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COMMENTS ON THE INTELLECTUAL PROPERTY CONSULTATIVE FRAMEWORK, 2016

submitted by

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Introduction

The Department of Trade and Industry ("the dti") recently published the Intellectual Property Consultative Framework ("the Consultative Framework"), which was approved by the Cabinet on 6 July 2016. As the stated aim of the Consultative Framework is simply to provide information on the perspective of the dti in relation to intellectual property matters, and specifically states that it does not seek to prescribe the national IP Policy,[1] it is not surprising that the document contains no specific details as to any proposed changes to the IP Policy. It does still raise some concerns about how the dti, as the custodians of our legislation relating to intellectual property, plans to proceed with updating our law, or when the revised IP Policy would see the light of day. Accordingly, the purpose of these comments is to note the most significant concerns raised by the Consultative Framework.

Status

As the IP Chair has previously stated, any initiative to improve our intellectual property ("IP") laws is welcomed, given the fact that considerable time has elapsed since the relevant Acts were reviewed. It is, of course, important that any exercise of this nature should proceed with a thorough examination of the matters of concern by experts, and stakeholders, in the field. The Consultative Framework does, indeed, indicate that that will be the case going forward. However, the concern remains that it stops short of what most IP experts would probably consider necessary: the assurance that the misconceived legislative measures which have been passed (but

[1] Para 1 (iii), p 2.

not been brought into effect), or have been proposed, will be subjected to same level of scrutiny and consultation as envisaged in the Consultative Framework. It is no secret that the quality of the outputs from the dti over the past few years have been a cause for concern to those interested in ensuring that our legislation properly balances the various interests at stake, and produces the necessary certainty.

It is, therefore, fair to ask what the status, or future relevance, of the Draft National Policy on Intellectual Property, 2013 (the "Draft Policy") will be going forward? Why does the Consultative Framework make no reference to the earlier Draft Policy? Despite the express statement that the Consultative Framework does not seek to prescribe the national IP Policy, and is merely intended to reflect the dti's perspective in relation to intellectual property matters, the Consultative Framework does implicitly appear to reflect the new "National IP Policy".[2]

From a third party's perspective, it appears that the principal purpose of the Consultative Framework is more in the nature of a public relations exercise, to signal a changing of the guard at the dti in relation to IP protection, and to put some distance between themselves and the dti's activities in the field of IP over the past few years. While the Consultative Framework, thankfully, exhibits a greater appreciation for the complex nature of IP laws, there appears to be a lack of political will to acknowledge that the recent products of the dti, such as the Draft Policy, the Intellectual Property Laws Amendment Act 2013 (thankfully not yet in operation), the Copyright Amendment Bill 2015, and Protection of Investment Act, are potentially harmful to our law and raise issues relating to the constitutional rights of IP owners

[2] Para 5.2 (i), p 17.

and users in this country. This is regrettable in the light of the exceptionally poor quality of the mentioned statutory instruments. Some of this is evidenced by the fact that the Consultative Framework makes it clear – almost as an afterthought, in the very last numbered item of the Consultative Framework – that the Intellectual Property Laws Amendment Act 2013 ("IPLAA") and the Copyright Amendment Bill 2015 (the "CAB") will not be reconsidered under the proposed new, comprehensive approach.[3] The only reason given for this statement is the "significant resources which have already been committed" to these pieces of legislation. It is quite revealing that there is no suggestion that these dti products are consistent with the new "broader IP Policy". In fact, the contrary may be said to be true: there is the distinct suggestion that they will, in time, have to be brought into line with such policy.

It comes as cold comfort if the new approach at the dti is to be more willing to consult with interested parties, or displays a greater competency, when it appears that the dti is more concerned with the possibility of causing political offence than ensuring that we have well-considered legislation. There has been more than enough expert criticism of IPLAA and CAB to indicate to any right-thinking person that – despite the sums which may have been spent in their drafting – those legislative changes will potentially cause untold harm to our IP legislation. There is no rational reason why IPLAA and CAB should not be reconsidered under the promised new, comprehensive approach to IP management. If the persons previously at the helm at the dti wasted resources on these legislative proposals, let's not exacerbate the costs to the country by enacting such legislation. Especially not because it may give

[3] Para 5.2, p 17.

offence to any persons responsible therefor. Let's cut our losses, and draw a line through those legislative initiatives. As a country, we seem to have developed a particular penchant for wasting resources in the pursuit of placating our political superiors, irrespective of the merits of their actions. Furthermore, any failure to publicly admit that mistakes may have been made may result in those responsible being rewarded for the harm caused.

The laudable approach which emerges from the Consultative Framework will be rendered nugatory if palpably bad legislation is allowed to come to fruition. The damage to IP law brought about by these instruments will counteract any good achieved by the Consultative Framework. If the Consultative Framework is to serve its purpose, rectifying the harm caused by the aforementioned misguided instruments will occupy the attention of the bodies concerned for a long time. The preferable approach would be to apply the process contemplated in the Consultative Framework to these instruments and subject them to a searching review, as a prelude to revising or abandoning them.

Patent law reforms

The Consultative Framework has identified patent law reform as the most important focus in the immediate future. In particular, the indication is that our depositary system may be a cause for socially-harmful effects, such as a lack of affordable medicine due to the filing of spurious patents. Although the proposal for more flexibility on compulsory licensing is commendable, the special mention of the appointment of 20 new patent examiners, and potential outsourcing of examination

to foreign patent offices, raises a concern of quality, and costs, for South African patent applicants, and the system's accessibility to inventors that lack significant financial resources. As far as the appointment of examiners is concerned, while developing the skills in our country is something which we should all embrace, we should be realistic about the scale of such a task. Careful consideration should be given to whether a substantive search and examination system will address the types of concerns it is being sought to address, and then there is the very real concern about our potential to effectively administer such a system, and the economic impact in the consideration of outsourcing this task.

There may be alternative venues to explore, and in particular, the Chair of IP Law at Stellenbosch University, in collaboration with the Technical University of Munich's Chair for Intellectual Property Law, could assist in proposing and investigating alternatives for our patent system (and, indeed, in relation to any other aspect of IP law).

Conclusion

The reality is that the dti will be measured by its actions, not its public-relations exercises. If the dti does nothing to ensure that IPLAA and CAB are never implemented, its promises of being serious about maintaining our IP laws in line with international best practice will ring hollow. The dti is in a position make a change through collaborative effort.

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