



THE FREE MARKET FOUNDATION

of Southern Africa

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35 years of promoting economic freedom: 1975-2010

IPR Roundtable in Johannesburg a resounding success

The IPR Roundtable, held in Johannesburg on 29 April 2010, organized by the Free Market Foundation (FMF), chaired by Microsoft Director of Law and Corporate affairs, Chose Choeu, and attended by 53 participants invited for their expertise and special interest in IPR, was a resounding success.

Temba Nolutshungu, FMF Director in charge of Parliamentary liaison, described the strong interest of the Foundation in property rights, including intellectual property. He mentioned that SA is ranked 20th out of 125 countries on the IPR ranking of the International Property Rights Index, an important achievement as there is a strong correlation between IPR scores and economic growth. In welcoming the participants he made special mention of Joan Fubbs, Chair of the Department of Trade & Industry.

Ms Fubbs told the participants that she had concerns about attending the meeting since she would be chairing the upcoming Parliamentary Portfolio Committee hearings on the new IPR Bill but had decided to attend to hear a wider cross-section of views on this important legislation.

Traditional Knowledge Bill

The Intellectual Property Amendment Bill, generally known as the Traditional Knowledge Bill, introduced by MacDonald Netshitenze a Director in the Department of Trade & Industry (DTI), gave rise to lively discussion. Mr Netshitenze concentrated in his presentation on the increasing international support for the protection of traditional knowledge, acknowledged that he was aware that critics were of the view that such knowledge should not be accommodated within an IP regime, and stated that he disagreed with that view.

Andre van der Merwe, DM Kisch and Owen Dean, Spoor & Fisher, participants from major IP law firms, raised various concerns about the proposed legislation, made clear that they were in favour of protection for traditional knowledge, but suggested that the protection should be achieved by way of *sui generis* (special) legislation and that it should not be inappropriately forced into IP legislation. Leon Louw, FMF, was concerned that a Regulatory Impact Assessment (RIA) of the bill, carried out by the DTI had not been made public as required by the constitution. Jeanette Lotter, Innovative Medicines SA said that her organisation was not unhappy about the intent of the legislation but believed that there was a need to harmonise health and IP policy.

After having heard the strongly motivated view of the IP lawyers, Ms Fubbs, in a closing statement on the session said that it was clear that some sections of the Bill required attention but she was not in a position to express an opinion on the *sui generis* issue. She said that she would welcome further debate, especially if the general public could be involved.

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Constitutionality of Software Procurement Policy

Professor Robert Vivian, University of the Witwatersrand, analysed government's instruction to all sectors of government to give preference to open source in their software procurement. He found that the SA constitution supports protection and taking of property at the same time, which is anomalous. His conclusion was that, to act constitutionally, the government as a consumer should be neutral between open source and proprietary software. Upon being told that members of government had disagreed on the proposal to give preference to OSS but had been convinced by a legal opinion that it was a legitimate action, Professor Vivian responded by saying that the only way it could be made legitimate was by changing the constitution.

Publicly Financed Research

Dhesigen Naidoo, University of Pretoria, described the experience of universities since the adoption of the SA legislation on IP from publicly funded research, which is based on the US Bayh-Dole Act, listing the positives and negatives. A positive result of the legislation was that there was a greater consciousness among publicly funded organisations and their researchers of the potential commercial value of their research. This would lead to greater IP development and protection. Negative results included the fact that policing and reporting and the "walk in" rights of the state – the right, for instance, to take IP in the event of a health, security or emergency situation – were causing anxiety in the university environment. Another problem was that the legislation intervened in arrangements between publicly funded organisations and international partners, making partners wary of investing and sharing knowledge with SA partners. A participant mentioned that one danger of forcing publicly funded institutions to file patents was that it encouraged researchers to file useless patents, closing off competing research in the particular area.

The Anti-Piracy White Paper

Charl Everton, Chairperson of the Business Software Alliance, reported on the importance of IT to the SA economy, that it represented 4.2 per cent of GDP and is expected to rise to 4.9 per cent by 2013. Software is 14.7 per cent of the total IT market. Increasing piracy leads to economic losses, reduced tax revenues, and a loss of investment. A reduction in piracy would lead to the creation of many new jobs. Unauthorised use of software should be added to illegal copying and sale as a criminal offence.

Jasson Urbach, Director of the Health Policy Unit, described the dangers posed to health by the sale of fake and sub-standard drugs. Fake drugs make up 10 per cent of the global market and at least 25 per cent of sales in developing countries. Sub-standard drugs can in many cases be more dangerous than fake drugs in that they increase the probability of resistance to real drugs emerging.

Delegates included representatives from several major law firms, government departments and municipalities, universities and the Council for Scientific and Industrial Research (CSIR).