The Protection of Indigenous Traditional Knowledge through the Intellectual Property System and the 2008 South African Intellectual Property Law Amendment Bill*

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Abstract: The discussion of Traditional Knowledge as a subject of intellectual property protection continues to take centre stage at different fora. It is particularly relevant for developing and least developing countries whose Traditional Knowledge mechanisms continue to be exploited without accruing any benefits. The situation in South Africa is not different. The South African Department of Trade and Industry (Dti) is spearheading efforts to create a legal framework that seeks to protect and promote Traditional Knowledge using existing intellectual property law mechanisms. Through this Bill, South Africa is seeking to protect Traditional Knowledge beyond the area of patents. The challenge for the Bill is to cover all aspects of Traditional Knowledge. This has already proven to be difficult as indicated by the outcomes of one of the consultation workshops with various stakeholders (University professionals and indigenous communities). Furthermore the Bill will have to be mindful of the manifestations of intellectual property at regional (SADC, SACU and AU) as well as the international position (WIPO, TRIPS and WTO). This paper seeks to measure the extent to which the Bill will protect Traditional Knowledge and the possibility of its use as a model for the region and the developing world.

1. Introduction

The protection of Traditional Knowledge using the intellectual property regime has been a subject of much debate at national, regional and international circles. The South African Department of Trade and industry [1] through the Bill has tried to adopt the intellectual property style of traditional knowledge protection. The Bill advocates for equal protection across the board, from trademarks, patents, copyright, designs, geographical indications and Traditional Knowledge. The Bill seeks national, regional and international jurisdictions to respect the intellectual property systems that respect Traditional Knowledge and folklore. This paper will demonstrate that the intellectual property system is not the only or best system to protect traditional knowledge. Furthermore, the Bill promotes the use of traditional knowledge across all government departments. However, this paper focuses on the protection that the Bill offers to traditional Knowledge.

1.1 Problem statement

From the onset, it is important to realise that intellectual property law does not offer protection to traditional knowledge. Traditional knowledge is not considered as an intellectual property protection[2]. As such, the patentability of products or processes derived from traditional Knowledge poses a number of critical questions associated with compensation for Traditional Knowledge and protection against future uncompensated exchange of the knowledge. In South Africa, the current intellectual property system allows individuals to protect their inventions and intellectual property rights, but does not allow communities to collectively protect their traditional knowledge in all areas. In those areas where collective intellectual property registration is possible, communities are not exercising their rights.

Internationally, Article 27 (1) of the Trade Related Aspects of Intellectual Property[3] Agreement, in its provisions on what is patentable subject matter glaringly excludes any possibility of patenting Traditional Knowledge. This is especially so when one considers the requirements of novelty, inventive step and potential for industrial application. Article 27 (2) lays down circumstances under which inventions maybe excluded from patentability as for instance the necessity to maintain public order or morality. On the question of the inclusion of

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[1] Hereinafter referred to as the Dti
[2] Greaves, "Tribal rights" in bush and Stabinsky (Eds) Valuing Local Knowledge: indigenous people and intellectual property Rights (Island Press, Covelo, 1996)
[3] Hereinafter referred to as TRIPS

traditional knowledge, requirements such as disclosure of origin and so forth, would greatly conflict with the TRIPS Agreement by creating another substantive condition on patentability beyond those already provided by the latter.

The aim of this paper is to establish the difficult task before the drafters, legislators and other stakeholders in the making of this law. The challenge is to create legislation that seeks traditional knowledge protection at the highest level notwithstanding the already existing criteria that protects other forms of intellectual property. Furthermore, the definition of traditional knowledge is a disputed matter; hence the difficulty of setting out the parameters and boundaries of what to include in this Bill as all that fall under traditional knowledge. Ultimately, the Bill has to take heed of all national interests, balance them with the regional trends and most importantly seek compliance and compatibility with world legal bodies like the WIPO, WTO and TRIPS.

2. Background

In November 2004, the Indigenous Knowledge Systems (IKS) policy was adopted resulting from efforts to create a guide for the recognition, understanding, integration and promotion of South Africa's wealth of Indigenous Knowledge resources. The Bill emanates from the policy and seeks to protect indigenous knowledge, holders of such knowledge against exploitation. This was meant to ensure that communities receive fair and sustainable recognition and where appropriate, financial remuneration for the use of this knowledge be provided. The framework of the Bill will describe how the various forms of the South African intellectual property system of trademarks, geographic indications, patents, designs and copyright can be used to protect traditional knowledge systems. The international intellectual property system has shaped the national and regional policies and laws.

2.1 International Practice in Protecting Traditional knowledge

The debate on protection of indigenous knowledge is topical especially for developing and developed countries. Intergovernmental organisations, such as UNESCO, WIPO, WTO, UNEP and UNCTAD, have opened debates on the possible protection of indigenous knowledge using the intellectual property system. Led largely by debate from developing nations, UNESCO formulated the Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions and this has been adopted recently by the member states.

Unfortunately, negotiations at the WTO around amendments to the TRIPS Agreement on Traditional Knowledge have collapsed. Article 27 (3) (b) of the TRIPS empowers member states to consider protection of Traditional Knowledge using intellectual property systems. During discussions on the review of the TRIPS agreement at Dohar, Qatar, developing countries proposed amendments of Article 27 (3) (b) to cater for the protection of the use of Traditional Knowledge that leads to an invention. Developed nations are opposed to this, leading to the collapse of the negotiations. The WIPO has established an Intergovernmental Committee (IGC) to initiate discussions on the protection of Traditional Knowledge, genetic and biological resources and folklore using intellectual property systems. Although treaties can protect these issues under discussion, many developed nations are opposed to formulation of such treaties and negotiations are on the verge of collapse.

The United Nations Environment Programme (UNEP), which is the custodian of the convention on Biological Biodiversity (CBD), has requested WIPO, WTO and FAO to consider protection and benefiting of local communities that have contributed to an invention or intellectual property development. WIPO convened the ICG mentioned above and UNCTAD has voiced support, emphasising the economic value of Traditional Knowledge systems. Regional organisations such as Asia and the Pacific and the African Union have started to issue treaties and conventions regarding the regulation of Traditional Knowledge. Member states of these regions are busy formulating legislation.

2.2 The South African Scenario

The protection of Indigenous Knowledge in South Africa cannot ignore the international and regional trends, but protection within the South African context is vital and achievable. The Bill proposes protection under the intellectual property system, databases, sui generis laws and registers. The Dti initiated amendments to the Patents Act 1978, now the Patents Amendment Act 2005. The Patents Amendment Act 2005 is being used at the WTO and to a certain extent at WIPO as model legislation in this regard. Trademarks, copyright, designs and geographical indications are earmarked to provide similar protection to traditional knowledge.

The Dti has approached cabinet and the Portfolio Committee for trade and industry for approval and initial briefing on the policy and the Bill were published on the 5th of May 2008 in the Government Gazette no. 31026 for public consultation. The closing date for comments was 15 June 2008[4]. The public consultations took the form

[4] The Policy and the Bill can be accessed on www.thedti.gov.za

of bringing together students, academic, traditional leaders, and indigenous communities. Discussion on the deliberation at this consultation session is captured in this paper. The Dti used Universities to coordinate the consultation sessions.

3. Domains of Intellectual Property, extending protection to traditional knowledge

The following discussion focuses on the extent the Bill has managed to use the intellectual property system in its current form with minimum changes made.

3.1 Trade Marks

The Bill invites communities that own the original traditional knowledge trademarks to licence such trademarks. They need to comply with all licensing requirements for example prior informed consent. The communities must negotiate for a royalty fee and must preferably form an organisation to manage these types of Traditional Knowledge-trademarks. From a business perspective, trademarks may be used in all sectors. International markets for local products will be sought and protection in those jurisdictions can be obtained. Small businesses can prepare themselves for export markets by securing protection of trademarks/geographical indications, e.g. "Rooibos/honeybush tea" that has both a reputable domestic and international market. Traditional knowledge holders in the area of Trade Marks/geographical indications can also use cultural names or signs. These names may be registered under legislation protecting intellectual property type issues. Rooibos tea is a good example of a geographical indicator since it can only be grown in South Africa, Western Cape in the Cederberg Mountains. The registration of rooibos tea as a trademark in the USA resulted in the blockage of exports of rooibos tea from South Africa into the USA market. The Dti is currently helping with the deregistration of this trademark. The government should move fast and declare rooibos tea a geographical indicator (GI). Trading partners should be approached to recognise the new GI.

3.2 Patents

Traditional communities have a lot to offer in this area. There are patents that are associated with cultural paintings of clay utensils and artistic works in skins, clothing and other textile material. In the agricultural sector, traditional communities also contribute in supplying their knowledge for inventions and traditional farming methods. Traditional communities have also given valuable contributions to the pharmaceutical sector. The Khoi and San people have been using Hoodia plants for suppressing thirst and hunger. The community worked with the Council for Scientific and Industrial Research[5] and their knowledge led to an invention (P57) of the slim pill. Recently the European Patent Office (EPO) granted a patent based on this Traditional Knowledge. The CSIR and the Khoi/San have a benefit sharing agreement. The Patents Amendment Act of 2005 now regulates this regime. The Dti has identified the pharmaceutical industry as needing nourishment.

3.3 Copyright

The Bill is seeking to strengthen copyright laws relating to folklore music. The folkloric music has to be owned by the community or the government for anonymous folklore. This will be realised by a drive to research and compilation of folklore databases. The community and government can negotiate benefit-sharing agreements flowing from the use of this folklore.

3.4 Designs, Geographic indications and Traditional Knowledge

Similar approaches as indicated in the discussions on trademarks, patents and copyright will be adopted. Communities have to agree on how to manage paintings, designs and related artefacts.

[5] Hereinafter referred to as CSIR

4. Other forms of Protection

4.1 Potential Sui generis protection models[6]

In an effort to extend protection to Traditional Knowledge, various countries have adopted existing IP systems to the needs of Traditional Knowledge holders through sui generis measures. These take different forms; for example, the Chinese have a team of patent examiners specialising in traditional Chinese medicine. South African is seeking to join several countries like Peru, Costa Rica, Portugal and Thailand in adopting sui generics laws. The approaches available in the literature can be broadly divided into Defensive and Positive groupings. While Positive protection would refer to the acquisition by the traditional knowledge holder of an intellectual property right to such as a patent, Defensive protection refers to provisions adopted in the law or by a regulatory authority to prevent such claims to knowledge, a cultural expression or a product being granted to unauthorised persons or organisations. The distinction between the two is not always clear in the sense that positive mechanisms might actually give rise to defensive effects.[7]

4.2 Certificates of Origin

This is a defensive approach to the problem that emphasises disclosure of Traditional Knowledge origin regarding genetic resources as an accompaniment to the patent application. The aim of the proposal is to ensure fair and equitable benefit sharing by seeing to it that Traditional Knowledge was acquired in accordance with bio diversity access and benefit sharing regulations in the source country.[8]

The disclosure has weak, medium and strong forms. The medium form emphasises the mandatory nature of disclosure and countries like India have introduced this into their legislation through the Patents (Amendment) Act, 2002, which provides for the revocation of patents for incomplete specification, or in cases of wrong mentioning of source in a geographical context of biological material used in the invention. If, the invention so far as has been claimed was anticipated having regard to the knowledge oral or otherwise available within any local or indigenous group in India or elsewhere.

Similarly, the amendment denies as innovation anything that is a result of duplication of known properties or traditionally known components. This is a laudable effort since it makes it hard for anyone to free ride without acknowledgement of origin. This mode tends to allude to the novelty requirement as well, that no one should masquerade as an inventor if in fact there is nothing new about the invention. It therefore becomes difficult to accept the USA position that protection of traditional knowledge would in fact impose another substantive condition for patentability. As for the source of genetic material, it is quite hard to understand why inventors would not be required to indicate where they got it from and would hardly be burdensome in most cases.

4.3 Transforming Traditional Knowledge into Trade Secrets

Efforts are being made to make sure that traditional knowledge may be transformed into trade secrets[9]. The TRIPS Agreement has, generated new opportunities to develop alternative intellectual property rights regimes that are ethically, socially and environmentally appropriate to the needs and conditions of indigenous and local people's knowledge in developing countries. Under Article 27.3 (b) of the TRIPS Agreement members may establish effective *sui generis* regimes. Developing countries should quickly tap into this opportunity by devising and promoting non-patent measures[10].

4.4 Innovative Databases

There are limited numbers of research materials on local innovative databases of Traditional Knowledge. Graham Dutfield has contributed a lot to the current discussions on local innovative database and the following discussion is made largely based on his works.

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[6] Sui Generis is a Latin term meaning 'of its kind' and is used to describe something that is unique or different. What makes an IP system Sui generis is the modification of some of its features so as to properly accommodate the special characteristics of its subject matter (traditional knowledge) and the specific policy needs which led to the establishment of a distinct system.

[7] See note 2 above, at 18.

[8] See Hendrick, F. v. Koester, and C. Prip (1993) "Access to genetic Resources, a legal analysis"

[9] Posey and Dutfield, *Beyond Intellectual Property* (International Development Research Centre, Ottawa, 1996)pp. 3 and 22-41.

[10] Dr John Mugabe, Intellectual Property Protection and Traditional Knowledge: *An Exploration In International Policy Discourse,* available at the African Centre for Technology studies, Nairobi Kenya.

Innovative database involves defensive protection measures that provide possible means of identifying contributors to intellectual property rights (IPR) protected plant varieties and might help to prevent unauthorized appropriation[11] As a defensive protection measure innovative database serves as evidence of prior art.[12]

Innovative databases can also involve positive protective measure which operate as property regime and vests exclusive right in the traditional community, of which the right to refuse, authorize and determine condition for access to the Traditional Knowledge are fundamental.[13] It can also operate as a liability regime when the use of the Traditional Knowledge is allowed without the prior authorization of the right holders while ex-post remuneration is still required.[14]

The primary role of innovative local database of traditional knowledge is the institutionalisation of the protection of intangible property rights of traditional communities. Dutfield identified that such databases can also prevent the disappearance of Traditional Knowledge. Through documentation, improved understanding of Traditional Knowledge can be gained[15.] Despite the scepticisms and problems associated with local innovative database, many developing countries have adopted the systems. Nongovernmental organisations are playing a significant role in this regard. It is submitted that even though databases are not effectively providing positive protection mechanism their use in the defensive protection of Traditional knowledge is vital since they provide the documentary proof for prior art.

5. Improvements brought by the new Bill

The Amendments to the **Performers Protection Act, 1967**, section 1 has the following improvements:

Section 1 (1) (c) 'indigenous community' meaning "any community of people currently living within the borders of the Republic, or which historically lived in the geographical area currently located within the borders of the Republic"

The mention of indigenous community is a welcome improvement. However, it is still debatable on who qualifies to be indigenous. The other query concerns cross boarder communities who now reside in neighbouring countries. How will these communities be affected by a foreign Bill and how will they benefit from their Traditional Knowledge exploitation in South Africa. An example can be drawn from the Khoi/San community who are still hunters and gatherers. Their place of habitation is not permanent as they often find themselves within the borders of South Africa, Botswana and Namibia.

Section 1 (g) has the addition of 'traditional performance' meaning a performance which is recognised by an indigenous community as a performance having an indigenous origin and traditional character. There are no defined criteria on what may be deemed as traditional performance. Traditional character may vary from one community to another whereas the Act applies nationally. Traditional performances have become so generic in South Africa. Most of them cannot be identified with specific communities. An example can be drawn from the famous Lion king play where the songs and dance have elements of traditional performances not just from South Africa but also from other parts of Africa. How are those people going to be compensated?

Section 13 (b) (1) has incorporated 'national databases' of traditional intellectual property contemplated in section 40c of the Copyright Act, 1978. Subsection (2) gives right to any indigenous community or their representative the right to submit to the council a request together with the appropriate information for a traditional performance to be recorded in the database. Explaining to indigenous communities what databases are may prove very difficult. Some of their Traditional knowledge is incompatible with technological advancement of databases. Such traditional knowledge may need to be altered to fit database criteria. This may lead to loss of originality, a key to intellectual property protection requirement. The issue of representation is a grey area since bogus representatives can exploit the communities.

Amendment to Section 1 of the Copyright Act of 1978 includes subsection (1) definition of 'author' relating to (i) a traditional work. This will prove to be difficult for rock paintings whose authors are unknown. The indigenous communities may have painted as a community over extended periods. The 'authorship title' is more suited for modern written work; a more compatible title may be suitable for traditional artwork.

'Traditional work shall not be eligible for copyright unless it has been written down, recorded, represented in digital data or signalled, or otherwise reduced to material form or communicated to the public". Some traditional work will be difficult to subject to these modern methods of storage without changes. Some superstitious communities will not allow their work to be recorded. Such transformation could be a taboo.

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[11] Graham Dutfield, Intellectual Property Rights, Trade and Biodiversity: Seeds and plant Varieties, Earth scan Publication Ltd., London (2000) p. 81

[12] UNCTAD/ICTSD, Protecting Traditional Knowledge and Folklore: A review of progress in diplomacy and policy formulation, 2002, p.31

[13] Ibid

[14] Ibid p.32

[15] Graham Dutfield, Protecting and Revitalizing Traditional Ecological Knowledge: Intellectual Property Rights and Community Knowledge Database in India, *Perspective on Intellectual Property, Vol.6* (Sweet and Maxwell, London 1999), p. 109

Section 40 of the Act, 98 0f 1978 states that the national council shall be established by the Minister. This will be the national council for traditional intellectual property. The council shall consist of 12 members appointed by the Minister. In these appointments, the Minister may consult other Ministers responsible for agriculture, arts and culture, environmental affairs and science and technology. This seems to be a narrow selection of specialities considering the fact that Traditional Knowledge is at the centre of the Bill. The council is not representative enough to cater for all stakeholders, especially the traditional leaders who are deemed custodians of Traditional Knowledge. Section 40b (1) gives the council exclusive powers to advise the Minister, advise the Registrar of patents, copyright, trademarks and design on any matter relating to the registration of intellectual property as against Traditional Knowledge. Such a duty needs to be extended to other experts in the field of Traditional Knowledge. Experts in Traditional Knowledge may not have acquired modern type of education.

6. General shortcomings of the Bill

During the public hearings at the North West University[16], the following issues were raised by Academics, traditional leaders, indigenous community representatives and students.

(i) The Bill was considered too bulky, covering too many areas of intellectual property. Other proposed separate Bills for each and every of the following, patents, trademarks, copyright, designs, geographic indications and traditional knowledge.

(ii) The role of the individual in the consultation process is not defined. The impact of individual suggestions towards the Bill could easily be ignored.

(iii) The traditional communities did not understand the role of databases and ownership of such mechanisms.

(iv) The registration processes still follows the first come first serve approach. This can be abused by those with resources and have access to the registration office.

(v) The position of community representatives is not clearly defined in the Act. Some prefer the use of traditional leadership but others have reservations. This is a result of the corrupt nature of some of these traditional leaders who may pursue selfish interests.

(vi) Some Academics preferred a Bill that is more African oriented, with less of Western style of intellectual property type of protection.

(vii) The Chiefs are concerned by the fast deteriorating and dissolving nature of the traditional community owing to the effects of urbanisation and migration. One can hardly find a completely traditional community that has not been infiltrated by foreigner elements.

(viii) Some communities exist across two or more jurisdictions rendering the need to provide benefits under a South African initiative complex.

(ix) Some Traditional Knowledge does not belong to an individual community. Who is entitled to the benefits for such exploitation?

(x) Some stakeholder felt left out of the drafting of the Bill with the chiefs feeling they are being marginalised.

(xi) Some communities feel that they need and should be afforded other methods of protection other than the Bill.

(xii) They prefer other forms of testing besides Western laboratory tests for traditional medicines.

(xiii) Traditional communities feel IKS protection is perpetual; there is no need to follow a renewal process that is cumbersome.

(xiv) The essence of geographical indication can be questioned in an environment that share common names and culture. Some people refuse to be identified with certain regions.

(xv) The Bill is silent on protection of traditional healing methods that are associated with taboos. They resist the influence of Western technology.

(xvi) Research on traditional foods is lacking in the Bill.

(xvii) The Bill is silent on resolution of disputes. It is highly likely that dispute will rise when communities and individuals fight for benefits. Provision of conciliation and arbitration according to the Arbitration Act of 1956 could help the advisory purpose of the council.

(xviii) The Bill must then thus indicate and state the terms of reference of the Council with regard to alternative dispute resolution.

(xix) Mechanisms of dispute resolutions must accommodate both indigenous and Western conflict resolution mechanisms.

(xx) Council membership has to be based on expertise. They should be chosen from Communities who possess traditional knowledge.

[16] This public consultation was held on the 5th of June 2008 at the North West University.

7. Conclusion

The protection of Traditional Knowledge as a form of intellectual property rights holds the key to the majority of South Africans' participation in the national, regional and global economy. Under the old intellectual property regime, misappropriation of individual and community Traditional Knowledge took place and continues to at the behest of certain quarters of the economy. The Bill presents a fair attempt at trying to protect Traditional Knowledge using the orthodox intellectual property type protection. Notwithstanding the extent of several weaknesses of the Bill as discussed in this paper, the Bill demonstrates that the intellectual property system can be exploited fairly without offending the interest of Traditional Knowledge holders. More importantly, the door is open for the use of other methods of Traditional Knowledge protection.

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