

Protecting Traditional Knowledge

By Xoliswa Mpanza

The issue of traditional knowledge and how it should be protected is important and currently a concern throughout the world. The protection of traditional knowledge through the intellectual property regime carries out the essential function of preventing third parties from exploiting this knowledge for profit. However, this regime is not only unavailable to most traditional knowledge holders, but it also does not necessarily guarantee the preservation of the knowledge.

What is traditional knowledge?

The World Intellectual Property Organisation (WIPO) report on 'Traditional knowledge – operational terms and definitions' (2002) defines 'traditional knowledge' as being, 'tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks; names and symbols; undisclosed information; and all other based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields' ('WIPO/GRTKF/IC/3/9' www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_9.pdf, accessed 14-5-2014).

In the article titled: 'The Uneasy Case for Intellectual Property Rights in Traditional Knowledge' (2009) 27 *Cardozo Arts and Entertainment Law Journal* 37, Munzer and Raustiala point out that there is a broader description that applies to traditional knowledge. They state that traditional knowledge fully and carefully defined is the 'understanding or skill, which is typically possessed by indigenous peoples and whose existence typically predates colonial contact (typically with the West), that relates to medical remedies, plant and animal products, technologies, and cultural expressions' (at 48). They also go on to define the term 'cultural expressions' as including 'religious rituals, sacred objects, rites of passage, songs, dances, myths, stories, and folklore generally. These forms of knowledge and cultural expressions are rarely frozen in time. Generally they evolve over decades and centuries' (at 48).

In the article, 'Welcome to Traditional Knowledge Online', the authors point out that in order to establish the different aspects of traditional knowledge, it is important to distinguish between traditional knowledge and indigenous knowledge. Traditional knowledge is said to be more of a 'broad term referring to knowledge systems, encompassing a wide variety of areas, held by traditional groups or communities or to knowledge acquired in a non-systemic way,' (E Blanco and J Razzaque *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (UK: Edward Elgar Publishing 2011)).

The Draft Intellectual Property Laws Amendment Bill, 2007

The issue of the protection of traditional knowledge is also a matter of concern to the South African government. The Department of Trade and Industry developed the policy framework for the protection of indigenous traditional knowledge through the Intellectual Property System, which was drafted in 2007 as well as the Draft Intellectual Property Laws Amendment Bill of 2007 (the IPLA Bill). The IPLA Bill sought to amend various Acts, which are currently in place.

The policy document explains the purpose of the IPLA Bill as, 'to create a guide for the recognition, understanding, integration and promotion of South Africa's wealth of indigenous knowledge resources. ... [T]he protection of Indigenous Knowledge, and the holders of such knowledge, against exploitation. ... [E]nsuring that communities receive fair and sustained recognition and, where appropriate, financial remuneration for the use of this knowledge' (IPLA Bill).

Stellenbosch Chair of Intellectual Property Law Professor Owen Dean has severely criticised the IPLA Bill, which seeks to introduce a special form of protection for traditional knowledge into each of the trade marks, copyright, designs and performance protection Acts. Professor Dean is of the view that if some form of special protection for traditional knowledge is required, this should be provided in a *sui generis* statute that is customised to meet the requirements as well as characteristics of the subject matter to be protected. He further states that the protection, which the Department of Trade and Industry is seeking to achieve, cannot be achieved by amending the existing intellectual property statutes without doing serious damage to the basic doctrine of such statutes (O Dean 'Breaking with tradition' 12-12-2012 www.bizcommunity.com/Article/196/546/86970.html, accessed 14-5-2014).

This is because specialised protection for traditional knowledge is not compatible with the fundamental principles of intellectual property law as embodied in such statutes. As a result, the desired objective, which is the protection of traditional knowledge, cannot be achieved.

Prof Dean is of the opinion that the IPLA Bill is extremely poor legislation and is indeed practically 'unworkable'. One of his criticisms is that he does not believe that any traditional work can meet the requirement of 'originality' for copyright and consequently that copyright can subsist in any such work (O Dean 'Golden Oldies? Gallo Music v Sting Music' 18-5-2012 <http://blogs.sun.ac.za/iplaw/2012/05/18/golden-oldies-gallo-music-v-sting-music/>, accessed 14-5-2014).

Despite these criticisms, there is support for the view that, if traditional knowledge should be protected, then this should be done through a *sui generis* statute. It is argued that a *sui generis* statute must be drafted specifically to meet the special requirements of traditional knowledge and that the intellectual property statutes, which are currently in place should not be 'adulterated' (O Dean 'Inside Views: From South Africa – Keeping Traditional Knowledge Traditional' 7-12-2012 www.ip-watch.org/2012/12/07/from-south-africa-keeping-traditional-knowledge-traditional-2/, accessed 14-5-2014).

However, the Portfolio Committee still maintains that the IPLA Bill has been appropriately passed. It raises various arguments as to why it believes that the Bill is in fact effective and sufficient for the protection of traditional knowledge. One of these arguments is that the committee believes that *sui generis* protection for traditional knowledge is not appropriate because it still would not prevent 'poaching' of traditional knowledge by means of the existing intellectual property system.

The Protection of Traditional Knowledge Bill, 2013

The new *sui generis* Protection of Traditional Knowledge Bill (the PTK Bill), which was drafted by the Prof Dean, was tabled in Parliament by Dr Wilmot James in 2013. The new Bill, if it becomes law, is said to introduce a pioneering approach to the protection of indigenous works in a way that benefits South Africa's status as a leader of the international intellectual property community. Also, the PTK Bill is intended to establish a traditional knowledge system that will be able to stand firmly on its own, unrestricted by the interference from its 'ill fitting cousins', namely the intellectual property statutes that the earlier IPLA Bill drafted by the Department of Trade and Industry sought to amend for this purpose.

The PTK Bill, if passed, is believed to be capable of establishing a specially made traditional knowledge system, customised to the unique and widely divergent demographic of the South African population and capable of actually protecting traditional knowledge and financially benefitting the indigenous communities from whence it hails. In this regard, it needs to be noted that the Government's Bill was and is still met with the most serious objection possible to its proposed legislation – namely that the foremost intellectual property practitioners in South Africa have found it entirely impracticable and have resolved to advise their clients to ignore it (if it is to become law) and, where necessary, bypass its limping application with the law of contract.

Dean points out that generally, there are various views on the protection of traditional knowledge. He refers to what he describes as the 'left wing', which consists of those who are of the view that the existing intellectual property laws give adequate protection, to the degree necessary, to traditional knowledge and therefore feel that no special protection is required. Dean states that in the centre, there are those who hold the view that the existing laws are adequate, but provision can and should be made to ensure that where rights are claimed in property by a third party (eg, the registration of a patent), the rights of traditional communities to continue using their traditional knowledge undisturbed should be entrenched. This is called 'defensive protection'. He then refers to what he calls the 'right wing', consisting of those who believe that some form of special protection for traditional knowledge, so called 'positive protection', may be appropriate but that such protection should be in customised *sui generis* legislation. Lastly, he explains that the so called far 'right wing' includes those who favour amending existing intellectual property laws so as to allow special protection for traditional knowledge.

Draft National Policy on Intellectual Property, 2013

The new policy document entitled the Draft National Policy on Intellectual Property has been drafted by the Department of Trade and Industry in August 2013. The objectives of the Policy are namely to –

- complement other progressive economic national policies;
- encourage co-ordination within all spheres of government;
- encourage the intellectual property policy to interface with all sectors of the economy; and
- influence regional and international formulation of treaties to be in the best interests of South Africa.

The department suggests that the recommendations made within the policy should be categorised into long- and short-term goals, which need to be implemented. It also suggests that immediate legislation should be developed while developing negotiating strategies in international trade relations in the interim. Lastly, it suggests that for the long term, South Africa needs to convince international and regional non-governmental organisations and civil society to support its vision in the various areas of intellectual property. The policy was published on the 4 September 2013 in the *Government Gazette* in order to allow persons in the public to submit their written comments.

Conclusion

It is clear that traditional knowledge should be protected in order to allow indigenous people to use and/or exploit their own knowledge. The protection of traditional knowledge will also prevent unauthorised people from exploiting this knowledge. The main issue, therefore, is how to protect such knowledge. Should the protection be provided by redrafting the existing laws or by the introduction of specific legislation (*sui generis*)? Government has suggested that the existing laws be amended, however, this appears to not be appropriate or even workable. A far preferable solution therefore would be to introduce specific legislation that focuses on traditional knowledge as a species of intellectual property, which is deserving of its own protection. A *sui generis* Bill has been drafted by Prof Dean. In my view, the PTK Bill serves as an excellent alternative to the previous Government Bill. The most important factor about this Bill is that it not only recognises, but incorporates the *sui generis* approach towards the protection of traditional knowledge. The PTK Bill provides, 'adequate; financially viable; and legally enforceable protection for Traditional Knowledge that will provide *sui generis* (of its own kind) protection for Traditional Knowledge' ('Member of Parliament, Dr. Wilmot James, Submits New Protection of Traditional Knowledge Bill' (<http://natural-justice.blogspot.com/2013/04/member-of-parliament-dr-wilmot-james.html>, accessed 14-5-2014)).

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