

The Chairperson: Ms J L Fubbs MP
Portfolio Committee Trade & Industry, Parliament
Attention: Mr Andre Hermans
Tel: 403 3776; 083 709 8482;
email: jfubbs@parliament.gov.za



18 October 2010

**AFRICAN CENTRE FOR BIOSAFETY SUBMISSION ON:
Intellectual Property Laws Amendment Bill**

Contents

Introduction	2
Shortcomings in legislative landscape and traditional knowledge	3
Intellectual Property Amendment Bill	4
Vague Terminology	5
National Trust Fund for Traditional Intellectual Property	5
Lack of Dispute resolution mechanism.....	6
Conclusion.....	6
References	8

Introduction

The African Centre for Biosafety (ACB) is a non-profit NGO based in South Africa, concerned with the promotion of biosafety and challenging biopiracy, agrofuels and the commodification of biological resources and associated traditional knowledge. The ACB has in the recent past undertaken extensive work in the field of biopiracy, intellectual property rights and the discourse on access and benefits sharing. One of our key successes in this realm is the challenge of a patent held by German Pharmaceutical company, Schwabe, on the use of *Pelargonium sidoides* and *Pelargonium reniforme*. These two South African indigenous plants are traditionally used to treat various respiratory infections and diseases, including tuberculosis (TB). This patent unlawfully used traditional knowledge held by the Masikhane community in Alice (Eastern Cape).

ACB advocates that government play a central role in protecting traditional knowledge vis-à-vis biological resources from inappropriate and illegal use and commodification. It opposes any attempts to protect traditional knowledge (TK) through the intellectual property system, which confers monopolistic rights to biodiversity and traditional knowledge in line with the Trade Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organisation.

In this submission, we discuss the shortcomings inherent in South Africa's legal framework pertaining to TK vis-à-vis biological resources. Following this discussion, we address the most recent draft of the Intellectual Property Laws Amendment Bill, which aims to confer protection of traditional knowledge through the intellectual property system and point out its ramifications for TK in the realm of biodiversity. Finally, the ACB argues in favour of a *sui generis* system to prevent the biopiracy of traditional knowledge with regard to biological resources.

Shortcomings in legislative landscape and traditional knowledge

In November 2004, the Department of Science and Technology adopted the Indigenous Knowledge Systems Policy. It provides a framework to promote and strengthen the contribution of traditional knowledge to South Africa's social and economic development. This policy inter alia, contemplated the promulgation of legislation to protect traditional knowledge within an intellectual property rights regime.¹ During 2006, under the auspices of the Department of Trade and Industry (DTI), the Patent Amendment Act was promulgated. This Act aims to ensure that bio-prospecting leading to the development of commercial products, should directly benefit indigenous communities who provide access to, or hold traditional knowledge in respect of such resources.² This is enforced by a provision of the Act requiring every applicant, who lodges an application for a patent to the Companies and Intellectual Property Registration Office (CIPRO), to disclose whether such an invention is based on or derived from an indigenous biological resource, genetic resource, or traditional resource or use. While this disclosure requirement is welcome, it only applies in respect of patents applied for in South Africa and does not have any bearing on patents applied for in other patent offices, such as the European or United States Patent Offices.

The provisions contained in chapter 6 of the National Environmental Management: Biodiversity Act 2004 (NEMBA) and the accompanying regulations on Bio-Prospecting, Access and Benefit Sharing (2008) constitute the principle bioprospecting legislation in South Africa. These require that bioprospectors obtain the prior informed consent of traditional knowledge holders before any resource to which their knowledge relates can be accessed or used. These provisions are attempts by South Africa to comply with its international obligations under the Convention of Biological Diversity (CBD). The NEMBA legislation also requires the Minister of Environment to approve all benefit sharing agreements involving the bioprospecting of TK and ensure that stakeholders are properly consulted. The imperatives underpinning the NEMBA bioprospecting provisions include both notions of protection of TK and its commodification, including intellectual property rights such as patents.

NEMBA contemplates benefit sharing for the bioprospecting of TK in rather simplistic monetary and non-monetary compensation terms. Whereas indigenous and local communities perceive property as being multidimensional, involving a network of relationships such as guardianship over knowledge or cultural heritage being exchanged, reciprocity for the exchange and appropriate use of the knowledge exchanged. Continued use and ownership of exchanged knowledge and cultural heritage is dependent on the continual renewal of these relationships and fulfilment of obligations. The right to trade, sell or to give away knowledge is determined collectively.³

The intellectual property rights system has been designed to encourage industrial innovation and creativity through market incentives. Intellectual property rights are mostly attributed to technological inventions that have an industrial application. In contrast, traditional knowledge is based on cultural heritage and developed through several generations for non-commercial use. Furthermore, intellectual property is attributed to an individual entity, while traditional knowledge is mostly an outcome of a collective, which is not only intergenerational, but also sometimes also trans-cultural and trans-national.⁴

Furthermore, in some cases cosmological forces regulate the use of indigenous biological resources. Information exchanged openly is still regulated by these forces and therefore not part of the public domain as defined in western law.⁵ Being in the public domain does not

necessarily mean that such knowledge can be defined as a public good that can be accessed and used by everyone. Therefore, traditional knowledge requires protection for perpetuity not temporarily as provided through the intellectual property rights system.

Another practical problem with granting intellectual property rights to traditional knowledge is that a great body of this knowledge only exists orally. Within copyright law, this can lead to granting copyright to a recorder of TK instead of the rightful knowledge holders.⁶

Taking cognisance of the above-mentioned problems related to granting intellectual property rights to traditional knowledge, there is a strong need to protect traditional knowledge through a *sui generis* system. *Sui generis* refers to a legal classification that exists independently of other categorisations because of its uniqueness. However, instead the government has decided, again, to extend its protection of traditional knowledge through the intellectual property system by formulating the Intellectual Property Amendment Bill.

Intellectual Property Amendment Bill

This Bill aims to strengthen intellectual property rights relating to traditional performances⁷, traditional work⁸, traditional terms of expressions⁹ and traditional designs.¹⁰ This required amendments to be made to the Performers' Act of 1967; the Copyright Act of 1978; the Trade Marks Act of 1993 and the Designs Act of 1993.¹¹ Provisions made in the Intellectual Property Laws Amendment Act aim to enable communities to exploit their own traditional knowledge through their own legal entities or businesses. The Bill also stipulates that outsiders are allowed to commercialise this traditional knowledge, but only if prior informed consent of (or on behalf of) the community is obtained. The Bill foresees the establishment of a National trust fund to collect and redistribute benefits derived from this commercialisation. In addition, it also proposes the establishment of a national database to record 'traditional intellectual property' and a national council to advise the Ministry and the registrar of TK on traditional intellectual property rights.¹²

The Bill does not directly deal with the protection of traditional knowledge vis-à-vis biological resources. However, the Bill would apply if traditional knowledge on biological resources were written down in traditional works such as poetry or novels or contained in traditional performances. Other provisions that could indirectly refer to TK vis-à-vis biological resources are the amendments made under the Trade Marks Act. The Trade Marks Act now includes the protection of geographical indications, which is defined by the Act as 'an indication which identifies goods as originating in the territory of the Republic or in a region or locality in that territory, and where a particular quality, reputation or other characteristic of the goods is essentially attributable to the geographical origin of the goods, including natural and human factors¹³.' In terms of this provision, local traditional production methods involving indigenous biological resources can be protected. Therefore, read together with the Trade Marks Act, the Intellectual Property Amendment Laws Bill does bring traditional knowledge vis-à-vis biological resources within the intellectual property system.

Apart from our fundamental criticism on protecting traditional knowledge through the intellectual property rights system, there are major shortcomings within the current bill that will prevent this piece of legislation from effectively protecting traditional knowledge holders from the inappropriate use of their knowledge and from receiving any benefits from the commercial use of their knowledge. Some of the main issues are highlighted below:

Vague Terminology

The Bill fails to clearly define indigenous community, traditional work and traditional performance. The current definition for 'indigenous community' is vague: 'any community of people currently living within the borders of the Republic or which historically lived in the geographic area currently located within the borders of the Republic'. The Bill does not further define 'community of people' or the members belonging to this community. This loose definition of 'indigenous community' is problematic in identifying the exact traditional knowledge holders. It raises the following pertinent questions - Who is authorised to give prior informed consent and who receives the financial benefits of the commercialisation of traditional knowledge? How to resolve situations where more than one community claims to be the true holder of specific traditional knowledge? In addition, how will the issue of specialised groups within communities that hold certain knowledge be dealt with, for example traditional healers or guardians of sacred sites?

'Indigenous community' has already been defined in the bioprospecting regulations after an extensive stakeholder consultation process.¹⁴ The definition used in these regulations is more comprehensive than the definition provided in the Bill. It defines an 'indigenous community' as any community of people living or having rights or interests in a distinct geographical area within the Republic of South Africa with a leadership structure.¹⁵ This definition is more precise because it acknowledges that indigenous communities belong to a particular geographic area and that people belonging to a community interact within shared institutions (i.e. leadership structure). This definition has become the accepted norm within scholarly debate.¹⁶ There is a danger that too many different definitions for 'indigenous community' in government legislation will add confusion to the understanding of what exactly constitutes such a community.

The Bill provides vague definitions of traditional work, traditional performances and traditional design. These forms of traditional knowledge are described as traditional intellectual property, recognized by an indigenous community of having an indigenous origin and a traditional character. Definitions of indigenous origin and traditional character may vary between communities and are therefore subjective.¹⁷ This can be problematic in situations where more than one community claims to be the rightful knowledge holder of a traditional work or performance.

National Trust Fund for Traditional Intellectual Property

The Act provides for the establishment of a National Trust Fund that will comprise subfunds administered by the registrars of patents, copyright, trademarks and designs.¹⁸ These respective funds will be responsible for distributing benefits accruing from the commercial use of TK to TK knowledge holders. This is similar to the model presented in the NEMBA bioprospecting regulations, which cater for the establishment of a bioprospecting trust fund.¹⁹ However, unlike the bioprospecting regulations that specify how this trust fund will function, the Intellectual Property Laws Amendment Bill does not outline these functions. Crucial questions that are left unanswered include: how received royalties will be transferred to beneficiaries; what the exact duties and responsibilities of the different fund administrations will be and how to deal with surplus money in the various funds.

In addition, the Bill makes no mention of community involvement in administering the National Trust Fund. The government's management rather than a custodian role in the process of regulating the protection of traditional knowledge is different from existing traditional knowledge legislation (such as NEMBA).²⁰ Given that ownership of this knowledge resides with indigenous communities, a custodian role is more appropriate.

Furthermore, community members have expressed that the wide-ranging rights given to Traditional Leaders in the Traditional Leadership and Governance Framework Act, 41 of 2003 is problematic. These legislated powers could lead to benefits accruing to an elite, while possibly excluding community members from using their own knowledge in their daily life or for commerce. Section 20(1) of the Act provides a role for traditional councils or leaders in respect of, inter alia, arts and culture, economic development, environment, tourism and the management of natural resources. If benefits accruing from intellectual property are to uplift the communities that are custodians of that knowledge, rather than simply enrich traditional authorities, it is crucial to have clear guidelines on community consultation procedures as well as ensure access to information about what knowledge is to be protected, what deals have been struck and who will benefit from these.

Lack of Dispute resolution mechanism

At present the Bill does not include any mechanisms to resolve disputes that may arise from various communities claiming the use or benefits of the commercialisation of particular traditional knowledge. One such foreseeable dispute is in a situation where TK is held by various indigenous communities that do not agree on whether or not to approve the commercial use of their TK. The Bill should include dispute mechanisms that accommodate both indigenous and Western conflict resolution mechanisms.²¹

Conclusion

ACB's primary concern is to ensure the proper protection of traditional knowledge vis-à-vis biological resources. Although this is not the focus of the Intellectual Property Amendment Laws Bill, this Bill does strengthen the protection of traditional knowledge within the intellectual property system, thereby commodifying and privatising knowledge that is a vital part of our human heritage. Since traditional knowledge is collectively owned and developed for non-commercial use, exchange of this knowledge is regulated through customary laws of information exchange. Traditional knowledge does not belong within the intellectual property regime that is designed to provide ownership for technological inventions within the context of industrial applications. In addition, the intellectual property system does not cater for protection in perpetuity and can provide protection to a recorder of knowledge rather than the rightful knowledge holders. We have given our critique of the provisions of the Bill as it stands, but would like to record that we are fundamentally opposed to the strategy for protection of TK taken in this Bill.

The ACB advocates for the implementation of *sui generis* legislation to protect traditional knowledge holders from the inappropriate use of their knowledge. Such a system should contain provisions that provide protection for all forms of traditional knowledge, including traditional knowledge vis-à-vis biological resources.

By implementing a *sui generis* system for traditional knowledge protection, the South African government will act as a true guardian of the countries rich biodiversity and cultural heritage.

References

-
- ¹ Department of Science and Technology of South Africa. 2004. **Indigenous Knowledge Systems Policy.**
- ² Republic of South Africa, 'No 20 of 2005: Patent Amendment Act, 2005,' *Government Gazette* (28319) (Cape Town, 9 December 2005) 4.
- ³ Hardison, 2005. *The Report on TK Registers (TKRs) and Related TK Databases (TKDBs)*. Publication of Convention of Biological Diversity. P6.
- ⁴ Koopman, Jerzy. 2005. **Reconciliation of proprietary interests in genetic and knowledge resources: Hurry cautiously!** *Ecological Economics* 53 (523-541). P528.
- ⁵ Hardison, 2005. *The Report on TK Registers (TKRs) and Related TK Databases (TKDBs)*. Publication of Convention of Biological Diversity. P6.
- ⁶ Nicholson, D. 6 October 2010. Copyright service Liberian at Witwatersrand University. Personal communication.
- ⁷ **Traditional performance** is defined by this bill as 'a performance which is recognized by an indigenous community as a performance having an indigenous origin and a traditional character.'
- ⁸ **Traditional work** is defined by this bill as 'a literacy work, an artistic work or a musical work which is recognized by an indigenous community as a work having an indigenous origin and a traditional character.'
- ⁹ **Traditional terms of expression** is defined by this bill as 'a term or an expression which is recognized by a n indigenous community as having an indigenous origin and a traditional character and which is used to designate, describe or refer to goods or services.'
- ¹⁰ **Traditional design** is defined by this bill as 'any design applied to any article, by whatever means it is applied whether for the pattern, shape, configuration or ornamentation thereof; or for any two or more of the purposes contemplated in paragraph (a); and whether or not it has features which are necessitated by the function which the article to which the design is applied is to perform, which design is recognised by an indigenous community as having an indigenous origin and a traditional character;
- ¹¹ Idem, P2.
- ¹² National Economic Development and Labour Council. 2010. **Final report on the Intellectual Property Laws Amendment Bill, 2007**. Submitted to the Portfolio Committee to The Department of Trade and Industry, 27 July 2010
- ¹³ Trade Marks Act 194 of 1993
- ¹⁴ Von Braun, J. 8 October 2010. Associate Natural Justice. Personal communication.
- ¹⁵ Department of Environmental Affairs and Tourism. 8 February 2008. **National Environmental Management: Biodiversity Act, 2004 (Act no. 10 of 2004): commencement of on bioprospecting, access and benefit-sharing regulations, 2008**. *Government Gazette* no. 8831. P9.
- ¹⁶ Commission for Promotion and Protection Rights of Cultural, Religious and Linguistic Communities. 28 July 2010. Debating the definition of community. Submitted to the Portfolio Committee to The Department of Trade and Industry 28 July 2010
- ¹⁷ Karim, Q. 30 July 2009. **Intellectual property bill slammed as an 'abomination'**. *Mail and Guardian*. <http://www.mg.co.za/article/2009-07-30-intellectual-property-bill-slammed-as-an-abomination> (Accessed 10 October 2010).
- ¹⁸ Department of Trade and Industry. 29 March 2010. **Intellectual property laws amendment bill, 2008**. P10.
- ¹⁹ Von Braun, J. 8 October 2010. Associate Natural Justice. Personal communication
- ²⁰ Idem.
- ²¹ National Economic Development and Labour Council. 2010. **Final report on the Intellectual Property Laws Amendment Bill, 2007**. Submitted to the Portfolio Committee to The Department of Trade and Industry, 27 July 2010