



IMPLEMENTATION OF THE INTELLECTUAL PROPERTY LAWS AMENDMENT ACT, NO. 28 OF 2013

Briefing to the Portfolio Committee on Trade and Industry

4 March 2020



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA



PURPOSE

The purpose of the presentation is to brief the Portfolio Committee on Trade and Industry about the Intellectual Property Laws Amendment Act (IPLAA), No. 28 of 2013 and its alignment to the Protection, Promotion, Development and Management of the Indigenous Knowledge (IK) Act, No. 6 of 2019.



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Timelines and Processes of IPLAA

- Bill introduced to the National Assembly (NA) 20 April 2010.
- The Department of Trade and Industry briefed the Portfolio Committee on the Intellectual Property Laws Amendment Bill on 18 May 2010.
- The Bill was passed by the National Assembly and sent to the National Council of Provinces (NCOP) on 26 October 2011.
- The Bill was passed by both Houses and sent to the President for assent on 07 December 2011.
- The Bill was returned to the National Assembly by the President due to reservations about its constitutionality on 19 September 2012.
- The Bill was passed by the National Assembly on 04 June 2013.
- The Bill was passed by both Houses and sent to the President for assent on 14 November 2013.
- The IPLAA was signed by the President and became the Act, No. 28 of 2013 in December 2013.



Timelines and Processes of IK Act

- The Bill was published on 20 February 2015, in the *Government Gazette*.
- On 12 April 2016, the Minister of Science and Technology introduced the Protection, Promotion, Development and Management of Indigenous Knowledge Systems (IKS) Bill to the National Assembly [B6-2016] (National Assembly–proposed section 76).
- Department of Trade and Industry paused the development of regulations in 2015 to await the Department of Science & Innovation's (DSIs) Bill. One of the main reasons for non-enactment was to ensure alignment with the DSI legislation which is now passed into law.
- In 2017 both Departments presented to the joint Portfolio Committees on Science and Technology and Trade and Industry to outline the alignment of the IPLAA and the DSI law.
- The Committee recommended that a technical team ought to work in collaboration with **the dti** and DSI and they should deal with the following issues: Trade secrets, management systems between IK and IPLAA with a specific focus on the entities such as the national council and the other committee found in the IK Act.
- On 14 November 2017, the National Assembly approved the IKS Bill for concurrency.
- In 2018, the Bill was referred to the NCOP.
- The Bill was passed into law in August 2019.

Focus of the IK Act

- Bio piracy
- Misappropriation
- Promotes registration of Indigenous Knowledge
- Recognises prior learning of practitioners
- Benefit sharing for communities
- Facilitates research and development
- Creates mechanisms for dispute resolution for the communities



Context of IPLAA

- Indigenous knowledge is critical in the economic development and development of the cultural industry of South Africa.
- IPLAA aims to recognise and protect certain manifestations of indigenous knowledge. South Africa has a rich heritage that has an impact on the communities and society.
- Indigenous Knowledge Systems (IKS) deals with research, development, promotion, education and strengthening of the regime of Indigenous Knowledge.
- The Intellectual Property Laws Amendment Act amends South Africa's four existing Intellectual Property (IP) statutes to incorporate indigenous intellectual knowledge as a form of IP.
 - The SA Copyright Act 1978, the Performers' Protection Act 1967, the Trade Mark Act 1993 and the Design Act 1993 are amended to include certain forms of TK protection.



Context of IPLAA

- The IPLAA is an Act of Parliament but not yet implemented. There are no regulations that have been promulgated in terms of the Act. It was passed into law in 2013 and it has been six (6) years since.
- The Department as the custodian of intellectual property has taken a stance to implement IPLAA. The Companies and Intellectual Property Commission (CIPC) is a public entity that operates under **the dti** and is a creation of the Companies Act which was promulgated in 2008.
- The Commission deals with the registration of intellectual property (IP) and companies and acts as a regulator of company and IP issues. All forms of IP registration are handled by CIPC. The CIPC also performs an education and awareness function.



Institutional Arrangements for IPLAA

CIPC is an agency of the Department of Trade and Industry with a legislative mandate to register:

- Companies and Co-operatives
- Copyright in Films
- Designs
- Trademarks
- Patents

Under the following domestic legal framework:

- Copyright Act, 1978
- Performers' Protection Act, 1967
- Patents Act, 1978
- Cinematograph Films Act, 1977
- Trademarks Act, 1993
- Designs Act, 1993
- Counterfeit Goods Act, 1997



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Challenges with IPLAA

- This Act is not in force and academics have expressed an opinion in support of repealing it.
- IPLAA was promulgated in 2013 but no Regulations have been developed.
- The fact that the other Indigenous Knowledge legislation exists in the Department of Science and Innovation (DSI), which deals with promotion and preservation of indigenous knowledge, **the only relevant remaining aspect in the IPLAA is the three requirements of prior informed consent, disclosure of source of origin and benefit sharing agreement.** Only the registration of indigenous knowledge **meeting IP requirements** will be considered for registration under IPLAA.
- Other features of IPLAA can be suitably implemented in the DSI piece of indigenous knowledge legislation to avoid overlapping functions between these two legislations.
- It is observed that functions and institutions such as National Council, National Trust and National Database in IPLAA constitute overlaps and duplications of the functions in both IPLAA and DSI Indigenous Knowledge legislations and they will not be implemented. The overlapping and duplications have been addressed.



Lifespan of Traditional Knowledge

- The DSI legislation of indigenous knowledge guarantees perpetual ownership of indigenous knowledge through its sui generis nature and it is more suited to benefit the owners of indigenous knowledge as long as the indigenous knowledge continues to be used.
- At World Intellectual Property Organisation (WIPO), the protection of indigenous knowledge through a sui generis system is preferred against protection within the intellectual property regime even though no consensus has been reached on the protection of indigenous knowledge.
- South Africa has an opportunity to secure perpetual protection through *sui generis* system (DSI legislation) and further require compliance with three requirements when intellectual property applications having indigenous knowledge are filed with CIPC.



Life Span and Benefits to Communities

- Once indigenous knowledge (IK) has been declared as such and recorded by DSI in favour of a specific community/ies, the right established by such recordal is a **right which will exist in perpetuity**, which does not need to meet IP registration requirements and most importantly, needs not be renewed (as in the case of trade marks) and cannot lapse (as in the case of patents and designs).
- Article 4 of the DSI Act on IK recognises IK as “*property*”, thus there clearly is a right established in IK by a community upon recordal of the IK by DSI. And “*property*” is of course protected in terms of the Constitution.
- In addition and complimentary to this perpetual/forever right in IK already established in favour of a community under the DSI IK Act, the protection can be supplemented by an IP registration, for example a trade mark.

Life span and benefits to communities

There are 3x scenarios which would present itself under this:-

- The community owning the indigenous knowledge can apply for a trade mark, and then develop, market and commercialise the product itself; OR
- The community having entered into a benefit sharing agreement with a 3rd party/investor can apply for a trade mark, and simultaneously grant a trade mark license to the 3rd party in view of the benefit sharing agreement, and the 3rd party will then develop, market and commercialise the product. In addition, use of the trade mark by the 3rd party/licensee will then be considered as use by the community/holder of the IK; OR
- The 3rd party could on the strength of a benefit sharing agreement concluded with the community, apply for a trade mark in its own name, and then develop, market and commercialise the product, and share benefit with the community as holder of the IK, in line with the conditions of the benefit sharing agreement.

Alignment Between the dti, CIPC and DSI

- There will be alignment between **the dti** IPLAA and the DSI IK Act.
- The two Departments are working collaboratively and have been engaging on the two laws.
- The value chain approach has been identified on the two legislation.
- The Department of Science and Innovation will record traditional knowledge from communities and CIPC will participate only in registration once a traditional knowledge requires IP protection.



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Alignment between the dti, CIPC and DSI

**DSI legally records
traditional
knowledge in
communities-IK Act**

**Communities
traditional
knowledge
protected,
economically
empowered**

**CIPC registers the IP-
IPLAA, the dti**

Implementation Approach

- **the dti** will be in the process to develop the regulations to implement IPLAA. This process is anticipated in the 2020/21 financial year.
 - DSI will be undertaking a similar process to develop the regulations. Both Departments will work together on the respective regulations.
- CIPC and **the dti** will continue to work closely with the DSI to ensure continued alignment and to implement the registration of IP required.
- It is not envisaged that there will be many IK applications for patents, designs and trademarks. In copyright, there is no registration except in cinematograph films.
- Copyright protection is claimed automatically once the work is original and reduced to material form.

Implementation Resource Capacity

- CIPC has existing systems of IP registrations. There is no need to amend laws to cater for the implementation approach.
- There will not be requirements for new systems and resources except slightly to cater for copyright depository system in the future as copyright has no registration except for films in terms of Cinematograph Films Act, 1977.

Way Forward

- the DSI legislation provides a sui generis protection of indigenous knowledge in perpetuity while IPLAA compliments it by availing protection of derivative intellectual property through the intellectual property regime.
- The other functions and institutions proposed by IPLAA will be suitably implemented in the DSI legislation.
- The process of the development of the Regulations will be underway.
 - Both Departments will form part of Task teams to develop regulations.
- Collaboration with DSI has been established and will be monitored and effectively maintained.
 - Possible MOUs to be developed between all parties.
- Education and awareness programmes to be developed targeted at communities.
 - CCRD has an education and awareness intervention that can be expanded on this mandate.
 - Joint education and awareness campaigns will be considered, with the use of various media platforms including social media.
 - Rural communities will be prioritised.

THANK YOU



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