Owen Dean: Courtesy of Spoor & Fisher

A DIFFERENT BALL GAME?

Intellectual property authority Dr Owen Dean writes for SAMRO Notes, questioning the logic and constitutionality of the mooted new Intellectual Property Laws Amendment Bill

The Department of Trade and Industry (DTI) proposes placing before Parliament a Bill to amend the intellectual property statutes, and more particularly the Trade Marks Act, Copyright Act, Designs Act and Performers Protection Act, so as to introduce protection for so-called "traditional knowledge" into these Acts as a form of intellectual property.

"Traditional knowledge" for these purposes means traditional works such as indigenous artworks (e.g. bushman paintings), tribal legends, indigenous songs and the like. Let me at the outset pin my colours to the mast and, with apologies to William Shakespeare and Mark Anthony, say outright that I come to bury the Bill, not to praise it.

THE ESSENCE OF INTELLECTUAL PROPERTY

Intellectual property has an underlying philosophy. When an individual creates something new or original, he or she is given a qualified monopoly in the use of this creation for a limited period. During this period, he/she can exploit it commercially. At the conclusion of the period of protection, the work passes into the public domain and is free for use and exploitation by all. In this way, the creative person derives a reward for his/her creativity. In return, in due course, he/she bequeaths the creation to the world, thus benefiting society as a whole.

Traditional knowledge, on the other hand, has an entirely different makeup. In the main, the cultural expressions have been around since time immemorial and it is uncertain which individual(s) created them. Such works are presently in the public domain. What is now, however, sought to be achieved is to take works out of the public domain, and give them protection in the form of a monopoly of use for an unlimited period. In other words, the intent of protecting traditional knowledge is precisely the opposite of the system for protecting intellectual property.

ADDRESSING THE PROBLEM

The Bill has attracted considerable adverse criticism, particularly in intellectual property circles. Judge Louis Harms, the Vice-President of the Supreme Court of Appeal and an expert in IP law, has stated: "The proposals are fundamentally flawed and will not lead to any material benefit to any community in South Africa; they will not make the country technologically or otherwise rich; and they will protect little (if any) indigenous knowledge."

I have added my two cents' worth in a letter published in the May edition of 'De Rebus', the journal of the attorneys' profession, by saying that the attempt to clothe traditional knowledge in intellectual property statutes

"can be viewed as dressing something in clothes which were not designed for it, thus making for an extremely uncomfortable fit".

The trouble with us intellectual property types is that lay persons do not really understand our different language. Consequently, it is useful to use an analogy, in this case with soccer and rugby.

CHANGING THE RULES FOR CONVENIENCE'S SAKE

The games of rugby and soccer have several common features. They are played on the same fields, the fields have a goal line at each end, there are two teams, the game is controlled by a referee by means of blowing a whistle, a leather ball is used, and so on.

At present, rugby and soccer each has its own sporting code, administration, organisations and rules. One might argue, however, that given the significant common features of the games, the two sporting codes should be combined, thus rationalising administration, decreasing costs and generally promoting unity of purpose. Should the games be unified and a single set of rules be produced, obviously provision will have to be made for the extent to which rugby differs from soccer – such as the "handball rule", kicking goals and the shape of the ball.

So, what will emerge from this process is a set of rules for the game of soccer which have been adjusted so as also to cater for the game of rugby. This will be done by means of creating exceptions to the relevant rules of soccer. This may, of course, give rise to tricky issues of interpretation of the rules and confusion.

BACK IN THE REAL WORLD...

Really! No-one in their right mind would contemplate doing what I have described. It makes no sense whatsoever.

I come back now to the Bill. Applying my analogy, one can regard the intellectual property statutes as being the equivalent of the rules of soccer, and the provisions of the Bill as being the changes that would have to be made to the rules of soccer to cater for the introduction of rugby as a species of soccer into those rules.

Perhaps now the reader can appreciate why the intellectual property fraternity is up in arms about the prospect of having rules pertaining to traditional knowledge, a totally different ball game, being integrated into the intellectual property statutes. It makes as little sense for the Bill to pass through into law as it would for the rules of soccer to be amended to allow for the incorporation of the rules of rugby. The Bill is riddled with inconsistencies and anomalies and, indeed, downright absurdities. This is particularly true of those parts of it which amend the Copyright and Performers' Protection Acts. The Bill is challengeable on these grounds alone.

Moreover, one cannot help but wonder whether the "communities" that the Bill apparently seeks to benefit know that the rights granted to them with the one hand are immediately taken away and given with the other hand to the State. The only "compensation" would be that it may be possible for them at some time in the indefinite future to benefit by means of the State's largesse.

BURY THE BILL

The constitutionality of the Bill is seriously questionable, and, if it is passed in its present form, it is likely to be referred to the Constitutional Court to be declared invalid.

It is simply not practical, theoretically sound, nor compatible with common sense for traditional knowledge to be regarded as a species of intellectual property. They are, in essence, significantly different animals.

The way forward for protecting traditional knowledge, like in the case of rugby, is to have its own separate customised set of rules, which may have some similarity to intellectual property legislation. This is what intellectual property practitioners in South Africa are saying about protecting traditional knowledge (a laudable objective), and what legal thinkers on the subject of traditional knowledge throughout the world are saying.

Only in South Africa does the DTI want to do the equivalent of integrating rugby into the game of soccer. For pity's sake, no! The Bill must be buried and new custom-made legislation with a similar objective must arise in its place.

To continue the conversation on the IP Bill refer to **www.samro.org.za** or join us on our facebook page.