

Ms. Shumi Pango
Director-General
Department of Science and Technology
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14 May 2015

RE: Comments on the South Africa Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill 2014

Dear Director-General Pango:

The International Trademark Association (INTA) is a global organization of 6,500 trademark owners and professional firms from over 190 countries, including 26 members in South Africa. INTA is a not-for-profit membership association dedicated to supporting trademarks and related intellectual property in order to protect consumers and promote fair and effective commerce. Founded in 1878, INTA is the global leader in trademark research, policy development, education, and training. More details about INTA are available at www.inta.org.

INTA greatly appreciates the opportunity to comment on the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill 2014, as set out in Government Gazette number 38574, General Notice 243 of 2015 dated 20 March 2015.

The scope of our comments will be limited to the section of the Bill that affects trademarks and their ability to protect consumers, prevent unfair competition between businesses, and promote innovative commerce. We do not take a position on other sections affecting other areas of the law.

INTA General Position

INTA notes that when developing legislation for the protection of traditional knowledge and traditional cultural expressions the choice of legal mechanisms is a matter of national discretion.

While INTA supports the recognition of traditional knowledge and traditional cultural expressions, INTA believes that any protection afforded to traditional knowledge and traditional cultural expressions must not prejudice existing trademark rights.

Further, INTA does not support any proposal that would seek to grant special trademark status to traditional knowledge and traditional cultural expressions. INTA takes this position with respect to all such initiatives and has advocated in individual countries against any 'special interest' trademark legislation that provides specific groups exclusive trademark rights.

INTA is concerned that any system introduced to protect traditional knowledge or traditional cultural expressions and enables the coexistence of traditional knowledge and traditional cultural expressions with trademark rights should be consistent with the well-established intellectual property principles of territoriality, exclusivity, priority, and notice. In particular, any new system should include a process where the owner of an existing trademark right will receive notice and be afforded an opportunity to object to the granting of a

new right. This process will help to prevent potential abuse and enhance reliability and confidence in the system while providing existing rights holders with certainty and stability.

INTA has concluded that the adoption of these types of systems, without taking these principles into consideration, could result in an unfavorable outcome, including:

- complete loss of, or diminution of value, in rights previously held and enjoyed by trademark owners,
- consumer confusion as to source, and
- impairment of trade.

Chapter 1 – Definitions and Interpretation

Definitions of 'indigenous cultural expressions' and 'indigenous knowledge'

INTA is concerned that the definitions of indigenous cultural expressions and indigenous knowledge are so broadly defined that they are vague and introduce ambiguity. For example, the definition for indigenous cultural expressions begins with the following:

Indigenous cultural expressions means those expressions that result from the creativity of individuals, communities, groups and societies, and that have cultural content, including but not limited to...

It is unclear whether the individuals, communities, groups and societies, need to be indigenous or not. INTA seeks clarity with this term in addition to other terms, such as what constitutes 'cultural content' so as to provide clear and consistent interpretation and prevent abuse of the system.

Definition – moral rights

The scope and term of protection of moral rights has no limit. The lack of minimum criteria for determining whether and how a moral right in relation to indigenous knowledge continues to be maintained and used makes for an indefinite and unduly burdensome system.

INTA is of the view that trademark owners require, as far as possible, some degree of certainty when selecting, and adopting, in good faith, signs for use as trademarks, including knowledge of rights in claimed indigenous knowledge or indigenous cultural expression and when those rights have been terminated or otherwise extinguished.

Chapter 2 – Application and Objectives of Act

Objectives of the Act

INTA is concerned that section 4(1)(a) is unclear because the section refers to protecting the 'knowledge of indigenous communities'. The term 'knowledge of indigenous communities' is not defined in the Act. INTA is of the view it would be more appropriate to use one of the defined terms provided in the Bill.

Chapter 4 – Protection of indigenous systems

Section 12 - Scope of protection

As discussed above, INTA opposes any proposal to grant special status to indigenous knowledge or indigenous cultural expressions that would otherwise interfere with or preempt existing trademark rights that violate the established principles of territoriality, exclusivity, priority, and notice.

Section 13 – Term of protection

The scope and term of protection has no limit. The lack of criteria for determining whether and how an indigenous cultural expression right continues to be maintained and used makes for an indefinite and unduly burdensome system.

Trademark owners require, as far as possible, some degree of certainty in selecting, and adopting in good faith, signs for use as trademarks, including knowledge when those rights have been terminated or otherwise extinguished.

Section 14(2) – Beneficiaries of rights

INTA is concerned that where the custodian of indigenous knowledge rights is not identified, then the state will become the custodian. This introduces a conflict of interest in granting indigenous knowledge rights to the state where none have originally existed.

As there is no ability to object or oppose or provide notice of the traditional knowledge or traditional cultural expressions granted to the state, this provisions introduces an unfair and inequitable advantage to the state. In these circumstances, INTA suggests that some ability for third parties to consider, review and object to any applications for recognition of indigenous knowledge or indigenous cultural expressions is a minimum requirement. As stated in INTA's general position above, the owner of an existing trademark right should receive notice and be afforded an opportunity to object to the granting of a new right.

Chapter 9 – General provisions

Section 25 Offences and complaints

Section 25 presumes a person is guilty of an offence if that person uses indigenous knowledge resources without the required authority or consent of the indigenous community.

INTA is opposed to this presumption, because a trademark owner, acting in good faith, could be unfairly sanctioned. The imposition of a sanction against an innocent adopter without an opportunity to be heard is inequitable.

This submission was prepared by INTA with the assistance of the Indigenous Rights Subcommittee of the Related Rights Committee, as well as members of INTA's policy staff. If you have any questions about the enclosed comments or INTA, please contact Mr. Seth Hays, Policy Advisor, Asia-Pacific, at shays@inta.org.

Yours sincerely,



Etienne Sanz de Acedo
Chief Executive Officer