

THE FREE MARKET FOUNDATION
of Southern Africa

progress through freedom

IPR 2008

REPORT ON THE

INTELLECTUAL PROPERTY
RIGHTS INDABA

**IPR policy in the context of South Africa's
growth and development needs**

26 November 2008

Hilton Hotel, Sandton

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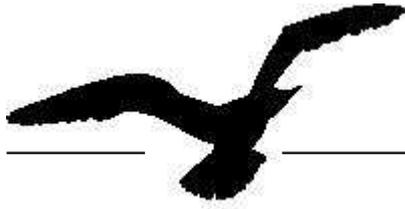


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THE FREE MARKET FOUNDATION of Southern Africa

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EXECUTIVE SUMMARY



The Indaba covered fundamental aspects of intellectual property rights and focused on three major fields: software, health care and music. The Free Market Foundation, International Policy Network, Microsoft and Merck, Sharp & Dhome (MSD) sponsored the event.

In her message to the conference (delivered by McLean Sibanda), Dr Boni Mehlomakulu, the Deputy Director General (DDG) of the Department of Science & Technology said that the National System of Innovation (NSI) is set to address the outdated technology used by small firms, the failure rates of start-ups, and entry into value-added areas such as the development of innovative ideas by SMMEs.

The DDG said that it was essential for government to act as a facilitator with the National System of Innovation (NSI) agenda being set by industry, which ultimately had a better idea of the needs in the market. SA did not compare well with other countries such as Korea in the number of patent applications submitted annually. The SA public would want to know whether money spent on supporting the development of an NSI was in fact a higher priority than spending on alternative competing demands for funding.

Douglas Lippoldt, Senior Economist and Policy Analyst at the Organisation for Economic Co-operation and Development, Paris, opened his keynote address with a presentation of patent and copyright indexes from a recent OECD working paper, providing an indication of the strength of IPRs in a broad sample of countries around the world. The indexes show that during the period 1990-2005 a significant number of countries (both developed and developing) have substantially strengthened their intellectual property rights regimes in terms of laws on the books. This is economically important because IPRs play a key role in the ability of rights holders to capitalise on their innovations, boosting incentives for technology transfer and further innovation. Indeed, there are statistically significant positive relationships between IPRs and

FDI, trade, R&D and patent applications. IPRs are one factor that influence innovation, though they are not a silver bullet policy solution - they account for just a portion of the variation in these economic indicators. Successful implementation of IPR regimes depends on complementary factors, for example, the quality of legal institutions, markets and infrastructure. In other words, the efficacy of intellectual property reform on trade and FDI is ultimately subject to the environment in which IPRs operate.

McLean Sibanda, Senior Patent Attorney with the Innovation Fund of the National Research Foundation, noted, "Despite the fact that some inventions are patented this does not reduce access or preclude further development on the innovation". Furthermore, empirical evidence demonstrates that countries with weak IPRs develop slower. IPR policy should be formulated to suit the specific needs of each individual country – a one-size-fits-all approach is not appropriate for each unique country. For example, one cannot adopt an IPR policy in Zimbabwe that has been developed for the US.

Leon Louw, Executive Director of the Free Market Foundation observed that, "With increased investment in an economy, income per capita increases, higher per capita incomes lead to greater levels of saving, which in turn lead to greater levels of investment". Thus it is imperative to protect property rights so that this investment in the economy can occur. According to the International Property Rights Index, SA ranks 23rd of the 115 countries surveyed. The countries surveyed in the index account for 96 per cent of the worlds GDP. The index shows that the countries ranked in the top 20 per cent are nine times wealthier than countries ranked in the bottom 20 per cent. More importantly, low-rated countries with improving IPRs prosper, whereas high-rated countries with declining IPRs stagnate.

Mark Lange, Senior Policy Counsel for Microsoft, Europe, Middle East and Africa, said that software is developing all over the globe. Examples from South Africa include SYSPRO, Softline and K2. These propriety software companies succeed because they invest in software innovation, license directly to customers for a fee, use revenues to grow, invest in further innovation, attract more business and stay ahead of the competition.

But it is not only the proprietary companies that are succeeding. Their customers are benefiting due to more efficient operations, their employees succeed and are rewarded by high quality jobs and the South African economy succeeds because it is afforded the opportunity to grow as a result of each of the software companies' activities. The proprietary business plan is well documented but how do companies that sell open source software (OSS) succeed? These companies also succeed by investing in software innovation. Typically they will license an OSS community version for free but they also license a commercial version for a fee. OSS companies use the revenues from the commercial version to grow and invest in further innovation. Thus there is a virtuous cycle of innovation. R&D leads to intellectual property, which leads to licensing which leads to revenue, which leads to further investments in R&D.

Ultimately competition is still about products that provide value to customers and business models that are viable for investment and innovation. Thus generally speaking OSS complements, but does not supplant business models for proprietary companies. Rewarding innovation remains imperative and is the goal of a beneficial IPR policy. It is imperative for government to remain neutral towards business and development models so that all can compete.

Jacques Van-Rhyn, a Partner and Director at PriceWaterhouseCoopers, SA, discussed tax and exchange control impediments to IP development in Africa. The top 500 companies in the world have 75 per cent of their investment in IPR compared to the average company in Africa that invests less than 10 per cent. A significant factor explaining this is that Africa is characterised by poor tax harmonisation due to poor tax treaty networks. Furthermore, African governments

continue to levy withholding and other pernicious taxes that deter foreign investment. It is necessary to devise tax incentives to attract foreign investors. Success for Africa does not lie in simply throwing more money at its governments but through education. The key to development lies in attracting multi-national companies to facilitate skills transfers and improve revenues. Governments should also remove tax trade barriers to promote inter-African trade.

Dr Nalini Naidoo, External Affairs Manager at MSD noted, “Innovation in the pharmaceutical industry brings about better health outcomes for the country’s citizens and a healthy population equals a more productive and wealthier population”. As a starting point it is imperative to expand the R&D component of the economy since IP is the engine of economic growth. Five years ago SA was a leading country in terms of pharmaceutical innovation but other countries such as India have subsequently overtaken it.

In the SA pharmaceutical market IP protection lasts for a maximum of 20 years but the inefficiency of the registration process consumes a significant portion of the protection period. The lack of time to recover costs reduces the commercial value of the product. There ought to be a fundamental change in the way SA approves medicines so the country can re-attract clinical trials. A delegate suggested that pharmaceutical companies should be lobbying government to improve the systems that are ineffective and use foreign control measures to proxy for approval processes in SA.

Bright Simons, Research Fellow & Director of External Development, IMANI, Ghana, noted, “One in three people on the globe lack access to essential medicines and expanding access will save an estimated 10.5 million lives by 2015”. The priorities of Ghana’s MeTA project are to make pharmaceuticals more affordable, promote rational use of medicines, address inequitable health financing, weak supply chains and unreliable quality and under-innovation with respect to developing country diseases. Access to medicines is not simply about resource availability. It is institutions, market practices, bureaucratic conduct, and policy structures that matter.

Alec van Gelder, Network Director of International Policy Network, said that bringing a drug to market typically consists of four stages, the first being filing for a patent, which depends on the usefulness, novelty, and non-obvious qualities of the drug. The next involves clinical trials that typically consist of four stages plus a post approval monitoring stage. The third phase involves regulatory testing and the fourth and final stage involves the effective life of the patent. The first three phases typically take between 8 and 12 years and cost the pharmaceutical company approximately USD800 million.

Imposing price controls and other interventions make it less enticing for producers of medicines to invest in countries that introduce such measures. In “established” markets in “developed” countries, the counter-productive effects include a greatly delayed approval for new, more effective, more cost-saving medicines, and higher prices for over-the-counter (OTC) medicines. R&D based firms are less likely to locate their operations in these markets - and to invent new useful medicines. Consequences include costlier regulatory procedures, the uncompetitive supply of generic medicines, and unnecessarily high prices for patients.

Mark Schultz, Assistant Professor, Southern Illinois University School of Law, USA, and co-author of *Nashville in Africa* observed that, “The IP and development debate typically treats IP as something created in wealthy countries and does not give credit to people in the developing world for their inventiveness and creativity”. But the Nashville experience has relevance for developing countries. Due to strong IPRs the music industry in Nashville has grown from humble beginnings and now generates USD6-billion a year. It has created 20,000 direct jobs that generate USD700-million in annual wages and an estimated 35,000 indirect jobs. Tennessee was an

under-developed economy with per capita incomes in the region a mere 40 per cent of US national average.

Lessons learned from the Nashville experience hold relevance for the current African situation. In order to turn Africa into a Nashville it is necessary to enact, implement and enforce effective copyright laws. Nashville is not a panacea but it provides an example of the way Africa could move if it enforced effective property rights laws.

Mandla Maseko, of AIRCO said, "Piracy costs the SA economy millions of Rands each year". It not only robs the individual producers of their living but it also robs music labels and government of tax revenue. Artists producing music end up working for someone else who benefits from the fruits of their labour. However, there is some cause for optimism because evidence suggests that the fight against piracy in SA is progressing. A recent Enforcement Bulletin reported that "Hotspots for counterfeit goods have been named and shamed and perpetrators have been arrested".

Musician Eugene Mthethwa echoed the sentiments of many other musicians when he said that in SA music IPRs, as they are currently enforced, do not benefit the musicians and producers of music. He said the benefits from IP accrue mainly to the record labels and do not benefit the producers of music. One possibility for correcting the situation was that purchasers of music copyrights should not be given outright ownership of such rights but should become "holders" of the rights for a limited period.



IPR 2008

Intellectual Property Rights Indaba

held on

26 November 2008

The Indaba covered fundamental aspects of intellectual property rights focussing on three major fields: software, health care and music. The Free Market Foundation, International Policy Network, Microsoft and Merck Sharp & Dhome (MSD) sponsored the event.

Opening Address - Dr Boni Mehlomakulu
Deputy Director General, Department of Science & Technology
 (delivered on her behalf by McLean Sibanda)

The National System of Innovation (NSI) is a general term describing the network of interacting public and private organisations that focus specifically on nurturing and developing science and technology with a view to stimulating economic development within the economy. In order to develop the South African economy the NSI requires an appropriate IPR framework.

According to the National Advisory Council on Innovation the NSI is set to address the following issues:

- Outdated technology and technology support used by many SMMEs
- Failure rates of start-up and entry into value-added areas by SMMEs
- Access to competitiveness and business support and promotion of innovative ideas

In South Africa the NSI concept was introduced in a White Paper in 1996. The recommendations in the Paper were not adopted at the time because it was agreed that there were other more pressing issues to be addressed within the South African economy. More recently, an OECD review of South Africa's NSI confirmed the key challenges of implementing the NSI strategy. It was noted that for a successful NSI strategy to be adopted, it is essential for government to act as a facilitator, with the NSI agenda being set by industry. It is recognised that ultimately industry has a better idea of the needs in the market.

Key issues that emanated from this presentation were:

- SA has remained relatively stagnant especially when compared to a country such as Korea, where there are many Patent Co-operation Treaty (PCT) applications each year.
- The South African public wants to know what they will get out of the development of an NSI when there are other competing alternatives for the funding.

Keynote Address – Douglas Lippoldt

Senior Economist & Policy Analyst, Trade & Industry Directorate,
Organisation for Economic Co-operation and Development,
Paris

The Development Dimensions of IPRs in the Digital Era

A recent project undertaken by the OECD entitled: *The OECD Growth Project* analyses factors fuelling differences in growth performance in OECD economies. The project stresses that "... something new is taking place in the structure of OECD economies... and this transformation might account for the high growth.... Policies that engage ICT, human capital, innovation and entrepreneurship in the growth process, alongside fundamental policies to control inflation and instil competition while controlling public finances are likely to bear the most fruit over the longer term."



Due to the intangible nature of IP it has a tremendous ability to reach a vast number of people and does not confer the same characteristics as a private good in the sense that there is no exclusivity in consumption. Unlike a material resource, the same bit of intellectual property (IP) - say, a patent - can be made available simultaneously and repeatedly on a non-exclusive basis to multiple users, generally at a low marginal cost. Given the nature of IP, innovators face a challenge to appropriate the economic benefits of their ideas. Governments grant IPRs to assist innovators and provide incentives for innovation and IP dissemination.

Technology is a key tool to accomplish greater development, representing the means to increase productivity, as measured by increased output per individual within an economy. In order to increase the deployment of more efficient technologies within the economy, it is important that technology be well protected so that there is an economic incentive to develop or 'import' new technologies. Apart from technologies developed within a country's borders, there are five main channels of technology transfer: (1) Trade in goods and services, (2) Foreign direct investment, (3) Joint ventures, (4) Licensing, and (5) Cross-border movement of personnel.

According to the WTO TRIPS Agreement (effective 1995) Art. 7: "The protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations." Art. 66.2 states that, "Developed countries shall provide incentives promoting tech transfer to developing countries".



Some IP can be protected through "natural" protections or trade secrets (e.g. some products are difficult to reverse engineer, copy; some lead-time advantages). For other IP, weak IPRs mean rights holders could face difficulty in appropriating returns from the use of their IP or they could risk abuse of their intellectual property by a competitor. Theoretically IPRs could be made too strong and confer excess market power on rights holders but this is not likely to occur in most developing countries, given the general lack of IPR protection there. IPR serves to protect rights holders for both open software and propriety software. International

accords recognise IP holders' rights to license, rent, or assign IP. The recognition of IPRs as property opens the way to markets for intellectual property (e.g. technology, digital content, designs).

A significant number of countries (both developed and developing) ratified key WIPO IPR treaties during the first half of the 1990s thus strengthening IPRs. The 1990s witnessed increased coverage of IPR issues via trade agreements: TRIPS and Regional Trade Agreements. The TRIPS Agreement built on the framework of the WIPO-administered agreements and extended minimum protection across all WTO members. Patent and copyright indexes developed by Ginarte and Park (1997), Park (2005) and later extended by Park and Lippoldt (2008) draw on empirical criteria to assess the strength of IPR protection in a broad sample of countries based on laws on the books, taking into account accessions to these international agreements and other provisions in domestic law. They highlight the strengthening of IPR protection during recent decades, and in particular since 1990.

We live in a changing economic environment and IPRs play a key role in the ability of rights holders to capitalise on their innovations. There are statistically significant positive relationships between IPRs and FDI, trade, R&D and patent applications. However, IPR protection is but one factor amongst others that influence innovation and it requires complementary conditions to be effective. That is, stronger IPRs are not a silver bullet policy solution - they account for just a portion of the variation in the economic indicators. Successful implementation of IPR regimes depends on complementary factors such as the quality of legal institutions, functioning markets, infrastructure, and adequate availability of human capital. It is with such complements that domestic innovation is enabled, international technology transfer encouraged, and value created. In other words, the efficacy of intellectual property reform is ultimately subject to the environment in which IPRs operate.

Session 1 Intellectual Property Rights & South Africa's economy

Chairman: Chose Choeu (Director: Law & Corporate Affairs, Microsoft SA)

McLean Sibanda

Senior Patent Attorney, Innovation Fund, National Research Foundation



Left: Leon Louw; Right: McLean Sibanda



McLean Sibanda

Intellectual Property in Social and Economic Development

Despite the fact that innovations have been patented they are still widely available and patents should not be viewed as an obstacle to accessibility. Despite the fact that some inventions are patented this does not preclude further development of the product. Evidence is found in the evolution of medicines, the majority of which are patented. As a result of medicine patents and innovations people are living longer and healthier lives. A study by Shapiro and Hassett demonstrates that countries with weak IPR develop slower. In order for developing countries to solve the problem of the so-called neglected diseases it is necessary for them to develop strong IPR.

Patenting rates in South Africa have remained relatively stagnant at approximately 10,000 per year for several years. Disaggregating the data on patents shows that foreigners are filing an increasing proportion of patents relative to South African citizens. Yet South Africans are responsible for a number of ground breaking innovations such as:

- Kreepy Krauly's (for cleaning pools)
- Radioactive isotopes (for treating cancer patients)
- Brush tee's (for playing golf)
- Infant monitor's (for monitoring a child's activities)
- Round about play pumps (for pumping water from deep within the ground)
- Rooivalk fighter helicopter's (for military purposes)

IPR should be formulated to suit the specific needs of each individual country – a one-size-fits-all approach is not appropriate for each unique country. For example, one cannot adopt an IPR policy in Zimbabwe that has been developed for the U.S.

In response to a question on the need for Centres of Competence (COCs - government agencies involved in research and development and innovation), the speaker suggested that it is necessary to have these Centres because government has realised the importance of innovation to South African society. Hence government has begun to invest in developing new technologies. Furthermore, he suggested that the private sector will not provide long-term funding for developing risky technologies, thus it is necessary for the government to assist via the COCs, which are not new. They were developed in other countries and are simply being developed and adopted in South Africa.

Leon Louw

Executive Director, Free Market Foundation

Intellectual Property Rights and Prosperity

With increased investment in an economy, income per capita increases. Higher per capita incomes lead to greater levels of saving, which in turn lead to greater levels of investment. Property rights protection is imperative if investment in the economy is to occur. According to the International Property Rights Index, SA ranks 23rd of the 115 countries surveyed. The index comprises three components: (1) Physical property rights (2) Intellectual property rights (3) Law and policy.

The countries surveyed in the index account for 96% of the world's GDP. The index shows that the countries ranked in the top 20 per cent are nine times wealthier than countries ranked in the bottom 20 per cent.



Leon Louw

Low-rated countries with improving IPRs prosper, whereas high-rated countries with declining IPRs stagnate. The major challenges facing IPR in South Africa at the moment fall into four broad areas:

Government funded IPR – Is this really necessary? Shouldn't South Africa be creating the conditions that enable the private sector to innovate?

Health – Major multi-national companies have traditionally been the main producers of pharmaceutical products in South Africa but there is currently an exodus due to the

onerous conditions imposed upon them. Fuelling this exodus are the comparatively attractive conditions offered elsewhere.

Software – The SA government has decided to use open source software but certain departments cannot function on open source software because it simply has not yet been developed.

Expropriation Bill – The expropriation bill that was recently shelved has resurfaced and threatens all manner of private property. The post-apartheid government should not trample on these rights since they are all too familiar with the conditions that prevailed under apartheid. In order to overcome the land issue, the government should simply give title to all the land that black South Africans currently occupy and superfluous government land should be utilised to give land to those who have none.

Session 2 Software & Intellectual Property in Africa

Chairman: Vis Naidoo (Director: Citizenship, Microsoft SA)



Mark Lange

Senior Policy Counsel, Microsoft – Europe, Middle East and Africa

Intellectual Property Rights Strategies & Business Models in the Software Sector

Proprietary software is developing all over the globe. Examples from South Africa include: SYSPRO, Softline and K2. These companies succeed because they invest in software innovation, license directly to customers for a fee, use revenues to grow, invest in further innovation, attract more business and stay ahead of the competition. This is essentially what the proprietary IPR model is based on – build something valuable to customers, license it, protect it and continue to improve it.

It is not only the companies that are succeeding – their customers are benefitting due to more efficient operations, their employees succeed and are rewarded by high quality jobs and the South African economy succeeds because it is afforded the opportunity to grow as a result of each of the aforementioned companies' activities.

South Africa also has a successful Open Source Software (OSS) company for example KnowledgeTree. KnowledgeTree is based in Cape Town. The main function of the company is to make collaboration software for small businesses, which it initially developed in 2003. After sharing their product freely with others and seeing significant interest in it, the company re-wrote the software and commercialised it in mid-2006. Now the company sells to major corporations, government, academia and small to medium-business the world over.



Mark Lange

But how does this company succeed if it's selling OSS? They invest in software innovation and license an OSS community version for free but they also license a commercial version for a fee. Customers can therefore get the OSS version for free, plus proprietary extensions that add value and the accompanying services. They use the revenues from the commercial version

to grow and invest in further innovation. Is this a proprietary IPR model with an OSS twist? Or is it an OSS model with a proprietary twist? Either way there is a virtuous cycle of innovation. Research & Development leads to intellectual property, which leads to licensing which leads to revenue, which leads to further investments in R&D hence completing the virtuous cycle.

The mixed source software sector comprises of open, free and proprietary software. All are viable and have their respective strengths. The software industry and customer environments are mixed. For example, one can find OSS on Windows and proprietary on Linux. Thus Windows and Linux can and do operate in the same environment. Customers require industry co-operation, interoperability and competition.

Ultimately competition is still about products that provide value to customers and business models that are viable for investment, innovation and employment. Business models impact the company's IPR position. For example, if the company is involved in the manufacture of components or products they have a greater incentive to ensure a secure property rights environment. In contrast, businesses that are involved in advertising or consulting services have more incentive for IPR to be more freely available.

Open source is not a business model. It is a development and distribution model that is enabled by a licensing tactic. Vendors that build revenue streams around open source software for the most part do not choose between open source and proprietary development and licensing; they choose business strategies that attempt to make the best use of both open source and proprietary development and licensing models in order to maximise their opportunities for generating revenue and profit.

Open source complements, but does not supplant business models for all these proprietary companies. South Africa does benefit from proprietary software models and different models can and do coexist. But rewarding innovation remains imperative and is the goal of a beneficial IPR policy. Moreover, it is imperative for government to remain neutral towards business and development models so that it enables all to compete.

Jacques Van-Rhyn

Partner/Director, PriceWaterhouseCoopers, Southern Africa

Tax and Exchange Control Impediments to Intellectual Property Development in Africa

Of the top 500 companies in the world 75 per cent of investment is in IPR compared to the average company in Africa that invests less than 10 per cent in IPR. The only exception to the rule is found in the cellular industry where there is major investment in IPR. Ireland decided to become a hub for IP development and attracted companies by offering them low rates of corporate taxation. In Africa there are no such incentives and the continent is characterised by high levels of corporate taxation, no tax harmonisation and political instability, all of which serves to deter investors.

Poor tax harmonisation in Africa is due to a poor treaty network between its states. African governments continue to levy withholding taxes and other pernicious taxes. To make matters worse, due to the poor inter-country tax harmonisation African companies are often double taxed, once in the host country and once in the home country. In order to attract foreign investors it is thus necessary to devise tax incentives.



Jacques Van-Rhyn

Most African states import IP by allowing licences. The South Africa government promotes technology and skills transfers and local IP development. If African states do not incentivise foreign companies, development will simply not occur. Success for Africa will not be achieved by throwing money at it but through education. Set up foreign MNCs to facilitate the skills transfer and remove the tax trade barriers to promote inter-African trade. The 'bric' countries (Brazil, India and China) offer better incentives through strong IP protection amongst other things. The South African Treasury is trying to promote FDI but continues to impose exchange controls. At best these controls may prevent companies from extracting their profits but in the long run they adversely affect the amount of investment entering South Africa.

Session 3

Role of Intellectual Property Rights in Healthcare

Chairman: Chose Choeu (Director: Law & Corporate Affairs, Microsoft SA)

Dr. Nalini Naidoo

External Affairs Manager, Merck, Sharp & Dhome, South Africa



Left: Alec van Gelder; Middle: Bright Simons; Right: Dr Nalini Naidoo

Encouraging Innovation in the South African Pharmaceutical Industry

Innovation in the pharmaceutical industry brings about better health outcomes for the country's citizens and a healthy population equals a more productive and wealthier population. As a starting point is it therefore imperative to expand the R&D component of the country since IP is the engine of economic growth. However, five years ago South Africa was a leading country in terms of pharmaceutical innovation but it has subsequently been overtaken by other countries such as India.

In the South African market, IP protection lasts for a maximum of 20 years but the registration process consumes a significant portion of the time period allowed to recoup costs due to its inefficiency. This lack of time to recover costs reduces the commercial value of the product. There ought to be a fundamental change in the way South Africa approves medicines so that we can re-attract clinical trials to our shores.



Dr Nalini Naidoo

In the case of HIV/AIDS drugs, compulsory licences have had a detrimental effect on the amount of money spent on R&D. Furthermore, an increasing number of pharmaceutical companies are disinvesting in HIV/AIDS drug development as a direct result of compulsory licences. Due to the slow and bureaucratic process of the Medicines Control Council (MCC), drugs that are claimed to take between 18-24 months to approve, could take up to five years in practice. This reduces the effective life of the patent and disincentivises companies from investing in R&D. Furthermore, even drugs that are on the fast track process, which should take between nine and twelve months to be approved, take on average 24 months.

It is becoming increasingly more expensive to conduct clinical trials in developed countries and this opens an opportunity for

these trials to be conducted in developing countries with sound IPR. Thus it is imperative for SA to improve its regulatory processes to attract this investment. A delegate agreed with the assertion that the regulatory process should be improved but suggested that instead of lobbying for patent extensions companies should be lobbying government to improve the systems that are ineffective, using foreign control measures to proxy for controls in South Africa.

In SA there has been an investigation by the Ministerial Task Team, which details the human resource constraints currently faced by the MCC, which are contributing to the slow rate of approvals. A delegate noted that it is also possible to develop a private sector standards authority that can do the job of the MCC and there is precedent for this – one only has to look at the alternative medicines and organic food industry for cases in point.

Alec van Gelder

Network Director, International Policy Network, London

The Impact of Drug Industry Regulation on Innovation and Patient Care

The international regulatory procedure for bringing a drug to market consists of four stages. In the first phase a company files for a patent. The success of this stage depends on three criteria: usefulness, novelty, non-obvious. The next phase involves clinical trials that typically consist of four stages plus a post approval monitoring stage. The third phase involves regulatory testing and the fourth and final stage involves the effective life of the patent. The first three phases of the regulatory process typically take between 8 and 12 years and cost the pharmaceutical company approximately USD800 million. The proposed solutions to increasing access lead to decreased investments in R&D and increase development costs. This results in fewer jobs in the economy and less wealth.



Alec van Gelder

Imposing price controls and other interventions make it less enticing for producers of medicines (whether they be R&D-based or generics-based) to sell to a specific marketplace and lead to counter-productive results. Where these interventions have been in place for a long time - e.g. the “established” markets in “developed” countries, the data suggests that counter-productive effects include a greatly delayed approval for new, more effective, more cost-saving medicines, and higher prices for over-the-counter (OTC) medicines. They also lead to stifled incentives for R&D based firms to locate their operations in these markets - and to invent new useful medicines. A separate element to this is the failure to learn good practices from other functioning generics markets, which leads to much costlier regulatory procedures, the uncompetitive supply of generic medicines and unnecessarily high prices for patients.



Bright Simons

Bright Simons

Research Fellow & Director of External Development, IMANI, Ghana

Barriers Preventing Access to Medicines: The Lure of an Elixir

The basic objective of Ghana's MeTA (Medicines Transparency Alliance) is to increase access to medicines. One in three people on the globe lack access to essential medicines and expanding access will save an estimated 10.5 million lives by 2015. The priorities of the MeTA project are to make

pharmaceuticals more affordable, promote rational use of medicines, address inequitable health financing, weak supply chains and unreliable quality and under- innovation with respect to developing country diseases.

Access to medicines is not simply about resource availability. More importantly, institutions, market practices, bureaucratic conduct, and policy structures all matter. Noteworthy elements of the project have been determining the adverse effects of government control of the supply chain. Government controls 30 per cent of medicines in Ghana. This has adverse effects on bringing the medicines to market and thus decreases accessibility. A further impediment to access is the medicines regulation process. Developing countries often try to develop their own regulation processes when they should simply approve drugs that have already been approved in developed countries. A further channel to increase accessibility is the development of evolutionary standards via medical practice. With increased caseloads, new ways of treating patients are constantly developed that promote access to essential medicines. New innovation in delivery is also an important source of increasing access. For example nurses visiting patients' houses as opposed to the traditional channel of sickly patients having to travel to clinics.

Session 4 Music Rights and Economic Development

Chairman: Temba Nolutshungu (Director: Free Market Foundation)

Mark Schultz

Assistant Professor, Southern Illinois University School of Law – co-author of *Nashville in Africa*



From Left to Right: Temba Nolutshungu, Mark Schultz; Mandla Maseko; Eugene Mthethwa

The Value of Creative Clusters and Nashville's Country Music Industry

The IP and development debate typically treats IP as something created in wealthy countries and does not give credit to people in the developing world for their inventiveness and creativity. The central premise of the paper *Nashville in Africa* seeks to answer the question, "What are pragmatic ways that people in developing countries can use IP to help themselves and their nations"? The Nashville experience has relevance for developing countries noting that the music industry in Nashville generates USD6-billion a year, has created 20,000 jobs directly related to music which equates to USD700-million in annual wages. Furthermore, 80 record labels have developed with 130 music publishers and 180 recording studios. Approximately 35,000 indirect jobs have been created as a result of the evolution of the music industry in Nashville.



Mark Schultz

But how does the music industry in Nashville, Tennessee relate to the African situation? Tennessee was an under-developed economy with per capita incomes in the region a mere 40 per cent of US national average. Large numbers of individuals were still employed in subsistence farming and malaria was rife with an estimated 30 per cent of the population infected. In the 1920's Ralph Peer saw an opportunity for the development of the music industry and signed the rights to record the music of Jimmie Rodgers and the Carter family. The royalties from Peer's publishing company for this record earned about USD80,000 a

month in 1928. Ralph Peer would pay groups USD50 per recording session in return for 2½ cents royalty per side of the record. Comparatively, the typical wage for mining, the dominant activity, was 76 cents per hour for a 48-hour work-week. Thus earnings from one recording session would be greater than one week's worth of wages from mining.

Lessons learned from the Nashville experience hold relevance for the current African situation and the recommendations of authors Mark Schultz and Alec van Gelder are that governments should (1) enact, implement and enforce effective copyright laws, and (2) reduce intervention in royalty collection and reduce taxes and regulatory burdens. The authors also point to the opportunities developed by creative clusters and the importance of private action. Not only was entrepreneurship essential in the case of Tennessee but government does not have to do much to set the ball rolling. However, Nashville is not a panacea but merely a step in the right direction for Africa.

Mandla Maseko

Director for Local Content and Anti-Piracy – Association of Independent Record Companies of South Africa (AIRCO)

The effects of music piracy on the economy – The South African artist's case study

Piracy costs the SA economy millions of rands each year. Piracy not only robs the individual producers of their living but it also robs music labels and government of tax revenue. Individuals producing music end up working for someone else who is benefiting from the fruits of their labour as a result of piracy. In South Africa the causes of music piracy may be attributed to amongst other things:

High illiteracy: A large proportion of SAs population cannot read and write. Some can read but do not use the skills. Thus illiterate masses are often soft targets for counterfeit materials.

Poverty and Low income: The bulk of counterfeit items are marketed in areas populated by poor and low-income earners – areas such as squatter camps, taxi ranks, and rural areas. However, this does not exclude middle and high-income earners.

Free market and easy access: Taxi ranks, train stations and traffic intersections are amongst the fast growing areas for counterfeit products in South Africa. As a result, distributors of counterfeit items use these platforms to make their products accessible to poor and low-income earners.

Fragmented Anti-piracy programmes and softer punishments: The anti-piracy strategies in South Africa are fragmented because the industry is perceived to be disjointed. The campaigns tend to be isolated to the industry. The other economic sectors, such as the taxi industry, enable the business to grow within their ranks and the criminals do not feel the punishment, if there is any at all.

However, there is some cause for optimism because evidence suggests that the fight against piracy in South Africa is progressing. For example a recent *Enforcement Bulletin* produced by RISA notes, "Hotspots for counterfeit goods have been named and shamed and perpetrators have been arrested". Furthermore, there has been a steady decline in piracy due to initiatives such as the BSA (Business Software Alliance) along with cooperation from government and other factors. After the recent launch of an anti-piracy advertising campaign, the chairman of the BSA of South Africa, Stephan Le Roux, said that piracy cost South Africa 'only' R950 million (or \$136 million) last year, indicating a drop in the piracy rate from 36% in 2004 and 2005 to under 30% in 2007.



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From Systemic Exploitation to Systemic Exclusion

In the South African music industry intellectual property rights, as they are currently enforced, do not benefit the musicians and producers of music. Furthermore, the benefits from IP accrue mainly to the record labels and do not benefit the producers of music.

In South Africa there are only a few more years to benefit from the physical sales of music before the digital era catches up with the African continent. However, it is essential to (1) Take advantage of the existing national policies, (2) Take advantage of the socio-economic disadvantages of the artists' target market, (3) Re-look at the IPR acquisition process with a limited period on "holder-ship" against 50 years after death, (4) Consolidate the law enforcement procedure on piracy – criminal justice, (5) Increase the quota system – airplay, (6) Formalise the sector – for proper corporate governance, tax compliance, easy regulation, and (7) Have one collecting society for royalties – a trade body and advisory committee – services should be outsourced to a business through a tender process.



Eugene Mthethwa