

MEMORANDUM ON THE OBJECTS OF THE INTELLECTUAL PROPERTY LAWS AMENDMENT BILL, 2010

1. BACKGROUND

- 1.1 The Republic of South Africa has a number of pieces of primary legislation that provide for the definition, protection and enforcement of intellectual property (IP). These are the—
 - (a) Patents Act, 1978 (Act No. 57 of 1978);
 - (b) Copyright Act, 1978 (Act No. 98 of 1978);
 - (c) Trade Marks Act, 1993 (Act No. 194 of 1993);
 - (d) Designs Act, 1993 (Act No. 195 of 1993);
 - (e) Performers' Protection Act, 1967 (Act No. 11 of 1967); and
 - (f) Registration of Copyright in Cinematograph Films Act, 1977 (Act No. 62 of 1977).
- 1.2 There are also other statutes that are relevant to IP, such as the Merchandise Marks Act, 1941 (Act No. 17 of 1941), and the Counterfeit Goods Act, 1997 (Act No. 37 of 1997). However, these statutes do not create or recognise categories of protectable IP, but rather apply to IP as recognised and protected in the primary legislation.
- 1.3 In 2004 Cabinet approved the adoption of the policy on Indigenous Knowledge Systems (the IKS policy). Pursuant to the adoption of the IKS policy the Department of Trade and Industry (dti) has formulated a policy document on the commercialisation and protection of Indigenous Knowledge (IK) through the IP system. This policy seeks to recognise and protect IK as a form of IP, and to enable and promote the commercial exploitation of IK for the benefit of the indigenous communities from which the IK originated.
- 1.4 In order to create an appropriate legal framework for the recognition and protection of IK and to provide appropriate structures and mechanisms to enable the commercialisation of IK, it was considered appropriate to create an interface of IK with the current IP legislative dispensation and to integrate the protection of IK into the current IP protection laws of the Republic.
- 1.5 The draft Intellectual Property Laws Amendment Bill, 2010 (the Bill), seeks to implement the dti policy by introducing appropriate amendments into the primary IP statutes, excluding the Patents Act, 1978.
- 1.6 The Patents Amendment Act, 2005 (Act No. 20 of 2005), already gives recognition to indigenous knowledge and use within the context of the protection of indigenous genetic and biological resources as contemplated in the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004). The Patents Amendment Act, 2005, compliments the Biodiversity Act, 2004. There may be a need to effect consequential amendments to the Biodiversity Act, 2004, and the Plant Breeders Act, 1976 (Act No. 15 of 1976). This will be necessitated by the fact that the national department responsible for agriculture, which administers the Plant Breeders Act, 1976, has not yet effected amendments to compliment the Patents Amendment Act, 2005.
- 1.7 Indigenous knowledge and traditional intellectual property of indigenous communities may be open to exploitation by foreign countries. It is important to ensure that this is avoided and that the indigenous communities derive every benefit from their indigenous knowledge.

2. OBJECTS OF BILL

- 2.1 The proposed amendments to the Copyright Act, 1978, the Trade Marks Act 1993, the Designs Act, 1993, and the Performers' Protection Act, 1967, intend to achieve the following objectives:

- (a) Provide legislative mechanisms to protect the different species of traditional intellectual property and geographical indications;
- (b) recognise indigenous knowledge as traditional intellectual property by defining indigenous knowledge systems components, in relation to the—
 - (i) Copyright Act, 1978, as “traditional works”;
 - (ii) Designs Act, 1993, as “traditional designs”;
 - (iii) Performers’ Protection Act, 1967, as “traditional performances”;
 - and
 - (iv) Trade Marks Act, 1993, as “traditional terms and expressions”;
- (c) include a definition of “geographical indications” in the Trade Marks Act, 1993, to recognise and protect Geographical Indications (GI’s) as indications of origin referring to qualities and characteristics of goods derived from and originating in the Republic or a region within the Republic;
- (d) establish a national council to advise the Minister and the registrars of intellectual property on traditional intellectual property; a national trust fund to facilitate the commercialisation of traditional intellectual property and the application of income generated to the benefit of indigenous communities; and a national database for traditional intellectual property to facilitate access to information regarding traditional IP;
- (e) provide for use of collecting societies in the entire copyright regime as well as in trademarks and designs regime.

2.2 The proposed legislative amendments seek to give effect to the Government’s policy to recognise and afford protection to indigenous knowledge as a national heritage and asset, and to ensure that indigenous communities benefit from such recognition and protection, and from the commercialisation of this asset.

2.3 The proposed legislative amendments will also place the Republic amongst the leading countries as regards the recognition and protection of indigenous values.

2.4 The Bill also seeks to ensure that the indigenous knowledge and traditional intellectual property of indigenous communities is protected from exploitation by foreign countries. In this respect there is a proposed amendment that empowers the Minister to enter into agreements with foreign countries based on the principle of reciprocity.

3. BODIES AND ORGANISATIONS CONSULTED

The following bodies and organisations were consulted:

- Departments of Science and Technology, Foreign Affairs, Agriculture, Environmental Affairs, Arts and Culture and Health;
- Science councils, including the Medical Research Council;
- Provincial Governments, including the Limpopo Department of Environment and Tourism;
- Standing Advisory Committee on Intellectual Property Rights;
- A professional reference team consisting of eminent people in the area of IP and traditional knowledge;
- Traditional Leaders in KZN and North West Provinces; and
- Universities of Durban Westville, Fort Hare, North West, Cape Town and Venda.

4. FINANCIAL IMPLICATIONS

Additional funding will be required for the establishment of a database on traditional intellectual property and for the remuneration of members of the council, as well as the additional staff that will be required by the Companies and Intellectual Property Registration Office (CIPRO) to administer applications for traditional intellectual property. The additional funding requirements will be budgeted for by CIPRO.

5. COMMUNICATION IMPLICATIONS

The Bill was published in the *Gazette* for public comment and further consultations were held with other government departments and relevant stakeholders.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Trade and Industry are of the opinion that the Bill must be dealt with in accordance with the procedure prescribed by section 75 of the Constitution since it does not contain any provisions to which the procedure set out in sections 74 and 76 of the Constitution applies.
- 6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law and customs of traditional communities.