

TRADITIONAL KNOWLEDGE

Traditional knowledge (TK), for example folklore, is a controversial issue and we've written about it before. The government feels that TK should be legally protected, and that this should be achieved through amendments to the intellectual property (IP) statutes. The IP community has no issue with TK being protected, but it's not very comfortable with this being done through IP legislation. It feels that TK is far removed from laws which give limited monopoly rights as a reward for creativity or inventiveness. A particular problem is that our IP laws are closely aligned to the IP laws of most other countries - thus allowing for reciprocal protection for IP - and it's felt that if our IP laws suddenly start providing protection for things that are not protected elsewhere, there may be problems.

Parliament has approved legislation called the Intellectual Property Laws Amendment Bill 2007 (for convenience I'll refer to this as the *'TK Bill'*), which introduces protection for TK by amending various pieces of IP legislation, including the Copyright Act, the Designs Act and the Trade Marks Act. The President has, however, not yet signed this legislation. In the meantime, an academic who's opposed to the TK Bill, Professor Owen Dean, has drafted an alternative bill which keeps TK outside of our IP statutes. This is seemingly also the approach of the World Intellectual Property Organisation (WIPO), which feels that TK should be protected as a *sui generis* right. Dean's alternative bill has formally tabled in Parliament as a private members bill by Dr Wilmot James of the DA, the shadow Minister of the Department of Trade and Industry. The bill (hereafter referred to as the *'Wilmot Bill'*) has now been published in the Government Gazette for comment.

So what are the differences between the two bills? Well, the main difference is that, instead of making amendments to various IP Acts, the Wilmot Bill creates a brand new property right called *'Traditional Knowledge'*, which itself consists of three different rights. These are the Traditional Work, the Traditional Design and the Traditional Mark.

The Wilmot Bill deals with what's likely to be the most common form of Traditional Knowledge - literary, artistic and musical works - by establishing the *'Traditional Work'*. This is defined to mean a literary, musical or artistic work which evolved in, or originated from, a Traditional Community, and in respect of which no individual owner is known. In order to enjoy protection the Traditional Work must be reduced to a material form by or for the community, and it must be recognised as being derived from and characteristic of that community by people outside that community. The owner has the exclusive right to perform the Traditional Work in public, and to broadcast, make adaptations and distribute copies of it. The right is only infringed if the person who commits the unauthorised act has knowledge of the right, and the usual copyright exceptions, such as fair use, apply.

The Wilmot Bill also creates the *'Traditional Design'*. This is defined to mean an aesthetic design that's applied to an article and which evolved in, or originated from, a Traditional Community, and in respect of which the owner is not known. In order to enjoy protection the design must be reduced to a material form by that community, and it must be considered as being derived from or characteristic of that community by people outside it. The owner has the exclusive right to make, use or dispose of an article embodying the protected design, and there can be no infringement without knowledge of the right.

Finally, the Wilmot Bill creates the *'Traditional Mark'*. This is defined to include a trade mark, collective mark or certification mark which evolved in or originated from a Traditional Community. To be protected a Traditional Mark must be represented graphically by or for the community, and it must be recognised as being derived from or characteristic of that community by people outside that community. The owner has the exclusive right to register it, and the mark is deemed to enjoy repute for the purposes of bringing a passing off case. A Traditional Mark can only be infringed by someone who knows of the right.

The Wilmot Bill also uses the concept of a *'Traditional Community'*, which is defined as a *'natural, indigenous and homogeneous grouping of people that have a common language and customs, which exist within the Republic as an organised structure and is generally recognised as having a separate and individual character.'* It goes on to provide that Traditional Knowledge will belong to the Traditional Community in which it evolved, or from which it originated. The Traditional Community can designate a person who will own the right in a representative capacity.

The Wilmot Bill makes provision for the licensing of Traditional Knowledge. It also provides for registration of Traditional Knowledge in a Register of Traditional Knowledge, and it creates a National Council for Traditional Knowledge and a National Trust Fund for Traditional Knowledge. To this extent it's in line with the TK Bill. But one major difference is that the Wilmot Bill makes provision for the protection of foreign Traditional Knowledge on an *ad hoc* basis (by way of a special proclamation in the Government Gazette), but only in cases where that foreign country gives reciprocal protection to South African Traditional Knowledge.

The two bills differ quite considerably. There are a number of concerns with the TK Bill that the Wilmot Bill seeks to address, without compromising on the main objective, which is to protect traditional knowledge. The 40 day period for commenting will no doubt receive much attention, and a revived interest, from the IP community.

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