

**Written comments on the draft Protection, Promotion, Development and
Management of Indigenous Knowledge Systems Bill [B6-2016]**

submitted by

Prof Sadulla Karjiker

Anton Mostert Chair of Intellectual Property Law at the Faculty of Law,
Stellenbosch University

[\(skarjiker@sun.ac.za\)](mailto:skarjiker@sun.ac.za)

These comments on the latest draft of the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill [B6-2016] (the “2016 IKS Bill”), published on 8 April 2016 (GG 39910),¹ are submitted to the Portfolio Committee on Science and Technology (the “Portfolio Committee”) pursuant to the invitation of the Parliamentary Monitoring Group. These comments will, given the short notice the writer has received, primarily be of a general nature, and focus on points of principle. It is also important to mention that the writer has already addressed the Portfolio Committee at a hearing on 7 September 2016 in Cape Town, and much of the contents hereof will be a repetition of the arguments and submissions made to the Committee on the aforementioned date.

1 Introduction

The 2016 IKS Bill follows the first draft Bill which was published last year (the “2015 IKS Bill”).² As will be indicated below, there appears to have been a fundamental change in the scope of application of the 2016 IKS Bill, when compared to the 2015 IKS Bill, which is not only regrettable, but undermines the substantive merit of the approach proposed by the 2015 IKS Bill. It is not an exaggeration to state that it

¹ The legislative process in South Africa still appears to be worryingly chaotic. There were actually two versions of the 2016 IKS Bill in circulation. While the version published in the aforementioned Government Gazette should, theoretically, be the official version, the version circulated to the press actually appears to be a later version. It is the latter version of the Bill (B6-2016) that forms the basis of this article, and not the version in the Government Gazette (B-2015), which also does not have the Memorandum which was attached to version B6-2016.

² GN 243, GG 38574 of 20 March 2015.

appears that the 2016 IKS Bill is simply an exercise in political accommodation between the Department of Science and Technology and the Department of Trade and Industry, which threatens to sacrifice the integrity of our intellectual property law for that end.

2 What is government's policy on IP?

The government's approach to intellectual property (IP) law (most notably as typified by the Department of Trade and Industry ("DTI")) in the recent past has been confused, to say the least. On the one hand, it appears that IP law is regarded with disdain, or with deep suspicion, and is sought to be blamed for all manner of things, such as government's inability to provide adequate educational materials to our schools or the need to provide access to medicine. Yet, on the other hand, there is a desire to cram more types of work into the protection afforded by *existing* intellectual property law (irrespective of the suitability of such new types of work), without any apparent contradiction. This, of course, should not be taken to suggest that IP law is currently perfect, and not in need of periodic review and amendment. However, the existing types of IP have a particular justification or rationale, which must be borne in mind when we consider legislation in this area.

The problem is that much of the discourse on IP law appears to be at a very rudimentary, often emotive, level, involving overly simplistic generalisations, or inaccuracies. What we need is a more sober, informed approach to these issues. There is, for example, the perception (or portrayal) that big corporates – principally those from the US and Europe – are coming to steal our indigenous knowledge and exploiting it for their own ends. From a South African perspective, there does not appear to much factual support for such concerns. However, it does appear that government – for its own ends - is concerned with wanting to be seen to be doing something. For example, the most high-profile example of such alleged exploitation, namely, that of the Hoodia plant, turned out to be a damp squib. It appears that IP protection is seen to be exploitative of indigenous communities or cultures, and that it has a winner-takes-all effect, or that it amounts to a zero-sum game, in which indigenous communities are the losers. This is a false categorisation of what it is that

IP protects and the function it serves. This may also be odds with the current market trends and conditions, such as, the growing demand for organic and natural substances.

3 Justification for IP protection

Due to their intangible nature, IP, such as copyright works and patents, are categorised as “public goods” from an economic perspective.³ Because of the non-rivalrous nature of IP, such as copyright works, they can be enjoyed by additional users at no (or negligible) cost, without affecting the enjoyment of others. This raises the issue of whether it is socially beneficial to prevent such additional use. After all, if it costs nothing for others to utilise and enjoy a copyright work, why should they be prevented from doing so? Therefore, any restriction on the use of such works is unnecessary and socially harmful, unless there is good reason to protect such works. Accordingly, let’s consider what would happen in the absence of IP protection.

In the absence of copyright protection,⁴ the public-good nature of copyright works gives rise to the so-called free-rider problem: there will be non-paying users of such a public good. A public good creates benefits — positive externalities — which others (such as the non-paying user) can enjoy, without the producer of the good having the ability to prevent such enjoyment. This results in market failure because, despite the benefit derived by a large number of people, they (or a significant number of them) have no incentive to pay any amount for such benefit. The market price of a product serves as a signal to influence future behaviour. In the absence of copyright protection, despite enjoying the benefits of public goods, the consumers of such goods will, rationally, understate their willingness to pay for such goods, which will cause the producers of such goods to receive skewed signals about the actual

³ Public goods are both nonexcludable (others cannot be prevented from enjoying its benefits) and nonrival (additional person can enjoy the benefits without causing a reduction in another person’s enjoyment). See Parkin M *Microeconomics* 10ed (2012) 374.

⁴ Copyright protection is used to illustrate the rationale for IP protection. A similar justification exists for patent protection.

demand which exists for such goods, resulting in an insufficient supply of such goods. It also results in producers of such goods being unable to charge those who benefitted from such goods a price which reflects the benefit, or value, they derive therefrom.

It is because we consider the types of works which are afforded IP protection socially beneficial that we consider it appropriate to protect them, through the provision of property rights, and thereby rectify this market failure in order that their production should be encouraged. Thus, the rationale for the legal protection of copyright works is based on the perceived need to encourage the creation of such works, which are considered to be socially beneficial. By awarding proprietary rights in such creations, copyright law gives copyright owners the *ability* to earn a financial return (and thereby potentially profit) from their efforts; copyright law, thus, provides the required incentives for authors to *create* copyright works. If copyright owners are to earn an economic profit from their copyright works, they have to earn an income which is sufficient to allow them to recover their total costs, namely, their opportunity costs, fixed costs, and variable costs.

Intellectual property protection, thus, at its core has a paradox. Ultimately, we want more of the relevant works - such as copyright and patents – to be freely available for anyone to use, that is, to form part of the public domain. However, such objective can only be realised by providing such works protection for a limited period, so as to incentivise their creation. In other words, by providing intellectual property protection, the size of the public domain is increased. Intellectual property rights are only permissible to the extent that they incentivise creation and enlarge the public domain.

Incidentally, we do not consider it socially desirable to protect all intangible creations of the mind. In fact, in some cases, because of the social costs which would be imposed by providing protection to certain types of intellectual creation, we do not protect such creations, despite their enormous value. There are numerous instances of intangible, and valuable, creations not protected in a manner similar to intellectual property. For example, the discovery of a new mathematical technique,

or the establishment of a large business (guaranteed to draw a large number of consumers to an area), may provide material benefits for others, but we do not permit the discoverer of the mathematical technique or the owner of the business to extract any form of compensation from others who benefit from their efforts. In other words, we consider some things too socially costly to protect, even though we would like people to make such discoveries or investments.

4 Is there a justification for the protection of Indigenous Knowledge (“IK”)?

In light of the justification for IP protection, we can see how fundamentally different indigenous knowledge is from IP. Protection of indigenous knowledge seeks to protect long-established elements or practices. There is no concern about incentivising creation, but rather with preserving something, something which may have existed for a century, or more. Furthermore, but for the legislation which is being proposed, it is, and has been, part of the public domain - free for others to use. It should, therefore, come as no surprise that the kinds of things which are sought to protected as indigenous knowledge do not satisfy the requirements for the existing forms of IP protection. It can only be protected as a form of IP by doing violence to the existing IP law, which is what the Intellectual Property Laws Amendment Act, 2013 (the “IPLA Act”) proposes to do.

So why protect indigenous knowledge? Is there a good reason for doing so? I can think of a small set of things that probably deserve protection. For example, if there are things which have a religious significance, and their use in a commercial context may cause offence, it may be deserving of some form of protection. But outside such exceptions, we should be wary of providing rights. We should be clear about what it is we are trying to protect.

So, if we can return to the Hoodia example, even in the context of patent law, where the fear of a winner-takes-all position is probably more acute, the problem may not be so in the context of indigenous knowledge. By having patent protection for the *synthetic* active ingredient, it could create a market for the natural product. A market which can profitably exploited. Who of us would prefer to drink a cup of

synthetic rooibos tea, rather than the natural product? We need to be clear about what we are seeking to prevent others from using.

In the absence of international consensus on what is covered by protection for indigenous knowledge, let us not shoot ourselves in the foot by stifling creativity in South Africa, which is a crucial driver to economic growth. We should be mindful of the effect of IK legislation on the producers (mostly small businesses) of goods which may inadvertently be affected by legislation. For example, how would the legislation affect the young man who started the *MaXhosa* brand of clothing, whose knitwear garments – inspired by traditional Xhosa designs - have received international acclaim? Will the proposed legislation hamstring such creativity, bog it down in red tape, or worst still, destroy such avenues of creative expression?

What may, ultimately, be more valuable to our economy is to educate all South Africans, through educational initiatives, about the existing types of intellectual property. By promoting awareness of what types of intellectual property protection exists in the *new* creations being produced – rather than by seeking to provide for “special cases” such as indigenous works – we will spur on the required intellectual activity that is a vital part of the economic growth, which we are all seeking to encourage. Also, if there is a concern that South African creative works are being exploited elsewhere, without any form of compensation or acknowledgement, we should perhaps be thinking about ways to assist these entrepreneurs in enforcing their intellectual property.

It must also be kept in mind that any legislation which we seek to introduce only serves to constrain creative endeavours in South Africa. Nothing stops, for example, an Australian from releasing a series of garments inspired by Ndebele patterns, but a South African designer may now have to comply with the proposed legislation. The proposed legislation would mean that persons elsewhere have greater freedoms in adapting indigenous works than their South African counterparts. This, arguably, disadvantages South Africans, as it prevents them from competing on an equal basis. Publishers in this country are already wary of whether they should publish works which may be viewed as containing indigenous

knowledge (and the uncertainty about whether permissions are necessary). If there are not sufficient exemptions available, it may lead to an unfortunate decline in the accessibility of such material to South Africans. It may be that in the future foreigners have more access to, and knowledge of, our folklore than our children, as they may have more exposure to such works.

5 The 2016 IKS Bill

As indicated at the time of the publication of the 2015 IKS Bill, the great merit of the approach embodied in the Department of Science and Technology's ("DST") 2015 IKS Bill was that it proceeded from the correct theoretical basis in relation to indigenous knowledge: it sought to provide special (*sui generis*) protection for indigenous knowledge. In other words, it did not seek to protect IK in terms of the recognised types of intellectual property, such as, patents, copyright, designs or trademarks, because it does not conform to such types of property. That singular fact meant that the DST's approach was preferred over that embodied in the IPLA Act. Lamentably, the 2016 IKS Bill appears to represent a rather serious dilution of the approach embodied in the 2015 IKS Bill.

The 2015 IKS Bill, despite its technical-drafting problems, purported to comprehensively deal with the protection of indigenous (or traditional) knowledge ("IK"), and indigenous (or traditional) cultural expressions ("TCEs"), by way of *sui generis* protection.⁵ That appears to no longer be the case. The 2016 IKS Bill still contains a definition of "indigenous cultural expressions", but, arguably, it may no longer be the exclusive source of substantive protection of TCEs. First, it is important to note that although clauses 2(2) and 9 of the 2016 IKS Bill *prima facie* only apply to "indigenous knowledge", the definition of "indigenous knowledge" now includes "indigenous cultural expressions". In contrast, the substantive provisions of the 2015 IKS Bill expressly listed "indigenous knowledge" and "indigenous cultural expressions" as separate protected subject matter, and did not subsume the latter into the definition of the former. Second, and more importantly, the concern is that TCEs, unlike other "indigenous knowledge", will no longer exclusively be the subject

⁵ See, for example, clauses 10, 11 and 12 of the 2015 IKS Bill.

of the *sui generis* protection crafted by the IKS Bill, as was the case under the 2015 IKS Bill.

The IPLA Act specifically deals with TCEs, and not IK. As has previously been pointed out, the IPLA Act was, and remains, an ill-considered attempt at protecting TCEs, which is out of kilter with the majority view of experts in the field of intellectual property law, both locally and internationally. The IPLA Act seeks to protect TCEs *as intellectual property*. It is a Procrustean attempt to force the protection of TCEs into the existing intellectual-property framework, despite the fact that TCEs do not conform to the rationale and requirements of the existing forms of intellectual property.

Given the fact that the 2015 IKS Bill purported to represent a concerted attempt to comprehensively deal with the protection of IK, and TCEs, it was hoped – at least by those concerned about maintaining the integrity of our intellectual property laws – that the proposed IKS Bill would result in the repeal of the IPLA Act, or, at a minimum, that it would never be brought into effect. On the face of it, the 2016 IKS Bill seems to envisage that the IPLA Act – despite its fundamentally-flawed approach – may no longer have the ignominious ending it deserves. The reason for the scepticism is that clause 32 of the 2016 IKS Bill states that the provisions of the IKS Bill will, in effect, be trumped by any rights conferred by another statute concerning intellectual property. But for the IPLA Act, clause 32 would not have been the concern it is.

Thus, the inclusion of clause 32 in the 2016 IKS Bill represents an undermining of the most praiseworthy aspect of the DST's efforts in seeking to protect IKS and TCEs, namely, its theoretically-correct approach in promoting *sui generis* protection. If the IPLA Act is not repealed, it will do more than cast a dark shadow over intellectual property law; it will also potentially undermine what the IKS Bill laudably sought to achieve. In addition to the repeal of the IPLA Act, it would be advisable to provide that subject matter which is protectable by recognised intellectual property rights (or the common law) should not also be protected under the IKS Bill. Works protectable by IP, should not also be protected under the IKS

Bill. There should be no overlap of the two forms of protection. After all, this type of protection is said to be required because the recognised types of intellectual property or the common law, do not protect IKs and TCEs.

6 Other substantive issues

For what it is worth, here is a selection of some other substantive issues which should ideally be addressed before the IKS Bill is enacted. First, it remains unclear whether protection is dependent on registration. Clause 33 gives IK holders 12 months to seek registration of their IK, but there is no indication if registration is a condition for protection. This was a shortcoming that was pointed out in relation to the 2015 IKS Bill, as well. Protection based on a registration system for IK would certainly be preferable, given the uncertainty about what will be protected and the precise scope of such protection. Second, the 2016 IKS Bill does not appear to adequately deal with the rights of persons who, hitherto, have used IK or TCEs. Third, clauses 13(5) and 28(1) introduce a preposterous concept that can only be described as “criminal contractual breach”. The proposed sections provide that the failure to use indigenous knowledge in the manner provide for in a licence for the use of indigenous knowledge is a criminal offence. Fourth, if the protection is not based on a registration system, it will be highly problematic to require a potential user to know when a licence is required (see clause 13(2)). This is particularly the case because the Bill appears to provide for a system of no-fault liability. The problem appears to be compounded by the seemingly unnecessary secrecy relating to the documents lodged in connection with the registration of IK (see clause 21(2)), and the fact that independent creation is not exempted.

7 Conclusion

Regardless of whether my reservations concerning the need for the protection of IK may be correct, what cannot be disputed is that IK is fundamentally different to the existing forms of IP. Thankfully, the 2015 IKS Bill recognised that fact. Unfortunately, the 2016 IKS Bill, by not providing for the repeal of the IPLA Act (and potentially allowing its provisions to override the IKS Bill), will potentially damage the

principled approach which the DST appeared to have championed in pursuing *sui generis* protection for IK and TCEs. Moreover, we should remind ourselves, that by continuing to plough this lonely furrow, it is only South Africans that will be restrained from using domestic IK and TCEs, if the IKS Bill is enacted. Persons elsewhere will continue to have unfettered freedom to use IK or TCEs originating in South Africa. So much for encouraging global competitiveness.

Prof Sadulla Karjiker

A handwritten signature in black ink, appearing to read 'S. Karjiker', written in a cursive style.

Anton Mostert Chair of Intellectual Property Law