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Deputy Director: Advocacy & Policy Development
Department of Science and Innovation
Pretoria

Attention: Ms Shumi Pango

By email only to: Shumi.Pango@dst.gov.za

Dear Madam,

SUBMISSIONS ON THE DRAFT REGULATIONS RELATING TO THE PROTECTION, PROMOTION, DEVELOPMENT AND MANAGEMENT OF INDIGENOUS KNOWLEDGE ACT NO 6 OF 2019.

Thank you for the opportunity to provide submissions to the Draft Regulations relating to the Protection, Promotion, Development and Management of Indigenous Knowledge Act No 6 of 2019 ("the IKS Act").

The South African Institute of Intellectual Property Law (SAIIPL) was established in 1954 and has as its members approximately 200 lawyers and practitioners of copyright, patent, and trade mark law who are experienced in the protection of intellectual property rights.

SAIIPL supports the objectives of the IKS Act. However, once in force, the IKS Act will have an impact on existing intellectual property (IP) rights. It was anticipated that the Regulations would be wide enough in scope to ensure the proper implementation of the IKS Act and would also deal with the manner in which any conflicts with existing IP rights could be addressed.

SAIIPL's full submission prepared by its Traditional Knowledge Committee, is attached. As will appear from our submission the Draft Regulations to the IKS Act are subject to significant reservations and provide virtually no guidance on the implementation of the IKS Act. The Draft Regulations will lead to legal uncertainty and require substantial revision.

We respectfully encourage the Department of Science and Innovation to take the initiative to reconsider and revise the Draft Regulations.

Yours faithfully
SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY LAW

E VAN DER VYVER
President

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Convener: Traditional Knowledge Committee

Please reply by email to mlgrobler@saiipl.co.za

SUBMISSIONS TO THE DEPARTMENT OF SCIENCE AND INNOVATION
ON THE DRAFT REGULATIONS RELATING TO
THE PROTECTION, PROMOTION, DEVELOPMENT AND MANAGEMENT OF INDIGENOUS KNOWLEDGE ACT NO 6 OF 2019
BY THE SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY LAW (SAIIPL)
2 FEBRUARY 2023

Introduction

1. The introduction of measures to protect Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs)[1] as envisioned in The Protection, Promotion, Development and Management of Indigenous Knowledge Act No 6 Of 2019 ("the IKS Act") is a significant development in our law.

2. The rights of indigenous peoples to maintain, control, protect and develop their cultural heritage and as well as the intellectual property over such cultural heritage is recognised both internationally[2] and locally[3]. However, it must be acknowledged that the subject is a complex one. What form such mechanisms/measures of protection should take as well as the nature and scope thereof, has been the subject of much debate.[4]

3. The approach taken by the Department of Science and Innovation by creating "sui generis" legislation to provide mechanisms for protection is generally considered to be the correct approach[5]. SAIIPL supports the objectives of the IKS Act as well as the Department of Science and Innovation's efforts in this regard.

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[1] The phrases Traditional Knowledge and Indigenous Knowledge as well as Traditional Cultural Expressions and Indigenous Cultural Expressions are generally interchangeable. The term "traditional knowledge" (TK) is the umbrella term used in other jurisdictions and by the World Intellectual Property Organisation (WIPO) to refer to the subject matter.
[2] Article 31 of the United Nations' Declaration on the Rights of Indigenous Peoples (https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html)
[s] Sections 30 and 31 of the Constitution is largely considered to be the primary source of the Government's mandate and power to regulate cultural matters.
[4] WIPO's Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was created in October 2000 specifically to create an international treaty to protect the subject matter in question. To date, the provisions are still in draft form.
[5] As opposed to the Intellectual Property Laws Amendment Act no. 28 of 2013 ("IPLAA") (not yet in force) which seeks to amend some of our existing statutes to protect traditional knowledge

4. The objective of the IKS Act are set out in section 3 and include the following:

> *(a) protect the indigenous knowledge of indigenous communities from unauthorised use, misappropriation and misuse;*
> *(b) promote public awareness and understanding of indigenous knowledge for the wider application and development thereof;*
> *(c) develop and enhance the potential of indigenous communities to protect their indigenous knowledge;*
> *(d) regulate the equitable distribution of benefits;*
> *(e) promote the commercial use of indigenous knowledge in the development of new products, services and processes;*
> *(f) provide for registration, cataloguing, documentation and recording of indigenous knowledge held by indigenous communities;*
> *(g) establish mechanisms for the accreditation of assessors and the certification of indigenous knowledge practitioners; and*
> *(h) recognise indigenous knowledge as prior art under intellectual property laws.*

5. The subject matter as defined in the IKS Act (and set out below for ease of reference), forms part of a community's cultural heritage and thus, due to its very nature is extremely broad.

> *"indigenous knowledge" means knowledge which has been developed within an indigenous community and has been assimilated into the cultural and social identity of that community, and includes —*
> *(a) knowledge of a functional nature;*
> *(b) knowledge of natural resources; and*
> *(c) indigenous cultural expressions.*[6]
>
> ***"**indigenous cultural expression" means expressions that have a cultural content that developed within indigenous communities and have assimilated into their cultural and social identity, including but not limited to –*
> *(a) phonetic or verbal expressions;*
> *(b) musical or sound expressions;*
> *(c) expressions by action; and*

[6] Section 1 of the IKS Act definition of "indigenous knowledge"

(d) action tangible expressions;[7]

6. The subject matter would also constitute intellectual property, which leads to an intersection of the IKS Act and the provisions of current intellectual property legislation as well as the existing rights of intellectual property right holders.[8]

7. Consequently, it is essential that any legislation regulating this new form of protection and complex subject matter be comprehensive as well as clear. Furthermore, it is a constitutional imperative that laws be written in "a clear, accessible and reasonably clear manner".[9] In describing the doctrine of vagueness, the Constitutional Court stated as follows:

> "*laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly".*[10]

8. The South African Institute of Intellectual Property Law (SAIIPL) was established in 1954 and has as its members approximately 200 lawyers and practitioners of copyright, patent, and trade mark law who are experienced in the protection of intellectual property rights.

9. It is within this context that SAIIPL makes the following submissions:

Preliminary observations

10. Although it is not yet in force, the IKS Act was signed into law on 13 August 2019. Being a new mechanism for protection it was not entirely clear from a reading of the IKS Act, how it would be implemented in practice.

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[7] Section 1 of the IKS Act definition of "indigenous cultural expressions"
[8] This intersection led to the enactment of "IPLAA" (not yet in force) see fn 5 above.
[9] LAWSA Constitutional Law: Structures of Government (Volume 7(2)) 3rd Edition par 46 citing *Affordable Medicines Trust v Minister of Health* 2005 6 BCLR 529 (CC) par 108
[10] *Affordable Medicines Trust v Minister of Health* 2005 6 BCLR 529 (CC) par 108

11. Intellectual property practitioners anticipated that the Regulations would provide guidance and clarity on the implementation of the IKS Act including a number of concerns raised by some of its provisions, specifically but not limited to

    - the registration process and the omission of an opposition term
    - the impact the registration of IK will have on existing IP rights[11]; and
    - whether it would apply to 'pre-existing works' (e.g. works already created prior to the enactment and commencement of the IKS Act and already protected under other IP laws, such as films produced and protected under copyright for instance).

12. In terms of section 31(1) of the IKS Act, the Minister may make regulations regarding any matter pertaining to —

    (a) the protection, promotion, development and management of indigenous knowledge;
    (b) procedures for securing registration in the Register and obtaining licences to use indigenous knowledge from NIKSO;
    (c) matters which may or must be prescribed in terms of this Act; and
    (d) in general, any ancillary or incidental matter that it is necessary to prescribe for the proper implementation or administration of this Act.

13. Thus, the IKS Act empowers the Minister to make wide ranging regulations to ensure the objectives of the IKS Act are met. Section 31(1)(d) in particular, allows the Minister to make regulations that will allow for the proper implementation of the IKS Act.

14. Unfortunately, we respectfully submit that the Draft Regulations as published in Government Gazette No 2722 of 4 November 2022 are insufficient to ensure the proper implementation of the IKS Act.

15. The Draft Regulations are very brief. The substantive part of the Draft Regulations comprises only four pages containing 12 provisions. The balance of the document comprises various forms, which do not appear to be in order.

[11] Section 32 of the Act stipulates that the Act does not alter or detract from any right in respect of any statute or the common law. The Act did not state what the position would be in the event of any conflict between this Act and any other intellectual property legislation (like the Trade Marks Act, Patents Act, Copyright Act or Designs Act). It was hoped that the Regulations may address this, but they do not.

16. The general function of regulations is to "flesh out" the main Act or legislation. However, in our view, these Draft Regulations do little to achieve this purpose. If one compares the IKS Act and these proposed Draft Regulation to the other South African intellectual property statutes[12], there is significantly less detail and very little guidance provided, which could lead to a great deal of confusion and many unintended consequences.

Specific observations

17. Regulation 2 Appointment of Advisory Panel

17.1. Regulation 2(1) introduces the word "official" in reference to the individuals that will make up the Advisory Panel, whereas section 7 of the IKS Act refers to these individuals as "members". The words have different meaning when read within the context of Regulation 2(1). The Draft Regulation should be amended to refer to "members" for the sake of consistency but also to ensure that the Panel is representative and does not consist solely of government "officials".

17.2. In addition, in order to ensure that the Advisory panel remains representative, it should be clear that one individual from each category listed in Regulation 2(1) (a) to (d) must be included. We suggest the following wording: "*the Advisory Panel contemplated in section 7(1) of the Act must consist of one member, at least, from each of the following sectors*: …"

18. Regulation 3 Accreditation of Assessors

18.1. An **''**assessor**''** means "*a qualified person accredited and assigned by NIKSO to assess applicants according to applicable pre-determined standards having regard to that person's possession of indigenous knowledge, expertise and skills for the purpose of being certified as an indigenous knowledge practitioner*".[13]

[12] The Regulations to the Trade Marks Act no 194 of 1993 for example comprises 60 Regulations.
[13] Section 1 of the IKS Act definition of "assessor"

18.2. An **‘‘**indigenous knowledge practitioner**’’** means “*a person who is certified as sufficiently knowledgeable in indigenous knowledge practices to render a related service, subject to section 15 of this Act and relevant prescribed practice standards being met*”.[14]

18.3. In terms of Regulation 3(1), an application for accreditation must be made on Form A in Annexure 1. There is no “Annexure 1”. We assume that reference was meant to have been made to “Schedule 1”. We have also assumed for purposes of these submissions, that Schedule 1 comprises those pages preceding Schedule 2. This must be corrected. However, there is no Form A in this part, or any part of the Draft Regulations. The correct form appears to be Form 10.

18.4. Regulation 3(3) stipulates that “the registered assessors must act in accordance with the accreditation procedures in Schedule 2, and failure to comply with the accreditation procedures constitutes unprofessional conduct”. However, there is no recourse or remedy stipulated for what the penalty should be for such unprofessional conduct.

18.5. Furthermore, the term “unprofessional conduct” is not a term that is used in the IKS Act. We assume that it would constitute one of the criteria listed in section 14(4)(a) –(g) which sets out the grounds on which accreditation may be cancelled, but this requires clarification.

18.6. Schedule 2 of the Regulations provides for the appointment of an Assessment Committee for Accreditation of Assessors, but this doesn’t appear to be provided for in the IKS Act and there are no criteria for (a) how the Assessment Committee is constituted, (b) how members are selected, (c) the duration for which the Assessment Committee members are appointed or (d) how often the Assessment Committee will be convened to review accreditation applications from Assessors.

19. <u>Regulation 4 Recognition of Prior Learning</u>

19.1. Regulation 4(1) refers to a Form B in Annexure 1. The reference to “Annexure 1” must be amended.[15] There is no Form B.

[14] Section 1 of the IKS Act definition of “indigenous knowledge practitioner”
[15] See paragraph 18 above

19.2. There is a numbering error in regulation 4, with the number 3 having being omitted.

19.3. Regulation 4(5) also refers to “unprofessional conduct”, but there is no indication of what the consequences of such conduct would be.

20. Regulation 5 Register of Designations

20.1. A ‘‘Register of Designations’’ means “*a register of names and levels of competencies of certified indigenous knowledge practitioners and accredited assessors*”.[16]

20.2. In terms of section 16(1) NIKSO must -

(a) keep the Register of Designations in the prescribed manner; and

(b) ensure the security of the Register of Designations.

20.3. Regulation 5 simply stipulates that the Register of Designations contemplated in section 16(1)(a) of the Act “must be kept within a system to be developed by NIKSO”. This is vague, open – ended and does not offer any guidance on the implementation of section 16(1).

21. Regulation 6 Registration of Indigenous Knowledge

21.1. The IKS Act will only protect registered indigenous knowledge (IK).[17] However, once the IK is registered it is protected indefinitely or until it no longer meets the eligibility criteria set out in section 11. The effect of the registration is that the holder of the IK (the community) will be entitled to limit the use of the registered IK. In addition, as discussed in more detail below, there are severe penalties for the unauthorised use of registered IK.

21.2. The following provisions grant far reaching rights and are set out below for ease of reference:

[16] Section 1 of the IKS Act definition of “Register of Designations”
[17] Section 9(1) and 20(4) of the IKS Act

Term of protection

10. (1) Indigenous knowledge is protected for as long as it meets the eligibility criteria set out in section 11.

(2) If indigenous knowledge ceases to meet the eligibility criteria set out in section 11, it falls into the public domain from the date of proven ineligibility.

Eligibility criteria for protection

11. The protection of indigenous knowledge contemplated in section 9 applies to indigenous knowledge, which—

(a) has been passed on from generation to generation within an indigenous community;

(b) has been developed within an indigenous community; and

(c) is associated with the cultural and social identity of that indigenous community.

Rights conferred

13. (1) Subject to subsection (3), the indigenous community holding indigenous knowledge has the exclusive right to—

(a) any benefits arising from its commercial use;

(b) be acknowledged as its origin; and

(c) limit any unauthorised use of the indigenous knowledge.

21.3. The registration process as set out in Chapter 6 of the IKS Act, is therefore the key mechanism by which rights are conferred to indigenous communities.[18] The formal registration of IK is dealt with in Chapter 6 of the IKS Act while section 20(1)-(4) deals with the registration process *per se*.

21.4. Given that the IKS Act contemplates lengthy / indefinite periods of protection for indigenous knowledge (which protection could effectively endure for longer that a registered patent or design), one would have expected substantially more detail / substance in the Regulations around the procedure for registration of any form of indigenous knowledge.

[18] section 20(4) which states that in order to exercise any right in respect of indigenous knowledge, it must be registered in terms of Chapter 6

21.5. Regulation 6 (1) simply states that an application for registration of indigenous knowledge must be in form of Form C in Annexure 1 to the Regulations. There is in fact no Form C in the Regulations. The reference to “annexure 1” must be amended.

21.6. The Application for Registration of Indigenous Knowledge can in fact be found in Form E. This Form E is very vague, in that it simply (i) provides a tick box for whether the knowledge is functional in nature, or comprises a natural resource or cultural expression, and (ii) requires that the knowledge in question be listed. This affords very little in the way of guidance. Especially considering that some IK are not set out in material form (oral folktales for example).

21.7. Likewise, the Certificate of Registration (Form F) simply has a block entitled: "*Has registered the following indigenous knowledge in the Register of Indigenous Knowledge*". It is doubtful that this will provide third parties with sufficient information regarding the nature of the IK in order to assess whether their use contravenes the IKS Act.

22. Regulation 7 Register of Indigenous Knowledge

22.1. In terms of Regulation 7(1) a “*Register of Indigenous Knowledge, in terms of section 19(1)(a) of the Act, must be in the form of Form E in Annexure 1 to these Regulations*”.

22.2. This regulation offers no additional guidance. Form E is not the correct form

23. Regulation 8 Amendment of the Register

23.1. Regulation 8(1) states that an application for the amendment of the Register must be in the form of Form F. This is incorrect. Form F comprises a certificate of registration of indigenous knowledge. Form G is the application form for an amendment of the Register.

23.2. Regulation 8(2) requires a Curator to request representations from the affected indigenous community when considering an application for the amendment of the Register. It would be useful to clearly prescribe the level of engagement that should take place, to ensure that proper engagement with the affected indigenous community has

been achieved. One may consider adopting a similar approach to that under Section 2(4) of the Interim Protection of Informal Land Rights Act, No. 31 of 1996, namely, (1) a meeting must be held on reasonable notice, to give members of the community ample opportunity to attend and participate in the meeting, and (2) receiving inputs from the majority of the community members in the presence of an authorised official of the Department.

23.3. Insofar as the 30-day period prescribed under Regulation 8(3) is concerned, we submit that this period may not provide ample opportunity to allow for meaningful engagement with communities who hold rights in the Indigenous Knowledge in question. We suggest that the period be extended to 3 months, considering that more than one indigenous group, along with subject-matter experts, may need to be consulted during this process.

24. Regulation 9 Access to and use of indigenous knowledge

24.1. One of the objectives of the IKS Act is to "promote the commercial use of indigenous knowledge in the development of new products, services and processes".[19] Once registered, the IKS Act provides a mechanism by which communities can license third parties to use their IK.

24.2. In terms of section 13(2) a "*person wishing to make commercial use of indigenous knowledge must—*

(a) apply through NIKSO for a licence in accordance with section 26(1); and

(b) when so applying, must indicate—

(i) the identity of the indigenous community;

(ii) the place of origin of the indigenous knowledge; and

(iii) whether prior informed consent of the indigenous community has been obtained and a benefit sharing arrangement entered into with that indigenous community".

24.3. The Regulation purporting to regulate the licensing of registered IK is inadequate. Regulation 9(1) simply states that "*an application for a license authorising the use of*

[19] Section 3(e) of the IKS Act

indigenous knowledge for commercial purposes in terms of section 26((1)(a), by any person who intends to use indigenous knowledge for commercial purposes, must be in the form of Form G in Annexure 1 to these Regulations".

24.4. Form G is titled "APPLICATION FOR AMENDMENT OF REGISTER OF INDIGENOUS KNOWLEDGE". Thus Regulation 9(1) is incorrect. There is therefore no form in the Draft Regulations to make application for a license.

25. Regulation 10 Dispute resolution committee

25.1. Whilst Regulation 10 makes provision for what the dispute resolution committee should at the very least comprise, the Regulation is vague and there is very little guidance provided as to how disputes should be resolved in practice.

26. Regulation 11 Offences and Penalties

26.1. Regulation 11 stipulates the penalty for any offences and penalties. This is unusual in intellectual property legislation. The fines are also excessive, R400 000 for use by an individual and 40% of annual turnover in the case of use by a juristic entity. This is significantly higher than penalties for responsible parties under the Protection of Personal Information Act, 2013 and the Competition Act, 1998, both of which provide for a fine of 10% of turnover.

26.2. It is also not clarified in the Act which actions would amount to the infringement of registered indigenous knowledge. Section 28 of the Act which deals with 'offences and penalties' simply determines that any unlicensed commercial use made of indigenous knowledge constitutes an offence and renders the convicted party liable to pay the fine prescribed in the Regulations.

26.3. It is uncertain whether an author or producer of a new creative work, like a book, a musical composition, television script or movie, may create and commercialise that work without risk of infringement when a part of that work may have been inspired by or adapted from a cultural expression that is protected as indigenous knowledge under the IKS Act.

26.4. Due to the uncertainty in the Act of when liability may be incurred for infringement of rights, and the disproportionate penalty fines prescribed for offences in the Regulations, this could result in a major disincentive for the commercial use of any materials, works or expressions that may become registered as indigenous knowledge in terms of the IKS Act.

26.5. As mentioned above, one of the key objectives of the IKS Act is to encourage and incentivise the licensed commercial use of protected indigenous knowledge, so that financial benefits would follow for the relevant rights holders and indigenous communities. Disproportionate penalties prescribed for infringements and the lack of clarity on exactly which actions would constitute infringement, would likely discourage and disincentivize the commercial use of indigenous knowledge, and this could have the opposite than intended effect of the legislation.

26.6. A more measured approach to penalties would be to consider a penalty structure that would be determinable based on an amount 'per act of infringement' perpetuated, with due consideration of various factors, such as i) the nature of the infringing work concerned, ii) the extent to which registered indigenous knowledge was incorporated in the infringing work; iii) the commercial value that the use that was made of indigenous knowledge contributed overall to the infringing work; iv) what a reasonable royalty would be, if a license was negotiated between the parties at the onset.

27. Conclusion

27.1. We respectfully submit that the Draft Regulations are subject to significant reservations and provide virtually no guidance on the implementation of the IKS Act. The Draft Regulations will lead to legal uncertainty and require substantial revision.

27.2. We respectfully encourage the Department of Science and Innovation to take the initiative to reconsider and revise the Draft Regulations

SAIIPL Traditional Knowledge Committee