

THE INTELLECTUAL PROPERTY LAWS AMENDMENT BILL, 2007 (the “Bill”) - Procedural and Substantive Concerns Ahead of Introduction to Parliament

SAMRO, PASA, SAFACT and DALRO (“Cultural Business”) have participated in the negotiation of the Bill in NEDLAC. Cultural Business has two procedural concerns on the proposed introduction of the Bill, as well as a number of substantive concerns.

A. Procedural Concerns

- ◆ A version of the Bill on record at Parliament is devoid of all amendments agreed to at NEDLAC. If it is formally submitted to Parliament in the near future, these amendments still have to be drafted. Cultural Business seeks the Minister’s assurance that any final Bill will comply with and honour NEDLAC agreements and resolve outstanding issues.

- ◆ Of additional grave concern to Cultural Business is the compliance (or lack thereof) of the Bill with Regulatory Impact Assessment (RIA) called for by the Presidency. Whilst the RIA on the Bill is not public at this stage, no assurance has been given by DTI that it will follow RIA recommendations.

Background:

To protect Traditional Knowledge (TK) in South Africa, Cultural Business engaged pro-actively with the Department of Trade & Industry (DTI) through NEDLAC for more than a year (during 2010, 2009 and parts of 2008).

Improvements were agreed by Business, Labour and the DTI on many issues, while some crucial ones were left unresolved. We understand that NEDLAC’s final report is expected this week. However, the only public version of the Bill does *not* reflect *any* improvements achieved at NEDLAC.¹ It is

¹ Substantiated by the following:

- The DTI has not yet presented NEDLAC with an updated draft of the Bill, as is the normal procedure in NEDLAC.

- The NEDLAC report has not yet been issued and sent to the Minister of Trade & Industry.

- A draft of the Bill with a 2009 reference number on the website of the Parliamentary Monitoring Group at <http://www.pmg.org.za/bills/100217iplabill.pdf> , which contains none of the changes agreed at NEDLAC.

- E-mail from Mr Simphiwe Ncwana, Deputy Director: Intellectual Property, Commercial Law and Policy Division of the DTI, to NEDLAC dated 2 February 2010 to the effect that the DTI “conceded that it does not have competency in the drafting of legislation or Bill. The NEDLAC report will form the real architecture of the legislation.”

noted that the DTI has declared that it intends to follow the NEDLAC process “to the letter”², but this is as of now uncertain.

We therefore urgently seek an assurance from you that will only a Bill with all the constructive improvements included as per the imminent NEDLAC report, will be tabled in Parliament.

B. Substantive Concerns:

Cultural Business remains convinced that the Bill (even as amended as agreed at NEDLAC and thereby dealing with their immediate concerns) will not achieve its objective of protecting traditional knowledge.

- ◆ **Cultural business sector supports TK protection, but the Bill fails to achieve this and prejudices existing rightsholders** of copyright.
- ◆ The **Bill fails** clearly to determine all four crucial issues that an effective protection of TK would have to provide:
(i) Who (ii) Owns (ii) What (iv) For How Long?
- ◆ **The Bill may benefit government, not communities:** the absence of a government budget to assist TK holders will likely result in government appropriating benefits before these get to communities.
- ◆ Section 9A of the original Bill harms copyright holders and is in breach of international agreements and the Bill attempts to “regulate” collecting societies inadequately.
- ◆ Cultural business needs the bill to include a new exclusive right, the so-called “communication to the public right”, for all rightsholders, not just for TK holders. This demand is fully in line with international standards of intellectual property protection and necessary, given the increasingly digital economy.

We have already shared its concerns in this regard with the Deputy Minister for Trade & Industry, and its presentation of 3 December 2009 is re-stated on the following pages (attached).

SAMRO and the other stakeholders representing Cultural Business support the protection of traditional knowledge against exploitation without recognition of the origin of those works, and remain committed to finding a constructive solution.

I. BASIC CONCERNS

² Presentation by the Commercial Law and Policy Division of the DTI to the Parliamentary Portfolio Committee on Trade & Industry on 17 February 2010.

- ◆ The creative **business sector supports Traditional Knowledge (TK) protection**, but the present **bill fails to achieve this and prejudices existing rightsholders** of copyright.
- ◆ The **Bill fails** clearly to determine all four crucial issues that an effective protection of TK would have to provide:
 - (i) Who (ii) Owns (ii) What (iv) For How Long?**³
- ◆ **The Bill may benefit government, not communities:** the absence of a government budget to assist TK holders will likely result in government appropriating benefits before these get to communities.
- ◆ Section 9A of the original Bill harms copyright holders and is in breach of international agreements and the Bill attempts to “regulate” collecting societies inadequately.
- ◆ Creative business needs the bill to include a new exclusive right, the so-called “communication to the public right”, for all rightsholders, not just for TK holders. This demand is fully in line with international standards of IP protection and necessary, given the increasingly digital economy.

³ (i) “Who”: the definition of TK holder is unclear: is it the “community”, and is a “community” a legal person (and if so, represented by whom) or the central government?

(ii) “Ownership/Right To Manage”: at the moment there is a paternalistic view in government which means the TK holders will not be able to act without government’s consent “for their own protection”. But government’s involvement risks to introduce so much red tape that, in practice, it will be impossible to manage TK deriving real benefits. This could lead to a “lock-up” of TK.

(iii) “What”: initially the bill tried to protect TK, but now government changed tack and will only protect “intellectual property” derived from TK – to protect derivative creations, the existing IP framework is sufficient! The bill now fails to address its main purpose altogether.

(iv) “How Long”: the bill currently provides no clear answer from when on it will be effective and it is not clear whether a time limit will apply. This creates great uncertainty and is detrimental both to business and to TK holders.