

TRAMPLING TRADITION – A CALL FOR SUPPORT

The Stellenbosch Chair of Intellectual Property (CIP) has repeatedly, thoroughly and honestly expressed [its views](#) on the proposed Intellectual Property Laws Amendment Bill (the Traditional Knowledge Bill) in no uncertain terms. Its labours have included extensive research on the consequences for our IP regime if it was to become law, the financial, legal and practical difficulties our legal system will face in its wake and the dismissive attitude of the Portfolio Committee on Trade and Industry toward every legitimate concern from the public. The incumbent Chair even went so far as to attend the largest gathering of IP experts and practitioners at the AIPPI conference in Korea, where the Bill met with nothing but scorn and ridicule from the worldwide IP community.

It is therefore with great (albeit guarded) excitement that the CIP received the news that it has at last been heard. On 5 March this year the Shadow Minister of Trade and Industry, Dr Wilmot James, submitted a Private Members' Bill to the Office of the Speaker entitled the [Protection of Traditional Knowledge Bill](#) (full text [here](#)). This Bill is of course the [new Traditional Knowledge Bill](#) drafted by the incumbent of this Chair, Prof Owen Dean, more than a year ago and published widely in the IP community and media. The Bill (now called the Wilmot Bill) seeks to bridge the gap between the current (old) TK Bill introduced by government in 2010 and the stated ideals of the Indigenous Knowledge Systems Policy adopted by government in 2004.

The Wilmot Bill is, as explained by its drafter, Prof Dean, in the [accompanying synopsis to the Bill](#), a considered effort to provide adequate, financially viable, legally enforceable protection for traditional knowledge (TK) that will:

- Provide *sui generis* protection for TK,
- Comply with South Africa's international obligations,
- Give effect to the principles for the protection of indigenous knowledge advocated by the World Intellectual Property Organisation (WIPO),
- Safeguard our existing IP statutes from irreparable harm and
- Establish a more sophisticated system for the protection of traditional knowledge in South Africa that far exceeds the level of protection anywhere else in the world.

It is worth noting that Prof Dean is also the author, among others, of the Merchandise Marks Amendment Act 2002 and the Copyright Amendment Act 1992. Indeed, his oeuvre of jurisprudential work is substantial by any standard. Therefore, by presenting to Parliament a workable TK Bill, Dr James has introduced the best alternative to the existing TK Bill anyone could have wished for.

Conversely, after refusing to sign the current (old) TK Bill into law, the President ordered that it be returned to Parliament for consideration by the House of Traditional Leaders on Friday (15 March). This marked the latest in a series of setbacks for the beleaguered portfolio committee and its ill-conceived Bill.

However, the portfolio committee maintains that the old Bill has been appropriately passed and should therefore not be re-opened for public comments. It argues that:

- *Sui generis* protection for TK is not appropriate because it would not prevent "poaching" of traditional knowledge by means of the existing IP legal system,
- Despite its (conjured) misgivings, the IP legal system already contains a workable system for the economic exploitation of TK and that this system should be employed to exploit TK without more,
- The cost of implementing the Bill would be less than R160 million and is therefore economically viable because the value chain of Rooibos is estimated at that amount,

- The members of the committee appropriately canvassed the enormously complex nature of the Bill during a one-day workshop with Prof Coenraad Visser of UNISA and a two-day workshop by the International Centre for Trade and Sustainable Development (ICTSD),
- The Bill should pass into law despite the President's reservations and the serious objections by a majority (3 out of 5) of the political parties represented on the committee itself. Of the 5 parties, only the ANC and COPE have not raised any substantive objection to the Bill, while the DA, IFP and FF Plus all raised fundamental problems with the Bill and unanimously support an alternative *sui generis* TK Bill.
- South Africa should regulate TK immediately despite it being unenforceable and not wait for the guidance of WIPO or any other model law, even though several international organisations have been working exclusively toward a workable solution for developing and developed nations.

These facts only scratch the surface of a mass of inadequacies in the work of the portfolio committee, the bullying attitude of the DTI and the festering political objectives that have driven this Bill since its inception. It is riding roughshod over our Democracy and blatantly contravening the Constitution. In fact, the [latest report by the committee](#) recommended that the Bill should pass into law *despite* the President's objections and the express recommendation by the Department of Science and Technology that the Bill be halted because it oversteps the mandate of the DTI.

Clearly the committee is prepared to trample underfoot every objection to its problematic Bill and is comfortable with ensuring that TK will never be protected in South Africa. The committee has transformed itself into a giant, so far removed from the real world that no obstacle may remain standing, least of all the foundations of our intellectual property law system.

These are the facts. The old TK Bill, if it goes any further, will introduce a TK system that is guaranteed never to function at all. In addition, it will crush the IP system into oblivion and forever divide our IP laws from that of the rest of the world.

Therefore, the CIP is prepared to make a last stand against the old TK Bill and is calling on everyone with an interest in the survival of our IP law, the protection of traditional knowledge or the survival of our Constitutional values of transparent and inclusive government to join us in calling on government to:

- Reject the old TK Bill once and for all,
- Open the matter for public comment from all traditional communities and
- Support the Wilmot Bill by way of written or oral submissions so that our TK system may be an example for Africa and the rest of the world.

In an attempt to lay bare the extent of government's ungainly efforts to win political favour through legislative intervention, this Chair has collected the most salient public documents relating to the work of the DTI and the portfolio committee. Please read these reports (available to download on our blog [here](#)) and see for yourself that our IP laws are hanging by a thread.

If you share our concerns, we urge you to call upon government to stop trampling on our values. To express your opinion post a comment on our blog (click [here](#)) or, better yet, contact those responsible for this chaos (details below) and let your voice be heard – as it should be in a real democracy.

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Read more about this and other matters at: www.sun.ac.za/iplaw or blogs.sun.ac.za/ipstell.

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