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ISSN 1727-3781



2010 VOLUME 13 No 4

## CAN TRADITIONAL KNOWLEDGE BE EFFECTIVELY COVERED UNDER A SINGLE "UMBRELLA"?

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### INTRODUCTION

The question of whether or not traditional knowledge (TK) can be effectively covered under a single umbrella is complex, consequently requiring a comprehensive assessment. In view of the government's commitment to a policy not only of protecting forms of TK but also of encouraging and protecting the commercialisation of certain forms of TK, the above question becomes even more complex.

One of the difficulties in providing a simple answer to the question is that there is no single or simple definition of TK or what it comprises. However, this difficulty should not provide an obstacle in elaborating the types of traditional knowledge or works, and how these should be protected.

Generally speaking, TK could be seen to include three broad classes or categories of knowledge or works. The first category could include indigenous scientific or technical knowledge; the second category could include works of an indigenous-cultural nature; and the third category could include miscellaneous indigenous knowledge and works that are difficult or even impossible to classify.

In greater detail, the first category, indigenous scientific or technical knowledge, could include knowledge relating to indigenous medicine and cures such as selecting, protecting and cultivating certain plants, harvesting, processing them or

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\* Keynote speech delivered at the Conference on Traditional Knowledge in Legal Context, 17-18 March 2009 at the Potchefstroom Campus of the North-West University, South Africa.

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extracting substances from them, and applying them to various ailments or in various treatments. This category could also include the selection, treatment and use of parts of insects and animals for various purposes. Because this type of knowledge is usually restricted within an indigenous community to only a few selected persons, it appears that certain aspects of this knowledge could amount to a form of confidential know-how.

The second category, that of works of an indigenous-cultural nature, could include musical and artistic works and designs, dramatic works, and dances and songs, including performances. It could also include stories, poems, history, folklore, and artistic and decorative works and designs, which could in turn include wall and other paintings, bead work, basket-weaving, face and body painting, jewellery and decorations. It could even include individual songs, chants, communal songs, war cries or chants, and praise singing. Some of these creations could possibly qualify for protection under the present South African intellectual property (IP) law if the work in question complies with the requirements of the relevant IP legislation.

The third category could include traditions and customs, beliefs, ancestral or sacred ceremonies, burial sites, architectural-archaeological sites, metalworking sites, and other sites that are unique and important to indigenous peoples. Generally speaking, it is difficult to categorise these and it appears that none or very few of these particular forms of TK would qualify *per se* for IP protection.

This presentation does not propose to deal with traditional medicines and biogenetic resources and their protection. A limited form of acknowledgement and control is provided for this category of traditional knowledge by certain requirements and formalities introduced into the Patents Act of 1978 by way of Act no 20 of 2005, which came into operation on 14 December 2007. The presentation is consequently confined to the subject matter considered in the Intellectual Property Laws Amendment Bill of 2007 (now dated 2009).

Another difficulty in dealing with this complex question is that the developed countries, on the one hand, and the developing countries, on the other, have, generally speaking, taken different approaches to the manner in which they protect or safeguard TK. This has led to a lack of international consensus on the best manner of protecting TK. This will be discussed in greater detail below.

TK must be properly protected in one way or another. This is the view of most jurists. However, the question of which approach to prefer is a matter for considerable discussion and debate among them.

## **HISTORICAL AND ORGANISATIONAL BACKGROUND TO THE ISSUE OF THE PROTECTION OF TRADITIONAL KNOWLEDGE**

It can be extrapolated from the reports of the World Intellectual Property Organisation (the WIPO) that the protection of folklore and traditional community expressions has been the subject of much discussion in WIPO and its committees since the 1980s. In particular the issue of what is called "bio-piracy" by drug companies, which involves the harvesting of plant material in developing countries, needed to be addressed urgently at that time.

The WIPO established the Inter-Governmental Committee on Genetic Resources, Traditional Knowledge and Folklore (the IGC) in 2000. The objective of this Committee was to address *inter alia* the bio-piracy problem, the appropriation of TK by third parties, and the increasing use of Intellectual Property Rights (IPRs) in respect of TK. The Committee also had to deal with the protection of cultural resources, TK and folklore.

The IGC has meanwhile brought about a considerable increase in awareness and understanding of TK and its relationship to IP and IPRs. Understandably, it appears that WIPO would generally be in favour of an IP-basis for the protection of TK, although there is no clear consensus as to the best manner of protecting TK.

In 2003 the African Group of Countries requested a commencement of negotiations for "a legally binding international instrument on genetic resources, TK and folklore". However, they did not say what such an agreement should contain.

In 2006 the IGC proposed a set of draft provisions for the protection of TK and Traditional Community Expressions (TCE's), which proposed what is basically a type of IP system. This has not been formally accepted by the WIPO to date.

## **PHILOSOPHICAL AND LEGAL BACKGROUND TO TK**

It should be borne in mind that TK was created and is still being created for cultural and community reasons, and not primarily for commercial gain. However, in some situations third parties may wish to commercialise certain aspects of TK. This tendency, of course, brings the cultural importance of TK into collision with contrasting commercial realities.

In most cases TK, at least in its basic forms, has been in existence for many years. It is generally created with the intention of existing in perpetuity, or at least for a long period, as part of and together with the culture of the part of society in which it was created. This can be contrasted with the generally limited term of the protection of IPR's.

In discussions before the IGC, the concept of 'protection' has given rise to considerable confusion and difference of opinion. While IPR's regard "protection" as preventing unauthorised people from copying protected IP, in the TK context what is sought after is to safeguard the continued existence and development of TK. This implies protecting and safeguarding the cultural and spiritual context of that knowledge within the community. This is a key consideration relative to IPR's.

IPR systems protect not only "property" but also "private" property. This concept clashes fundamentally with the nature of TK, which is considered to be a community heritage that cannot be owned by one person and that certainly cannot be bought or sold. In contrast, IPR systems are based on the principle of the private ownership of intellectual property.

Another consideration is that TK is generally accepted by jurists in developed countries as falling in the public domain. However, this is disputed by indigenous communities, who reason that TK belongs to their communities and not to society at large.

If IPR's are created in respect of TK, that part of TK protected by the IPR will be alienated from its communal ownership and will become private property. When such IPR's lapse or their term expires, that part of TK so removed will subsequently fall into the public domain, consequently becoming free from any restrictions as regards copying them and using them in any other way instead of remaining part of the heritage of the community in which it originated.

## **VIEWS AND REASONS ARTICULATED BY INDIGENOUS GROUPS**

Judging from reports and articles emanating from various NGO's, indigenous groups have a variety of views as regards TK and its protection. TK is said to form an indivisible part of an indigenous heritage that cannot be divided into its component parts. The protection or safeguarding of this heritage cannot be achieved by separating out aspects or elements such as songs or science. A further view is that as such a heritage is linked to territorial and resource rights, indigenous rights are essentially human rights, but not property rights in terms of Western legal systems. The concepts of human rights and property rights are not always a part of indigenous customary law. Both TK and bio-diversity are often best defended by asserting the right to self-determination, land and culture.

A further reason why IPR's and TK are thought to be incompatible is because IPR's are private monopoly rights and therefore incompatible with the protection or safeguarding of TK. In contrast, TK is held as part of a community heritage passed down from generation to generation. It is not allowed to slip into the "public domain". Indigenous peoples, in fact, strongly dispute the assertion that their TK can ever fall into the "public domain".

Another view finds customary law to be an important basis for safeguarding TK. Any legitimate work on the protection or safeguarding of TK should consequently start from an indigenous framework grounded in customary law. Any legislation, if needed, should use this as its point of departure, and not resort to IPR's. In addition, any legal framework should include provisions to ensure respect for cultural and religious heritage.

A detailed analysis by the IGC appears to show that protection of TK *per se* cannot be achieved through IPR systems, whether using existing IPR's or *sui generis* protection, as these forms of protection deals with private property and not heritage and cultural matters.

A number of developing nations have the view that the United Nations Permanent Forum on Indigenous Issues should produce one coherent body of rules on and for heritage rights.

### **SOME COMMENTS ON THE SOUTH AFRICAN IP LAWS AMENDMENT BILL (TK BILL) OF 2007 (- NOW 2010)**

The object of the TK Bill is to graft certain forms of TK onto or to incorporate it into the Performers' Protection Act, the Copyright Act, the Designs Act and the Trade Marks Act.

A large number of legal and technical comments and objections to the TK Bill have been lodged with the Department of Trade and Industry (DTI). Some of the problems identified are set out below.

There is an attempt to define an indigenous community in the definition section of the TK Bill. Such an Indigenous community (which will act as the applicant and proprietor of certain forms of IP) is generally not recognised as a legal person. The definition of an indigenous community is so broad as to include all ethnic and cultural groups, which is clearly not intended. Unfortunately only indigenous communities presently or previously located in the Republic of South Africa will receive protection for their TK. This will clearly be in breach of South Africa's reciprocal obligations in terms of the Paris Convention, the Berne Convention, and the TRIPS Agreement of the WTO.

The ownership of copyright in a traditional work will vest in a government fund (presumably it will vest in the government) and not in the indigenous community, while the proprietorship of a traditional trademark or a traditional design will vest in an indigenous community. This is an inexplicable and incomprehensible lack of uniformity.

Only works created within the last 50 years, or when created in future, will enjoy copyright protection in terms of the TK Bill. However, in effect, most traditional works were created hundreds or even thousands of years ago and will not enjoy protection.

The Registrars of Copyright, Trademarks and Designs will be responsible for the promotion, preservation, commercialisation and exploitation of traditional IP for the purposes of generating income. It is accepted that each Registrar is a legal and administrative official, and does not have the resources or the expertise to deal with or control such complex commercial matters.

The Registrar is obliged to refer applications for traditional trademarks and traditional designs to a newly created TK Government Council for its comment, thereby removing his or her sole discretion, which has always been a part of South African IP jurisprudence relating to trademarks and designs.

The TK Bill and its impact on South African IP law has furthermore received some negative comment from jurists in highly respected judicial circles, including Mr Justice Louis Harms, the Deputy Chief Justice of the Supreme Court of Appeal, one of South Africa's leading IP Jurists and an internationally recognised IP jurist (THRHR 2009).

During 2009 the South African government published a Note to Stakeholders regarding a proposed Regulatory Impact Assessment ("RIA") to determine the impact that the TK Bill would have, if enacted, on various spheres including, its economic, institutional, legal and social implications. Despite the fact that the suggested intention of the Note was to determine the impact of the TK Bill, the Bill has meanwhile been tabled by the responsible Minister in the National Assembly, and the required public hearings before the Department of Trade and Industry (DTI) Portfolio Committee took place during October 2010. Once again, both fundamental and detailed objections to the TK Bill and its provisions were raised, and calls were again made for its withdrawal *in toto*.

It is doubted that the objections referred to above will deter the DTI from its present course, and IP law practitioners in South Africa are deeply concerned that the Bill may become law and thereby damage the highly respected South African IP legal system.

## **CONCLUSIONS**

It is apparent that TK cannot be effectively or comprehensively covered or protected and safeguarded by a single system, particularly if a measure of commercialisation of TK is intended.

It is also apparent that a multi-disciplinary approach needs to be taken in creating a proper legal framework for the protection of TK, which needs to arise from input received from the indigenous communities by way of their leaders, and from other experts including anthropologists who can interpret and facilitate the proper transfer

of custom and knowledge, and jurists who have an understanding *inter alia* of customary law and IP law.

It is submitted that, the following two-part solution might be reached by using the above approach, and that it could provide a realistic and workable dual framework:

Firstly, a broad-based (non-IP) *sui generis* statute could be enacted to safeguard the continued existence and development of TK. This would need to be based on customary law and would need to recognise all heritage and cultural rights as forming an important part of the life and existence of indigenous communities.

Secondly, if required for commercialisation and licensing, parts of such TK can be protected in terms of and as far as is permitted by existing South African IP law.

The protection of TK will proceed, in this way, along a proper route, without distorting any well-established IP laws.