THE FREE MARKET FOUNDATION
of Southern Africa

progress through freedom

SUBMISSION

to the

Portfolio Committee ('PC')

of the

Department of Trade and Industry ('DTI')

by the

Free Market Foundation of Southern Africa ('FMF')

on

'Traditional Knowledge Bill'

(the *Intellectual Property Amendment Bill* as introduced in the National Assembly and published in Government Gazette 33055 on 29 March 2010.) **('the Bill')**

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1. INTRODUCTION – THE PRIMACY OF PROPERTY RIGHTS

The Free Market Foundation of Southern Africa (FMF) is South Africa's leading property rights champion. Throughout its thirty five year history it fought, more resolutely and consistently than any other role-player, for the unambiguous recognition and protection of all property rights for all South Africans. It pointed out that the essence of apartheid was the violation of property rights, and that it would not have been possible if property rights had not been violated.

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Unlike any other anti-apartheid organisation, the FMF encouraged whites to abandon apartheid by showing that the violation of property rights for blacks necessarily also entailed the violation of property rights for whites in that they could not trade or interact freely with blacks. This became clear when the Group Areas Act was eroded by whites letting and selling their property to blacks, and employing blacks on their property in shops and factories. Our view has always been that the violation of some people's rights is the violation of all people's rights.

2. POLICY WELCOMED AND CONCERNS REGARDING THE BILL

The FMF welcomes the desire to extend effective recognition and protection of tradition knowledge property rights. It is generally assumed that beneficiaries will be traditional or tribal black communities, whereas a constitutionally valid law must, of course, protect all traditional knowledge impartially and non-racially. Whilst supporting the objectives of the Bill, FMF draws attention to significant concerns which could turn this well-intentioned measure into one that counter-productive not just for intended beneficiaries, but property rights in general, and South Africa's international reputation in particular. As presently drafted, the measure probably violates international treaty obligations.

This submission is made as a bona fide contribution to implementing government policy effectively and legitimately. Its objective is to ensure that government policy is clearly articulated, properly crafted, effectively implemented, and consistent with the principles of good law.

In its present form, the Bill is more likely to compromise than protect traditional knowledge rights, especially that of 'communities'. It may lead to needless and costly litigation, some of which may find core provisions unconstitutional. Aspects may be unlawful as being in breach of treaties.

Only major concerns are addressed in this Submission. To avoid dilution of focus, and diversions form the most important issues, we do not comment in detail, but do point out that there are some typographical errors and drafting inelegancies. We are told that attention has been drawn to these in other Submissions to the DTI and the Portfolio Committee. We pledge our assistance with any attempt at addressing concerns raised by us and others.

Our Submission distinguishes between (a) **substantive** concerns (regarding the protection of property rights), and (b) **jurisprudential** concerns (regarding whether the policy should be implemented by way of an amendment to intellectual property legislation). We also address concerns regarding (c) **superfluous** provisions, and conclude with a query regarding (d) **public participation**.

3. SUBSTANTIVE CONCERNS

3.1 Existing law

The architects of the Bill do not appear to be aware of the extent to which traditional knowledge is already protected by common and statute law, including the ability for traditional communities to register their rights to traditional knowledge. There is no obvious need for new legislation.

3.2 Legitimate objective

Some traditional communities, as well as other people and entities entitled to protection (whose interests are not addressed in the amendment) may not be aware of the benefits of intellectual property rights or how to protect them. A legitimate purpose of new legislation is for government to facilitate protection for less sophisticated people.

3.3 Inconsistency with Government Policy

However, contrary to what government intends, the Bill does not provide for the protection of traditional communities' rights. Its effect is, in fact, the opposite of what the government's intention as stated in its *Policy Framework*.

3.4 Nationalisation of Community Rights

At present, communities are entitled to all the benefits of their IP. The effect of the Bill would be the nationalisation of their rights. Usually holders of rights have to enforce them against 'pirating'. Far from communities being assisted and protected by the government, they would, if this Bill is implemented in its present form, have a new enemy, the state. They would find themselves having to fight for their rights in costly court cases against the government under a law intended for their protection.

3.5 Need for Redrafting

Given the conflict between government's clearly stated and oft repeated intention and the Bill as drafted, we assume that the problem is essentially a substantive drafting error. At the very least, competent statutory drafters (see below) ought to be directed to correct this fundamental error.

3.6 Government Fund *versus* Trust

It there is to be a government run fund, it should be a trust holding and administering funds specifically for beneficiary communities. A trust of this sort should be involved, at most, pending the establishment of community-specific trusts. The government (DLA) has, for instance, created hundreds of Communal Property Associations (CPAs) for ownership by communities of their land. In this context, the government has accumulated lots of experience in the avoidance of unintended consequences, the lack of sophistication in many communities, and the creation of trusts specifically and unambiguously for their benefit.

3.7 Application of Funds

As presently drafted, royalties from traditional knowledge will be used, *inter alia*, for other communities or traditional knowledge in general. This is clearly inappropriate and, we assume, unintended. It would be like the government taking royalties from the author of a book, or revenue from a patent, in order to fund the competitors of the innovators concerned.

4. JURISPRUDENTIAL CONCERNS

4.1 Uniform concern

There appears to be virtually unanimous concern amongst experts, especially jurists, regarding the implementation of the policy by way of Amendments to existing intellectual property (IP) legislation. This concern is shared by experts regardless of where they stand on whether or to what extent and by which means traditional knowledge should be protected.

Such unanimity is rare, and it is our humble submission that under such extreme conditions the PC should refer the Bill back to the DTI with a request that

jurisprudentially legitimate means be sought to implement the government's policy.

4.2 The Concept of IP

The idea of IP protection is to give creators of IP protection when IP is the result of human design as opposed to mere human action (below). The period of protection varies. Some IP, such as trade marks, enjoys protection in perpetuity; some, such as patents, enjoys protection for a few years. In-between, copyright is protected for the creator's lifetime. Many innovations are not protected at all, such as new ways of doing things.

This protection is sometimes called a 'monopoly', which is a misnomer. We do not call the protection of other property – a car, furniture, land personal effects – a monopoly. It is simply property.

A basic problem with this Bill is that it is inconsistent with the essential and internationally recognised nature of IP. It envisages protecting or creating property and rights which are neither in the usual sense.

4.2 Giving Effect to Government Policy

This does not appear to be government's intention. If it is, it is inappropriate to create such property and rights by amending existing IP law. The appropriate means would be new dedicated legislation. Cannibalising existing IP laws is jurisprudentially unsound, and likely to have serious unintended consequences.

We suggest that the Bill be redrafted so as to be confined to that which can legitimately be regarded as property and rights, and that such protection benefits creators and owners of traditional knowledge directly.

What the Bill envisages is so at variance with local and international IP law that it should be (a) in separate legislation and (b) confined to the protection of legitimate IP. Much of what is sought to be protected cannot and should not be the subject of IP.

That which is the result of **human action** rather than **human design**, such as a folk dance, language, custom, music genre or literary style, cannot and should not be the subject of IP law.

5. SUPERFLUOUS PROVISIONS

5.1 General

The Bill contains various apparently superfluous provisions. Two examples are given below.

Under South African law on the interpretation of statutes, our courts are obliged to assume that Parliament does not waste its time. It does not, as in many countries 'codify' law. All its laws are presumed to change the *status ante quo*.

This Bill, like some others emanating from the DTI during recent years, does not seem to have been drafted by someone familiar with South African law. Some new laws include 'wish lists' (descriptions of the ideal world), and repetitions of extant law (such as the recriminalisation of common crime). We understand that the DTI has been using a Canadian lawyer to draft some of its legislation. We have been unable to establish why it does so. Not only does our country have many competent drafters of all races and political persuasions, but Canada has a profoundly different legal system, and government departments with very different areas of responsibility.

One of the many problems created by a drafter unfamiliar with South African law is that s/he may, as in this case, insert superfluous provisions, on one hand, and omit required provisions, on the other. The inclusion of superfluous provisions if a distinctive feature of, for instance, the new Consumer Protection Act.

Such provisions plunge South African law into needless uncertainty and create the potential for the wastage on clarifying litigation of substantial resources.

5.2 The Database

The Bill envisages the creation of a database. One of the principles of good law is that the objective of a law ought to be clear. This is a requirement of the rule of law (an obligatory and justiciable provision of our constitution) where there is discretionary power. What goes into the database is a matter of administrative discretion. For the measure to be implemented properly, the Bill must specify the database's purpose. Without that, officialdom would have no idea what is expected of it: to what end must it act and according to which objective criteria?

The Bill does not suggest a purpose for the database, and it has no legal consequences. Accordingly, it should be amended to specify a purpose, or it should be scrapped.

The government, without the proposed amendment, is free to gather data. The Minister may direct departmental staff to enter data into a database. If a change to the *status quo* is envisaged, the Bill should clarify what precisely is to change, and why.

5.3 International relations

The Bill also provides for the Minister to enter into international treaties. It is unclear what the purpose of this provision is. What change is envisaged?

Our government is presently free to negotiate international treaties and conduct international relations. It does so continually, and has concluded hundreds of treaties, MOAs etc.

What change does this provision envisage? Does it mean, for instance, that the Minister need no longer abide by conventions and laws (including the Constitution) governing international relations?

If no change is envisaged, the measure should be scrapped. If a change is envisaged, the Bill should be reworded so as to clarify what changes.

5.4 Adequate Consultation?

We understand that the Constitutional precondition for policy formulation has not been met. If our understanding is correct, the Bill will be unconstitutional. The Constitution requires not just that there must be adequate participation by potentially affected parties, but that there must be good faith. In other words, that inputs must be taken seriously and that policies must reflect significant inputs. It is not enough for government to go through the motions; it must respond properly to inputs.

Our impression is that inputs by concerned experts have not been taken into account. This is not merely a constitutional or jurisprudential nicety. The problem government visits upon itself if it does not take proper account of inputs, especially expert opinion, is that it becomes needlessly burdened with policy failure.

6. CONCLUSIONS

The idea that traditional rights ought to be properly secured, as stated in the *Policy Framework*, is laudable and has our enthusiastic support. Unfortunately, this Bill, as drafted, has the opposite effect.

Our concerns include:

6.1 Widespread condemnation by jurists of core aspects of the Bill despite support for the government's desire to enhance protection of the legitimate rights to traditional knowledge by traditional communities.

6.2 Unintended (counter-productive) effects, especially the reduction of the rights of traditional communities, and the effective nationalisation of traditional knowledge.

6.3 Superfluous and potentially costly provisions.

6.4 Inconsistency with the Constitution, others laws and international obligations.

Our humble submission is that, in the circumstances, the Bill should be referred by the PC back to the DTI for these and other concerns to be addressed.
