

Representations on the draft Protection, Promotion, Development and Management of Indigenous Knowledge Bill, 2014

Submitted by

Prof Sadulla Karjiker (BSc, LLB, LLM, LLD)

Member of the IP Unit at the Faculty of Law, Stellenbosch University

(skarjiker@sun.ac.za)

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General Notice 243 of 2015 (GG 38574, 20 March 2015)

These comments are submitted pursuant to the invitation extended by the Minister of Science and Technology on the publication of the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill, 2014 (the “IKS Bill”) as Notice 243 of 2015 (GG 38574, 20 March 2015).

1 Introduction

At the outset, it is important to note that the IKS Bill’s great merit is that it proceeds from the correct theoretical basis in relation to indigenous knowledge: it seeks to provide special (*sui generis*) protection for indigenous knowledge (however that term may be defined). That fact alone makes it infinitely more appropriate than the Intellectual Property Laws Amendment Act, 2013 (the “IPLA Act”). Thus, while the comments below may appear to be highly critical of the draft IKS Bill, it should definitely not serve as some sort of indication that the approach taken in the IPLA Act was in any way superior, and should be the preferred approach. That is definitely not the case. Despite the fact that there are issues (some of a very serious nature) in the IKS Bill which require addressing before it is enacted into law, it represents the sensible, and preferred, approach to protecting indigenous knowledge.

In other words, indigenous knowledge should be protected by legislation which has specifically been drafted to deal with its unique nature, which is what the IKS Bill

seeks to do. The comments below should, therefore, simply be considered to deal with technical problems which could be addressed through a more rigorous drafting process. I will first deal with issues of overall principle which are unclear in the IKS Bill, and then proceed to comment on specific drafting issues.

2 General framework of the IKS Bill

Given the new ground being broken with the introduction of protection for indigenous knowledge, an accompanying memorandum detailing the framework of the IKS Bill and explanatory notes on its provisions would be of immeasurable assistance going forward. The IKS Bill introduces novel concepts, and a more descriptive accompanying document would greatly help it achieve its objects. It may, for example, be the case that the issues which I highlight below are in some manner already impliedly addressed. Having said that, as the IKS Bill seeks to provide protection to the unique knowledge of indigenous communities (who may not necessarily be versed in legal matters), it is important that its provisions are drafted in clear and plain language.

For purposes of these comments, I will refer to the subject matter which is sought to be protected by the IKS Bill as an “indigenous work” in order to avoid confusion with the various definitions employed in the IKS Bill. The definition which is probably the functional equivalent to “indigenous work” in the IKS Bill is “indigenous knowledge resources” (see para 3(2)). As should become clear from the comments below, greater attention should be given to the drafting of the definitions, and possibly deleting some definitions.

There is a plethora of definitions, but, fundamentally, there is no clarity on who the owner of an indigenous work is. For example, the expression “communities of practice” is used in the definitions of “Certification” and “indigenous knowledge practitioners” (in para 1), which implies that these are the owners of indigenous knowledge. The “indigenous knowledge holders” – contrary to what a reader may initially assume to be the case - are clearly not the owners of an indigenous work (see, for example the definition of “prior informed consent” (para 1)) and neither are

the “indigenous knowledge practitioners.” It should either be made clear that the “communities of practice” are the owners of indigenous works, or perhaps a defined term “indigenous knowledge owner” can be introduced.

Why should there be any need to protect future indigenous works (see para 3(2))? The fact that this type of protection is considered necessary is because of the perception that intellectual property law is unable to deal with the protection of certain types of expression and knowledge which has existed for a considerable time, and is deserving of protection. There is no cogent reason for extending protection in respect of cultural or other practices to future works or practices: these should either sought to be protected by the existing types of intellectual property, or should form part of the public domain. What should be happening simultaneously with the enactment of the TKS Bill is that NIKSO should be mandated with the task of educating all South Africans, through a public education initiative, about the existing types of intellectual property. It is only by embracing intellectual property protection – rather than by seeking to provide for “special cases” such as indigenous works – that we will spur on the required intellectual activity that is an integral part of the economic growth which we should all be seeking to encourage. Thus, there should be no need to protect future indigenous works.

3 Registration system

It is not clear whether the IKS Bill protects indigenous works by way of a registration system. In other words, is it the intention that, possibly subject to limited exceptions, indigenous works will only receive protection once they have been registered? This point of principle needs clarification, as the IKS Bill seems to suggest that protection will be by way of a registration system, but it is not clear that that is the case. For example, the definition of “Certification” (in para 1), and paragraph 20(1), suggests that it is NIKSO which grants the rights in, or access to, indigenous works. Furthermore, paragraph 25(1)(c) refers to the “*registered* holder of indigenous knowledge.” NIKSO would not realistically be in a position to comply with its function to administer indigenous works if the protection of indigenous works is not done by

way of a registration system. A registration system for indigenous works would certainly be preferable.

Given the nature of the subject matter (which hitherto generally formed part of the public domain), it is important that there be certainty about what will be protected and the precise scope of such protection. A registration system will provide for both a notification to the public of the rights that have been granted, and for an accurate description of the protected subject matter. Given the fact that the IKS Bill appears to provide for a system of no-fault liability (see para 25), and the fact that third parties could, therefore, inadvertently infringe the rights granted, it is important that third parties should be given an adequate opportunity to know what is protected as an indigenous work.

Ideally, a system similar to that for trade mark protection should be created, which allows for a period of opposition to the granting of rights in an indigenous work, the scope of such rights, or in respect of claims of ownership of such rights. Doing so would ensure that the protection afforded does not simply amount to the arbitrary appropriation of aspects of the public domain.

4 Technical drafting issues

Definitions (paragraph 1)

“beneficiary”: The definition is clearly inadequate as it was considered necessary to give it an extended meaning in paragraph 14(1) so as to include individual and families. Thus, the definition should be fixed so that it does not require “ad hoc” extensions when subsequently used.

“Certification”: It is not clear what NIKSO’s powers are (and, thereof, what it can delegate to “communities of practice”)? First, I assume that NIKSO will, in the first instance, have the power to determine who the indigenous knowledge holders, and indigenous knowledge practitioners are, and that such power can be delegated. It is

important to make the sequence of legal acts clear. Second, there appears to be no reason why this defined term should start with a capital letter.

“community of practice”: In the light of my earlier comment concerning the needed clarity on the ownership of indigenous works, consideration should be given to whether this definition is necessary.

“cultural identity”: Delete “one’s”. Why is the phrase defined in relation to a “group or culture” and not with reference to an “indigenous community”? Is it not the case that indigenous works are those which have their origins in an indigenous community? There is no definition of “group”? For example, why should a musical group (who may have started a new genre of music) in the 1960s not qualify, and so have their musical works protected indefinitely as indigenous works, rather than as copyright works?

“indigenous community”: There is no good reason why the borders of South Africa should be defined with reference to the commencement of the IPLA Act. Hopefully, such Act will never be brought into effect, and the TKS Bill should repeal the IPLA Act. Why should “economic conditions” define an indigenous community? Is it really the case that something is deserving of protection as an indigenous work because it forms part of the “culture” of the proletariat or the bourgeoisie? For example, would English gentlemen’s clubs or debutante balls be a form of cultural expression deserving of protection as indigenous works if this type of legislation were passed in England?

“indigenous cultural expressions”: Why is the phrase defined in relation to a “group or culture” and not with reference to an “indigenous community”? See my comments above in relation to the definition of “cultural identity.” There appears to be a typographical error in sub-paragraph (c): “mas” should probably be “music.” This could be a contentious issue. What type of subject matter is intended to be covered by this definition? There appears to be no element of objective assessment as to whether something can be as a “sacred place.” Would Nkandla qualify if two successive generations of its neighbouring community considered it to be sacred?

“indigenous knowledge”: The phrase “or as individual custodians of such knowledge as part of” should be changed to “or by individual custodians of such knowledge on behalf of such communities”. It should be clear that the knowledge belongs to the communities. As indicated above, the protected knowledge should have its origins in an “indigenous community,” and not any other source, such as an individual or group. If an indigenous work originated from an individual (or even a small group), such work should have been protectable by intellectual property rights. More importantly, the definition of “indigenous knowledge” is too broad. Given the wide import of the definition of “information knowledge systems,” and the extensive protection given to indigenous works, something should only qualify for protection as “indigenous knowledge” if such knowledge is *unique*. Accordingly, the phrase “tangible and intangible aspects of the whole body of knowledge” should be replaced with “unique knowledge”. It makes no sense to speak about “tangible and intangible” knowledge.

“indigenous knowledge resources”: The expression “indigenous innovations” has not been defined, unlike the expressions “indigenous cultural expression” and “indigenous knowledge.”

“indigenous knowledge systems”: Why should cosmology qualify as an indigenous knowledge system? Cosmology is a science, and scientific principles or theories should form part of the public domain. Creation, or other, “mythology” may possibly be considered to be part of indigenous knowledge. Of course, I do not wish to engage in a philosophical discourse on what constitutes “knowledge” for these purposes, but it clearly should not be an area of science such as cosmology. It would, indeed, be far-fetched to suggest that scientists have hitherto sought to exploit indigenous communities in seeking to determine the origins of the universe. I also strongly doubt the basis on which “economic and philosophical learning or educational, legal and governance systems” should qualify for protection. As indicated in my comments in relation to “indigenous knowledge,” something should only qualify for protection as “indigenous knowledge” if such knowledge can be said to be *unique* to such community. Furthermore, is it at all necessary to have this definition? Could the definition of “indigenous knowledge resources” not be used

where there are references to “indigenous knowledge systems” (as in, for example, para 3(1), para 6 and para 27(a))?

“Natural resources”: There appears to be no reason why this defined term should start with a capital letter.

“prior art”: The words “any particular type of” should be inserted before the words “intellectual property.” “Intellectual property” is an umbrella term for different types of legal protection.

“sacred information”: While there are two instances in which the phrase “sacred places” are used in the TKS Bill (see definition of “indigenous cultural expressions” in para 1), this term is never used, and should be deleted.

Application of the Act (paragraph 3)

Paragraph 3 highlights the real difficulty in seeking to protect indigenous works in the absence of international consensus and a convention. While the Act applies to persons in South Africa, persons elsewhere are able to freely use indigenous works originating in South Africa. It means that persons elsewhere have greater freedoms in adapting and innovating indigenous works than their South African counterparts. This, arguably, disadvantages South Africans, as it prevents them from competing on an equal basis.

See my earlier comment which questions the need to protect *future* indigenous works (para 3(2)(b)).

Functions and duties of NIKSO (paragraph 6)

There is a typographical error in paragraph 6(1)(f): “mechanisms” is spelt incorrectly.

Establishment of Advisory Panel (paragraph 8)

Who are the “institutional members” referred to in paragraph 8(1)?

Eligibility criteria for protection (paragraph 11)

As indicated, it is suggested that the IKS Bill should not recognise *future* indigenous works, or at least not in the absence of an international convention which provides for the protection of such works. Accordingly, it is submitted that the “are” before the start of the list be changed to “were”.

The addition of “and between generations” after “from generation to generation” appears to be tautologous, and should be deleted. A better alternative would be to simply rephrase paragraph (a) as follows: “passed on between successive generations in indigenous communities.”

Incidentally, the requirement of inter-generational passage of knowledge for it to qualify as indigenous knowledge also highlights the difficulty in seeking to protect future indigenous works. For example, as the IKS Bill is currently drafted, subject to the other requirements being satisfied, a new genre of music, such as kwaito, may be protected as an indigenous work at some point in the future (depending on the number of years which constitute a generation). However, in the meantime – and rightly so – musicians from all walks of life are free to embrace the genre and extend its range. This would not be the case if it was protected as an indigenous work. Would musicians in the future be required to seek permission for their use of the genre?

There should be a materiality threshold to the extent that an indigenous work is still maintained, used, or developed. Accordingly, the words “a significant” should be inserted before “part” in paragraph 11(d).

Incidentally, the Hoodia plant, which was considered by many to be *cause célèbre* for the protection of indigenous knowledge, would seem not to be protected under

the criteria for eligibility under paragraph 11. It is, arguably, the case that there was no “creative intellectual activity” associated with its use among the indigenous community, but that it was merely a resource from their surroundings which they consumed, and which purportedly had some health benefits (which, incidentally, scientific studies have now largely dismissed).

Scope of protection (paragraph 12)

As indicated, it is recommended that protection be afforded on the basis of a registration system, and that there should be clarity as to the effective date of such protection.

Why are the rights given to the “beneficiaries” and not simply to the relevant indigenous communities? Given the definition of “beneficiary” (see para 1), there is a real possibility that a third party could face multiple legal actions for infringement, which is undesirable. Infringement proceedings should only be instituted by NIKSO or a duly authorised representative of the relevant indigenous community (who, of course, could be a beneficiary).

The phrase “or deny” in sub-paragraph (1)(b) can be deleted as it is superfluous.

Apart from the difficulty inherent in making such determinations, there is no reason why one of the exclusive rights should be the right to receive “a fair and equitable share of benefits” (see sub-paragraph (1)(c)). As the TKS Bill, when it is enacted, will create proprietary rights in indigenous works, the terms on which the use of such works is authorised by NIKSO will be a matter for the negotiation between the relevant parties, and should be subject to the principles of contract law. If NIKSO operates as agent, or custodian, for indigenous communities in negotiations with third parties, it should ensure that it acts in the best interests of such communities, and gets a fair deal for such communities.

Sub-paragraphs (1)(d) to (1)(e) should be moved to a separate section dealing with infringements of indigenous works, as is the case with section 23 of the Copyright Act, 1978.

It is not clear who the word “their” before “indigenous knowledge” is meant to refer to in sub-paragraph (2). There is the suggestion that the rights in indigenous works belong to NIKSO. Is that really what is intended? Presumably, the sub-paragraph concerns a situation in which a third party seeks to apply for the registration of some type of intellectual property and the subject matter of that registration incorporates an indigenous work.

Term of protection (paragraph 13)

Why does the paragraph only refer to “indigenous knowledge” and not also to “indigenous cultural expressions and indigenous knowledge associated with the utilisation of natural resources,” as in paragraph 12(1)?

Who makes a determination whether an indigenous work no longer satisfies the eligibility criteria? For example, could such a challenge be made as part of a defence to infringement proceedings? Could proceedings be brought to seek the “expungement” of an indigenous work? If so, provision should be made for who would be entitled to seek such expungement.

Beneficiaries of rights (paragraph 14)

The provisions of paragraph 14(1) should probably be included in the definition of “beneficiary” in paragraph 1.

Why is it not simply provided that NIKSO will be the custodian of the indigenous works if the beneficiaries have not been identified (see paragraph 14(2))?

Application for accreditation and certification of indigenous knowledge holders and indigenous knowledge practitioners (paragraphs 16 and 17)

“South African Qualifications Authority” in paragraph 17(1)(c) should be replaced with “SAQA”.

Mediation Committee (paragraph 22)

The dispute resolution provisions in paragraph 22 are wholly inadequate, and its process is also fundamentally flawed. First, although the process prima facie refers to a mediation, the “mediation committee” is meant to give a binding decision on the dispute concerning access to indigenous works. There is no clarity on whether the process amounts to an arbitration or an expert determination, which would affect the basis on which the decision may be challenged on appeal. Second, given the fact that the process is not a mediation in the ordinary sense of the word, why should the committee consist of NIKSO and members of the relevant communities? NIKSO already appears to be acting as agent (or custodian) of the relevant communities. Thus, there appears to be no attempt to ensure impartiality on the part of the mediation committee, which has the power to make a binding decision. Third, there appears to be a number of other issues which could result in disputes or seek to be challenged, and a comprehensive dispute resolution mechanism needs to be provided for in the IKS Bill. For example, there may be: competing ownership, or disputed beneficiary, claims to indigenous works; disputes concerning the validity (or continuing validity) of indigenous work; disputes concerning the certification of (or refusal to certify) someone as an “indigenous knowledge holder” or an “indigenous knowledge practitioners”; challenges to “compliance notices” issued pursuant to paragraph 26(a); and, if the concept is to be retained, the determination of what constitutes “sacred information.” Fourth, consideration has to be given to who has right (that is, who can be considered to be an interested party) to bring dispute proceedings. Fifth, are cost orders allowed by the mediation committee, or sanctions for malicious or vexatious claims made for protection of indigenous works.

Exceptions and limitations relating to the access of the indigenous knowledge resources (paragraph 24)

It would probably be better to move away from the closed list of fair-dealing exceptions, to a more open-ended approach, as is found in the US Copyright Act 1976. Such an approach would, more generally, allow for uses which do not compete with the commercial interests of the relevant communities. If the existing closed-list approach is to be retained, there should be the addition to the list of the use of indigenous works in educational resources, such as school textbooks. This is particularly so in the case of indigenous works such as folklore. If such an exemption is not available, it may lead to an unfortunate decline in such material in educational material due to the costs which would now have to be incurred in gaining the necessary permissions for the inclusion of such material. As indicated, it may be that in the future foreigners have more access, and knowledge, about our folklore than our children, as the IKS Bill and the IPLA Act does not have any effect in other countries.

Offences and complaints (paragraph 25)

This section should be the equivalent section to section 23 of the Copyright Act 1978, as referred to above.

As the IKS Bill does not provide for any criminal sanctions relating to the unauthorised use of indigenous works, it would be better to change the introduction to paragraph 25(1) to read as follows: "A person shall infringe the rights in indigenous knowledge resources if that person." Paragraph 26 simply amounts to a list of "remedies" without any of the required detail one would expect of well-drafted legislation. There may, of course, be the need to also have criminal consequence for certain types of conduct, but these should be carefully considered. For example, paragraph 25(1)(c) should probably be a criminal offence because it seeks to prevent someone from fraudulently representing to third parties that it is authorised to grant permission to use an indigenous work. If such conduct takes place with the

required intent or knowledge, it should be a criminal offence. The other provisions which should probably also be criminal offences are paragraphs 25(1)(e), (f) and (g).

Why do sub-paragraphs 25(1)(a), (b) and (c) suddenly use the phrases “indigenous community owner,” “indigenous and local community owners,” and “registered holder of indigenous knowledge,” respectively, instead of the defined term “communities of practice”?

Why is paragraph 25(1)(d) necessary? Sub-paragraphs (a) and (b) already requires that use of indigenous works must be authorised by the owners thereof (who, I assume, are the “communities of practice”). It should make no difference if the consent is given by the owners, or their agent (namely, NIKSO). In any event, “indigenous knowledge resources” should probably be used instead of “indigenous knowledge or an indigenous knowledge system” in paragraph 25(1)(d). Also, the word “by” in front of “NIKSO” should be replaced with “from.”

Why does paragraph 25(2) not simply use the defined term “communities of practice” instead of “[i]ndigenous communities possessing collective knowledge”? Given the fact that there may be more than one community who owns an indigenous work, there needs to be more comprehensive provisions about who can institute infringement proceedings in order to avoid a multiplicity of claims.

Again, “indigenous communities” should be replaced by “communities of practice” in paragraph 25(2).

Sub-paragraph (4) is deeply problematic. Licensees should have certainty about the rights which have been granted to them. As mentioned above in relation to paragraph 12(1)(c), licences should not, apart from on the basis of general contractual principles, subsequently be capable of being set aside on the basis that they are not fair and equitable. If a licence has been concluded in good faith by a third party, there should be no basis for setting it aside on the basis that it was unfair. Should the owners of the indigenous work have been short-changed in a particular

transaction, their remedy (in contract or delict) should be against the person (possibly NIKSO) who concluded the contract on their behalf for any loss suffered.

Penalties (paragraph 26)

As indicated above, paragraph 26 simply amounts to a list of “remedies” without any of the required detail one would expect of well-drafted legislation. For example, sub-paragraph (a) simply resembles a “compliance notice” pursuant to the Companies Act 2008, rather than a penalty. The IKS Bill does not provide for the power of the mediation committee to issue compliance notices. Sub-paragraphs (c) and (d) would be within the inherent powers of the court, and, thus, are unnecessary. Sub-paragraphs (e) to (g) appear to be inappropriate in this context.

Transitional arrangements (paragraph 28)

The retrospective application of the IKS Bill (when it is enacted) may be unconstitutional. If protection is based on a registration system, it may be better to provide for interim protection from the time of an application for protection. However, the existing provision appears to be unduly invasive to prior rights, given the fact that it would generally be very difficult for third parties to establish when something would constitute an indigenous work (particularly if there is no registration system).

5 Interaction with existing IP

There is no indication as to the interaction between the protection of indigenous works and the recognised types of intellectual property, such as, copyright, patents, designs and trade marks. It is submitted that works which were, or are, protectable by intellectual property right should not also be protected as indigenous works. The general rationale for protecting intellectual property such as copyright and patents is that their creation should be incentivised. However, such works are protected for a limited period as they are intended to form part of the public domain after such protected period. In other words, intellectual property rights may be viewed as the exception to the public domain; the purpose of intellectual property law is,

paradoxically, to increase the size of the public domain. Intellectual property rights are only permissible to the extent that they incentivise creation and enlarge the public domain.

The rationale for the protection of indigenous works is that such works did not, or do not, qualify for intellectual property protection. Given the fact that the IKS Bill contemplates potentially indefinite protection, works which were, or are, protectable by intellectual property rights should not be indefinitely protected, as is the case with indigenous works.

Prof Sadulla Karjiker