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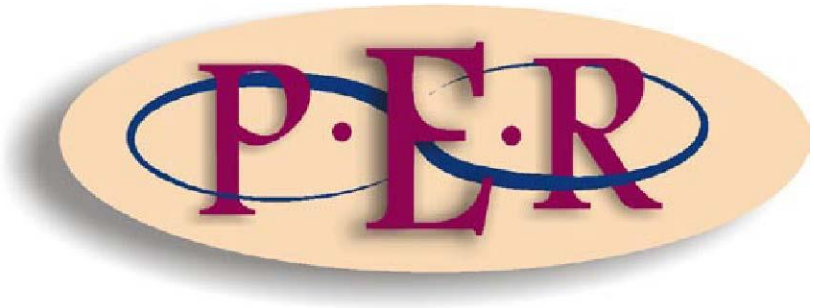

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HARNESSING INTELLECTUAL PROPERTY FOR DEVELOPMENT: SOME THOUGHTS ON AN APPROPRIATE THEORETICAL FRAMEWORK

CB Ncube*

1 Introduction

Intellectual Property (IP) law is expected to provide equitable protection for eligible kinds of works in virtually all industries; to achieve fair treatment of creator, user and societal interests; and to contribute to a country's efforts to achieve economic development. This is a tall order and debates pertaining to IP law tend to be heated and heavily contested due to the tensions caused by these high expectations. In an effort to move such debates forward, this paper advances a nuanced framework through which contested IP issues may be resolved and upon which national IP policy and legislation may be based.

This is a timely discussion as South Africa is engaged in national IP Policy formulation and public consultation is in progress.[1] There are also current continental and international IP debates in which the country has a stake. Continentally, the establishment of a Pan-African Intellectual Property Organisation under the auspices of the African Union is on the agenda.[2] Internationally, a treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities was adopted at a diplomatic conference on 28 June 2013.[3]

IP law is fraught with tension for three main reasons. First, its cross-cutting nature and diverse scope of coverage generates numerous issues in need of resolution across a range of different industries. These range from the appropriate protection

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1 The draft national intellectual property (IP) policy GN 918 in GG 36816 of 4 September 2013

2 Ncube and Laltaika 2013 *JIPLP* 114.

3 WIPO 2013 www.wipo.int.

of computer programs[4] to the manner in which copyright law facilitates meaningful access to knowledge for learners and the visually impaired.[5] Another topical IP issue is the protection of traditional knowledge (TK).[6] The core of the debate is whether IP protection is suitable, whether a *sui generis* system should be crafted, or if a combination of the two approaches should be adopted. A policy[7] and various iterations of a Bill providing for IP protection have been published by the Department of Trade and Industry (DTI) as has a privately drafted alternative version of the Bill.[8] In 2012 the *Intellectual Property Laws Amendment Bill* No 8B of 2010 was passed by both the National Assembly and the National Council of Provinces but was denied Presidential assent[9] and returned to the National Assembly. Presidential assent was withheld because the Bill had not been dealt with as required by s 76 of the *Constitution of South Africa*, 1996 and it had not been referred to the National House of Traditional Leaders as required by s 18 of the *Traditional Leadership and Governance Framework Act* 41 of 2003. This paper will not rehash the discussion of the appropriateness of IP protection for TK that has already been held in many forums. It only seeks to highlight the main point of contestation in this discussion, which is whether or not IP law is suited to the peculiarities of TK, which include communal creation and ownership and the fact that TK often does not meet the eligibility criteria of IP protection such as novelty (for patent protection) or material fixation (for copyright protection). Perhaps, informed by these concerns, the Department of Science and Technology (DST) is creating *sui generis* protection for TK[10] to complement the DTI's approach. These two different departmental approaches show that this issue is so complex that even government departments are in favour of different approaches.

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4 Ncube 2012 *SLR* 438; Tong 2009 *JWIP* 266; De Villiers and Tshaya 2008 www2.warwick.ac.uk 1; De Villiers 2006 *SALJ* 315.

5 Schonwetter, Ncube and Chetty "South Africa" 231-239; Jonker "Access to Learning Materials" 113-146.

6 See, for example, Cross 2010 *PELJ* 12; Dean 2012 *Without Prejudice* 41; Masango 2010 *SAJLIS* 74; Tong "Does the Intellectual Property System offer adequate protection for traditional knowledge?" 375-381; Van der Merwe 2010 *PELJ* 2; Rengecas 2013 afroip.blogspot.com.

7 *Policy Framework for the Protection of Indigenous Traditional Knowledge through the Intellectual Property System and the Intellectual Property Laws Amendment Bill, 2008* (Gen N 552 in GG 31026 of 5 May 2008).

8 Dean 2012 blogs.sun.ac.za.

9 The President 2012 www.parliament.gov.za.

10 Seleti 2012 www.pmg.org.za.

The second reason for the inherent tensions in IP law is that it seeks to simultaneously address the position of three distinct constituencies: including the creators or owners, the producers, and the users of IP[11] - or society in general. The creators of IP can generally be said to desire full control of their IP and therefore seek to obtain strong IP protection. Their main needs are for "recognition, respect and remuneration".[12] The producers of IP, who commercialise creators' works, seek enforceable protection for IP and competitive markets that will enable them to recoup their investments.[13] Like creators, producers favour strong protection. On the other hand, the main needs of the users of IP are "access to and affordability of scientific and cultural technology."[14] Consequently, they seek to avoid undue restrictions on their usage of the IP concerned and generally prefer minimalistic IP protection. In other words they prefer little or no protection at all. IP policy and law need to balance these competing stakeholder interests. Such a balancing act needs to be achieved within an equitable, constitutionally sound and economically viable policy scaffold. Section 3 below outlines such a model of equitable IP.

Thirdly, the relationship between IP law and economic development and the role IP can play as a means of achieving economic development has been misunderstood. Previously it was thought that having an IP system akin to developed countries' current systems would guarantee economic growth.[15] It was believed that a strong IP system was the key to economic growth. Recent scholarship has challenged this notion and shown that law, including IP law, is an important component and driver of economic growth.[16]

It has also been shown that developed countries began with minimal IP protection to encourage innovation and economic growth.[17] These systems were incrementally

11 Dutfield and Suthersanen *Global Intellectual Property Law* 51.
12 Dutfield and Suthersanen *Global Intellectual Property Law* 52.
13 Dutfield and Suthersanen *Global Intellectual Property Law* 52.
14 Dutfield and Suthersanen *Global Intellectual Property Law* 52.
15 Maskus 2000 *Case W Res J Int'L L* 471; Evenson 2001 *Case W Res J Int'L L* 187; Maskus "Foreign Direct Investment" 41; Idris *Intellectual Property*.
16 Sen 2000 issat.dcaf.ch 13.
17 Gibbons 2011 *SMU L Rev* 923; Dutfield *Intellectual Property Rights* 29; Ostergard *Development Dilemma* 19. Also see Vaver *Intellectual Property Rights* 449.

strengthened in tandem with economic growth.[18] This same approach is being used by today's fastest growing economies. Brazil, Russia, India and China's IP systems are not as strong as those of developed nations, leading to some conflict as they are pressurised by developed nations to strengthen their IP systems.[19] As a result of the manner in which their IP systems have been calibrated, Brazil, [20] Russia, India and China's[21] economies are thriving. South Africa's experience substantiates this argument, because there have been minimal FDI inflows into the country[22] although it has a relatively strong IP system,[23] as is proven by its consistently high IP system rankings.[24] In contrast, Brazil, Russia, India and China have weaker IP systems than South Africa,[25] but have received substantially higher FDI inflows than South Africa.[26] Therefore South Africa would do well to learn from her fellow BRICS and adopt a conservative IP regime which favours minimalism, within the bounds of her international obligations, until national socio-economic goals have been achieved.[27]

This paper engages in a broad discussion of IP and does not focus in depth on any particular type of IP protection. However, it is important at the outset to note that the theoretical framework outlined in the paper ought to be followed by more robust consideration of each type of IP in any future policy formulation. To illustrate how

18 Chang 2001 *Journal of Human Development* 287, 303; Teljeur 2002 www.tips.org.za 25.

19 Bird 2006 *ABLJ* 323-329; Bird "Impact of Coercion" 431-432; Bird and Cahoy 2007 *NJTIP* 403.

20 McIntyre and Mooney "Where Now With Equity? " 259 note that Brazil delayed the provision of patents for pharmaceuticals until December 2004, but has become a leading global generics manufacturer.

21 Yu "China Exception"*;* Yu "China Puzzle" 174-175, 180.

22 Kaplan "Intellectual Property Rights" 5.

23 Kaplan "Intellectual Property Rights" 2.

24 Kaplan "Intellectual Property Rights" 2, noting that in 1998 South Africa was ranked the highest out of 44 developing and industrialising countries. In a study carried out by Lesser in 2005, South Africa scored higher than other similarly placed developing countries and even some developed countries on the Ginarte Park Index, and in 2008 South Africa ranked 22nd out of 115 countries in the Property Alliance's International Property Rights Index (IPRI). See further Lesser 2001 www.wipo.int and Property Rights Alliance 2008 internationalpropertyrightsindex.org. The Property Alliance's 2011 IPRI ranks South Africa's IP system as number 21 out of 129 countries with a score of 7.3 out of 10 (Property Rights Alliance 2011 internationalpropertyrightsindex.org 35).

25 In contrast to South Africa's placing at 21, the 2011 IPRI ranks Brazil and India at 51 with a score of 5.5 each. China ranks at 59 with a score of 5.2 and Russia ranks at 67 with a score of 5.

26 UNCTAD 2011 www.unctad.org 3 notes that in 2010 South Africa received $1.3 billion FDI inflows, whilst Brazil received $30.2 billion, China received 101.1 billion (exclusive of the financial sector), India received $23.7 billion and Russia received $39.7 billion.

27 As recommended by principles 1 and 8 of the Adelphi Charter. See Royal Society of Arts 2006 www.thersa.org 4-5

this may be done, the paper uses examples relating to patent and copyright protection for computer programs and educational materials respectively. It also considers the protection of traditional knowledge, as this is a topical matter.

2 Overview of IP and the protection of TK

This section gives a very broad overview of IP law. It merely defines IP and introduces the various types of IP protection and does not engage in a detailed discussion of each type. IP law seeks to protect IP rights (IPRs) which are "legal and institutional devices that protect creations of the mind such as inventions, works of art and literature, and designs".[28] IPRs may be divided into the two main categories of (1) industrial property and (2) copyright and related rights. Industrial property entails the protection provided by patents, trademarks, industrial designs, plant breeders' rights and geographical indications. It also includes the protection of utility models, trade dress and layout designs or topographies of integrated circuits, and protects against unfair competition, including the protection of trade secrets.[29] Copyright protects the original expression of ideas, the expression having been reduced to fixed form, provided the creator of the work is qualified or eligible for protection in that jurisdiction. Related rights relate to performance and similar depictions of work.

3 In search of equitable IP

This section does not purport to provide a comprehensive theory of IP because this is a nearly insurmountable task that is both inappropriate and unnecessary for present purposes. Not even a leading text on the theory and philosophy of IP[30] attempts to do this. The section merely constructs a nuanced framework[31] to be

28 Dutfield *Intellectual Property Rights* 1, 25. For a similar definition, see Henderson and Kane 2001 www2.warwick.ac.uk.

29 WIPO 2003 www.wipo.int.

30 Drahos *Philosophy of Intellectual Property*.

31 As recommended by Elkin-Koren and Salzberger *Law, Economics and Cyberspace* 5: "the uncritical use of a conventional analytical framework runs the risk of producing a distorted view on both positive and normative level".

used to evaluate the appropriateness of IP protection in South Africa. This framework is based on three principles, namely instrumentalism, the interests of the public, and the balancing of the constitutional rights of the creator and the user.

The first principle of the framework is its underlying instrumentalist worldview, which rejects the elevation of property rights above all other rights and advocates for property rights that serve moral values and seek the "improvement of human conditions and experience".[32] Instrumentalism is in stark contrast to proprietarianism and universalism, which prioritise the property rights held by creators or owners over the rights held by users or society generally, on the national and international sphere respectively.[33] Building on the basis of instrumentalism, this paper contends that in order to more equitably balance the contesting rights of the creators and users, IPRs should be formulated and enforced so as to meet societal goals[34] or the public interest, to be responsive to the economic environment, and to take cognisance of the human rights claims of both creators and users. Each of these strands is discussed in turn below.

3.1 Public interest and the economic environment

The public interest approach to IP seeks to equitably balance the interests of creators and users in a manner that is beneficial to society generally. This approach is promoted by developmental agencies[35] and is evident in their strategic decisions[36] and in the international agreements they administer. For example, the *Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods* (TRIPS)[37] article 7 provides:

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32 Drahos *Philosophy of Intellectual Property* 215.

33 Drahos *Philosophy of Intellectual Property* 200-202; Dutfield *Intellectual Property Rights* 1; Drahos "Death of a Patent System" 3-8.

34 Fisher "Theories of IP" 172.

35 For example the UN's Human Development Report 2001 states that the fair use of IPRs is essential if developing nations are to meaningfully participate in e-commerce and achieve economic development. See UN 2001 hdr.undp.org 7.

36 For instance, WIPO's adoption of the Development Agenda is a clear instance of strategy that is influenced by the public interest. See De Beer "Defining WIPO's Development Agenda" 2-3.

37 *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods* (1994) (TRIPS).

> The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the *mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.* (My emphasis)

This provision takes clear cognisance of the competing interests of producers and users of technological knowledge and calls for an equitable balancing of these interests. This position is reinforced by article 8(1) which in part provides:

> Members may, in formulating or amending their laws and regulations, adopt measures necessary … *to promote the public interest in sectors of vital importance to their socio-economic and technological development,* provided that such measures are consistent with the provisions of this Agreement. (My emphasis)

This provision complements article 7 but differs from it because it expressly refers to the advancement of the public interest in certain sectors. It is particularly significant because it acknowledges that IP laws ought to be formulated so as to promote socio-economic goals. It is therefore inappropriate to take a one-size fits all approach to IP laws, as each jurisdictions socio-economic status and developmental goals have to be taken into account.

To create a sound framework, it is necessary to anticipate criticisms of the public interest approach and to take them into account in the construction of an equitable IP model. A criticism that has been levelled against the public interest approach is that it is unclear which social ends are to be met by IP laws.[38] In those instances where theorists venture to recommend the social ends to be met by IP laws, they are accused of being paternalistic because they seek to prescribe what would be good for people.[39] Such accusations are countered by the fact that the selection of societal ends is essentially a democratic issue, and that IP laws should serve the goals a country has set itself through its legislative and executive processes.[40] Accordingly, this paper looks to South Africa's government policies to ascertain the

38 Fisher "Theories of IP" 193; Chander and Sunder 2007 *UC Davis L Rev* 567.
39 Fisher "Theories of IP" 152.
40 Chander and Sunder 2007 *UC Davis L Rev* 577.

"good" to be attained. One of South Africa's key strategies is the encouragement of economic development through commercial enterprise by the provision of an enabling legal environment.[41] Special cognisance has been taken of the contribution of SMEs to economic development and the government has committed itself to promoting local SMEs.[42]

How IP ought to be used to serve the public interest can be argued from a creator or user perspective, raising the question of which interests are paramount. It is thus necessary to devise means by which these contesting claims can be balanced. This paper proposes the use of the twin pillars of human rights and socio-economic conditions to attempt to break the deadlock between creator and user interests. The use of these pillars finds support in articles 7 and 8 of TRIPS for two reasons. First, these two articles have been interpreted as establishing "a human rights mandate" for TRIPS member states because of their close alignment with international human rights legislation.[43] Secondly, the text of the articles makes express reference to economic welfare and development. Each pillar is discussed below.

3.2 Using human rights to balance stakeholder interests

The public interest approach is considerably strengthened by the incorporation of a human rights perspective, which can break the deadlock between contesting visions for IP protection if it is properly deployed. Care needs to be taken with the use of human rights narratives because they can be used both in favour of expanding IP rights (in the interests of creators of IP) and against such expansion (in the interests of users).[44] The proper deployment of this narrative is to use it as a bottom-line or "baseline" for human rights goals, then work backwards to establish how IP law can

41 *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* (GN 1183 in GG 26493 of 23 June 2004) 80.

42 *Integrated Strategy on the Promotion of Entrepreneurship and Small Enterprises: Unlocking the Potential of South African Entrepreneurs* (DTI Pretoria 2005) 3, *White Paper on Small Business: National Strategy for the Development and Promotion of Small Business in South Africa* (DTI Pretoria 1995)*;* SA Government Information 2008 www.info.gov.za.

43 Dutfield and Suthersanen *Global Intellectual Property Law* 223.

44 Chander and Sunder 2007 *UC Davis L Rev* 577; Helfer 2007 *UC Davis LR* 1015-1020; Okediji 2003 *SJICL* 353; MacQueen *et al Contemporary Intellectual Property* para 10.19.

be used to achieve those goals.[45] It is thus necessary to find this baseline by looking to South Africa's *Constitution*[46] and to the international obligations by which the country is bound.

3.2.1 The right to IP

The South African Constitution does not provide for the right to IP as a human right because the Constitutional Court held that the right to have IP protection is not a fundamental right.[47] Dean[48] argues that the court should have found that IP had the status of a fundamental right following article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[49] Although South Africa has ratified the ICESCR, the country has not incorporated ICESR provisions into domestic legislation.[50] The South African position is in marked contrast to the United States' position where article 1(8) of the United States *Constitution* expressly provides for IP protection. Scholars have thus been able to debate the constitutionality of various types of IP protection on the basis of whether or not that protection promotes the progress of science and the arts.[51]

In addition to constitutional clauses that protect IP specifically, as outlined above, there are also clauses that recognise the right of traditional communities to IP. The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[52] provides for traditional communities' rights to "maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions".[53] The South African Constitution predates UNDRIP

45 Helfer 2007 *UC Davis LR* 1018; Chapman 2002 *Journal of International Economic Law* 873-879; Barrat *Battle for Policy Space* 6-7, 294-303.
46 *Constitution of the Republic of South Africa*, 1996.
47 *In re certification of the Constitution of the RSA* 1996 4 SA 744 (CC) 799.
48 Dean *Handbook of South African Copyright Law* 1-2A.
49 *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR).
50 See s 231(4) of the *Constitution*; *Azapo v The President of the Republic of South Africa* 1996 4 SA 671 (CC) 688 para 26.
51 See for example Pollack 2002 *Rutgers Computer & Tech LJ* 28.
52 *UN Declaration on the Rights of Indigenous Peoples* (2007) (UNDRIP).
53 Article 31 UNDRIP.

by almost a decade and therefore does not contain any equivalent provisions for traditional communities to protect their IP.

3.2.2 The right to work

Section 22 of the South African *Constitution* provides for the right to choose a trade, occupation or profession (the "right to work".)[54] The Constitutional Court has held that the meaning of this right is not found in the semantics of defining a "trade, occupation or profession" but in identifying the purpose of such activities, namely, that every citizen has the right to choose and practice an economic "activity to pursue a livelihood".[55] The courts have emphasised that this right is a "sacrosanct"[56] aspect of South Africa's constitutional democracy which places a premium on human dignity.[57] This right has both horizontal and vertical application and binds the state and natural and artificial persons.[58] This means that in creating policies and enacting legislation the state is enjoined to respect this right. South Africa's IP laws must therefore not prejudice this right.

The right to work has been judicially considered in a number of cases relating to restraint of trade agreements and the regulation or prohibition of trade, where the courts have shown their commitment to ensuring its enforcement.[59] However, it is yet to be considered in the context I am contemplating here, which is explained by

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54 For an overview of this right, see Davis "Economic Activity" 29-15-29-19; Le Roux 2003 *SALJ* 452, 458-462.

55 Rautenbach 2005 *TSAR* 854; *Affordable Medicines Trust v Minister of Health of RSA* 2005 6 BCLR 529 (CC) para 59.

56 *JR 1013 Investments CC v Minister of Safety and Security* 1997 7 BCLR 925 (E) 929 where the court said: "The right to choose a trade, occupation or profession is entirely different in nature from a right either to engage in economic activity or to pursue a livelihood. It is wider in content. *It is sacrosanct"* (my emphasis).

57 For example, see *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) 496 para 15, where the court said: "...all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions…" S 22 of the *Constitution* guarantees "[e]very citizen . . . the right to choose their trade, occupation or profession freely" reflecting the closeness of the relationship between the freedom to choose a vocation and the nature of a society based on human dignity as contemplated by the *Constitution*. Also see Rautenbach 2005 *TSAR* 855 citing *Affordable Medicines Trust v Minister of Health of RSA* 2005 6 BCLR 529 (CC) para 58.

58 See s 7(2) of the *Constitution* and Rautenbach 2005 *TSAR* 856.

59 For example *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA); *JR 1013 Investments CC v Minister of Safety and Security* 1997 7 BCLR 925 (E).

the following two examples in relation to the protection of computer programs and TK.

If a person (A) chooses to be self-employed and to run an SME which employs a computer program to implement its business methods, it is conceivable that A could argue that the IP protection, arising for example by the patenting of one of these methods by another person (B), prevents him (A) from freely practising his chosen trade or occupation and that this is not justifiable in a democratic society. It is possible to patent computer programs and business methods because their exclusion from patentability in section 25(2) of the *Patents Act* is qualified by the "as such" limitation provided for in section 25(3). Therefore a business method or computer program that has a technical effect is not a business method or computer program 'as such' and is patentable. A's argument could succeed if:

1. A's business, or an aspect of it, can only be practised by using that particular business method,
2. a licensing agreement cannot be concluded between A and B,[60] and
3. the IP protection excludes A or other creators from developing functionally equivalent methods.

A's argument is buttressed by the fact that the South African *Constitution* does not contain a right to IP, and B would therefore be unable to mount an argument in which he pits his own human rights against A's. A's argument could thus be successful.

However, B could contest A's claim that there is only one way in which to practise that element of A's business. B could therefore argue that as there are numerous permutations of the method in issue, and that A is not being prevented from exercising his right to a trade or occupation of his choice because he could use another equivalent method. However, A could counter B's argument by contending that the need to find alternative methods, the threat of infringement actions and the

[60] The need to obtain licences is a major barrier. See Krause 2000 *Seattle UL Rev* 80.

need to negotiate licensing with patent holders pose significant barriers (patent thickets) which he cannot overcome. Therefore A is effectively prevented from practising his chosen trade or occupation. This argument is likely to succeed because research has shown that these barriers are quite significant.[61]

However, this constitutional protection of the right to work does not entitle users to gratis or unrestricted use of IP-protected computer-implemented business methods. The argument made above is in relation to access to such technology, but it does not extend to making a case for gratis access. IPR- holders have legally enforceable rights to charge market-related royalties for the licensed use of their protected methods, and to pursue infringers. On the other hand, the exercise of these licensing rights ought to take cognisance of the fact that South Africa is an emerging economy that seeks to promote the growth of small- and medium-sized enterprises (SMEs). This paper therefore is not making a case for free user access to business methods that flout the legitimate rights of IPR holders. Rather, it seeks to make a case for an equitable balancing of creator and user rights.

A second example, in the TK context, is that for a traditional community the right to work may entail trading in cultural artifacts or charging for cultural performances which would be adversely affected by the privatization of TK by community outsiders. On the other hand, it could also be argued that traditional communities require IP protection of their TK in order to enable them to exercise their right to work. However, as shown above at section 3.2.1, there is no general constitutional right to IP protection; nor is there a provision mandating the IP protection of TK.

3.2.3 User access rights

Section 16(1) of the *Constitution* protects freedom of expression, which includes "freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research". This section clearly supports

61 Bessen and Meurer *Patent Failure* 8-9.

users' rights to access.[62] Davis points out that it includes "the right to research, publish and assimilate learning without any interference from the government".[63] He notes that it has been suggested that this right may be extended to impose a duty on the state to adequately fund research.[64] However, Davis is of the view that such an extension would pass muster as the basis of the constitutional provision is an attempt to prevent state "interference with the autonomy of tertiary institutions".[65]

Section 16 is particularly relevant in the context of access to knowledge or, more specifically, access to learning materials. In this context, this right is easily linked to the socio-economic right to education.[66] Section 29 of the *Constitution* provides for a right to basic education and a qualified right to further education, coupled with the right to receive education in the language of one's choice.[67] In this context the argument is that access to certain ideas, information and materials is necessary to facilitate education and is critical for learners. Jonker notes that "access to learning materials means that learning materials must be affordable, available, relevant, available in an inclusive range of languages, and available in formats suitable for use by the print disabled".[68] IP policies, laws and practices have a significant impact on the availability of learning materials and thus it is imperative to bear this constitutional imperative in mind in IP policy formulation. The IP system has to balance creator rights against user rights in a way that ensures adequate access to scientific and cultural technology in accordance with section 16 of the *Constitution* and the right to education in accordance with section 29 of the *Constitution*.

62 Rens "Introduction" 4.
63 Davis "Freedom of Expression" 11.4.2.
64 Davis "Freedom of Expression" 11.4.2.
65 Davis "Freedom of Expression" 11.4.2.
66 For commentary on this right ,see Davis "Education" 24-1–24-6.
67 Jonker "Access to Learning Materials" 141.
68 Jonker "Access to Learning Materials" 126.

4 Conclusion

An equitable IP model that is informed by the considerations outlined in section 3 above can be used as an evaluative tool in both policy and legislative drafting contexts. In order to guarantee the enjoyment of relevant user and creator constitutional rights, policy makers have to engage in stakeholder analysis and balance competing interests.

The users of IP-protected works need affordable access to these works for various reasons. These reasons include facilitating the exercise of the right to work and access to knowledge as provided for by sections 22 and 16 of the *Constitution* respectively. However, this is not to say that creators are to be denied due recognition plus reasonable reward and remuneration for their efforts, as this would ultimately be to the detriment of users. Creators' needs therefore need to be taken into account. One of creators'' foremost needs is for IP protection that is compatible with the nature of the good being protected and the manner in which the creative process unfolds. The ease and affordability of the acquisition of IP protection is also of paramount importance to creators. The cost of enforcement, which is generally high, is similarly important. Creators benefit from a vibrant commons from which to draw the building blocks for their creations. Finally, both users and creators require legal clarity and certainty so as to be able to protect their rights. An equitable regulatory scheme will therefore meet these user and creator needs.

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List of abbreviations

ABLJ	American Business Law Journal
Case W Res J Int'L L	Case Western Reserve Journal of International Law
DTI	Department of Trade and Industry
JIPLP	Journal of Intellectual Property Law and Practice
JWIP	Journal of World Intellectual Property
JILT	Journal of Information Law & Technology
IPRI	International Property Rights Index
PELJ	Potchefstroom Electronic Law Journal
NJTIP	Northwestern Journal of Technology and Intellectual Property
RSA	Republic of South Africa
Rutgers Computer & Tech LJ	Rutgers Computer and Technology Law Journal
SAJLIS	South African Journal of Libraries and Information Science
Seattle UL Rev	Seattle University Law Review
SJICL	Singapore Journal of International and Comparative

	Law
SLR	Stellenbosch Law Review
SALJ	South African Law Journal
SMU L Rev	Southern Methodist University Law Review
TRIPS Agreement	Agreement on Trade-Related aspects of Intellectual Property Rights including Trade in Counterfeit Goods, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UC Davis L Rev	University of California Davis Law Review
UCT	University of Cape Town
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WIPO	World Intellectual Property Organisation

HARNESSING INTELLECTUAL PROPERTY FOR DEVELOPMENT: SOME THOUGHTS ON AN APPROPRIATE THEORETICAL FRAMEWORK

CB Ncube*

SUMMARY

This paper considers how an appropriate theoretical framework for Intellectual Property may be constructed. Such a framework would be the lens through which contested IP issues may be resolved and upon which national IP policy and legislation might be based. The paper begins by highlighting the inherent tensions in IP, which are caused by the various stakeholder interests that this body of law seeks to balance, and by the cross-cutting nature of IP. It contends that in order to more equitably balance the contesting rights of the creators and users, IP rights should be formulated and enforced so as to meet societal goals or serve public interest, be responsive to the economic environment, and take cognisance of the human rights claims of both creators and users.

National socio-economic goals should inform such a framework in a way that ensures that IP is used as a means to achieve these goals and is not perceived as an end. This will require nuances in policy and legislation that meet the country's needs. In particular, as a developing country South Africa would do well to exploit available flexibilities in the various international IP agreements by which it is bound.

Due regard also ought to be had to the users' need for affordable access to IP-protected goods in order that they may exercise the right to work and access to knowledge, as provided for by ss 22 and 16 of the Constitution respectively. Similarly, creators ought to be given due recognition, together with reasonable reward and remuneration for their efforts. This will be achieved through the creation of an IP system that provides protection that is compatible with the nature of the

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good being protected and the manner in which the creative process unfolds. Such protection should rely on registration systems are efficient, simplified and affordable. The accompanying enforcement system should be equally accessible, although the costs of enforcement would depend on the forum used to secure redress. Finally, the resulting IP regulatory framework should be both certain and clear.

KEYWORDS: Intellectual property, equity, stakeholder interests, right to work, access to knowledge.