

South African Institute of Race Relations NPC
SUBMISSION
to the Portfolio Committee on Trade and Industry
of the National Assembly
regarding the
Copyright Amendment Bill of 2017 [B13 - 2017]
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<u>Contents</u>	<u>Page</u>
1 Introduction	1
2 The importance of public consultation in the legislative process	2
2.1 <i>The constitutional requirement</i>	2
2.2 <i>Public participation already fatally flawed</i>	4
Proposed Intellectual Property Tribunal	5
3.1 <i>Replacement of the Copyright Tribunal</i>	5
3.2 <i>Ministerial control, as opposed to judicial independence</i>	6
3.3 <i>Powers and functions of the IP tribunal</i>	7
3.4 <i>Proceedings and hearings</i>	8
3.5 <i>Appeals and reviews</i>	9
3.6 <i>Interim relief and tribunal orders</i>	9
3.7 <i>Unconstitutionality of the IP tribunal</i>	10
4 Ramifications of the proposed Intellectual Property Rights Tribunal	11
4.1 <i>Broad jurisdiction and powers</i>	11
4.2 <i>Unnecessary and unconstitutional</i>	11
4.3 <i>The IP tribunal and patent rights</i>	12
4.4 <i>The granting of patent rights</i>	13
4.5 <i>More scope for compulsory licences</i>	15
4.6 <i>Conflict with the TRIPS Agreement</i>	16
4.7 <i>Patents and prosperity</i>	17
5 No socio-economic assessment of the Copyright Bill	18
6 Conclusion	20

1 Introduction

The Portfolio Committee of Trade and Industry (the committee) has invited comment on the Copyright Amendment Bill of 2017 [B13-2017] (the Copyright Bill) by 19th June 2017.

This submission on the Copyright Bill is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its present objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

2 The importance of public consultation in the legislative process

2.1 The constitutional requirement

Public participation in the legislative process is a vital aspect of South Africa's democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning a decade or more. These rulings include *Matatiele Municipality and others v President of the Republic of South Africa and others*; [(CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)]; *Doctors for Life International v Speaker of the National Assembly and others*; [2006 (6) SA 416 (CC)] and *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others*. [2016] ZACC 22]

The key constitutional provisions in this regard are Sections 59, 72, and 118. According to Section 59(1)(a) of the Constitution, the National Assembly 'must facilitate public involvement in the legislative...processes of the Assembly and its committees'. Under Sections 72 and 118, essentially the same obligations (the word used is again 'must') are placed on the National Council of Provinces and, where relevant, on all provincial legislatures to 'facilitate public involvement in the legislative and other processes of the legislature and its committees'. [Sections 59, 72, 118, Constitution of the Republic of South Africa of 1996 (the Constitution)]

Various decisions of the Constitutional Court have elaborated on what these sections require of both Parliament and, where relevant, the nine provincial legislatures:

- In the *Matatiele* case, the court said that a provincial legislature must 'act reasonably' in facilitating public involvement in the legislative process. Whether a provincial legislature has in fact done so will depend on all the relevant factors, including the intensity of the impact of the legislation on the public; [*Matatiele* case, Media summary, p1]
- In *Doctors for Life*, the court held that 'Parliament and the provincial legislatures have a broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case', so long as what they do is 'reasonable'. 'This duty will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of laws that will govern them.' Factors relevant to reasonableness include 'the nature of the legislation and what Parliament itself has assessed as being the appropriate method' to facilitate public involvement. [*Doctors for Life*, Media summary, p2]
- In the *New Clicks* case, Mr Justice Albie Sachs noted that there were very many ways in which public participation could be facilitated. He added: 'What matters is that...a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say'. This passage was quoted with approval in both *Doctors for Life* and the *Land Access* case, as further described in due course. [*Minister for Health and another v New Clicks South Africa (Pty) Ltd and*

others, [2005] ZACC 14, at para 630; *Doctors for Life*, at para 145; *Land Access*, at para 59]

Among the factors relevant to reasonableness, as the Constitutional Court stated in the *Land Access* case, is ‘the nature of the legislation in question’ and ‘any need for its urgent adoption’. The court also stressed that ‘a truncated timeline’ for the adoption of a bill by the NCOP and provincial legislatures can itself be ‘inherently unreasonable’. If the period allowed is too short (as it was in the *Land Access* case, when roughly a month was allowed for the Restitution of Land Rights Amendment Bill of 2014 to proceed through the NCOP), then ‘it is simply impossible for the NCOP – and by extension the Provincial Legislatures – to afford the public a meaningful opportunity to participate’. [*Land Access*, paras 61, 67] The same principles apply equally to the National Assembly and its committees, including the portfolio committee on trade and industry.

In the *Doctors for Life* case, where the timeline for adoption of the Bill was also short, the Constitutional Court further stressed that legislative timetables cannot be allowed to trump constitutional rights. Said the court: ‘The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.’ [*Doctors for Life*, para 194]

The Constitutional Court in the *Land Access* case not only cited this passage with approval, but also went on to say: ‘In drawing a timetable that includes allowing the public to participate in the legislative process, the NCOP cannot act perfunctorily. It must apply its mind taking into account: whether there is real – and not merely assumed – urgency; the time truly required to complete the process; and the magnitude of the right at issue’. [*Land Access*, para 70]

The Constitutional Court’s judgment in the *Land Access* case also makes it clear that:

- public participation must be real, in that it must provide the public with an opportunity to be heard which is ‘capable of influencing the decision to be taken’; [*Land Access*, para 71, citing *Moutse Demarcation Forum and others v President of the Republic of South Africa and others*, 2011 (11) BCLR 1158 (CC), para 62]
- a notice of a public hearing regarding a bill must ‘not only provide details of the place, time and purpose of a public hearing’ but must ‘also assist in building awareness’ of what the bill proposes; [*Land Access*, para 76]
- notices of public hearings must be published timeously and should give people more than seven days’ warning, as a shorter period may deprive them of an opportunity to participate; [*Land Access*, para 77] and
- the notice given must be sufficient to ‘allow the public to study the bill and prepare for the hearings adequately’, as this could otherwise have ‘an adverse impact on the quality of submissions’ made. [*Land Access*, para 77]

2.2 Public participation already fatally flawed

The period for public comment to the portfolio committee on the Copyright Bill opened on 29th May 2017, while the deadline for comment has been set at 19th June 2017. This means that only 14 working days have been allowed for the public to obtain, read, and get to grips with the Copyright Bill, which is a long and complex measure. It is also impossible to understand the Copyright Bill without first obtaining and reading the principal Act it is intended to amend. This is, of course, the Copyright Act of 1978 (the Copyright Act), which is also a lengthy and complicated statute. Also highly relevant, given the Copyright Bill's proposal to establish an 'intellectual property rights tribunal' with the capacity to adjudicate on patent matters, is the Patents Act of 1978 (the Patents Act) – which is long and complicated too.

In addition, the lawfulness of what is being proposed cannot be evaluated without regard to relevant international conventions binding on South Africa. These include the Berne Convention (formally, the Berne Convention for the Protection of Literary and Artistic Works), which is an international treaty governing copyright. Also vital to take into account is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This agreement is administered by the World Trade Organisation (WTO), is binding on all WTO member states (including South Africa), and sets down minimum standards for the regulation of patents and the adjudication of patent disputes.

Given the complexity of the relevant issues, that the portfolio committee has limited the period for public comment to 14 working days shows a disregard (if not a contempt) for the constitutional obligation to facilitate meaningful public involvement in the legislative processes of the National Assembly and its committees.

The portfolio committee has also invited interested individuals and groups to participate in public hearings, which have been scheduled to take place in Parliament on 27th, 28th, and 29th June 2017. However, the notice of these hearings fails to provide necessary information about the Copyright Bill, the significance of the changes it proposes, and to what extent these changes comply with South Africa's binding international obligations. It thus 'fails to assist in building awareness' of what the Copyright Bill proposes, even though this is what the Constitution requires. According to the Constitutional Court in the *Land Access* case, the notice given of a hearing must be sufficient to 'allow the public to study the bill and prepare for the hearings adequately', as this could otherwise have 'an adverse impact on the quality of submissions' made. The portfolio committee has ignored this constitutional obligation in sending out a notice which simply lists the objects of the Copyright Bill without providing any insight into its terms, its significance, its constitutionality, or the extent to which it conflicts with South Africa's binding international obligations.

Moreover, if the people of South Africa are truly to have an opportunity for 'meaningful participation' in the legislative process, they also need to know that provisions of the

Copyright Bill relevant to patent rights are likely have many adverse economic consequences for innovation, technological development, investment, growth and jobs.

To give them greater insight into such socio-economic issues, the public should thus also have been given access to comprehensive socio-economic impact assessments of the Copyright Bill. Such assessments should also have accompanied the measure when it was released for public comment. But no such assessment has been made available, which suggests that the obligation to conduct such an assessment has also been overlooked.

Both the truncated timeline for public comment – coupled with the failure to provide crucial information on the Copyright Bill, its validity, and its socio-economic ramifications – suggests that the portfolio committee has simply been going through the motions on public participation, rather than seeking to make this meaningful.

Given the brevity of the time allowed for public comment, the IRR has been compelled to confine its comments to the most serious of the provisions in the Copyright Bill. These are the ones proposing to introduce a new ‘intellectual property rights tribunal’ to deal with both copyright and patent matters.

3 Proposed Intellectual Property Tribunal

3.1 Replacement of the Copyright Tribunal

Under the Copyright Bill, the current Copyright Tribunal is to be replaced by a new Intellectual Property Tribunal (the IP tribunal). Understanding the significance of this change requires a brief review of relevant provisions of the Copyright Act.

Works eligible for copyright under South Africa’s Copyright Act of 1978 include literary, artistic, and musical works, along with films, sound recordings, and computer programmes. The author is the person who initially creates an original work by reducing it to material form. To enjoy copyright protection, the author must also be “a qualified person”: in other words, he must either be a South African citizen or resident, or a citizen of another Berne Convention country. For literary, artistic, and musical works, the copyright term is the life of the author and 50 years thereafter. [Eric Levenstein and Ryan Tucker, ‘South Africa: Introduction to the Law of Copyright’, Werksmans, 6 December 2005]

During the copyright period, the author has an exclusive right to publish, perform, broadcast, translate, adapt, or reproduce the work. He can also enforce his copyright against anyone who does any of these acts (“the restricted acts”) without his consent. To enforce his rights, he can sue in the High Court for delictual damages (compensation to restore him to the position he would otherwise have been in) or a reasonable royalty, along with an interdict to prevent any repeat of the restricted acts and the seizure of any unauthorised copies. In cases where the infringement is particularly flagrant, the courts may also award additional or punitive damages. [Levenstein and Tucker, ‘Introduction to the Law of Copyright’]

At the same time, the Copyright Act does allow certain infringements, but only if these amount to “fair dealing”. Under this exemption, copyrighted work may be partially reproduced for such purposes as research, teaching, private study, review, or reporting on current events in a newspaper or magazine. [Levenstein and Tucker, ‘Introduction to the Law of Copyright’]

The Copyright Act also allows the Copyright Tribunal to grant a compulsory licence over a copyrighted work where the author has “unreasonably” refused to grant a voluntary licence which an applicant claims to “require”. At present, the Copyright Tribunal consists of a High Court judge, who is also the “commissioner of patents” under the Patents Act and thus presides over the Patents Court. Once it has heard all the relevant evidence, the Copyright Tribunal may “make an order declaring that the applicant is entitled to a licence on such terms and conditions, and subject to the payment of such charges, if any, as it...determines to be reasonable in the circumstances”. Any party to the proceedings may appeal against the tribunal’s ruling under the same rules as govern appeals against a civil judgment handed down by a single judge. [Sections 29, 33, 35, 36, Copyright Act]

Under the Copyright Bill, however, the Copyright Tribunal is to be replaced by a new Intellectual Property Tribunal (the IP tribunal). This IP tribunal will likewise be empowered to issue compulsory licences over copyrighted works. However, it will also be given many other powers under the Copyright Bill, along with a vast and untrammelled scope to “carry out the functions and exercise the powers assigned to it by...*any* legislation”. [New Section 29A, Copyright Bill, emphasis supplied]

3.2 Ministerial control, as opposed to judicial independence

As noted, the present Copyright Tribunal consists of the commissioner of patents. This means that he is also a High Court judge and enjoys all the usual institutional protections aimed at safeguarding the independence of the Bench. He is also expected to have specialist knowledge of intellectual property matters, which is why he presides over the Patents Court as well.

By contrast, the IP tribunal will be made up of a chairman and various other members, all of whom will be “appointed by the minister” of trade and industry. [New Section 29B (1), Copyright Bill] Members will not have to be specialists in copyright, patent, or other aspects of intellectual property law. Instead, it will be enough if they have “adequate qualifications and experience” in either “economics, law, commerce, or public affairs”. [New Section 29B (1), Copyright Bill] Many members of the IP tribunal could thus be public servants appointed for their political loyalties and ideological commitments, rather than their legal qualifications.

The minister of trade and industry will also be empowered to: [New Sections 29B(2)(4), Sections 29E(e), Copyright Bill, emphasis supplied by the IRR]

- designate the chairperson and deputy chairperson of the tribunal;

- “determine the remuneration, allowances, benefits, and other special terms and conditions of employment” of all tribunal members (which he must do in consultation with the finance minister); and
- remove or suspend any tribunal member who “engages in any activity that *may* undermine the integrity of the tribunal”.

Members will generally serve on the tribunal for five years, but their terms of office may be renewed by the minister for a further five-year term. [New Section 29D, Copyright Bill] The prospect of having their initial terms renewed is likely to give tribunal members incentives to please the minister, and this could further erode their independence.

All the powers given to the minister will fundamentally undermine the autonomy of the tribunal. They are also at odds with the requirements for institutional autonomy laid by the Constitutional Court in the *Glenister* case, as further described below. [*Glenister v President of the Republic of South Africa and others*, 17 March 2011, CCT48/10]

Tribunal members may be disqualified from appointment – and may also be barred from continuing to serve – if they have been convicted of fraud (without the option of a fine) or are “office-bearers” in any political party or movement. [New Section 29C(1) and (2)(a) and (e), Copyright Bill] However, this last exception is a limited one, which will not be enough to insulate tribunal members from political interference. In particular, members of the ruling African National Congress (ANC) and/or the South African Communist Party (SACP) will be able to serve on the tribunal even though they are subject to party discipline and the doctrine of democratic centralism prevailing in these organisations. This too is likely to compromise the independence of the IP tribunal.

Under the Copyright Bill, the minister will also have the power to “prescribe rules regulating the processes and proceedings of the tribunal”, [New section 39(cF), Copyright Bill] In addition, he will be empowered “at any time, to conduct an audit review of the performance and exercise of its functions by the Tribunal”. The tribunal may also be required to report to the minister (under either the Copyright Act or any other legislation), and must in any event submit annual reports to him on “its performance and activities, as required by the Public Finance Management Act of 1999”. [New section 29S, Copyright Bill]

3.3 Powers and functions of the IP tribunal

The IP is expressly authorised to “carry out the functions entrusted to it in terms of the [Copyright] Act” or “any other legislation”. The tribunal may also “adjudicate any application or referral made to it” under either the Copyright Act, the Companies Act of 2008, or “any other relevant legislation”. It may also “make any appropriate order” under any of these laws. [New Section 29A(1)(2)(a), Section 29N, Copyright Bill] These powers are extraordinarily broad – and equally uncertain.

The tribunal is to be entrusted with “hearing appeals or reviewing any decisions” of the Companies and Intellectual Property Commission. This commission is appointed by the

minister of trade and industry under the Companies Act of 2008, and its function is primarily to oversee company registrations and other aspects of corporate governance. However, the commission is also responsible for granting applications for patent rights under South Africa's current system, which allows the granting of such rights (without a prior process of objection and adjudication) provided the application *prima facie* meets all relevant requirements. The IP tribunal will thus have a wide and seemingly untrammelled power to set aside the granting of patent rights by the Commission – a power which currently rests with the patent court and can be exercised only in specified circumstances (see *The granting of patent rights*, below).

In addition, and specifically in the intellectual property rights sphere, the IP tribunal will be empowered: [Section 29A(2)(d) and (e), Copyright Bill]

- to “adjudicate any application or referral” made to it by a person, institution or regulatory authority “where the dispute can only be directly referred to the tribunal in terms of this Act and such dispute relates to intellectual property rights”; and
- to “settle disputes” relating either to “the payment of royalties” or “the terms of agreements...regulating...matters in relation to intellectual property rights”.

The IP tribunal is thus clearly to be made responsible for carrying out many of the important functions currently vested in the Patents Court. This proposed shift carries serious dangers. In particular, the Patents Court is part of the High Court, with all that this entails in terms of independence, security of tenure, and commitment to due process. By contrast, the IP tribunal will not be subject to any of these vital safeguards. The IP tribunal is nevertheless to be given even wider powers than the Patents Court enjoys, and will be able to decide on a host of important patent matters (see *The IP tribunal and patent rights*, below).

3.4 Proceedings and hearings

The chairperson of the IP tribunal will be responsible for “managing its case files” and assigning matters (depending on their complexity) either to a single member of the tribunal or to a panel of three members. Where a panel is appointed, at least one of its three members must have “suitable legal qualifications and experience”. However, this requirement does not seem to apply where a single member of the tribunal is entrusted with hearing a case. In addition, where a three-person panel is appointed to hear a particularly complex matter, the one person on it who has legal knowledge could readily be outvoted by the two who lack such experience. [Section 29G(1),(2), Copyright Bill]

All decisions of the IP tribunal must be handed down in writing and must “include reasons” for the decision made. According to the Copyright Bill, any “decision, judgment or order of the tribunal may be served, executed and enforced as if it were an order of the High Court”. All tribunal decisions are thus binding on all parties, “subject to review or appeal to a High Court”. [Section 29G(4)(6), Copyright Bill] The possibility of review or appeal provides some safeguard to litigants, but is not enough to fulfil the constitutional right of “access to court”, as described below.

In proceedings before the IP tribunal, neither South Africa's usual adversarial system nor the normal rules of civil procedure will apply. Instead, the tribunal will conduct its hearings "in an inquisitorial manner" and "as expeditiously and informally as possible" – though the "principles of natural justice will also apply". Hearings will generally be conducted in public, unless "the proper conduct of the hearing" requires the exclusion of the public or of specified people (journalists, for example). [Section 29H(1)(2), Copyright Bill]

Anybody with "a material interest" in a hearing will be able to attend it, while the tribunal member presiding over the matter will have the right to summon witnesses, demand the production of books and documents, and "give directions prohibiting or restricting the publication of any evidence". The presiding member will also have the power to decide "any matter of procedure" that may arise. [New sections 29I, 29J, 29K, Copyright Bill] He will, however, also be subject to the minister's regulations on "the processes and proceedings" of the tribunal. [New section 39(cF), Copyright Bill]

3.5 Appeals and reviews

Any participant in a hearing before a single member of the IP tribunal may "appeal against a decision of that member to a full panel of the tribunal". Subject to relevant High Court rules, a participant in a hearing before a full panel may apply to the High Court to review the decision of the tribunal, or appeal to the High Court against that decision. [New section 29L, Copyright Bill] The right to a review or appeal will thus not be automatic but will depend on whether the High Court is satisfied that there are grounds for setting aside the decisions of the IP tribunal. Such grounds might be difficult to establish when the powers given to the tribunal are so broad and undefined.

3.6 Interim relief and tribunal orders

The IP tribunal will have the power to grant "an interim order". This could include a temporary injunction which prohibits the unauthorised reproduction of a copyrighted work, pending the finalisation of a hearing into the matter. However, such relief may be granted only where, among other things: [New Section 29(M) (1), (2), Copyright Bill]

- there is *prima facie* evidence to support the applicant's case,
- where an interim order is "reasonably necessary" to "prevent serious and irreparable damage" to the applicant; and
- "the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings".

This last requirement will in many instances prevent quick action being taken against the infringement of both copyright and patent rights. This, in turn, will undermine the efficacy of South Africa's system for the protection of intellectual property rights.

According to the Copyright Bill, the IP tribunal will also be empowered to "make any appropriate order" on any matter brought before it. This may include an order "declaring that particular conduct constitutes an infringement" of copyright and is prohibited for this reason.

It will also be able to “interdict conduct which constitutes an infringement” of copyright. [New Section 29N, Copyright Bill] Both these provisions reveal an intention to give the IP tribunal the power to adjudicate over copyright infringements, even though this power currently belongs to the High Court under Section 24 of the Copyright Act. Yet, once the task of adjudicating on copyright infringements has been given to a tribunal lacking both skills and independence, there is a real risk that alleged infringements will either be too easily tolerated or too harshly punished.

According to the Anton Mostert Chair on Intellectual Property Law (in a comment on equivalent provisions earlier contained in the Copyright Bill of 2015): “It should be appreciated that copyright infringement proceedings frequently involve complicated non-intellectual property issues and it is doubtful, given the composition of the tribunal, whether it will be properly equipped to deal with such other legal questions. The inquisitorial system envisaged for the conduct of proceedings before the tribunal is also not appropriate for infringement matters.” [Anton Mostert Chair of Intellectual Property Law, *Commentary on the Copyright Amendment Bill, 2015*, Faculty of Law, Stellenbosch University, p64]

The IP tribunal will also have broad powers to make “any other appropriate order required to give effect to a right” contained either in the Copyright Act or in “any other relevant legislation”. [New sections 29M, 29N(h), Copyright Bill] Again, this power is so broad that its ramifications cannot easily be identified or assessed.

3.7 Unconstitutionality of the IP tribunal

Section 34 of the Constitution states that “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”. [Section 34, Constitution of the Republic of South Africa, 1996]

The IP tribunal is neither a court nor a sufficiently “independent and impartial tribunal”. The Copyright Bill tries to cure this defect by stating that the IP tribunal “is independent and subject only to the Constitution and the law”, and that “each organ of state must assist the tribunal to maintain its independence and impartiality”. [New Section 29, Copyright Bill] However, this form of words – though clearly intended to echo the Constitution’s guarantees of judicial independence – cannot compensate for the minister’s comprehensive powers of control over the tribunal, as earlier described.

The Constitutional Court, in the *Glenister* judgment in March 2011, has also laid down a number of useful guidelines for assessing the sufficiency of institutional independence. These guidelines make it clear that institutional independence is absent where a cabinet minister has the power to dismiss the members of the relevant institution, to control the way it operates, and to oversee its functioning. [Lessons from the *Glenister* judgment, *Fast Facts*, June 2011, p7; *Glenister v President of the Republic of South Africa and others*, 17 March 2011, CCT48/10]

In the case of the IP tribunal, the impartiality of this proposed new body will also be undermined by provisions requiring it to finance itself (and pay its members and staff) at least in part from “any fees or fines” that it imposes under either the Copyright Act or “any relevant legislation”. [New Section 29R, Copyright Bill] This will give it a clear financial interest in laying down the maximum possible fees and fines, and will inhibit its capacity for objective assessment.

Overall, the IP tribunal will be subject to so much ministerial control that it will clearly be a creature of the executive and not an “independent and impartial” tribunal, within the meaning of Section 34 of the Constitution. It is also not enough that aggrieved parties will be able to apply to the High Court to have the tribunal’s decisions set aside on review or appeal. All South Africans have a right to have their legal disputes adjudicated either by the courts or by “independent” tribunals. Where a given tribunal is not sufficiently independent, the right of access to court must be immediate, not conditional or significantly deferred.

The broad powers given to the IP tribunal to decide any matter under “any other legislation” are also contrary to Section 2 of the Constitution. This identifies “the supremacy of the Constitution and the rule of law” as one of the founding values of South Africa’s democracy. The rule of law in turn demands certainty and predictability – requirements that are incompatible with the vague powers given to the tribunal.

4 Ramifications of the proposed Intellectual Property Rights Tribunal

4.1 *Broad jurisdiction and powers*

The proposed IP tribunal will have jurisdiction over all copyright matters, over all intellectual property matters referred to it, and over all other matters that may be provided for in “any” legislation. Yet the new tribunal is both unnecessary and unwise. In addition, its proposed establishment infringes at least two important constitutional provisions: Section 34 with its guarantee of access to court; and Section 2, which confirms the supremacy of the Constitution and the rule of law. The IP tribunal also holds grave ramifications for patent law and is likely to put South Africa in breach of its binding international obligations regarding the protection of patent rights, as further outlined below.

4.2 *Unnecessary and unconstitutional*

It is unnecessary and unwise to replace the current Copyright Tribunal with a new IP tribunal, and to give this new entity many of the powers that now vest in the Patents Court. At present the adjudication of copyright and patent disputes is entrusted to the commissioner of patents, who is both a specialist in intellectual property matters and a high court judge. This gives the patents commissioner the knowledge and experience needed to preside over complex intellectual property matters, especially in the patents field. It also means that the patents commissioner is likely to have high standards of individual independence and professional integrity, along with the security of tenure and wider institutional independence that all judges enjoy. In addition, both the Copyright Tribunal and the Patents Court apply the normal rules of evidence and civil procedure, the key purpose of which is to exclude unreliable

evidence, uphold due process, and ensure that justice is not only done but is also seen to be done.

By contrast, the new IP tribunal will be a creature of the executive and, in particular, of the minister of trade and industry. All its members will be appointed by the minister, who will also have the power to decide their remuneration, extend the terms of office of those who please him, and suspend or dismiss those whom he thinks “may” be undermining the integrity of the tribunal. No member of the tribunal will need expertise in intellectual property law. In addition, the majority of tribunal members could be public servants who belong to the ruling party or its communist ally and have little legal knowledge or capacity for impartial adjudication.

In proceedings before this flawed IP tribunal, the usual rules of evidence and civil procedure are to be replaced by new principles of procedure decided by the minister’s appointees (the members of the tribunal) and the minister himself. The emphasis in the new rules will be on brevity and informality, not on whether the evidence presented is properly admissible or has been comprehensively and objectively evaluated. The principle that civil proceedings must be open to the public and the media, which is vital in ensuring a proper level of external scrutiny, will also be undermined by provisions allowing the tribunal member presiding over any matter to decide, at his discretion, whether “the proper conduct of the hearing” requires that it be closed to the public and the press.

The impartiality of the IP tribunal will also be infringed by provisions stating that part of the money needed to fund it – and to pay the salaries of its members and its staff – is to come from the fines and fees that it imposes through its hearings. This power will be sufficient in itself to undermine the tribunal’s independence and objectivity.

In addition, the IP tribunal will have the power to adjudicate on any matter under “any” legislation already on the Statute Book or still to be enacted in the future. It will also be empowered to make “any appropriate order” on the matters brought before it. These provisions are unacceptably vague. They are thus also in breach of the rule of law, which requires that all legislation be certain and predictable. Yet the obligation to uphold the ‘supremacy’ of the rule of law is one of the founding values of the Constitution and cannot simply be ignored.

Moreover, as earlier noted, Section 34 gives all South Africans a right of access to court or to “an independent and impartial” tribunal. The current Patents Court and Copyright Tribunal satisfy this requirement. The proposed IP tribunal does not. Hence, all provisions in the Copyright Bill seeking to establish this new body should be deleted if the measure is to pass constitutional muster.

4.3 *The IP tribunal and patent rights*

Since the IP tribunal will have jurisdiction over all intellectual property matters brought before it, relevant patent law rules must also be taken into account. Hence, the Copyright Bill

must also be evaluated in the context of the DTI's 2013 and 2016 proposals to amend patent law in various ways. [Department of Trade and Industry (DTI), Draft National Policy on Intellectual Property, September 2013; DTI, Intellectual Property Consultative Framework, approved by the Cabinet on 6th July 2016 (the IP framework); read together with a more comprehensive explanation by Chan Park, Achal Prabhala, and Jonathan Berger, *Using law to accelerate treatment access in South Africa: An analysis of patent, competition, and medicines law*, United Nations Development Programme (UNDP), October 2013]

As the IRR has previously warned, these DTI proposals are not only economically damaging but also in breach of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This agreement is administered by the World Trade Organisation (WTO) and is binding on all WTO member states, including South Africa. TRIPS sets down minimum standards for the regulation of patents which South Africa is obliged to uphold and cannot simply disregard.

The IRR's full analysis of the DTI's 2013 patent law proposals (see Anthea Jeffery, *Patents and Prosperity: Innovation + Investment = Growth + Jobs*, IRR, 2014) cannot be repeated here. In essence, what the DTI proposes (as further confirmed by the Intellectual Property Consultative Framework of 2016) is to weaken patent protection in South Africa. It plans to do so in two key ways: by making it more difficult to obtain patent rights; and by authorising the granting of compulsory licences over patented products in wide-ranging circumstances. The DTI also seeks to reduce the royalties currently payable to the holders of patent rights, and seems to think that royalty rates should be set at minimal levels (around 3% of the price of copied products). Royalties set at these low rates would often be too limited to compensate patent holders for the costly research and development (R&D) that underpins their innovations.

The DTI's 2013 and 2016 patent proposals have evoked significant criticism and have yet to be translated into law through amendments to the Patents Act. Instead, the DTI seems to be intent on implementing at least some of its patent proposals by means of the Copyright Bill. This back door approach is presumably intended to circumvent the critical scrutiny that overt amendments to the Patents Act would trigger.

4.4 The granting of patent rights

The basic requirements for the granting of a patent in South Africa (as in other countries) are novelty and utility. In essence, a patent may be granted under the Patents Act for any "new" invention which involves "an inventive step" and is "capable of being used or applied in trade, industry, or agriculture".

South Africa is a "depository" or "non-examining country", in which all patent applications made to the Companies and Intellectual Property Commission are granted, without a prior system of objection and adjudication, provided a detailed patent "specification" (or description of the invention) is provided and the necessary fees are paid. In various other

countries, by contrast, all patent applications are “examined” for their novelty and utility, through objection and adjudication, before patents are granted.

Critics of the depository system suggest that the absence of prior examination inevitably leads to the granting of “weak” or “frivolous” patents that do not satisfy the relevant requirements or merit protection. In fact, however, the depository system has important safeguards to help prevent this. To begin with, the system puts pressure on all applicants to ensure that no similar patent already exists. If an earlier patent for essentially the same invention subsequently comes to light, the later patent is invalid, the money spent on its development is wasted, and damages for infringement may also be payable. In addition, the validity of a patent can always be challenged in the Patents Court after it has been granted – and the hearing of objections after the grant is just as effective as the hearing of objections beforehand.

Also relevant is the fact that South Africa used to have an examination system, but had to abandon it in 1978 because it lacked the necessary skills. Notes Judge Louis Harms, a retired judge president of the Supreme Court of Appeal: “[South Africa] had an examination system from 1952, but we had to abolish it in 1978 because we never had the people to do [the job]. It's highly specialised. You need [a person who is both] a scientist and a lawyer, and will also do the job at a government salary.” [Jasson Urbach, “Protected Patents”, @Liberty, 15/2014, 12 November 2014]

The DTI’s 2013 and 2016 proposals urge a shift towards a patent examination system. (The 2016 IP framework suggests that a new examination system should initially be limited to the health sphere, but this would be contrary to TRIPS, which bars differential treatment for patents in different sectors.) However, an examination system – even if it could lawfully be confined to the health sphere at the start – would be difficult and costly to implement.

The Copyright Bill is thus intended, it seems, to give the DTI a cheaper and much simpler way of limiting the grant of patents. Under this new scheme, applications for patent rights would continue to be made to the Companies and Intellectual Property Commission and would be granted by the commission in the usual way. However, objections to the granting of these rights could then be lodged – not with the Patents Court – but rather with the new IP tribunal, which would have the power under the Copyright Bill to set aside any decision made by the Commission.

Many of the patent rights granted by the commission could thus easily be set aside – especially as the IP tribunal might need much less convincing than the Patents Court that a given invention is not in fact sufficiently “new” to warrant patent protection.

Though the aggrieved inventor would still be able to apply to the High Court to overturn the tribunal’s decision on review or appeal, the process of obtaining patents in South Africa would become more arbitrary and significantly more time-consuming. The time element is

important, for the 20-year period of patent protection begins from the date an application for a patent is lodged – and not from the time it is finally granted.

4.5 *More scope for compulsory licences*

The Patents Act currently empowers the Patents Court to grant a compulsory licence over a patented product, but only in limited circumstances: in essence, for a failure to exploit or work a patented invention within a reasonable time. By contrast, the DTI's 2013 and 2016 proposals (the latter again solely in the health sphere at the start) seek to allow the granting of compulsory licences in much wider circumstances.

The DTI wants such licences to be obtainable whenever: [Draft National Policy, IP framework, UNDP article]

- negotiations with the patent holder over a stipulated period (say, 60 days) have failed, and the patent holder has refused to accept proposed royalties set at, say, 3% of the price of the copied product;
- the health minister has declared the existence of a national emergency or a situation of “extreme urgency”, so paving the way for the granting of compulsory licences over all medicines needed to counter these situations;
- the Government itself seeks a compulsory licence against what it regards as an “adequate” royalty; and/or
- a patent holder has been found guilty of “uncompetitive” conduct by the Competition Commission or Competition Tribunal: either for “unreasonably” refusing to grant a voluntary licence against a limited royalty; or for charging a price which is well above unit production costs (even though this price might be necessary to cover heavy R&D expenses); or for denying competitors access to an “essential facility”, such as the formula for its patented medicines. (South Africa's competition commission has already shown its willingness to interpret competition rules in this novel and unprecedented way, but elsewhere in the world such conduct would not be regarded as “anti-competitive”.)

Under the DTI's proposals, any attempt by a patent holder to enforce his patent rights would also invite counter-claims for compulsory licences, on all the grounds outlined above. This, of course, is calculated to deter patent holders from bringing infringement proceedings and so make it easier for people to breach patent rights. [Draft National Policy, IP framework, read together with UNDP article]

The DTI's proposals also call for the replacement of the Patents Court by a patents tribunal, which would operate outside of the country's High Court and would be responsible for hearing all patent matters. The DTI has also urged that this new tribunal should not be “dominated by lawyers” or subject to High Court rules, as these make for “highly technical and legalistic procedures”. [Draft national policy, pp43, 35]

The IP tribunal to be introduced under the Copyright Bill is fully in line with the DTI's 2013 proposals and will clearly be used to implement many of the DTI's other ideas. Particularly significant are clauses in the Copyright Bill stating that the IP tribunal "may adjudicate any application or referral made to it by any person, institution, or regulatory authority [such as the competition commission], where the dispute which is the subject of the application or referral can only be referred to the tribunal in terms of the Copyright Act and the dispute relates to intellectual property rights". [New Section 29A(2)(d), Bill] Some attempt to qualify the tribunal's broad powers of adjudication is reflected in this wording, which is slightly different from that contained in the 2015 Copyright Amendment Bill. However, the practical value of this change remains uncertain, especially given the wide powers given to the tribunal under all other legislation.

The Copyright Bill could thus give the new IP tribunal the power to decide on applications for compulsory licences in all the circumstances outlined above. The Patents Act might also in time be changed to extend the grounds on which compulsory licences may be granted – as the current wording of the statute allows compulsory licences solely against the "abuse" of patent rights, which has a different and much more limited meaning. However, the IP tribunal's powers are potentially so wide that they might not in fact be constrained by the provisions of the Patents Act (which could also be seen as having been superseded by the Copyright Bill). In addition, if new patent rules are in time put in place, so as to reinforce the IP tribunal's capacity to grant compulsory licences, the IP tribunal will, of course, immediately be available to enforce them.

A further key question is what royalties patent holders will receive once compulsory licences have been granted by the IP tribunal in the circumstances outlined above? At present, royalty payments are decided by the Patents Court, which is expressly enjoined by the Patents Act to consider 'the research and development' (R&D) undertaken by the patent holder. The court must also take into account the terms and conditions "usually stipulated" in voluntary licence agreements.

Under the Copyright Bill, by contrast, the IP tribunal will be empowered to "settle disputes relating to payment of royalties...in relation to intellectual property rights". [Section 29A(2)(e), Bill] It will also, of course, have the power to "make any appropriate order" in such a matter. Relevant too, of course, will be the new powers given to the minister to gazette regulations "prescribing royalty rates...for various forms of use". [New Section 39 (CI), Copyright Bill] There is nothing in the Copyright Bill which would require the minister to have regard to the patent holder's R&D costs, or to the royalties normally agreed under voluntary licence agreements. The DTI's desire to limit royalty payments to, say, 3% of the price of the copied product may thus be fulfilled under the Copyright Bill.

4.6 Conflict with the TRIPS Agreement

The DTI claims that its proposed changes to patent law are consistent with the TRIPS Agreement, as clarified by other WTO instruments intended to help developing countries deal with medical emergencies, such as the AIDS pandemic. This claim is false, however.

In essence, TRIPS allows member states to “provide limited exceptions to the exclusive rights conferred by a patent”, provided these exceptions do not “unreasonably conflict” with normal patent exploitation or “unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties”. The DTI’s proposals are too skewed against the patent holder to meet these criteria – and the powers it is now seeking to give the new IP tribunal under the Copyright Bill are equally at odds with TRIPS. (For further information, see Anthea Jeffery, “The DTI versus TRIPS”, @Liberty, 15/2015, 12 November 2014)

The DTI’s proposal to replace the patents court with an administrative (and executive-controlled) IP tribunal is also contrary to TRIPS, for Article 42 of the Agreement states that: “Members shall make available to rights holders civil judicial procedures concerning the enforcement of any [patent] right... Parties shall be allowed to be represented by independent legal counsel,...and all parties to such proceedings shall be duly entitled to substantiate their claims and to present relevant evidence.” The word “shall” in these Articles is peremptory.

The DTI’s further proposal that the IP tribunal should apply its own “informal” rules of procedure is also contrary to Section 49 of TRIPS. This states that, where “any civil remedy is ordered as a result of administrative procedures on the merits of a case”, those administrative procedures must “conform to principles equivalent in substance” to those applicable in the civil courts.

Despite the evident conflict between TRIPS and its patent proposals, the DTI seems to be intent on using the Copyright Bill to introduce an administrative tribunal whose powers and procedures will be fundamentally at odds with South Africa’s obligations under this binding WTO Agreement.

4.7 Patents and prosperity

Apart from the risks in infringing TRIPS, there are also sound economic reasons for giving patent rights a proper level of protection, along with effective judicial remedies for their enforcement.

Writes Judge Harms: “[In the context of intellectual property], there is a significant direct link between judicial system performance and economic development... For intellectual property rights to serve their purpose, effective judicial support is necessary... When judicial support for these specialised rights is feeble, the mobilisation of [innovation] falters, with considerable losses to the country.” [Louis Harms, ‘The Enforcement of Intellectual Property Rights, WIPO, 2012, p20]

As Judge Harms indicates, and as the government is well aware, innovation is vital to investment, growth, and jobs. The known nexus between innovation and prosperity is the key reason the State provides significant incentives for innovation and is trying hard to raise

South Africa's overall spending on R&D to 1% of GDP – a level which, even if it were to be attained, would still lag far behind the global norm.

Perversely, the DTI's patent proposals, as now buttressed by the Copyright Bill, contradict all the state's endeavours to stimulate innovation. They also contradict the key goals of the National Development Plan (NDP): to raise the economic growth rate to 5.4% of GDP a year and reduce the unemployment rate to 6%. Neither growth nor jobs will increase without much more direct investment – but investors will have little reason to risk their capital, skills, and other resources within South Africa unless they know their property rights, including their intellectual property rights, are secure.

5 No socio-economic assessment of the Copyright Bill

Since 1st September 2015 all new legislation in South Africa has to be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this new system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced. [SEIAS Guidelines, p3, May 2015]

According to the May 2015 Guidelines (the Guidelines), SEIAS is also intended to ensure that 'government policies do more to support [four] core national priorities'. These are 'social cohesion, economic inclusion, economic growth, and environmental sustainability', [Guidelines, p6] and all four need to be taken into proper account. Yet what often happens, as the Guidelines warn, is that 'policy/law makers focus on achieving one priority without assessing the impact on other national ones'. In addition, as the document goes on to stress: 'A balance has to be struck between protecting the vulnerable and supporting a growing economy that will ultimately provide them with more opportunities.' [Guidelines, p6]

The Guidelines deal specifically with proposed new rules that aim to 'achieve a more equitable and inclusive society', but which 'inevitably impose some burdens on those who benefited from the pre-existing laws and structures'. The Guidelines posit that 'relatively small sacrifices on the part [of past beneficiaries] can lead to a significant improvement in the conditions of the majority'. However, 'the challenge is to identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration'. [Guidelines, p11] It is, of course, precisely such major economic risks that the Copyright Bill raises.

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new legislation has been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'. [Guidelines, p7]

A ‘final impact assessment’ must then be developed, which must ‘provide a detailed evaluation of the likely effects of the [new law] in terms of implementation and compliance costs as well as the anticipated outcome’. When a bill is published ‘for public comment and consultation with stakeholders’, this final assessment must be attached to it. Both the bill and the final assessment must then be revised as required, based on the comments obtained from the public and other stakeholders. Thereafter, when the bill is submitted for approval to the cabinet, the final assessment, as thus amended, must be attached to it. [Guidelines, p7]

However, it seems that no initial or final SEIAS assessment of the Copyright Bill has been conducted. Such assessments have certainly not been made available to help inform the public, as the Guidelines require. This omission is also inconsistent with the constitutional imperative to ‘facilitate public involvement in the legislative process’. This in itself is enough for the Copyright Bill to be struck down by the Constitutional Court, as other statutes have been. [See Section 59(1)(a), 1996 Constitution and relevant Constitutional Court judgments, including *Matatiele Municipality and others v President of the Republic of South Africa and others*; (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC); *Doctors for Life International v Speaker of the National Assembly and others*; 2006 (6) SA 416 (CC), and *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others*. [2016] ZACC 22]

Since the current Copyright Bill has not been accompanied by the necessary SEIAS assessments, it cannot now go forward. If the DTI still wants to proceed with a new bill, then a proper SEIAS process must be implemented from the start. The initial SEIAS assessment required must identify the DTI’s objectives and weigh up the pros and cons of different possible ways of achieving them. All the risks involved in introducing the proposed IP tribunal, in particular, must be carefully and objectively examined.

This initial assessment should consider – on the basis of *all* relevant information – whether there is really a compelling need for such a tribunal when the present rules and adjudication system work well. Among other things, it should objectively examine whether the alleged ‘ever-greening’ of patent rights is really a major problem in South Africa, as some civil society organisations have claimed. Ever-greening takes place when the patent rights holder manages to obtain a new patent on the basis of some minor improvement to its invention, and so extends the life of its patent. However, this cannot happen under the current Patents Act, which clearly states that minor improvements can be protected solely under a ‘patent of addition’. A patent of addition expires at the same time as the original patent and so cannot extend the period of patent protection.

Any comprehensive and objective assessment of the relevant evidence is likely to show that the DTI’s proposed IP tribunal is neither necessary, constitutional, nor consistent with the TRIPS Agreement or other binding international conventions. If the DTI nevertheless insists on drawing up a new bill providing for the introduction of an IP tribunal, it must ensure that this new bill is accompanied by a final SEIAS assessment which sets out all the likely costs and consequences of such a change. This final assessment must also be revised to take

account of public warnings against the likely negative ramifications of a new IP tribunal. This revised assessment must then be made available to the cabinet before it approves any bill providing for the introduction of such a body.

6 Conclusion

The process of public consultation on the Copyright Bill has been fatally flawed. The period allowed for comment (a scant 14 working days) has been far too short. The portfolio committee, in inviting comment and giving notice of public hearings to be held in Parliament from 27th to 29th June 2017, has also failed to provide any real insight into what the Copyright Bill proposes.

The portfolio committee seems to have set a very short timeline for the adoption of the Copyright Bill, whereas the Constitutional Court has emphasised that legislative timetables cannot be allowed to trump constitutional rights. Said the court in the *Doctors for Life* case: ‘The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.’ [*Doctors for Life*, para 194] Moreover, having cited this passage with approval in the *Land Access* case, the Constitutional Court went on to say: ‘In drawing a timetable that includes allowing the public to participate in the legislative process, the NCOP cannot act perfunctorily. It must apply its mind taking into account: whether there is real – and not merely assumed – urgency; the time truly required to complete the process; and the magnitude of the right at issue’. [*Land Access*, para 70] Though this injunction was addressed to the NCOP on the facts of the particular case, it applies no less to the National Assembly in this instance.

Public consultation has also been undermined by the fact that no initial and final SEIAS assessments have been made available. This has made it more difficult for ‘members of the public and all interested parties to know about the issues and to have an adequate say’ (to cite the Constitutional Court in the *New Clicks* case). Effectively, this has also denied the people of South Africa an opportunity to be heard which is ‘capable of influencing the decision to be taken’, as the Constitution requires. [*Land Access*, at para 71, citing *Moutse*, at para 62]

If South Africa is to attract direct investment, raise the growth rate, and generate millions more jobs, it needs to uphold and respect property rights, including copyright and patent rights. The provisions in the Copyright Bill seeking to establish a new IP tribunal overlook this key requirement. They are also in conflict with the TRIPS Agreement and inconsistent with Section 34 and Section 2 of the Constitution.

Overall, these provisions in the Copyright Bill are so damaging that the measure should simply be withdrawn from the legislative process. The DTI must go back to the drawing board; while proper SEIAS assessments must be conducted throughout the process of drawing up any replacement bill.

