

Rethink IP changes

BY SADULLA KARJIKER, JUNE 13 2013, 11:36



There is much talk about the perceived need to protect SA's traditional or indigenous knowledge. It seems to suit some to believe that rapacious multinational pharmaceutical companies constantly patent medicines based on old, local community remedies or that famous global artists routinely exploit traditional cultural work.

This belief has led to some proposed changes to local intellectual property (IP) law in the form of the Intellectual Property Laws Amendment Bill, 2010 - better known as the traditional knowledge or TK bill - that are potentially damaging. This is despite an independent regulatory impact analysis commissioned by the department of trade & industry in 2009, which seriously questioned both the need for the bill and the route taken to address the issue.

If the impact report is correct, the department is engaging in cheap politicking that will be financially costly by perpetuating a myth, and in the flawed process destabilising the current IP environment.

The TK bill seeks to recognise and protect traditional knowledge within the existing forms of IP, such as copyright and patents. However, most expert opinion, including that of the World Intellectual Property Organisation (Wipo), is that if traditional knowledge requires protection, it should be in the form of a new type of legal instrument rather than being subjected to IP.

In its diplomatic criticism of the TK bill, the Wipo secretariat describes government's approach as "novel and unusual" - a polite way of saying it is unworkable. Aside from highlighting the "lack of drafting and conceptual clarity", Wipo emphasises there is as yet no internationally accepted standard for the protection of traditional knowledge and says the proposed protection could undermine the existing IP system by introducing "unwelcome uncertainty".

These views echo the criticism by virtually the entire IP community in SA throughout the TK bill's drafting and approval process. There are those who see any form of IP protection as imposing an unnecessary cost on society and as an infringement on the public domain, insisting that material should be freely available for use by anyone. This view reflects a crude perception that a strong IP framework inhibits innovation and creativity, whereas such legislation actually serves to reward creation and provide incentives for it, which increases the size of the public domain.

At the other end of the spectrum are those who seek to actively shrink the public domain through IP. This, effectively, is what the TK bill seeks to do by covering concepts and works that have been in existence for decades and have hitherto been freely available for use and development by others. The proposals would thus inhibit innovation and creativity.

The TK bill proposes not only to introduce legislation that would make us the laughing stock of the international community because of its poor conceptualisation but also impose significant institutional and legal costs arising from the uncertainty it would introduce. The impact report says there is insufficient evidence to suggest these costs are justified.

Government must stop perpetuating the myth that the TK bill is required, because, as the report states, there is "a danger that communities' expectations of commercial benefits may not be realised". Culture (and knowledge generally) is dynamic. The best way to "preserve" it - if such a notion is appropriate at all - is for it to be free from restrictions rather than for it to be catalogued on a prescribed database. The resources earmarked to establish the institutional infrastructure to support the TK bill would be much better spent on a national education programme on IP rights.