

'Traditional knowledge' subverts intellectual property principles

Judge Louis Harms, the Vice President of the Supreme Court of Appeal and an internationally acknowledged expert in intellectual property law, has written an article entitled 'A few negative trends in the field of intellectual property rights', which will shortly be published in an authoritative South African legal journal. The article makes interesting reading, in particular on account of the criticisms that he voices of the Draft Intellectual Property Laws Amendment Bill that is currently in the legislative process.

This Bill seeks to force the protection of so-called 'traditional knowledge' into the intellectual property statutes, thereby clothing it with statutory protection and, in particular, the facility to attract revenue for its use. This can be viewed as dressing something in clothes which were not designed for it, thus making for an extremely uncomfortable fit.

Judge Harms is scathing in his criticism of the Bill (correctly so in my view). His estimation of the worth of the Bill can be summed up by the following statement:

'The proposals are fundamentally flawed and will not lead to any material benefit to any community in South Africa: they will not make the country technologically or otherwise rich; and they will protect little (if any) indigenous knowledge.'

The views expressed by Judge Harms about the Bill echo similar views held by a large number of attorneys and other practitioners specialising in the practice of intellectual property law. More especially, they are shared by the majority of the members of the Intellectual Property Committee of the Law Society of South Africa (LSSA).

Judge Harms goes on to say

'doubters, I fear, will remain silent simply because they believe that the legislation will have no practical effect; but they prefer not to say it aloud'.

This statement, I fear, is a serious and not altogether unwarranted indictment of the attorneys profession which, if it considers the Bill to be undesirable, should have the courage of its convictions and voice this standpoint. To date the LSSA has remained silent on the question despite the views of its Intellectual Property Law Committee. There is, however, still an opportunity to raise objections to the Bill and I hope that the LSSA will iterate the concerns of its Intellectual Law Property Committee.

My own major concern is that, not only will the Bill not achieve its objective (which in principle is a laudable one), but by trying to mix oil with water, it will contaminate or undermine long-established and internationally recognised principles of intellectual property law. Rather like a parasitical growth on a tree, it will end up destroying the health of the tree. In the words of Judge Harms, 'legal structures that have grown over centuries can be destroyed by legislation that is politically expedient'.

OH Dean,
attorney, Centurion

Esmé du Plessis, chairperson of the LSSA's IP Law Committee, responds as follows – Editor:

In the letter by OH Dean, the LSSA is called upon to raise objections to the Draft Intellectual Property Laws Amendment Bill which seeks to provide protection to traditional knowledge by amending certain existing intellectual property (IP) statutes. It would not be proper, in a response to a brief letter in which the author refers to certain (as yet unpublished) statements by an eminent Judge of the Supreme Court of Appeal, to endeavour to deal with the merits of the issues raised.

As regards the procedural aspects of the Bill and the opportune time for the LSSA to submit comments, or 'raise objections' as Mr Dean puts it, the position (closely monitored by the LSSA) is as follows:

- On 23 January 2008 the Department of Trade and Industry notified Parliament of a Policy Framework on the Protection of Indigenous Knowledge through the Intellectual Property System, and a draft Intellectual Property Laws Amendment Bill.
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By way of GN 552/2008 in GG 31026/5-5-2008 (a year ago) the Minister of Trade and Industry invited interested persons to submit comments on the Policy and Bill by 15 June 2008.

- By way of GN 679/2008 in GG 31112/30-5-2008 the Minister of Trade and Industry published his intention of introducing the Bill into Parliament during June 2008. For reasons unknown, the Bill was then withdrawn from the parliamentary programme and did not proceed.
- Prior to that, also on 23 January 2008, the LSSA was informed of the Policy Framework and Draft Bill, and it was invited to comment, and on 5 February 2008, the members of the LSSA Committee on IP were informed and a meeting date arranged.
- The meeting of the LSSA Committee on IP took place on 22 February 2008 and the work of preparing comments on the Bill was divided among members. However, at the next meeting of the Committee on 11 April 2008, a decision was taken that
 - the Committee in principle supported the need for **traditional knowledge** to be protected;
 - the Committee, however, resolved that the Bill in its current format could not be supported since it was in conflict with well-established **principles** of **intellectual** property law and that such a piece of legislation would undermine South Africa's international IP relations;
 - *sui generis* legislation would be more appropriate; and
 - for these reasons comments on the Bill in its current format would not be submitted.
- In the light of the withdrawal of the Bill from the parliamentary programme no further action was taken.
- The next opportunity for comment would only arise when the Bill is reintroduced on the parliamentary programme, which may take place in the second half of 2009. Submissions to the Portfolio Committee could then be made. The LSSA Council will address that possibility as soon as further information is available.