** in the area of **trade marks/geographical indications**. These names may be registered under legislation protecting IP-type issues (defensive registration). The state may unilaterally declare these names geographical indications and request reciprocity from other nations. This can be done through the Merchandise Marks Act, 1941). Rooibos/honey bush teas are good



Discussion

- These cultural names/symbols or “intangible cultural heritage” if defined as such under the National Heritage legislation should not be used without permission. In this regard, Malaysia and OAPI define well what should constitute “intangible cultural heritage”, e.g. any form of expressions, sayings, musically produced tunes, notes, audible lyrics, songs, oral traditions and theatrical plays. There is a need for our national heritage legislation to talk to IP legislation. In the area of copyright, the lifespan of folklore will be perpetual whilst the lifespan of the contemporary music will be time-bound. **Further**, the Minister of Trade and Industry may also declare such names and “**tangible cultural heritage**” as “**prohibited marks**”. If a “portion” or a picture of such symbols are to be used with certain features, **IP MAY BE CLAIMED ON THE “NEW PRODUCT”(DERIVED WORK FROM THE ORIGIN) BUT NOT ON THE ORIGINAL CULTURAL NAME/SYMBOLS.**
- The above shows that the IP system alone cannot properly protect IK in certain circumstances. This is also true where other legislation such as Biodiversity or heritage legislation do not speak to the IP system.
- In this regard examples under common law and judicial activism can be found in Australia and New Zealand. Judicial activism alone is not enough, parliamentary intervention is a *sine qua non* for effective protection. Commentators from Australia suggest that South Africa is on the right track and Parliament of South Africa should intervene.
- Certain expressions such as “indigenous knowledge” should not be defined, but the courts will have to purposely interpret what constitute “indigenous knowledge”. This is also confirmed in a recent international convention.



Discussion

- A trend is growing that trade marks and Geographical indications are associated with IK systems. Certain trade marks may have to abide with the IK legislation that may regulate certain names or symbols associated with local communities. In this regard, benefit sharing agreements may have to be entered into between the users of such symbols and the indigenous owners.
- Licensing from the community/State may be the best form of such a relationship. Names such as Rooibos and Honeybush tea may qualify as geographical indicators and should Government move to the direction of declaring them as such, business and local communities should situate themselves accordingly. Collective management of geographical indications and trade marks may be introduced from the perspective of protection of IK through the IP system. France may also provide enough experience in the area of wines.
- It should be noted that there are patents that can be found around Rooibos tea, Sutherlandia, Hoodia and Honeybush tea. Pharmaceutical and those that specialise in beauty may need to work with local communities. The Patents Amendment Act and the Biodiversity Act will be applicable.
- Databases of IK may be developed without undermining IK (Development of WIPO Toolkit). This matter also indict harmonisation of IP with health legislation.

Domains of IP:

B. Patents

- In the area of patents, indigenous communities have much to offer. There are patents that are associated with cultural painting of clay utensils and artistic work in skins, clothing and other textile material. In the agricultural sector, traditional communities also contribute in supplying their knowledge for inventions. The pharmaceutical industry/chemical/biotechnological industries are not spared! In the beauty and food security and health sectors traditional communities have also contributed. EXAMPLES, Project P57, Malaria drug and patents associated with Sutherlandia.
- Patents associated with IK can also found in medicines. The Commission of WHO on IP, Innovation and Public Health may also have a bearing in this area. South Africa is mindful of access to medicines.
- The industrial Policy of the dti has recognised the Pharmaceutical Industry as one of the industry to be nourished, and therefore there is a need to map the way forward in relation to the patent law in this regard. Tourism and cultural industries may have to follow the sane route.

- Protection of IK using patents law is well established in South Africa. Industry and state organs should brace themselves to balance their interest in this regard and both parties should benefit. Monitoring and evaluation on the Patents Amendment Act, 2005 may be conducted and all relevant patents that are non-compliant should be dealt with accordingly.
- Research institutions may have to balance the application of the Patents Amendment Act, 2005, Biodiversity Act and the Publicly Financed Research Act, 2008. Development of Databases as discussed earlier should be informed. Any disharmony should not be allowed.



Discussion

Domains of IP:

C. Copyright

- In the main collective management of copyright will be introduced in the current copyright law. This is an issue of strengthening the bargaining position of holders of copyright.
- Folklore forms part of “intangible cultural heritage” and therefore the State must have paternity over them. Permission to use has to be sought from the Designated/Supervisory Authority/Community. IP can be claimed on the contemporary work or derived work from folklore, but not on the original work.
- Benefit sharing agreements are to be entered into and relevant community will have to benefit.
- Exceptions to use will be catered for, e.g. for personal use, fair use/dealing, education and research.
- WIPO-UNESCO Model, Tunis Model Law, OAPI and Australian approach by the courts will provide useful guidance.



Discussion

- **D. Designs, Geographical Indications and Traditional Knowledge.**
- Same principles espoused under A, B, and C above apply.



The Bill introduces “registration” of IP-IK type

- All IP that have an IK component will have to be “registered” somehow and a sub-database will have to be created.
- The sub-databases will form part of the IP database.



- Legislation dealing with the E-Commerce environment also deals with “cyber-squatting” and therefore IK holders should also be protected in this regime.
- Laws dealing with the protection of IK/IK-type (other than the IP system) may be introduced by other departments and may have a bearing on IP.
- The Industrial Policy and Trade Policy may necessitate IP/IK review.



3. International Trends

- Intergovernmental organisations as described in the background information are tackling these issues. Others have concluded treaties on many issues but the process in WIPO and the WTO is marred with the differences between developed and developing countries. However, as mentioned earlier, issues of traditional knowledge, geographical indications and protection of state emblems will take place even if there is no solution in these two organisations. Trade negotiations at bilateral and regional levels may change the landscape.
- Development Agenda and IP is positively concluded and let us see how the implementation of it through treaty and legislative amendment develop.
- The International Treaty on Plant Genetic Resources provides for protection of IK in the agricultural sector and the dti requested the Department of Agriculture to ratify this treaty and amend its legislation accordingly. Failure to do so will defeat scheme of things.
- DOH should consider protecting "confidential information" for traditional healers where they chose to protect themselves through trade secrets in clinical trials. DAC must consider declaring intangible and tangible cultural heritage to be owned by the state and the IP Amendment Bill should talk to such. DEAT has supported the Bill and they may consider reopening discussion on the paternity of all genetic and biological resources based on the Convention on Biological Diversity (CBD).



4. Regional Trends

- Various regions of developing world are legislating on many issues that have been mentioned above.

5. National trends

- South Africa is a developing country with a mixed economy and is trying to balance competing interest of various stakeholders. In the area of the IP system protecting traditional knowledge, countries such as the US (traditional cultural expressions), India, Brazil, Peru and Panama have moved in the right direction. Australia is reach in court judgments based on common law and South Africa should have parliamentary intervention.



ISSUES...

ISSUES COVERED BY THE POLICY AND BILL:

- Intangible Cultural Heritage owned by the state/communities
- Indigenous knowledge in the area of agriculture, health and biodiversity to be protected.
- National Council should also perform the function of dispute resolution
- Exceptions/exemptions/limitations allowed also in this Policy/Bill.
- Compilation of Databases should be informed as described above.



Issues...

- International and regional developments considered but dealing with national issues.
- Delegated/Supervisory Authority/community to give permission
- Do not define what constitute “indigenous knowledge” as is internationally and SA courts are progressive enough to deal with this issue.
- TIP not necessarily to be in writing in the Model Legislation of UNESCO and WIPO.
- Deal with cross-border issues and benefit sharing mechanism.



Issues...

- Policy suggests that SA Government should influence other governments to incorporate the tenets of the Policy and the Bill in intra-regional and international relations.
- Judicial intervention in South Africa is rare and a political/parliamentary intervention is needed.
- Licensing of IK is favourable than deed of assignment. PIC must be obtained and benefit sharing agreements must be in place.
- Trade secret principles or protection of confidential information must be in place.
- Wrong to coerce people to disclose their IK into an unprotected database. Not everything should be in the public domain.
- Protection of IK is recognised by the Constitution Act.



Discussion

6. Recommendations

- Pharmaceutical/chemical/biotechnological sector is officially recognised in the Industrial Policy and this is also an indictment for this sector to work closely with IK-sectors that may be regulated by different Government departments.



Conclusion

7. Conclusion

- The IP system may be exploited fairly without offending the interest of IK holders. However, the IP system has its limitations and other systems such as customary laws should be expedited. South Africa should understand its duty to provide leadership in the region and internationally.
- Other departments should be amenable to consequential amendments of their legislation through this Bill and Policy or should amend during this Parliamentary process.
- Enforcement agencies should situate themselves in enforcing laws that might not have been in the equation of orthodox IP.

