

Intellectual property

Where angels fear to tread

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Folklore and other forms of what has become known internationally as “traditional knowledge,” (that is artwork, stories and legends, traditional medicinal preparations, traditional symbols and the like originating from indigenous sources), have become items of commercial significance in the modern world. These forms of “property” are generally in the domain of indigenous communities and ethnic groups in many countries in Africa, including South Africa, and in countries such as New Zealand, Australia and Canada.

Traditional communities have cast envious eyes in the direction of intellectual property owners and have felt that their works should enjoy similar protection and thus the ability to earn revenue. There is general consensus internationally that this is a sustainable point of view but the question of how to provide protection for this work has been perplexing and, despite being under investigation for several years by the World Intellectual Property Organisation (WIPO), no clear cut solution has been forthcoming.

Parallels have been drawn between intellectual property and traditional knowledge and, at first blush, the solution to the problem appears to lie in integrating traditional knowledge into the intellectual property regime. However, this approach does not bear analysis or scrutiny because, while there are similarities between the two classes of works, there are also very significant fundamental differences. Accordingly, in general it is not seriously contended that countries can simply write protection for traditional knowledge into their intellectual property statutes. The more fancied solution is to create a *sui generis* form of protection for traditional knowledge loosely based on the model of intellectual property laws.

THE SUIT DOES NOT FIT

The main problem in simply incorporating protection for traditional knowledge into intellectual property laws lies in the different fundamental departure points of the two forms of protection. Intellectual property law is based on the philosophy that the creative person should be rewarded for his creative endeavours in order to enable him to gain financial benefit from his efforts and thus create an incentive for him to create further and better works. At the same time, society as a whole should also be in a position to derive benefits from these creative efforts. In order to meet these diverse objectives, a system was created whereby the creative person is afforded a practical monopoly in the use and commercial exploitation of his work for a limited period, after which the work falls into the public domain and is freely available for use by, and the benefit of, all.

The duration of the practical monopoly varies according to the nature of the species of intellectual property; in the case of a patent it is a period of 20 years, in the case of a design, it is a period of 15 years; in the case of copyright it is a longer period, generally the lifetime of the creator and a further 50 years; and in the case of a trade mark protection, extends for an unlimited series of 10 year periods for as long as the trade mark is being exploited.

All forms of intellectual property require a creative step, be it original effort

in the case of copyright, novelty in the case of a patent or design, etc before protection becomes available. The theory is that the general public is not really being deprived of anything where a practical monopoly in the use of something is being granted for a limited period, if that item did not previously exist and would not have come into existence but for the creative efforts of the originator. The public benefit comes into being once the period of the practical monopoly has reached an end.



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In the case of traditional knowledge the situation is entirely different.

What is sought to be protected is something which has already been in existence for a long time and in respect of which the circumstances of the creation are unclear. The work is already in the public domain, and has been for a lengthy period. What is now sought to be achieved is that the works should be extracted from the public domain and prospectively be made the subject of a practical monopoly. In other words, the philosophy of intellectual property is neatly reversed in the case of protection for traditional knowledge.

It is this dichotomy in the two types of works which makes intellectual property laws unsuitable for providing a readymade solution for protecting traditional knowledge. The different departure points and philosophies make many of the provisions of intellectual property laws entirely unsuitable. This position is widely accepted internationally and is the root cause of why legal scholars are grappling for a suitable theory for protecting traditional knowledge.

SOUTH AFRICAN INITIATIVE

Undaunted by this, the South African Government is rushing headlong into a situation where angels fear to tread. The Intellectual Property Laws Amendment Bill, 2007, is quite well advanced in the legislative process and is expected to come before Parliament next year. Despite widely voiced and severe critical comment from informed sources, including no less than Justice Louis Harms, the Acting Deputy President of the Supreme Court of Appeal

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and an internationally acknowledged intellectual property expert, government continues to strive for the impossible by simply integrating traditional knowledge into all forms of intellectual property law.

So, for instance, it sought to introduce into the Copyright Act, a new species of work eligible for copyright, known as “traditional knowledge” despite the fact that the nature of the works sought to be protected and the form of protection is at odds with the basic principles of copyright law. This in itself would be sufficient reason to steer the bill in the direction of a scrap heap but the position is compounded by the fact that by trying to fit the proverbial square peg in the round hole, government is undermining well established and clear principles of copyright law.

If the bill becomes law and the intellectual property statutes are amended in this manner, South Africa will embarrass itself in the international community and the courts will have to deal with legislative provisions which are basically nonsensical. Clearly this situation should be averted; government should withdraw the bill entirely and commence afresh with efforts to provide some form of protection for traditional knowledge. The irony is that without exception, commentators on the bill have welcomed the notion of protecting traditional knowledge, but have disagreed vehemently with the unprecedented approach of simply incorporating such protection into existing intellectual property laws.

South Africa has ventured into this blind alley mainly because, to date, no coherent theory for protection of traditional knowledge has been advanced anywhere in the world. Accordingly, the first priority for achieving the goal of affording proper protection to traditional knowledge is to develop such a theory. So far, all the efforts have centred round trying to adapt the intellectual property theory to the circumstances of traditional knowledge. Perhaps a different departure point is necessary.

A NEW THEORY

What follows is a theory based on the common law delict of passing-off, for protecting traditional knowledge. It is formulated as the kernel of *sui generis* legislation in order to achieve the objective of protecting traditional knowledge:

“(1) No one may commercially exploit an item in the nature of intellectual property if it is likely that the public will perceive that such item originates or derives from a particular traditional community, or if it embodies and copies knowledge or knowhow peculiar to a particular traditional community, without paying a royalty to that community in the amount and a manner determined by the Minister of Trade and Industry.

(2) When determining the likely perception on the part of the public for the purposes of sub-section (1), regard should be had to the likely state of mind of a substantial number of the relevant sector of the public.”

Obviously such a formulation requires fleshing out and definitions and administrative provisions will have to be added to the legislation, but it is proposed that this should be the crux and the underlying theory of the proposed legislation.

This approach is very different from those so far attempted and it moves away from trying to characterise traditional knowledge as property; rather it seeks to protect it in an indirect manner without necessarily creating a right of property in an item, but invoking a form of goodwill flowing from past heritage and tradition. The effect would be that any work which borrows heavily from traditional knowledge can only be commercialised if a royalty is paid to the relevant community. Perhaps adopting an approach along these lines can break the logjam. “*Ex Africa semper aliquid novi*” (Pliny)*. ♦

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* according to the Oxford Dictionary of Quotations

Semper aliquid novi Africam adferre. Africa always brings [us] something new. (often quoted as “*Ex Africa semper aliquid novi* [Always something new out of Africa]”) *Historia Naturalis* bk. 8, sect. 42