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DTI's IP draft policy is incoherent and contains unsubstantiated and incorrect statements on the law

"The DTI's draft policy for Intellectual Property (IP) is unclear," according to David Cochrane, patent attorney and partner at Spoor Fisher. Speaking at a media briefing at the Free market Foundation (FMF) on Wednesday November 26, Cochrane said that the main problem was that the policy had not been drafted with input from experts in IP law which has led to uncertainty in meaning, intention and compliance with the agreement on the international Trade-Related Aspects of Intellectual Property Rights (TRIPS) to which South Africa is a signatory.

The draft national policy was published on 4 September 2013 with comments from interested parties required by 17 October 2013. As yet no updated policy has been issued. He said that most commentators agree with the broad objectives of the draft IP Policy, that the framework has some commendable objectives and that it is important for South Africa to finalise IP Policy.

"Once finalised, the IP Policy will be a reference document for amendments to the Patents Act. The patent system in South Africa works and there are already safeguards to protect public health. The system works, and there are mechanisms that can be used to ensure that there is access to medicine", he said. However, The South African Patents Act has, however, not been amended since 2002 and can be brought further into line with developments in Patent Law and to address public health issues.

The draft IP Policy mentions compulsory licensing, parallel importation, patent examination and "ever-greening" and suggests amendments to the South African Patents Act to bring South Africa in line with the flexibilities in the Doha Declaration on TRIPS and public health.

Compulsory licensing occurs when a court or a government, allows a person other than the owner of a patent to make available a patented product without the consent of the patent owner. A compulsory licence is usually granted in the event of abuse of patent rights, in the case of a national emergency or in the interests of public health. South Africa's current laws allow for this, but Cochrane concedes that there is room for amendment in view of international developments.

Parallel importation refers to the importation of genuine goods bought in one country, into another. The South African Patents Act is not clear on this and an amendment to make provision for parallel importation would be allowable from a legal point of view, he said.

Another suggestion in the draft IP Policy is that South Africa should consider implementing substantive patent examination and make allowance for pre- and post-grant opposition of patents. Currently, South Africa has a deposit-based patent system with no opposition

procedure. Cochrane discussed the pros and cons of both systems. He explains that the current system works. Cochrane said that a patent examination system could benefit the South African economy by employing more engineering and science graduates as patent examiners and provide more and better career opportunities. The draw-back is that it will be more expensive, take longer and make obtaining patents more difficult. The main risk is that South Africa may not have the capacity, ability, resource and expert training available to implement an effective patent examination system. He suggests that the introduction of an opposition procedure, which will require a panel of experts to decide on the validity of a patent that is challenged by a third party, may be enough.

Cochrane discussed evergreening – the practice of extending patent protection on a product by filing a subsequent invalid patent after the initial patent has expired. Cochrane explained that the South African courts will not enforce a patent if it is not inventive, and thus will stop attempts at evergreening. He also explained that the South African courts take public interest into account when a patent is enforced. The draft policy appears to suggest that a standard of innovation should be required for pharmaceutical inventions. He does not think that our law should be amended to try and legislate on this, and that pharmaceutical inventions should comply with the normal requirements of inventiveness.

Cochrane concluded that the IP Policy needs to be finalised without further delay, and with input from experts in IP Law. When it comes to the amendment of the South African Patents Act, "It is important that the amendments are clear and unambiguous and comply with South Africa's obligations under the TRIPS agreement and that a functioning system continues to ensure that patent rights are protected. We must not throw the baby out with the bath water," Cochrane said.

Download David Cochrane's presentation and paper [here](#)

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Editors Notes

The Free Market Foundation (FMF) is an independent, non-profit, public benefit organisation, created in 1975 by pro-free market business and civil society national bodies to work for a non-racial, free and prosperous South Africa. As a policy organisation it promotes sound economic policies and the principles of good law. As a think tank it seeks and puts forward solutions to some of the country's most pressing problems: unemployment, poverty, growth, education, health care, electricity supply, and more. The FMF was instrumental in the post apartheid negotiations and directly influenced the Constitutional Commission to include the property rights clause: a critical cornerstone of economic freedom.

The FMF has a wealth of information in papers, articles and opinion pieces available on the website which can influence the public debate and present alternative policies to the people of South Africa. Please look at www.freemarketfoundation.com.

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