

**HEADS FOR A DEBATE BY THE PORTFOLIO COMMITTEE ON  
THE INTELLECTUAL PROPERTY LAWS AMENDMENT BILL**

**FUNDAMENTALS REVISITED AND APPLIED**

by

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**THE CURRENT EXISTING LAW**

<b><u>STATUTORY IP RIGHTS</u></b>	<b><u>COMMON LAW IP RIGHTS</u></b>
<b>PATENTS</b>	<b>TRADE SECRETS</b>
<b>TRADE MARKS</b>	<b>CONFIDENTIAL INFORMATION</b>
<b>DESIGNS</b>	<b>KNOW-HOW</b>
<b>COPYRIGHT</b>	<b>SHOW-HOW</b>
<b>PERFORMERS' RIGHTS</b>	<b>UNREGISTERED TRADE MARKS</b>
<b>PLANT BREEDERS' RIGHTS</b>	<b>PASSING-OFF</b>

**PERIODS OF PROTECTION IN EXISTING LEGISLATION**

**TRADE MARKS: 10 YEARS – RENEWABLE INDEFINITELY**

**\*DESIGNS:**

**AESTHETIC – 15 YEARS - SUBJECT TO RENEWAL  
FUNCTIONAL – 10 YEARS - SUBJECT TO RENEWAL**

**\*COPYRIGHT: 50 YEARS FROM AUTHOR'S DEATH**

**\*PERFORMERS' RIGHTS: 50 YEARS FROM WHEN PERFORMANCE  
TOOK PLACE**

*\*COPYRIGHT LIKE IP RIGHTS*

## THE PROPOSED TK- IP LEGISLATION

<u>STATUTORY IP RIGHTS</u>	<u>COMMON LAW IP RIGHTS</u>
PATENTS	<del>TRADE SECRETS</del>
TRADE MARKS	CONFIDENTIAL INFORMATION
DESIGNS	<del>KNOW-HOW</del>
COPYRIGHT	<del>SHOW-HOW</del>
PERFORMERS' RIGHTS	<del>UNREGISTERED TRADE MARKS</del>
<del>PLANT BREEDERS' RIGHTS</del>	PASSING-OFF

### PERIODS OF PROTECTION IN PROPOSED TK - IP LEGISLATION

**TRADE MARKS:**                      INDEFINITE

**\*DESIGNS:**

AESTHETIC – 15 YEARS - SUBJECT TO RENEWAL  
 FUNCTIONAL – 10 YEARS - SUBJECT TO RENEWAL

**\*COPYRIGHT:**

50 YEARS FROM DATE OF TK/IP ACT OR  
 WITHIN 50 PRECEDING THAT DATE

**\*PERFORMERS' RIGHTS:**

50 YEARS FROM WHEN PERFORMANCE  
 TOOK PLACE

*\*COPYRIGHT LIKE IP RIGHTS*

3.

I have read the reports to the Portfolio Committee by the Department of Trade and Industry; by the Department of Science and Technology; by Nedlac; and by the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

### THE FIRST QUESTION

I list hereunder names and subjects which I have culled from the debates ensuing from those reports. Since these examples are well catered for in the current existing IP law what is the purpose of the IP Laws Amendment Bill *in regard thereto?*

Let us test this question with reference to the examples which I have listed.

HERBS FOR MEDICINAL PURPOSES	ROOIBOS
TRADITIONAL HEALING	BOOKS
TECHNOLOGICAL INDIGENOUS KNOWLEDGE	CD's
COCA-COLA'S SECRET FORMULA	ZULU RYTHM
INDIGENOUS KNOWLEDGE RIGHTS	McDONALDS
JAMACIAN REGGAE	CHAMPAGNE
SINGER JIMMY CLIFFE	SHERRY
HYUNDAI TECHNOLOGY	PORT
COUNTERFEIT GOODS	KILAMANJARO
COMPUTER SOFTWARE	JOHNNY CLEGG
EGYPTIAN COTTON	ENGLISH BREEDS
CINEMATOGRAPHIC FILMS	AMERICAN TECHNOLOGY
ROMAN WATER RETICULATION SYSTEMS	
ITALIAN FAST FOOD	SCOTTISH WHISKY AND TARTANS

4.

If the answer to the first, specific, question is “none”, then I pose the following second **general** question.

### **THE SECOND QUESTION**

The second question is this: Is there **one, single, concrete example** of what is aimed at by the IP Laws Amendment Bill which is not adequately catered for in our current existing IP law regime?

If the answer to the second question is none, then the IP Laws Amendment Bill has no place to fill. The proposals contained therein will simply serve no purpose.

5.

### **THE THIRD QUESTION**

The third issue which I wish to raise for discussion is South Africa’s IP legal reciprocal obligations viewed internationally.

Paragraphs 4 (13C, performers rights), 16 (40E, copyright), 27 (69A, trade marks), 37 (53A, designs) of the IP Laws Amendment Bill provides that the Minister may enter into reciprocal agreement with other states in regard to international reciprocity of TK-IP rights.

These provisions, like other provisions of the Bill, amount to naught. South Africa is a party to treaties and conventions which it is bound to respect, no matter what the Minister might have to say about it.

### **THE TRIPS AGREEMENT**

Article 3.1 – relating to IP rights generally

Articles 9 to 12 – relating to copyright and incorporating the relevant terms of

the Berne Convention

Article 14.1 – relating to performers' rights

Article 15 to 24 – relating to trade marks and incorporating relevant provisions  
of the Paris Convention

Articles 25 to 26 – relating to designs.

These provisions of TRIPS are to be read with article 2 of the Paris Convention; article 5 of the Berne Convention; the Rome Convention and the like.

South Africa is not the sole and only repository of “traditional rights”. There are thousands of pockets of such “traditional knowledge” worldwide. The extent of the chaos that would result were the owners of such traditional knowledge to exercise their rights of reciprocity in South Africa, and the resultant damage to our current existing IP regime, takes one’s breath away.

6.

## **THE APPROACH OF THE LAW SOCIETY OF SOUTH AFRICA**

The Law Society of South Africa (LSSA) recommends that the IP Laws Amendment Bill be withdrawn.

Detailed comments were submitted to the Department of Trade and Industry in 2009. They are there for the reading and the LSSA stands by those comments.

The LSSA has also submitted to the secretary of the Committee a copy of a draft *sui generis* Bill drafted by Dr. Dean as an example of the sort of legislation which is envisaged by the LSSA.

The LSSA recommends, and I, of course, reiterate, that a committee of experts should be appointed to prepare a draft Bill, along the lines of Dr. Dean’s draft.