South African Institute of Race Relations NPC
Submission to the Department of Trade and Industry
regarding the
Copyright Amendment Bill of 2015
Johannesburg, 16th September 2015

Introduction

The Department of Trade and Industry (DTI) has invited comment on the Copyright Amendment Bill of 2015 (the Copyright Bill). This submission is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its present objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

Purpose of copyright protection

The purpose of copyright protection is to encourage creativity and to reward the labour, effort, skill and talent that goes into the production of literary, artistic, musical, and other works. Under copyright rules, the author of such a work is thus granted a monopoly for a limited period, during which time the work cannot be published, copied, adapted, performed or broadcast except by the author or with his consent. For literary and various other works, the period of protection is the life of the author, plus 50 years after his death. Once this period has expired, the author's work passes into the public domain and may freely be used by others. These rules balance the interests of the individual author against the wider interests of society, helping both to stimulate creativity and, in time, to provide untrammelled access to the literary and other works thus produced.

The Berne Convention on Copyright

The Berne Convention (formally, the Berne Convention for the Protection of Literary and Artistic Works) is an international treaty governing copyright. It takes its name from the fact that it was first accepted in Berne (Switzerland) in 1886. It has since been amended by agreement a number of times. It has also been endorsed by almost all states (168 countries, as at September 2014), including South Africa.

Under the Berne Convention, the author of an original literary or similar work becomes entitled to copyright as soon as the work is "fixed": in other words, as soon as it shifts from being an idea to having a material existence. Copyright comes into existence in this way automatically and without any need for registration or state approval, and arises in the country where the work is first produced (the "country of origin").

An important purpose of the Berne Convention is to extend copyright protection to authors across all signatory states. Before the Convention was adopted, national copyright laws only applied for works created in each country. Hence, a work published in the United Kingdom by a British national would be covered by copyright there, but could be copied and sold by

anyone (either in English or in translation) in France, the Netherlands, or any other country. This naturally reduced the market for the author's work both in his own country and elsewhere. Under the Convention, however, all signatory countries, including South Africa, must accord the same copyright protection as their own nationals enjoy to any work which is copyrighted in another signatory state.

The Berne Convention now also includes an Appendix which allows the translation and copying (reproduction) of literary works in developing countries that face "economic situations and social or cultural needs" which make full compliance difficult. However, countries wanting to take advantage of these provisions must lodge declarations to that effect and otherwise comply with the requirements laid down in the Appendix.

Under Article II of the Appendix, a developing country may establish a "competent authority" with the capacity to grant compulsory licences for the translation and publication of printed works still under copyright. However, this may be done solely for "the purpose of teaching, scholarship and research". Specified waiting periods also apply: for example, one year for translation into a language that is in general use in the developing country but is not in general use "in the developed countries". Various other conditions must also be fulfilled. [Article II, Appendix: Special Provisions Regarding Developing Countries, Berne Convention]

Under Article III, compulsory licences may also be granted to any national of the developing country in question to reproduce and distribute a printed work "in connection with systematic instructional activities". However, such licences may be granted only where the author has not yet distributed the work in the country at a reasonable price and within a specified time: three years in the case of works dealing with science, mathematics, and technology; five years for other textbooks; and seven years for art books along with "works of fiction, poetry, drama, and music". [Article III, Appendix, Berne Convention]

South Africa has long been a party to the Berne Convention and is bound by its provisions. Like other signatory states, it must comply with the minimum protections laid down in the Convention. It can add to these protections through its national legislation, but is not entitled to subtract from them. It is unlikely to qualify as a developing country within the meaning of the Convention, and does not appear to have lodged a declaration seeking the special translation and reproduction rights for printed works available under the Appendix.

South Africa's Current Copyright Act

Works eligible for copyright under South Africa's Copyright Act of 1978 include literary, artistic, and musical works, along with films, sound recordings, and computer programmes. The author is the person who initially creates an original work by reducing it to material form. To enjoy copyright protection, the author must also be "a qualified person": in other words, he must either be a South African citizen or resident, or a citizen of another Berne Convention country. For literary, artistic, and musical works, the copyright term is the life of

the author and 50 years thereafter. [Eric Levenstein and Ryan Tucker, South Africa: Introduction to the Law of Copyright, Werksmans, 6 December 2005]

During the copyright period, the author has an exclusive right to publish, perform, broadcast, translate, adapt, or reproduce the work. He can also enforce his copyright against anyone who does any of these acts ("the restricted acts") without his consent. To this end, he can sue in the High Court for delictual damages (compensation to restore him to the position he would otherwise have been in) or a reasonable royalty, along with an interdict to prevent any repeat of the restricted acts and the seizure of any unauthorised copies. In cases where the infringement is particularly flagrant, the courts may also award additional or punitive damages. [Eric Levenstein and Ryan Tucker, South Africa: Introduction to the Law of Copyright, Werksmans, 6 December 2005]

At the same time, the 1978 Act does allow certain infringements, but only if these amount to "fair dealing". Under this exemption, copyrighted work may be partially reproduced for such purposes as research, teaching, private study, review, or reporting on current events in a newspaper or magazine. [Levenstein and Tucker, Introduction to the Law of Copyright]

The 1978 Act further allows a Copyright Tribunal to grant a compulsory licence over a copyrighted work where the author has "unreasonably" refused to grant a voluntary licence which an applicant claims to "require". At present, the Copyright Tribunal consists of the High Court judge who is also the "commissioner of patents" under the Patents Act of 1978 and presides over the patents court. Once it has heard all the relevant evidence, the Copyright Tribunal may "make an order declaring that the applicant is entitled to a licence on such terms and conditions, and subject to the payment of such charges, if any, as it…determines to be reasonable in the circumstances". Any party to the proceedings may appeal against the tribunal's ruling under the same rules as govern appeals against a civil judgment handed down by a single judge. [Sections 29, 33, 35, 36, Copyright Act]

Key provisions of the Copyright Bill

New Intellectual Property Tribunal

Replacement of the Copyright Tribunal

Under the Copyright Bill, the Copyright Tribunal is to be replaced by a new Intellectual Property Tribunal (the IP tribunal). This IP tribunal will likewise be empowered to issue compulsory licences over copyrighted works. However, it will also be given many other powers under the Copyright Bill, along with a vast and untrammelled scope to "carry out the functions and exercise the powers assigned to it by…*any* legislation". [New Section 29A, Copyright Bill, emphasis supplied]

Ministerial control

As noted, the present Copyright Tribunal consists of the commissioner of patents. This means that he is also a High Court judge who has specialist knowledge of intellectual property matters and is appointed, for this reason, to preside over the patents court.

By contrast, the IP tribunal will be made up of a chairman and at least ten other members, all of whom will be "appointed by the minister" of trade and industry. [New Section 29A (4), Bill] Members need not be specialists in intellectual property law. Instead, it will be enough if they have "suitable qualifications and experience" in either "economics, law, commerce, or public affairs", though three at least will need to have "adequate legal training and experience" so that they can serve as members of decision-making panels (see *Proceedings and hearings*, below). [New Section 29B (1), Bill] Many members of the IP tribunal could thus be public servants appointed for their political loyalties and ideological commitments, rather than their legal qualifications.

The minister of trade and industry will also be empowered to: [New Sections 29B(2)(4), Sections 29E(1)(b) and (f), Bill]

- designate the chairperson and deputy chairperson of the tribunal;
- "determine the remuneration, allowances, benefits, and other special terms and conditions of employment" of all tribunal members (which he must do in consultation with the finance minister); and
- remove or suspend any tribunal member who "repeatedly fails to [his] satisfaction…to perform the duties of the tribunal" or "engages in any activity that may undermine the integrity of the tribunal".

Members will generally serve on the tribunal for five years, but their terms of office may be renewed (by the minister) for a further five-year term. [New Section 29D, Bill] The prospect of having their initial terms renewed is likely to give tribunal members incentives to please the minister and could thus further erode their independence.

Tribunal members may be disqualified from being appointed – or may also be barred from continuing to serve – if they have been convicted of fraud (without the option of a fine) or are "office-bearers" in any political party or movement. [New Section 29D and 29C(2)(a) and (e), Bill] However, this last exception is a limited one, which will not be enough to insulate tribunal members from political interference. In particular, members of the ruling African National Congress (ANC) and/or the South African Communist Party (SACP) will be able to serve on the tribunal even though they are subject to party discipline and the doctrine of democratic centralism prevailing in these organisations. This too is likely to compromise the independence of the IP tribunal.

Under the Copyright Bill, the minister will also have the power to "prescribe rules regulating the processes and proceedings of the tribunal", [New section 39(cF), Bill] In addition, he will be empowered "at any time, to conduct an audit review of the performance and exercise of its functions by the Tribunal". The tribunal may also be required to report to the minister (under either the Copyright Act or "any legislation"), and must in any event submit annual reports to him on "its performance and activities, as required by the Public Finance Management Act of 1999". [New section 29S, Bill]

Powers and functions of the IP tribunal

The IP is expressly authorised to "carry out the functions and exercise the powers…assigned to it in terms of the [Copyright] Act" or "any legislation". The tribunal may also "adjudicate any application or referral made to it" under either the Copyright Act, the Companies Act of 2008, or "any legislation". It may also "make any appropriate order" under any of these laws. [New Section 29A(1)(2)(a), Bill] These powers are extraordinarily broad and commensurately uncertain.

The tribunal will also be entrusted with "hearing appeals or reviewing any decisions" of the Companies and Intellectual Property Commission. This commission is appointed by the minister of trade and industry, under the Companies Act of 2008, and its function is primarily to oversee company registrations and other aspects of corporate governance. However, the commission is also responsible for granting applications for patent rights under South Africa's current system, which allows the granting of such rights (without a prior process of objection and adjudication) provided the application prima facie meets all relevant requirements. The IP tribunal will thus have a wide and seemingly untrammelled power to set aside the granting of patent rights by the Commission – a power which currently rests with the patent court and can be exercised only in specified circumstances (see *The granting of patent rights*, below).

In addition, and specifically in the intellectual property rights sphere, the IP tribunal will be empowered to: [Section 29A(2)(c) and (d), Bill]

- "adjudicate any application or referral" made to it by a person, institution or regulatory authority "where the dispute [in issue] relates to intellectual property rights"; and
- "settle disputes" relating either to "the payment of royalties" or "the terms of agreements…regulating…matters in relation to intellectual property rights".

The IP tribunal is thus clearly to be given the responsibility for carrying out many of the important functions currently vested in the patents court. This proposed shift carries many dangers. In particular, the patents court is part of the High Court, with all that this entails in terms of independence, security of tenure, and commitment to due process. By contrast, the IP tribunal will not be subject to any of these vital safeguards. The IP tribunal is nevertheless to be given even wider powers than the patents court to decide on a host of patent matters (see *The IP tribunal and patent rights*, below).

Proceedings and hearings

The chairperson of the IP tribunal will be responsible for "managing its case files" and assigning matters (depending on their complexity) either to a single member of the tribunal or to a panel of three members. Where a panel is appointed, at least one of its three members must have "suitable legal qualifications and experience". However, this requirement does not apparently apply where a single member of the tribunal is entrusted with hearing a case. [Section 29G(1),(2), Bill]

All decisions of the IP tribunal must be handed down in writing, and must "include reasons" for the decision made. In addition, any "decision, judgment or order of the tribunal may be served, executed and enforced as if it were an order of the High Court". All tribunal decisions are thus binding on all parties, but are nevertheless "subject to review or appeal to a court of law". [Section 29G(4)(6), Bill] The possibility of review or appeal provides some safeguard to litigants, but is not enough to meet the constitutional right of "access to court", as described below.

In proceedings before the IP tribunal, neither the country's usual adversarial system nor the normal rules of civil procedure will apply. Instead, the tribunal will conduct its hearings "in an inquisitorial manner" and "as expeditiously and informally as possible" – though the "principles of natural justice will also apply". Hearings will generally be conducted in public, unless "the proper conduct of the hearing" requires the exclusion of the public or of specified people (journalists, for example). [Section 29H(1)(2), Bill]

Anybody with "a material interest" in a hearing will be able to attend it, while the tribunal member presiding over a matter will have the right to summon witnesses, demand the production of books and documents, and "give directions prohibiting or restricting the publication of any evidence". The presiding member will further have the power to decide "any matter of procedure" that may arise, [New sections 29I, 29J, 29K, Bill] but will also, of course, be subject to the minister's regulations on "the processes and proceedings" of the tribunal. [New section 39(cF), Bill]

Appeals and reviews

Any participant in a hearing before a single member of the IP tribunal may "appeal against a decision of that member to a full panel of the tribunal". Subject to relevant High Court rules, a participant in a hearing before a full panel may apply to the High Court to review the decision of the tribunal, or appeal to the High Court against that decision. [New section 29L, Bill] The right to a review or appeal will thus not be automatic but will depend on whether the High Court is satisfied that there are grounds for setting aside the decisions of the IP tribunal. Such grounds might be difficult to establish when the powers given to the tribunal are so broad and undefined.

Interim relief and tribunal orders

The IP tribunal will have the power to grant "interim relief", such as a temporary injunction prohibiting the unauthorised reproduction of a copyrighted work, pending the finalisation of a hearing into the matter. However, such relief may be granted only where there is prima facie evidence to support the applicant's case and an interim order is "reasonably necessary" to "prevent serious and irreparable damage" to the applicant, among other things.

According to the Copyright Bill, the IP tribunal will further be empowered to "make any appropriate order" on any matter brought before it, including an order "declaring particular conduct to constitute an infringement" of copyright and to be prohibited for this reason. It will also be able to "interdict conduct which constitutes an infringement" of copyright. Both

these provisions reveal an intention to give the IP tribunal the power to adjudicate over copyright infringements, even though this power currently belongs to the High Court under Section 24 of the Copyright Act. Moreover, once the task of adjudicating on copyright infringements is given to a tribunal lacking both skills and independence, there is a real risk that alleged infringements will either be too easily tolerated or too harshly punished.

Adds the Anton Mostert Chair of Intellectual Property Law, in a commentary on the Copyright Bill: "It should be appreciated that copyright infringement proceedings frequently involve complicated non-intellectual property issues and it is doubtful, given the composition of the tribunal, whether it will be properly equipped to deal with such other legal questions. The inquisitorial system envisaged for the conduct of proceedings before the tribunal is also not appropriate for infringement matters." [Anton Mostert Chair of Intellectual Property Law, *Commentary on the Copyright Amendment Bill, 2015*, Faculty of Law, Stellenbosch University, p64]

In addition, the IP tribunal will have a broad power to make "any other appropriate order required to give effect to a right" contained either in the Copyright Act or in "any other relevant legislation". [New sections 29M, 29N, Bill] Again, this power is so broad that it cannot easily be analysed or assessed.

Offences and penalties

The IP tribunal will also have the power to adjudicate on a number of new criminal offences created by the Copyright Bill. These include the "unreasonable refusal to grant permission for the use of copyrighted work for educational [purposes]…[and] the translation of copyrighted work in a usable format". [New section 23(4)(d), Bill] These "offences" will be punishable by "imprisonment for a period not exceeding ten years, or a fine not exceeding R50 000, or both imprisonment and a fine". [New section 23(6), Bill] These penalties, particularly the proposed prison term, are draconian. It is extraordinary that the Copyright Bill seeks to introduce them when the obligations thus placed on authors go far beyond what the Berne Convention allows.

According to the Anton Mostert Chair, the obligations thus placed on authors to make their works available for educational purposes are "unwarranted and materially undermine, or expropriate, the property rights of copyright owners". Yet there is no evidence to suggest that "copyright law is a material impediment to the provision of textbooks and learning material". On the contrary, "If the Government would like to provide cheaper textbooks without having to negotiate with the commercial publishers, it is at liberty to commission and print its own material. And, if there is a desperate need for translations of copyright works into other languages, why is Government not partnering with the relevant authors or copyright owners in getting the required works translated? A commercial copyright owner, who has the prospect of selling thousands of books to Government, should be quite an amenable counterparty. Instead, it appears that Government seeks to expropriate property in order to reduce the costs of its constitutionally-mandated obligations to provide education." [Anton Mostert Chair, *Commentary*, p32]

It is also unnecessary and ill-advised, adds the Anton Mostert Chair, to put "so much reliance on criminalising conduct" when violations of intellectual property laws are civil wrongs for which appropriate relief is available in civil proceedings. Why then should, for example, should it be a criminal offence, punishable by up to ten years in prison, to fail to pay royalties, as the Copyright Bill provides? This is a matter of contract law and it should be resolved via civil remedies, as it always has been in the past. Many of the other offences created by the Copyright Bill – for example, collecting royalties other than through the stipulated collecting society – are "rather mild transgressins and barely warrant any civil law liability let alone criminal liability". [Anton Mostert Chair, *Commentary*, pp32-33]

Unconstitutionality of the IP tribunal

Section 34 of the Constitution states that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". [Section 34, Constitution of the Republic of South Africa, 1996]

The IP tribunal is neither a court nor a sufficiently "independent and impartial tribunal". The Copyright Bill tries to cure this defect by stating that the IP tribunal "is independent and subject only to the Constitution and the law", and that "each organ of state must assist the tribunal to maintain its independence and impartiality". However, these provisions – though clearly intended to echo constitutional guarantees of judicial independence – cannot compensate for the minister's comprehensive powers of control, as earlier described.

The Constitutional Court, in the *Glenister* judgment in March 2011, has also laid down a number of useful guidelines for assessing institutional independence. These make it clear that institutional independence is absent where a cabinet minister has the power to dismiss the members of that institution, to control the way it operates, and to oversee its functioning. [Lessons from the Glenister judgment, Fast Facts, June 2011, p7; *Glenister* v *President of the Republic of South Africa and others*, 17 March 2011, CCT48/10]

In the case of the IP tribunal, the impartiality of this proposed new body will also be undermined by provisions requiring it to finance itself (and pay its members and staff) at least in part from "any fees or fines" that it imposes under either the Copyright Act or "any relevant legislation". This will give it a clear financial interest in laying down the maximum possible fees and fines, and will inhibit its capacity for objective assessment.

Overall, the IP tribunal will be subject to so much ministerial control that it will clearly be a creature of the executive and not an "independent and impartial" tribunal, within the meaning of Section 34 of the Constitution. It is also not enough that aggrieved parties will be able to apply to the High Court to have the tribunal's decisions set aside on review or appeal. All South Africans have a right to have their legal disputes adjudicated either by the courts or by "independent" tribunals. Where a given tribunal is not sufficiently independent, the right of access to court must be immediate, not conditional or significantly deferred.

The broad powers given to the IP tribunal to decide any matter under "any legislation" are also contrary to Section 2 of the Constitution. This identifies "the supremacy of the Constitution and the rule of law" as one of the imperative founding values of South Africa's democracy. The rule of law also demands certainty and predictability – requirements that are incompatible with the vague powers given to the tribunal.

The vesting of copyright in the State

The Berne Convention clearly states that "the term of protection" it confers on literary, artistic, and musical works is "the life of the author and fifty years". [Article 7(1), Berne Convention] The Copyright Act currently reflects this rule. [Section 3(2(a), Copyright Act] The Act also confirms that "copyright is transmissible as movable property…by testamentary disposition" to the author's heirs, [Section 22(1), Copyright Act] a provision which allows the author's spouse, children, or other legatees to continue benefiting from the copyright in his works for a full 50 years after his death.

By contrast, the Copyright Bill proposes to breach the Berne Convention by stating that the "ownership of any copyright whose owner…is deceased shall vest in the State". [New Section 21(3), Bill] The Bill also prohibits any future assignment of any copyright "owned by, vesting in, or under the custody of the State". [New section 22(1), Bill] The State's ownership or "custodianship" of copyright – whether acquired on the death of an author or in any other way – will thus persist for the remainder of the copyright period. The State will also be able to derive income from the work and to grant licences, against the payment of royalties, for its reproduction by others. [Prof Owen Dean, DTI dishes up a hopeless curate's egg, in Anton Mostert Chair, *Commentary*, p82]

These are extraordinary provisions, for which there is no precedent throughout the world. [Moneyweb 20 August 2015] Among other things, they effectively deprive the author's heirs from enjoying the fruits of his labour; and amount to an irrational and uncompensated expropriation by the State, contrary to the provisions of Section 25 of the Constitution.

Translation rights

Part of the function of the new IP tribunal will be to award compulsory licences for the translation of copyrighted works on the terms set out in a Schedule to the Copyright Bill.

Though this Schedule is particularly poorly drafted, it seems that "any person" will be able to apply to the IP tribunal for "a licence to make a translation of a [printed] work into any of the [specified] languages", which include Afrikaans, Zulu, Sotho, Tswana, Xhosa, Venda, and Ndebele. However, no such licence may be granted until "one week after the date of first publication of the original copyrighted work". In addition, the waiting period for a licence to translate the work into "any other language in general use" in the country (English, for example) will be three months, while the waiting period for translation into languages not generally used in South Africa, such as French or Spanish, will be one year. [Sections 1, 2, Schedule A, Translation Licences]

At the same time, a translation licence may be granted solely for the purposes of "teaching, training, scholarship or research" and may not "extend to the export of copies made under the licence". [Section 4(1), Schedule] In addition, there must be no existing translation of the work in the language in issue, the author must have been "located and given an opportunity to be heard", and a further short period (two days for the specified languages, for example) must be allowed for the author to print a translation before the licence is granted. [Section 3 (1), Schedule A] If a compulsory licence is granted, the author will be entitled to "just compensation", consistent with the royalties agreed in similar voluntary licences. [Section 4(4), Schedule A] However, this provision regarding royalties must be read in conjunction with the minister's new powers, as set out in elsewhere in the Copyright Bill, to issue regulations "prescribing royalty rates…for various forms of use". [Section 39(cL), Bill]

Schedule A of the Copyright Bill is clearly modelled on the Appendix to the Berne Convention, which allows the granting of compulsory licences in developing countries for the translation of printed works needed for "teaching, scholarship or research". However the waiting periods laid down in the Schedule are extraordinary short: one week (plus two days) for translation into any of the specified languages, rather than the one year (plus nine months) that the Appendix requires.

The one-week period mooted in the Schedule is also so brief as to make a mockery of the clause giving an author "the opportunity to be heard". The economic loss to authors will, of course, be limited by the royalties payable (depending on how high these are set by the minister) and by the fact that translation and reproduction will be authorised solely for teaching and study purposes. The provisions nevertheless demonstrate (yet again) South Africa's willingness to flout international conventions that are binding on it and which it has pledged to uphold.

Reproduction licences

Schedule B of the Copyright Bill allows the granting of compulsory licences for the reproduction and publishing of printed works. Here, however, the waiting periods laid down in the Schedule are consistent with those in the Berne Appendix. For example, the waiting period for copying scientific, mathematical and technological works is three years, while the waiting period for fiction, poetry, drama and music is seven years, as the Berne Appendix requires. The author must again be given an opportunity to be heard, while the copies reproduced under the compulsory licence may be used solely "in connection with systematic instructional activities". This is also in keeping with what the Berne Appendix states. However, since South Africa is unlikely to qualify as a developing country under that Appendix, this Schedule provides yet another example of its willingness to disregard a binding international convention.

Local content obligations

The Copyright Bill also states that the broadcasting industry is "under obligation (sic) to develop the culture [of the country] and support the growth of local content" by "promoting

local programming and the production of local television content". This in turn requires "broadcasting 80% of local television content in public channels" and "60% of local television content in private channels". In both instances, this must be done "consistently with applicable local content quotas as developed by the broadcasting industry and relevant laws".

Similar rules govern the playing of "local music" on public and community radio stations (where an 80% quota applies) and to local music on private radio stations (where the local content requirement is 60%). [New Section 10A(1), Bill] According to the Bill, these requirements "shall have a retrospective operation" to the time when quotas for local content are developed by the broadcast industry. [Section 10A (2), Bill]

Any broadcasting institution that fails to meet these local content requirements will be guilty of an offence. Where the broadcaster is a company or other juristic person, every director "in charge of or responsible for the conduct of its business" will also be deemed guilty of this offence, unless he proves that "the offence was committed without his knowledge or that he exercised due diligence to prevent it". Notwithstanding these provisos, "if it is proved" that the company's offence was committed with the consent or through the collusion or negligence of "any director, manager, secretary, or other officer", that individual will also be deemed to be guilty. On conviction, both the juristic person and any such individual will be liable, on a first offence, to imprisonment for up to three years or a fine of up to R5 000, or both, "for each article to which the offence relates". Higher penalties will apply to repeat offences. [New Section 27A, read together with new Section 27(6)]

Comments Herman Blignaut, a partner at Spoor & Fischer, a legal firm specialising in intellectual property rights: "Apart from being draconian, from a practical perspective the SABC [South African Broadcasting Corporation] would have to broadcast everything local it can get its hands on and re-broadcast old material to get to that level." In addition, he points out, local content requirements should not be included in the Copyright Bill, as no copyright issues are involved in such rules. [Moneyweb 20 August 2015]

In addition, as the Anton Mostert Chair points out, the Berne Convention makes it clear that copyright law cannot discriminate against the foreign owners of copyright (such as those producing music or television programmes). "The section thus breaches our obligations under international treaty and is for that reason contrary to the South African Constitution. It is therefore invalid." [Anton Mostert Chair, *Commentary*, p28]

Moreover, the Companies Act already comprehensively deals with the circumstances in which the director of a company can incur personal liability for the actions of that company. Notes the Anton Mostert Chair: "There is no reason why directors of companies which commit infringements of the Copyright Act should have a different degree, or level, of liability than normal… The reverse onus which the section seeks to create – that is, the presumption of guilt – is probably unconstitutional." [Anton Mostert Chair, *Commentary*, pp58-59]

Ramifications of the Copyright Bill

Provisions laying down new requirements for the broadcasting of local content do not belong in a copyright measure and should be deleted. For the rest, the most important provisions in the Copyright Bill are those establishing a new IP tribunal, vesting copyright in literary and other works in the State on the death of an author, and extending the circumstances in which compulsory translation licences may be granted.

A new IP tribunal

The proposed IP tribunal will have jurisdiction over all copyright matters, over all intellectual property matters referred to it, and over all other matters that may be provided for in "any" legislation. Yet the new tribunal is both unnecessary and unwise. In addition, its proposed establishment infringes at least two important constitutional provisions: Section 34 with its guarantee of access to court; and Section 2, which confirms the supremacy of the Constitution and the rule of law. The IP tribunal also holds grave ramifications for patent law and is likely to put South Africa in breach of binding international agreements on the protection of patent rights, as further outlined below.

Unnecessary and unconstitutional

It is unnecessary and unwise to replace the current Copyright Tribunal with a new IP tribunal, or to seek to replace the patents court with this new entity. Moreover, in both the Copyright Tribunal and the patents court, adjudication is currently entrusted to the commissioner of patents, who is both a specialist in intellectual property matters and a high court judge. This gives the patents commissioner the knowledge and experience needed to preside over complex intellectual property matters, especially in the patents field. It also means that the patents commissioner is likely to have high standards of individual independence and professional integrity, along with the security of tenure and wider institutional independence that all judges enjoy. In addition, the Copyright Tribunal and patents court currently apply the normal rules of evidence and civil procedure, the key purpose of which is to exclude unreliable evidence, uphold due process, and ensure that justice is not only done but is also seen to be done.

By contrast, the new IP tribunal will be a creature of the executive and, in particular, of the minister of trade and industry. All its members will be appointed by the minister, who will also have the power to decide their remuneration, extend the terms of office of those who please him, and suspend or dismiss those who fail to function "to his satisfaction". No member of the tribunal will need expertise in intellectual property law, while the majority of tribunal members could be public servants who belong to the ruling party or its communist ally and have little legal knowledge or experience.

In proceedings before this flawed IP tribunal, the usual rules of evidence and civil procedure are to be replaced by new principles of procedure decided by the minister's appointees (the members of the tribunal) and by the minister himself. The emphasis in the new rules will be on brevity and informality, not on whether the evidence presented is properly admissible or

has been comprehensively and objectively evaluated. The principle that civil proceedings must be open to the public and the media, which is vital in ensuring a proper level of external scrutiny, will also be undermined by provisions allowing the tribunal member presiding over any matter to decide, at his discretion, whether "the proper conduct of the hearing" requires that it be closed to the public and the press.

The impartiality of the IP tribunal will also be infringed by provisions stating that part of the money needed to fund it – and to pay the salaries of its members and its staff – is to come from the fines and fees it imposes through its hearings. This power will be sufficient in itself to undermine its independence and objectivity.

In addition, the IP tribunal will have the power to adjudicate on any matter under "any" legislation already on the Statute Book or still to be enacted in the future. It will also be empowered to make "any appropriate order" on any matter brought before it. These provisions are unacceptably vague. They are also in breach of the rule of law, which requires that all legislation be certain and predictable. Yet the need to uphold the rule of law is one of the foundational values in the Constitution and cannot simply be ignored.

Moreover, as earlier noted, Section 34 gives all South Africans a right of access to court or to "an independent and impartial" tribunal. The current patents court and Copyright Tribunal are in keeping with this requirement. The proposed IP tribunal is not. Hence, all provisions in the Copyright Bill seeking to establish this new body must be removed if the measure is to pass constitutional muster.

The IP tribunal and patent rights

Since the IP tribunal will have jurisdiction over all intellectual property matters brought before it, the Copyright Bill cannot be read in isolation. Instead, it must be evaluated in the context of the DTI's 2013 proposals to amend patent law in various ways. [Department of Trade and Industry, Draft National Policy on Intellectual Property, September 2013; read together with a more comprehensive explanation by Chan Park, Achal Prabhala, and Jonathan Berger, *Using law to accelerate treatment access in South Africa: An analysis of patent, competition, and medicines law*, United Nations Development Programme (UNDP), October 2013]

As the IRR has previously warned, these DTI proposals are not only economically damaging but also in breach of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This agreement is administered by the World Trade Organisation (WTO), is binding on all WTO member states (including South Africa), and sets down minimum standards for the regulation of patents which need to be upheld, not disregarded.

The IRR's full analysis of the DTI's patent law proposals (see Anthea Jeffery, *Patents and Prosperity: Innovation + Investment = Growth + Jobs*, IRR, 2014) cannot be repeated here. In essence, the DTI's proposals seek to weaken patent protection in South Africa by making it more difficult to obtain patents and by authorising the granting of compulsory licences over

patented products in wide-ranging circumstances. These proposals also seek to reduce the royalties payable to the holders of patent rights to some 3% of the price of copied products. Royalties set at this low rate would often be too limited to compensate patent holders sufficiently for the costly research and development (R&D) that has gone into their innovations.

The DTI's 2013 proposals evoked significant criticism, and have not yet been translated into law via amendments to the Patents Act. Instead, the DTI seems to be using the Copyright Bill to implement at least some of its 2013 proposals via a Bill that, according to its title at least, deals solely with copyright and is thus less likely to attract critical scrutiny.

The granting of patent rights

The basic requirements for the granting of a patent in South Africa (as in other countries) are novelty and utility. In essence, a patent may be granted under the Patents Act for any "new" invention which involves "an inventive step" and is "capable of being used or applied in trade, industry, or agriculture".

South Africa is a "depository" or "non-examining country", in which all patent applications made to the Companies and Intellectual Property Commission are granted, without a prior system of objection and adjudication, provided a detailed patent "specification" (or description of the invention) is provided and the necessary fees are paid. In various other countries, by contrast, all patent applications are "examined" for their novelty and utility, through objection and adjudication, before patents are granted.

Critics of the depository system suggest that the absence of prior examination inevitably leads to the granting of "weak" or "frivolous" patents that do not satisfy the relevant requirements or merit protection. Yet the depository system in fact has safeguards too, for it puts pressure on all applicants to ensure that no similar patent already exists. If an earlier patent for essentially the same invention subsequently comes to light, the later patent is invalid, the money spent on its development is wasted, and damages for infringement may also be payable. In addition, the validity of a patent can always be challenged in the patents court after it has been granted – and the hearing of objections after the grant is unlikely to be any less effective than the hearing of objections beforehand.

Also relevant is the fact that South Africa used to have an examination system, but had to abandon it in 1978 because it lacked the necessary skills. Notes Judge Louis Harms, a retired judge president of the Supreme Court of Appeal: "[South Africa] had an examination system from 1952, but we had to abolish it in 1978 because we never had the people to do [the job]. It's highly specialised. You need [a person who is both] a scientist and a lawyer, and will also do the job at a government salary." [Jasson Urbach, "Protected Patents", *@Liberty*, 15/2014, 12 November 2014]

The DTI's 2013 proposals urged a shift towards an examination system, but such a system would of course be challenging and costly to implement. The Copyright Bill may now give

the DTI a cheaper and much simpler way of making the granting of patents much harder to secure. Under the DTI's new scheme, applications for patent rights would continue to be made to the Companies and Intellectual Property Commission and would be granted by the commission in the usual way. However, objections to the granting of these rights could then be lodged, not with the patents court, but with the new IP tribunal, which has the power under the Copyright Bill to set aside any decision made by the Commission.

Many of the patent rights granted by the commission could thus easily be set aside, especially as the IP tribunal may need little convincing that a given invention is not in fact sufficiently "new" to warrant patent protection. Though the aggrieved inventor would still be able to apply to the High Courts to set aside the tribunal's decision on review or appeal, the process of obtaining patents in South Africa would become more arbitrary and significantly more time-consuming. The time element is important, for the 20-year period of patent protection begins from the date an application for a patent is lodged – and not from the time it is finally granted.

More scope for compulsory licences

The Patents Act gives the Patents Court the power to grant a compulsory licence over a patented product, but only in limited circumstances: in essence, for a failure to exploit or work a patented invention within a reasonable time. By contrast, the DTI's 2013 proposals seek to allow the granting of compulsory licences in much wider circumstances.

In particular, the DTI wants such licences to be obtainable whenever: [Draft National Policy, UNDP article]

- negotiations with the patent holder over a stipulated period (say, 60 days) have failed, and the patent holder has refused to accept proposed royalties set at, say, 3% of the price of the copied product;
- the health minister has declared the existence of a national emergency or a situation of "extreme urgency" in the *Government Gazette*, so paving the way for the granting of compulsory licences over all medicines needed to counter these situations;
- the Government itself seeks a compulsory licence against what it regards as an "adequate" royalty; and/or
- a patent holder has been found guilty of "uncompetitive" conduct by the Competition Commission or Competition Tribunal: either for "unreasonably" refusing to grant a voluntary licence against a limited royalty; or for charging a price which is well above unit production costs even though it might be needed to cover R&D expenses; or for denying competitors access to an "essential facility", such as the formula for its patented medicines. (However, though South Africa's competition commission has already shown its willingness to interpret competition rules in this way, elsewhere in the world such conduct would not be regarded as "anti-competitive".)

Under the DTI's proposals, any attempt by a patent holder to enforce his patent rights will also invite counter-claims for compulsory licences, on all the grounds outlined above. This,

of course, is calculated to deter patent holders from bringing infringement proceedings and make it easier for people to breach patent rights. [Draft National Policy, read together with UNDP article]

The DTI's 2013 proposals also call for the replacement of the Patents Court by a patent tribunal, which would operate outside of the country's High Court and would be responsible for hearing all patent matters. The DTI also urges that this new tribunal should not be "dominated by lawyers" or subject to High Court rules, as these make for "'highly technical and legalistic procedures". [Draft national policy, pp43, 35]

The IP tribunal to be introduced under the Copyright Bill is in line with the DTI's 2013 proposals and will clearly be used to implement many of the DTI's other proposals. Particularly significant are clauses in the Copyright Bill stating that the IP tribunal "may adjudicate any application or referral made to it by any person, institution, or regulatory authority [such as the competition commission], where the dispute which is the subject of the application or referral relates to intellectual property rights". [New Section 29A(2)(c), Bill]

This clause will clearly give the new IP tribunal the power to decide on applications for compulsory licences in all the circumstances outlined above. The Patents Act might also need to be changed to extend the grounds on which compulsory licences may be granted, as the current wording of the statute allows such licences solely against the "abuse" of patent rights, which has a different and much more limited meaning. However, the IP tribunal's powers will also be so wide that it might not in fact be constrained by the provisions of the Patents Act, which could be seen as having been superseded by the Copyright Bill. Moreover, if new patent rules are indeed put in place, so as to reinforce the IP tribunal's powers to grant compulsory licences, the IP tribunal will, of course, immediately be available to enforce them.

The further key question is what royalties patent holders will receive once compulsory licences have been granted by the IP tribunal in the circumstances outlined above. At present, royalty payments are decided by the Patents Court, which is expressly enjoined by the Patents Act to consider 'the research and development' (R&D) undertaken by the patent holder. The court must also take into account the terms and conditions "usually stipulated" in voluntary licence agreements.

Under the Copyright Bill, by contrast, the IP tribunal will be empowered to "settle disputes relating to payment of royalties…in relation to intellectual property rights". [Section 29A(2)(d), Bill] It will also, of course, have the power to "make any appropriate order" in such a matter. Relevant too, of course, will be the new powers given to the minister to gazette regulations "prescribing royalty rates…for various forms of use". [Section 39 (Cl), Bill] There is nothing in the Copyright Bill which would require the minister to have regard to the patent holder's R&D costs, or to the royalties normally agreed under voluntary licence agreements. The DTI's idea that royalty payments should be limited to, say, 3% of the price of the copied product may thus be close to being realized under the Copyright Bill.

Conflict with the TRIPS Agreement

The DTI claimed in 2013 that its proposed changes to patent law are consistent with the TRIPS Agreement, as clarified by other WTO instruments intended to help developing countries deal with medical emergencies, such as the AIDS pandemic. This claim is false, however.

In essence, TRIPS allows member states to "provide limited exceptions to the exclusive rights conferred by a patent", provided these exceptions do not "unreasonably conflict" with normal patent exploitation or "unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of third parties". The DTI's 2013 proposals are too skewed against the patent holder to meet these criteria – and the powers it is now seeking to give the new IP tribunal under the Copyright Bill are equally at odds with TRIPS. (For further information, see Anthea Jeffery, "The DTI versus TRIPS", *@Liberty*, 15/2015, 12 November 2014)

The DTI's 2013 proposal to replace the patents court with an administrative (and executive-controlled) IP tribunal is also contrary to TRIPS, for Article 42 of the Agreement states that: "Members shall make available to rights holders civil judicial procedures concerning the enforcement of any [patent] right... Parties shall be allowed to be represented by independent legal counsel,...and all parties to such proceedings shall be duly entitled to substantiate their claims and to present relevant evidence." The word "shall" in these Articles is peremptory.

The DTI's further proposal that the IP tribunal should apply its own "informal" rules of procedure is also contrary to Section 49 of TRIPS. This says that where "any civil remedy is ordered as a result of administrative procedures on the merits of a case", those administrative procedures must "conform to principles equivalent in substance" to those applicable in the civil courts.

Despite the evident conflict between TRIPS and its 2013 proposals, the DTI now seems to be using the Copyright Bill to introduce an administrative tribunal whose powers and procedures will be no less at odds with South Africa's obligations under this binding WTO Agreement.

Patents and prosperity

Apart from the risks in infringing TRIPS, there are also sound economic reasons for giving patent rights a proper level of protection, along with effective judicial remedies for their enforcement.

Writes Judge Harms: '[In the context of intellectual property], there is a significant direct link between judicial system performance and economic development... For intellectual property rights to serve their purpose, effective judicial support is necessary... When judicial support for these specialised rights is feeble, the mobilisation of [innovation] falters, with considerable losses to the country.' [Louis Harms, 'The Enforcement of Intellectual Property Rights, WIPO, 2012, p20]

As Judge Harms indicates, and as the Government is well aware, innovation is vital to investment, growth, and jobs. The known nexus between innovation and prosperity is the key reason the State provides significant incentives for innovation and is trying hard to raise South Africa's overall spending on R&D to 1% of GDP – a level which, even if attained, would still lag far behind the global norm.

Perversely, the DTI's 2013 patent proposals, as now buttressed by the Copyright Bill, contradict all the State's endeavours to stimulate innovation. They also contradict the key goals of the National Development Plan (NDP): to raise the economic growth rate to 5.4% of GDP a year and reduce the unemployment rate from 25% to 6%. Neither growth nor jobs will increase without much more direct investment – but investors will have little reason to risk their capital, skills, and other resources within South Africa unless they know their property rights, including their intellectual property rights, are secure.

Other key provisons in the Copyright Bill

As earlier noted, provisions in the Copyright Bill that vest copyright in the State on the death of an author are in breach of both the property clause in the Constitution and the Berne Convention. In addition, provisions allowing the granting of compulsory licences for the translation of printed copyright works within ten days of their initial publication conflict with the Berne Appendix.

These provisions may seem relatively insignificant but nevertheless have potentially damaging ramifications. If the clause vesting ownership in the State had been in place on the death of such internationally known South African writers as Nadine Gordimer and Andre Brink, this could have attracted global coverage and opprobrium. It would also have sent a message all around the world that the South African Government is willing to ride roughshod over the country's Constitution and to repudiate binding international agreements. Such additional reputational damage is something that South Africa can ill afford.

These provisions, though supposedly limited to translations for teaching and research purposes, are also inherently unreasonable. That they allow application for a compulsory licence to be made within a week of initial publication – as opposed to the 21 months laid down in the Berne Appendix – is yet another indictment of South Africa. It again shows the Government's contempt for intellectual property rights and, by extension, for property rights in general. Again, the message is unlikely to be lost on potential direct investors who may not be concerned about the translation rights in themselves but might see them as indicative of the ruling party's attitude to the protection of property.

Conclusion

If South Africa is to attract direct investment, raise the growth rate, and generate millions more jobs, it needs to uphold and respect property rights, including copyright and patent rights. The country is also obliged to do so under both the Berne Convention and the TRIPS Agreement. Very many provisions of the Copyright Bill are unconstitutional because they

conflict with binding international agreements, while those seeking to establish a new IP tribunal are also in breach of Section 34 and Section 2 of the Constitution.

In addition, the Bill is generally so poorly drafted that it is very often incomprehensible. In the words of the Anton Mostert Chair: "The Bill is extremely badly drafted and is very difficult, if not impossible, to comprehend. The use of language and grammar is poor and it is riddled with editorial errors. It is full of contradictions and anomalies and it pays scant regard to many of the basic principles of copyright law (and indeed other laws). It is also at variance with the South African Constitution in many respects… It is ill-conceived and very badly executed, [which makes]…the document a very poor basis for conducting any meaningful discourse on what the Bill is actually seeking to achieve." [Anton Mostert Chair, *Commentary*, p3]

Overall, the measure is so damaging, so unconstitutional, and so unintelligible that it should simply be withdrawn. The DTI must go back to the drawing board – for the flaws in the Copyright Bill are too many and too fundamental to be capable of being rectified.

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