

Red card

OWEN DEAN

The Department of Trade and Industry (DTI) has prepared, and proposes placing before parliament later this year, a Bill to amend the intellectual property statutes, and more particularly the Trade Marks Act, Copyright Act, Designs Act and Performers Protection Act. The purpose is to introduce protection for so-called “traditional knowledge” into these Acts as a form of intellectual property.

“Traditional Knowledge” means traditional works such as indigenous artworks (for example bushman paintings), tribal legends and indigenous songs. The Bill is a truly remarkable piece of draft legislation. In this context, however, the term “remarkable” could have two connotations; a positive or a negative. Let me at the outset pin my colours to the mast and, with apologies to William Shakespeare and Mark Anthony, say outright that I come to bury the Bill, not to praise it.

The Essence of Intellectual Property

Intellectual property, and the statutes regulating it, has an underlying philosophy or principle. It runs as a thread throughout, and underpins, the legislation like an ideology. When an individual creates something new or original – in other words he has been innovative and contributed something which did not previously exist – he is given a qualified monopoly in

the use of his creation for a limited period. During this period he can exploit it commercially and gather the fruits to which his ingenuity has given birth. At the conclusion of the period of protection, when the qualified monopoly has terminated, the work passes into the public domain and is free for use and exploitation by all.

In this way the creative person derives a reward for his creativity and in return, in due course, bequeaths his creation to the world at large, bringing about benefit to society as a whole.

This enables the creative person to make a livelihood from the exploitation of his creation and to have an incentive to conceive better and more creative works.

Traditional knowledge, on the other hand, has an entirely different makeup. In the main, the cultural expressions which are sought to be protected have been around since time immemorial and it is uncertain who created them. Such works are, absent any new legislation, in the public domain. What is now, however, sought is to remove works from the public domain, and give them protection in the form of a monopoly of use for an unlimited period. In other words, the purport of protecting traditional knowledge is precisely the antithesis of the system for protecting intellectual property.



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Addressing the Problem

You don't have to be a genius to realise that a set of rules and principles designed for one situation are not easily usable for an entirely different system diametrically opposed to the first system. The Bill, which seeks to achieve this, has attracted considerable adverse criticism, particularly from intellectual property circles. No less a luminary than Judge Louis Harms, Vice President of the Supreme Court of Appeal, who is also an internationally acknowledged expert in IP law, has stated that: "*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*" (See "*A few negative trends in the field of intellectual property rights*" LTC Harms THRHR - 2009, Bd.72(2), p.175).

I added my two bits worth in a letter published in the May edition of *De Rebus* by saying that the attempt to clothe traditional knowledge in intellectual property statutes "*can be viewed as dressing something in clothes which were not designed for it, thus making for an extremely uncomfortable fit.*" Furthermore, I said that "*by trying to mix oil with water, it (the Bill) 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.*"

The trouble with us intellectual property types is that we eat, sleep and drink the gospel of intellectual property and have become so immersed in it that we end up speaking a different language. We have difficulty in dis-



cussing the problems and principles of intellectual property with lay persons because they do not really understand our different language. Consequently, in this situation it is often useful and expedient to resort to the use of analogies with subject matter with which our addressees are more familiar.

This even happens in court when counsel have occasion to address

judges who have no IP background. I recall one case before the Bloemfontein High Court where counsel, in attempting to explain the intricacies and niceties of copyright in computer programmes, invited the judge to liken the subject matter under discussion to bull semen, of all things. So, in order to explain my point of view to readers, many or most of whom are probably among the uninitiated when it comes to intellectual property law, I shall employ recourse to an analogy. My analogy is with soccer and rugby, subjects with which most South Africans are reasonably familiar.

Rugby – Soccer

The games of rugby and soccer have several common features. They are played on the same fields (for example Loftus Versveld and Ellis Park). The fields have a goal line at each end and in the middle of each goal line is a set of upright wooden poles with a cross bar linking them. The edges of the field have so-called "touchlines." The length of the field is divided by a line making two equal halves. The four corners of the fields are demarcated by flags.

There are two teams, each consisting of more than ten persons. The game is controlled by a referee by means of blowing a whistle. The game is divided into two equal periods of time, called "halves." In the first half each team defends a goal line at one end of the field and attempts to advance into the territory defended by the other team and to score points at the other team's goal line.

An essential and crucial object in playing the game is a leather ball, about the size of a small suitcase. The teams score points by kicking the ball between the two upright poles on the opposition's goal line or by otherwise placing the ball over the opponent's goal line. The ball is conveyed by means of the members of the teams passing or transferring it to one another. It is important to keep the ball out of the possession of the opponent. Kicking the ball is a way of transferring possession of it. Possession of the ball by a team is one of the most important elements of the game and there is a strong incentive for a team to gain possession of the ball from its opponents.

This is achieved by, *inter alia*, tackling an opponent who is in possession of the ball. If tackling is excessively physically violent, the tackler can be penalised. This penalty can be utilised by the opposing team in having a free opportunity of kicking the ball to gain territory from the opponent or for other purposes, or, in certain circumstances, having an undisturbed opportunity to kick the ball through the upright posts on the opponent's goal line, thereby scoring points. In the case of foul play, the referee can send a player off the field.

The game begins by one of the teams kicking a ball from the centre spot of the field. If, during the course of play, it goes over the touchline, the team which is not responsible for conveying it there has an opportunity to put it back in play by transferring it to a fellow team member from the touchline.

The second half of the game begins by the other team kicking off the ball. At the end of the first half, and at the end of the game, the referee terminates play by blowing his whistle. In the event that there have been delays for injuries to players, the referee may add discretionary time to the normal duration of the game to compensate for the loss of time. When the referee blows his final whistle, the team that has scored the most points wins the game. In the event the points are equal, the match is declared a draw.

At present, rugby and soccer each has its own sporting code, administration, organisations and rules. It could be argued, however, that given the significant common features of the games, the codes should be combined, thus rationalising administrations, decreasing costs and generally promoting

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unity of purpose. After all, rugby originated from soccer and is but a variation of it which has evolved into a different form from the mother game.

It may be said, however, that rugby is in reality simply a species of soccer. Should the games be unified and a single set of rules be produced, obviously provision will have to be made for the manner and extent to which rugby differs from soccer. This can be achieved; the rules of soccer could be integrated into those rules that pertain peculiarly to rugby. It is merely a technical rule drafting exercise. The clear way forward then is to provide for exceptions to accommodate rugby in the soccer rules.

Adaptations to the Rules

The first, and most important, exception to the soccer rules which would have to be made would be to the “handball rule.” In rugby, players will be permitted to touch the ball, and indeed gather it up and run with it. The soccer off-side rule would have to be adjusted to accommodate a different concept in rugby, as will be the case with the rules relating to tackling an opponent and dispossessing him of the ball. Whereas in soccer, a technical infringement of the rules invariably gives rise to a free kick or penalty, an exception will have to be made in the case of rugby to allow for scrums to take place as an alternative to these measures. The soccer rule which allows forward passes will clearly require adjustment for the purposes of rugby, where a forward pass is contrary to the purport of the game and is not permitted.

A tricky question is that of kicking goals. The rule in soccer that in order to score points the kicked ball must pass under the crossbar linking the two upright posts will have to be changed to allow for it to be mandatory that the ball must cross over the crossbar in rugby. Of course, planting the ball behind the opponent’s goal line has very different significance in rugby and allowances will have to be made for that.

Oh, but most important of all (I nearly forgot), allowance will have to be made in rugby for the oval shape of the ball with which the game is played. Rugby would not be true to character if played with a round ball.

So, what will emerge from this process is a set of rules for the game of soccer which have been adjusted so as also to cater for the game of rugby, and this will be done by means of creating exceptions to the relevant rules of soccer where differences in the ways in which the games are played make this necessary. This may, of course, give rise to tricky issues of interpretation of the rules and a measure of confusion, but this and other problems arising from a uniform set of rules do not detract from the convenience and expediency of having a unified code, rationalisation of administrations and other benefits.

Upon Consideration

Really, no-one in their right mind would contemplate doing what I have described. It makes no sense whatsoever, notwithstanding the fact that it could conceivably be achieved from a technical text drafting point of view. Just imagine the howls of derision and anguish emanating from soccer administrators, players and the soccer supporting public if they were told that the rules of rugby were to be grafted onto the rules of soccer and that rugby was to be integrated into soccer. One can postulate that the rugby fraternity would not be terribly overjoyed either.

I come back now to the Bill. Applying my analogy, the intellectual property statutes can be regarded as equivalent to the rules of soccer, and the provisions of the Bill as the changes to the rules of soccer that would be necessary to cater for the introduction of rugby as a species of soccer.

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This explains why the intellectual property fraternity is up in arms about the prospect of having rules pertaining to traditional knowledge, a totally different ball game, being integrated into the intellectual property statutes. It makes as little sense for the Bill to pass into law as it would for the rules of soccer to be amended to make exceptions allowing for the incorporation of the rules of rugby.

Lest I be misunderstood as saying that it is technically possible to integrate provisions pertaining to traditional knowledge into the intellectual property statutes and that the only objection to the Bill is one of principle, let me hasten to add that this is not the case.

Whatever the theoretical feasibility of the grafting process may be, it has certainly not been accomplished in the Bill. The Bill is riddled with inconsistencies and anomalies and, indeed, downright absurdities. This is particularly true of those parts of it which amend the Copyright and Performers Protection Acts. The Bill is challengeable on these grounds alone.

Moreover, one cannot help but wonder whether the “communities” the Bill apparently seeks to benefit have been fully apprised of, and are happy about the fact that the rights granted to them with the one hand are immediately taken away and given with the other hand to the state, with the only “compensation” being that it may be possible for them at some time in the indefinite future to benefit from the fruits of the exercise of the rights by means of the state’s largesse. The constitutionality of the Bill is seriously

questionable, and, if passed in its present form, is likely to be referred to the Constitutional Court to be declared invalid.

It is simply not practical, theoretically sound, nor compatible with common sense for traditional knowledge to be regarded as a species of intellectual property. While there are common features between the kind of protection desirable for traditional knowledge, on one hand, and intellectual property on the other, they are in essence significantly different animals.

The way forward for protecting traditional knowledge, as in the case of rugby, is to have its own separate customised set of rules dealing comprehensively with all the characteristics of the subject matter— in other words *sui generis* legislation which may perhaps have some similarity to intellectual property legislation. This is indeed what intellectual property practitioners in South Africa are saying about protecting traditional knowledge (a laudable objective), and indeed, what legal thinkers on the subject of traditional knowledge throughout the world are saying.

Only in South Africa is the DTI wanting to do the equivalent of integrating rugby into the game of soccer.

With respect, we are rushing in where angels fear to tread. For pity’s sake, No! The Bill must be well and truly buried and new custom-made legislation with a similar objective must arise in its place. ♦

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