



Cape Town, 20 May 2015

The Director-General
Department of Science and Technology
Building 53, Scientia Campus (South Gate entrance)
627 Meiring Naude Road
Brummeria
PRETORIA
0002

Attention: Ms. S. Pango
By email to Shumi.pango@dst.gov.za

Dear Sirs/Madams

Publishers' Association of South Africa (PASA)
***PROTECTION, PROMOTION, DEVELOPMENT AND MANAGEMENT OF
INDIGENOUS KNOWLEDGE SYSTEMS Bill, 2014***

The Publisher's Association of South Africa (PASA) represents book and journal publishing in South Africa in the field of non-fiction, fiction, education, academic and trade publishing. PASA's well over 180 members comprise the vast majority of South African publishing houses, for profit and not-for-profit, University Presses, small and medium sized companies and multinational publishing enterprises. PASA is committed to creativity, literacy, the free flow of ideas and encourages a culture of reading. More information can be found on PASA's website www.publishsa.co.za.

From the outset in May 2008, PASA has engaged the Department of Trade and Industry (DTI) regarding the protection of indigenous and traditional knowledge. PASA always has and continues to support the goal of protecting indigenous and traditional knowledge. We therefore welcome this new initiative to consider the status and future of the protection of indigenous and traditional knowledge and wish to continue engaging with you.

PASA submits the following immediate comments on the PROTECTION, PROMOTION, DEVELOPMENT AND MANAGEMENT OF INDIGENOUS KNOWLEDGE SYSTEMS Bill, 2014:

1. Definitions:

Indigenous Knowledge Holders

The definition refers to the “primary sources of community knowledge”. It is submitted that the word “primary” is not well suited as it is vulnerable to diverse interpretations. The indigenous knowledge will likely have been accrued through heritage as transmitted by the indigenous communities, as referred to in the definition of “indigenous knowledge”. Thus, Indigenous Knowledge Holders will be holders of knowledge as received and will not constitute the primary (first, original, initial) holder. The use of the word “primary” confers upon prospective users of indigenous knowledge an encumbered burden of proof since it may well infer permission from the first source.

It is therefore suggested to remove the word primary and replace it with the main, principal, contemporary or current sources of indigenous knowledge.

Access

The definition of access refers to use, which should be defined separately since these two terms are referred to individually throughout the Bill. Access does not necessarily imply and include use and vice versa.

2. Exceptions and Limitations relating to the access of the indigenous knowledge resources:

PASA’s predominant interest in the Bill lies with the exception for “Academic purposes” as included in Section 24(1)(e). This exception is too narrow and should specifically include publishing and republishing as an outright exception, i.e. no prior informed consent is required for publishing and republishing of works that consist of or include indigenous knowledge resources. Arguing that publishing and republishing forms part of “incidental use” as included in Section 24(1)(f) constitutes an unfair burden of proof. If the Bill were to become law, any current and prospective published works in

the indigenous genre would be vulnerable to violation in terms of Section 25(1) and penalties as listed in Section 26. Also, clearance for these works will be difficult and coincidentally create legal uncertainty.

The Publishing industry incidentally facilitates and promotes education, public awareness and understanding of indigenous knowledge which capabilities are aligned with the objectives of the Bill, as listed in Section 4(1). Thus, publishing and republishing is necessary, as an exception, to achieve the objectives of this Bill.

In terms of Chapter 2, Section 16 (1) of the Constitution of South Africa each person has the right to Freedom of Expression and this right may only be limited, in terms of Section 36 of the Constitution, if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. We submit that the Right to Freedom of Expression in any form is paramount and depriving interested parties of this right to Freedom of Expression through publishing or republishing raises Constitutional concern. Any limitation of the Right to Freedom of Expression in terms of this Bill is not considered reasonable and justifiable as less restrictive means to achieve the objectives of this Bill exist.

Section 25 – Offences and complaints should be made subject to the exceptions as listed in Section 24 to avoid unnecessary complaints based on an exception.

3. Functions and Duties of NIKSO

Section 6(1)(h) grants NIKSO the authority to impose fines on violators of the Act. Should publication and republication not be listed as exceptions under Section 24(1), this Section 6(1)(h) will have chilling effects on the publication and consequential disseminating and preserving of Indigenous Knowledge.

4. Protection of existing Intellectual Property Rights consisting of or containing Indigenous Knowledge Resources

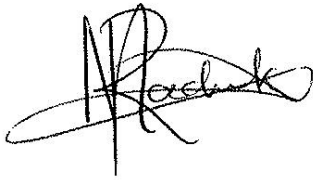
The Bill is deprived of a clause addressing protection of Intellectual Property based on Indigenous Knowledge Resources that came into existence before enactment of the Bill and this omission has the potential to result in great legal uncertainty. We thus recommend inclusion of a clause which will explicitly guarantee continued use and protection of Intellectual Property Rights consisting of or

containing Indigenous Knowledge Resources that came into existence before enactment of this Bill, for the relevant stakeholders.

5. Conclusion

We welcome the opportunity to provide input and to engage with the Department of Science and Technology on the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill, 2014. We are eager to expand on any of the above summary comments, should this be desirable or useful to you.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Mpuka Radinku', with a large, sweeping flourish underneath.

Mpuka Radinku
Executive Director
Publishers' Association of South Africa