

# Intellectual Property Laws Amendment Bill on Indigenous Knowledge



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REPUBLIC OF SOUTH AFRICA



# DELEGATION

- Ms Zodwa Ntuli: Deputy Director-General: Consumer and Corporate Regulation Division (CCRD), **the dti**
- Mr MacDonald Netshitenzhe: Chief Director: Policy & Legislation, CCRD, **the dti**
- Mr Simphiwe Ncwana: Dep Director: **the dti**



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# PURPOSE

- **To apprise the Select Committee about the existing IP laws and identify areas that need to be amended to factor in IK imperatives.**



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# Forms of IP

- **Patents**

- generally has a Lifespan of 20 years
- It can be any form of technology or medicine. Indigenous knowledge (IK) is inputted into “modern” inventions
- World Intellectual Property Organisation (WIPO) and Convention on Biological Diversity (CBD) CBD advocate for recognition of IP developed from IK. They requested that the following features should be available, namely:
  - Disclosure of origin of genetic material used that led to the patent invention
  - Disclosure of the indigenous community that assisted in the development of the IP;
  - Prior informed consent
  - Disclosure of a benefit sharing agreement. It should be said that these features are already incorporated in the Patents Amendment Act, 2005
  - As will be seen above the amendment process in the Bill concentrates on the other four domains since it was already done in respect of PATENTS



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# FORMS OF IP continued

- **Trade Marks (lifespan 10yrs renewable) – e.g. coke, MTN**
  - Trade marks distinguish goods and services from one another in order to, amongst other things, avoid misleading the public
  - It is a brand name, a slogan or a logo. Trade marks (collective or certification marks) can be used to protect culturally recognised symbols used or not used in trade and commerce. Example is “Rooibos” owned by Khoisan and Dutch descendants
  - Geographical Indications (GI) – i.e. product peculiar to a particular area due to skills, climate, soil type e.g. Rooibos and honey bush



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# FORMS OF IP continued

- GIs can therefore be the same as trade marks (collective/certification marks) because they are jointly owned by a particular association or community.
- Lifespan is perpetual.
- However, in certain instances they are stand-alone and Government can declare unilaterally what constitutes a GI and then convince trading partners to recognise them, e.g. “Champagne” for sparkling wines “owned” by France.
- South Africa can also declare unilaterally what constitutes GI; or
- Associations can apply in terms of the Trade Marks Act to own a GI.



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# FORMS OF IP continued

- Copyright (Lifespan of creator plus 50 years after the death of creator)
  - Examples: Books, CDs, computer software
  - Copyright regime can protect IK as it has been said earlier as follows:
    - The elements and principles of the copyright system are relevant to the protection of folklore because many folklore are literary and artistic productions and therefore already or potentially the subject matter of copyright protection.
    - E.g. music and storytelling emanating from communities
    - Many countries protect folklore under copyright regime, in particular the rights of performers.
  - Protection afforded to a derivative works vests in the new material or aspects of the derivative work.
  - Where the community and the innovator jointly own copyright, the lifespan of copyright is perpetual since the community exists in perpetuity.
  - If the innovator of the derivative work is an outsider, he/she can own copyright of the derivative work as long as “originality” requirement is satisfied.



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# FORMS OF IP continued

- **Designs (lifespan 15 yrs and 10 yrs)** – functional designs exist only in SA
  - Functional Designs (10yrs) intended to introduce a lower threshold for innovation e.g. reduce and/or minimise requirements/criteria for innovation, then improve on them
  - Encourages creativity between lower and higher thresholds / standards required
  - Something that mimics the function of the original design e.g. product of a lower standard that performs the same function as wheelbarrow
  - Industrial Designs (aesthetic-15 yrs) may be used to protect, for instance, textile design that is richly indigenous
  - A derivative design can be owned jointly or individually
  - The hereditary design lifespan is perpetual. Hereditary design is the one that has been passed from generation to generation. This cannot be registered and it is not in the public domain.



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# Provisions of the Bill

Key Interventions contained in the Bill should be as follows:

- Registration and identification – facilitates registration of IP component of IK for protection from unlawful use. Registration will be done through the Companies and IP Commission established in terms of the Companies Act of 2008;
- ALL FOUR PIECES OF LEGISLATION SHOULD BE AMENDED TO HAVE CLAUSES SUCH AS THE ONE IN THE PATENT AMENDMENT ACT, 2005, NAMELY: a) Disclose a prior informed consent from the relevant community, b) Disclose the knowledge used from the community that “enhances” the new “work”/”discovery”, c) disclose a benefit sharing agreement with a particular community.
- Definition of “community” should be flexible but allows improvements by courts and should be informed by other relevant legislation. It should not be static.
- All IP/TK may be recorded or be placed into the IP database/register and should be identifiable. Confidentiality where applicable to be respected
- In the area of Copyright Act, “registration” is being introduced like in video and cinematographic films, but this is optional



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# Provisions of the Bill

Key Interventions contained in the Bill are as follows:

- In the area of Trade Marks Act, prohibit registration of IK without consent or offensive to a particular public
- In the area of copyright/trade mark and designs moral rights should be introduced as a protection. Copyright also have such provisions and awareness need to be emphasised
- Licensing of IK rights – for identification and recognition of the original owner and ability to assign same to third parties and right to use IK for commercial purpose and for any development process
- Exchange of knowledge from the owner to the third party subject to prior informed consent
- Compensation for use – provides for negotiation of benefit sharing agreement regime on IP embedded on IK in order to fairly compensate and/or recognise the IK owner;



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# Provisions of the Bill

Key Interventions contained in the Bill are as follows:

- Databases/Sub-databases of IP/IK to be created within the Commission. The principles of data protection should be recognised. Community may request Commission not to reveal certain information to the general public
- National Council with specific roles to be created in terms of all IP legislation
- Business enterprises such as community trusts and cooperatives to be formed and need to manage and protect IK of communities. Collecting societies that are not regulated should be regulated beyond the issue of “needle” time royalty
- National Trust to be self funded need to be formed and manage “orphaned” IP/IK in all domains.
- State may give an advance to the National Trust for sustainability.



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# Provisions of the Bill

Key Interventions contained in the Bill are as follows:

- Alternative Dispute Resolutions (ADR) should be introduced in all domains of IP. The findings of ADR can be made an order of court upon application
- High Courts still have inherent jurisdiction to entertain any dispute pertaining to IP/IK



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# Provisions of the Bill

Key Interventions contained in the Bill are as follows:

- In the areas of copyright/designs, duration of protection for derivative works introduced and where it is jointly owned with the community protection should be perpetual
- Minister should be empowered in terms of the IP Laws to declare “geographical indicators” like in the area of agriculture
- Licensing of IK rights in all IP laws
- Exchange of knowledge from the owner to the third party subject to prior informed consent obtained



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# Provisions of the Bill

- Recording, documenting and storage – creates a database and/or sub-databases of IP and IK for storage,
- Education and awareness of communities to educate on social development issues associated with IK
- Enforcement structures established:
  - The National Council (NC) is established and its role is to advise the Minister on IK and the registrars of IP in relation to the registration of IP/IK;
  - Alternative Dispute Resolution (ADR) introduced
  - Community Trust and collecting societies – to negotiate for licensing of IK on behalf of the communities or any business enterprise;



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# Provisions of the Bill

- Courts to enforce the IK rights including the settlements arising from the Alternative Dispute resolution process;
- Establish the Alternative dispute resolution structure to resolve cases of possible violations in a fair, efficient and speedy manner; the Bill will provide for accreditation of ADR process by the Companies and IP Commission;
- Provision of investigation for possible violation and create inspectorate enforcement model to monitor compliance;
- Penalties – include nullification of the registration and ownership; sue for damages and compliance notices to be issued;



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# Conclusion

- Some countries also use IP system to protect IK
- WIPO resolved that either IP system or sui generis or a combination may be used to protect IK
- Internationally there is no international agreement to protect IK
- WIPO established intergovernmental Committee (IGC) on the Protection of Genetic Resources, Traditional Knowledge and Folklore in 2000 and a solution is not yet reached
- There is a need to protect IK using the IP system urgently as the IP system is the one that is being used to misappropriate and not recognise IK
- Other departments may do their bit to protect IK within their mandates, e.g. for preservation or cultural purposes.



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**THANKS!!**



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