

The Political Economy of Traditional Knowledge, Trademarks and Copyright in South Africa

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INTRODUCTION

This chapter, together with my ‘Politics, Law and Discourse: Patents and Innovation in Post-Apartheid South Africa’, also published in this *Handbook*, was written to constitute a general overview of the contested terrain of South African intellectual property (IP) policy and law since the fall of apartheid in 1994 and the end of the country’s international isolation. Nevertheless, it can also be read alone as a discussion of the dominant and competing narratives around the political and judicial aspects of trademarks, copyright and the protection of traditional knowledge, using exemplary cases from contemporary South African jurisprudence. Like its companion text, it links current South African policy and law to developments in the international IP and trade environment. For an analysis of the broader South African legal and economic context, and a description of the current development of government policy towards IP at the macro level, readers are referred to ‘Politics, Law and Discourse’ (Chapter 33, in this volume). This field of policy is one in which change occurs in unpredictable ways, and for up-to-date information, readers are advised to consult,

inter alia, the blogs cited at the end of this chapter.

PROTECTING TRADITIONAL KNOWLEDGE

The protection of ‘traditional knowledge’ (hereafter TK) through IP mechanisms is a ‘real but amorphous problem’ (Hughes, 2012: 1224), and one that is acute in the South Africa context. The Cape ‘floral kingdom’ is the smallest of the six scientifically recognized botanical kingdoms, and is particularly diverse in terms of indigenous species. The rest of the country is also especially rich in different kinds of plants, many of which have been and continue to be used by local communities for a wide range of medicinal, nutritional and other uses. This means that the country is especially vulnerable to ‘bio-prospecting’ and the related practice of ‘bio-piracy’, in which products are developed and marketed from plant or other natural resources with little or no recognition of prior knowledge within local communities, without permission and often without compensation. The twin risks are first that knowledge is

appropriated and privatized, and second that the physical resource itself may be harvested to the point of near extinction. Both practices frequently involve the registration of patents, and therefore become an issue of IP rights (IPRs). South Africa has added to this problem, if not to its solution, both an iconic piece of jurisprudence and a legislative proposal that has been severely criticized for its general approach. These are respectively the San-Hoodia case – probably the best known but certainly not the only South African case fought out in public and judicial arenas – and the much derided IP Laws Amendment Bill.

The *amorphousness* of the concept of traditional or indigenous knowledge is evidenced by what Hughes has called the ‘definitional instabilities’ of the field (2012: 1216). It is difficult to delineate exactly what TK is and what it is not, as well as how it relates to core IP concepts. Although the idea of TK can be traced back to the 1960s, the defining moments in the development of the now global drive towards IP protection for TK were the Convention on Biological Diversity of 1992, which included provisions in article 8 (j) for the regulation of TK; TRIPS, which *excluded* certain materials from patenting in its article 27.3 (b); and the Doha Declaration of 2001. Even the terminology is contested: ‘local knowledge’, ‘indigenous knowledge’, and ‘traditional knowledge’ are all used, as are ‘traditional environmental knowledge’ and ‘traditional cultural expression’ (previously called folklore). The phrase ‘traditional knowledge’ is preferred here as being broader than ‘indigenous knowledge’ and indeed encompassing it (Mugabe, 1999). TK is an aspirationally nomothetic concept: a broad definition would include techniques and theories, often preserved orally, of botany, agriculture, the environment, astronomy and other subsistence-and-survival fields of knowledge within a community.

The problem arises at the interface between globally dominant ‘Western’ values and subaltern systems of knowing, and is fundamentally political in nature. IP and TK are – and by and large remain – quite simply ‘worlds

apart’ (Patel, 1996: 318). Nineteenth- and twentieth-century imperialism and colonialism helped to produce a structural, persistent and global asymmetry of information and knowledge, in which what is ‘known’ in industrialized countries is contrasted with what is merely ‘believed’ in the global south. At the same time, selected TK was and continues to be appropriated and absorbed into the knowledge systems of the (former) colonizing powers: ‘indigenous cultural knowledge has always been an open treasure box for the unfettered appropriation of items of value to Western civilization’ (Greaves, 1996: 25). The contradiction, which has been frequently pointed out, lies in the literal acceptance of the ‘property’ metaphor in TK discourse by indigenous peoples, and the idea that Western IP is an appropriate instrument to control access to non-Western forms of knowledge that are not fixed in form, not used for trading, nor necessarily innovative:

... intellectual property has a unique European derivation and this informs its modes of classification, identification and operation. Intellectual property law promotes particular cultural interpretations of knowledge, ownership, authorship and property. These do not necessarily correspond to or complement indigenous peoples’ understandings about the role and function of knowledge and knowledge practices. (Anderson, 2010: 1)

The issue of the uncompensated appropriation of TK arose famously in South Africa when the Council for Scientific and Industrial Research (CSIR), having identified the active appetite-suppressing agent in the *hoodia* cactus, applied for local and international patents without taking into account the interests of the impoverished San people, who had used the plant in this way for centuries (Wynberg et al., 2009: 3).

Of course, bio-piracy is probably as old as empire, but it has always required enabling technologies to truly flourish. As soon as the invention of the Wardian case in the 19th century enabled plants to survive long sea journeys, imperial powers began their systematic plundering of the botanical riches of

the global south, culminating in the ‘greatest theft of protected trade secrets that the world has ever known’ (Rose, 2010: 245), i.e. Robert Fortune’s clandestine removal of tea plants from China in 1848–1849. It is evident that this tradition continues to the present day: the CSIR needed ‘high-field nuclear magnetic resonance spectrography’ before it was finally able to identify the relevant molecules in the *hoodia* (Wynberg and Chennells, 2009: 95).

The San-Hoodia case attracted intense media attention and has been the subject of journal articles, dissertations and film documentaries in recent years (Wynberg and Chennells, 2009: 90). The appetite-suppressant qualities of the *hoodia*, known to indigenous people for centuries, were first documented in the scientific literature in the 1930s. After years of research, the CSIR identified and patented the active agents in the *hoodia* plant in the mid-1990s, but made no contact with the San. A natural appetite suppressant attracted the interest of pharmaceutical companies marketing dietary remedies to the overweight, and over the next few years license and royalty agreements were duly concluded between the CSIR and various partners: Phytofarm, Pfizer, Unilever and, in the final stages, Phytofarm again.

In mid-2001, alerted by Rachel Wynberg and others at Biowatch South Africa, the British Sunday newspaper *The Observer* broke the story about the appropriation, with the objective of ‘making us thin’, of what it termed the ‘secret’ of *hoodia* (Wynberg and Chennells, 2009: 101). The issue became an international scandal, in which ‘big pharma’ was seen ripping off the impoverished and marginalized San. The negative publicity effectively forced the CSIR to begin negotiations with a cross-national representation of San people from Botswana and Namibia as well as South Africa. It soon became clear that the situation was complex. Not only the San, but interrelated indigenous groups such as the Nama and the Damara shared knowledge of the *hoodia*’s medicinal properties (Wynberg and Chennells, 2009: 104–106).

In 2003, an agreement was reached in terms of which the San would get 6 per cent of royalties received by the CSIR from Phytofarm (Wynberg and Chennells, 2009: 107). This would increase to 8 per cent when certain milestones were reached, and the revenue would be held by a trust whose objective was to ‘raise the standard of living and well-being of San peoples of southern Africa’ (Wynberg, 2010: 23). There were some obvious problems: the agreement was between the San and the CSIR, not the companies, so the revenue was a percentage of a percentage. In addition, the patent rights were traded around: Pfizer lost interest in 2003 and left the rights with Phytofarm, who then reached agreement with Unilever (Wynberg, 2010: 22–23). Last, the original assumption that *hoodia* would be marketed as a drug turned out to be false; by 2007 it was to be commercialized as a food supplement (Vermeyleen, 2007: 430). It is clear that expectations had risen to unrealistic levels. Such high hopes were inevitably dashed: the San apparently believed ‘that they [were] sitting on a potential goldmine and that they [would] become multi-millionaires overnight’ (Vermeyleen, 2007: 432). Even the modest amounts that have in fact been received bring new problems: by 2010 ‘only US\$100,000 [had] been received by the San Hoodia Trust, but already the challenges of distributing this money [were] immense, and [diverted] energy away from other needs’ (Wynberg, 2010: 24).

One of the problems in negotiations between commercial companies and local ‘communities’ is the lack of definition of what the membership of the community consists of, and who is authorized to speak on its behalf. In Bushbuckridge in Mpumalanga province a solution to this problem was found through a participatory and facilitated process to develop a ‘biocultural community protocol’ (BCP) for local traditional healers, who had little experience of working together. The area is poor, with high levels of unemployment; in addition ‘commercial-level harvesting of medicinal plants for use in South Africa’s cities threatens many [local]

plant species' (Sibuye et al., 2012: 103). The process of facilitating a BCP led to an agreed text that defines the 'community with shared values' and which 'clearly sets out their combined views on conservation and the sustainable use of medicinal plants, including the use of their traditional knowledge' (Sibuye et al., 2012: 107). The healers established the Kukula Traditional Health Practitioners Association, which now has around 300 members, is legally registered as a non-profit, and has negotiated agreements with a local cosmetics company about potential uses of local TK (Sibuye et al., 2012: 101, 106).

Another recent case that attracted some media attention involved the exploitation by a German company, Schwabe Pharmaceuticals, of the medicinal properties of the two very similar plant species *Pelargonium sidoides* and *Pelargonium reniforme*. The pelargonium is used as an ornamental plant in Europe, but has been used in southern Africa to produce a traditional herbal remedy, *umckaloabo*, used to treat symptoms of the common cold such as coughs, as well as diarrhoea and chest pain (European Medicines Agency, 2011: 3). Schwabe had patented extracts from the plant, but in 2010 the patents were challenged before the European Patent Office's Opposition Division by the African Centre for Biosafety (ACB) and a Swiss NGO, representing Eastern Cape communities, and the patents were revoked (McKune, 2010: 4). This was the first successful challenge to a patent by an African organization, but Schwabe announced their intention to appeal the judgement (Parkes, 2010: 5).

The desire to provide IP protection for TK is rooted in an expansionist and maximalist paradigm; similarly, the concept of bio-piracy is located in a discourse of communitarian and nationalist identity politics in which the 'accidents' of birth, geography and local environment are seen to determine rights of 'ownership'. Ironically, 'un-owned' communal knowledge ends up being appropriated, in the name of community, into a Western system that turns it into private property, as the only way of protecting it from complete

alienation. Dutfield has pointed to an analogy between the physical displacement of indigenous peoples by colonialism and the appropriation and privatization of their knowledge:

... open access is the rule for ... traditional knowledge and resources, whereas enclosure is the rule as soon as these are proved to have economic value ... one type of IPR system is being universalized and prioritized to the exclusion of all others, which causes the most legitimate disquiet among those peoples and communities that are least able to benefit from what, to them, is an imposed system. (2004: 59)

Can the global IP system be retro-fitted to the needs of TK? Patel posed this blunt question in 1996, and concluded that there was 'no possibility of modifying the IPR system in the foreseeable future in any way or manner in order to promote the rights of indigenous people ... the door is simply not open' (Patel, 1996: 319). The South African government (or at least the Department of Trade and Industry, the DTI; the Department of Science and Technology, the DST, appears to have its own views) disagrees, and at the time of writing is in the process of pushing legislation through parliament to protect TK. The IP Laws Amendment Bill is the legislative expression of a maximalist position that believes the prevention of bio-piracy to be an urgent matter: as Minister Rob Davies remarked in parliament when introducing the Bill in October 2011: 'failure to act will ... encourage further unabated exploitation of communities' heritages by unscrupulous private interests'. The Minister also referred to on-going but unidentified 'rampant exploitation of IK through the IP system' (Davies, 2011).

The Bill rejects the *sui generis* approach, and instead amends existing legislation – the Performers' Protection Act of 1967, the Copyright Act of 1978, the Trade Marks Act of 1993 and the Designs Act of 1993 – setting up a National Council, a National Database and a trust fund. It also establishes an Alternative Dispute Resolutions (ADR) system. This overall approach attracted strong – perhaps intemperate – criticism from the highly-respected Professor Owen

Dean, probably South Africa's best-known IP attorney in recent decades, and presently holder of the chair in IP law at Stellenbosch University. He described the legislation variously as 'an exercise in futility', 'an outright slap-stick farce' and 'a proverbial white elephant' (Dean, 2011). By mid-2012 he had drafted an alternative statute, which was tabled in the legislature in 2013 by the opposition Democratic Alliance (Jooste, 2013).

The DST had earlier taken a different line, publishing a policy document on TK systems in which the emphasis was on defensive measures to protect knowledge from appropriation. This document cautiously identified the establishment of a database of TK as an efficient method of anchoring TK in the public domain, with *sui generis* legislation – to be administered by the DTI – required as well (DST, 2005: 21, 29). The multi-pronged strategy recommended in the DST document involved four steps: the recording of IK by IK holders; minimum standards for benefit sharing; an agreement on public domain declarations of knowledge; and an agreement on the certification of IK holders and their IK rights (DST, 2005: 29).

TRADEMARK AND GI DISPUTES IN SOUTH AFRICA

The Trademarks Act (no. 194 of 1993), together with case law, governs this area of IP in South Africa. Protection is extended to registered trademarks under the act, and to some extent even to unregistered trademarks under common law. Importantly, trademark use is also governed by other legislation, such as the Counterfeit Goods Act (no. 37 of 1997), the Consumer Protection Act (no. 68 of 2008), and the Companies Act (no. 71 of 2008) (Wimpey, 2012: 255–256). The Trademarks Act came into force in May 1995, introducing 'two new forms of trademark infringement, namely: protection of well-known trademarks ... and the anti-dilution provisions' (Webster, 2005). The

two most important trademark cases since the end of apartheid have hinged on the clarification of these principles, but have not resulted in an entirely coherent jurisprudence, as lower courts have not necessarily followed the principles established by the Constitutional Court in the second case discussed here. Indeed, the contradictory trends discernible in the recent jurisprudence have been described by one specialist as constituting 'a fundamental collision of values' within the judiciary (Wheeldon, 2007: 253).

South Africa is a member of the Paris Convention for the Protection of Industrial Property (1883), administered by WIPO, but has not acceded to the Madrid Agreement Concerning the International Registration of Marks (1891). The national register of trademarks is maintained by the CIPC. Applications to register trademarks are examined and registration may be renewed every ten years upon payment of a fee, a process that may be repeated indefinitely. South African trademark law includes non-use provisions, which provide for the de-registration of a trademark if it was not registered in good faith (i.e. with an intention to use it), if it has not been used for a period of five years, or if the owner has died or gone out of business. The particular issue of the lapsing and removal of marks, and whether or not international brands were 'well-known' locally, was the basis for the first major trademark dispute of the post-apartheid era, a group of closely-interrelated cases of which the best-known is *McDonalds Corporation v. Joburgers Drive-Inn Restaurant*.

The movement to enforce sanctions on South Africa was an important weapon in the struggle against apartheid, especially in the 1980s. The objective was to isolate the country by enforcing economic, academic, cultural and sporting boycotts, including pressure on international brands to disinvest. In the United States, the Sullivan Principles played an important role, requiring US companies to ensure non-discrimination in their South African operations. These struggles, especially the disinvestment campaign, succeeded

in triggering capital flight from the country and played an important part in the eventual collapse of apartheid.

After the advent of non-racial democracy with the 1994 elections, several large companies that had disinvested decided either to return to South Africa or to begin trading. In the latter group was the hamburger franchise McDonalds, which had registered a range of trademarks in South Africa in 1968, and had renewed them at regular intervals, although up to 1993 it had never actually used any of them. The company claimed that it believed in respecting sanctions against apartheid and had been awaiting an appropriate political moment to enter the market (Dean, 1996b: 409).

The South African fast food market in the 1990s was dominated by 'several strong home-grown brands, specifically catering to South African tastes' and was to prove a harder nut to crack than the company had anticipated (*The Economist*, 1997). Indeed, the battles over trademark registration were only one aspect of a difficult journey to local acceptance by a corporation that at least initially failed to take into account the specific character of the new market that it was entering. Aspects of this specificity included black consumers' overwhelming preference for chicken over beef products. South Africans in general found McDonalds' burgers overpriced and under-sized (*The Economist*, 1997: 80). The path to success – in the marketplace as well as in the IP arena – was neither simple nor straightforward.

In this context, a South African company, Joburgers Drive-Inn Restaurant, applied in 1993 to have McDonalds' trademarks de-registered and re-registered in its own name in order to use them in South Africa. Joburgers was the franchiser of a successful local fast food chain, Chicken Licken. McDonalds immediately and successfully sued Joburgers for infringement, and obtained an interdict against their future use of any of the disputed marks (Dean, 1996b: 409). There is, incidentally, no tradition of arbitration of IP disputes in the South African system; in essence, everything is litigated (Alberts and Brand, 2008).

Joburgers subsequently acquired Asian Dawn Investments, which owned an existing restaurant in Durban called MacDonalDs, with the minor spelling variation. The US corporation quickly applied to prevent Joburgers from continuing to trade under that name as well; in response, Joburgers sold the company on to a third party, Dax, which operated other Chicken Licken franchises, and which in due course applied to register McDonalds' trademarks in its own name (Dean, 1996b: 410).

In May 1995, while these matters dragged on, the new Trademarks Act came into force, including the provision allowing the owner of a 'well-known' foreign trademark to sue for infringements. McDonalds instituted proceedings against both Joburgers and Dax on the grounds that its trademarks were indeed well-known – the idea that they might not be was considered 'preposterous' (*The Economist*, 1997: 79). When the case was heard in the Transvaal Provincial Division in 1996, McDonalds produced a couple of market surveys, conducted in the white suburbs of Johannesburg and Durban, as evidence in support of the claim that their marks were well known (Dean, 1996a: 102). Brand recognition was around 80 per cent. However, the judge was unconvinced, and ruled that McDonalds had failed to show that the marks were well known to all groups at all levels of society, across the whole country, or that its use 'by other parties would be likely to cause deception or confusion' (Dean, 1996b: 414). The judgment in effect said that McDonalds was not a well-known brand in South Africa, and that the trademarks must be cancelled.

Opinion was sharply divided on this decision, especially its impact on foreign attitudes towards South Africa. Visser, for example, regarded McDonalds' failure to demonstrate serious intention to use the mark in South Africa itself or through licensees as 'fatal' (1996: 16). Both Visser and Job noted that failure was also the result of the weakness of the survey evidence that McDonalds presented in court (Visser, 1996: 16; Job 1996b: 317). Indeed, Job lamented the fact that media coverage of the case had created

the *false* impression that ‘South African law and its courts pay scant regard to the protection of foreign trade marks and foreign investors are now left to the mercy of unscrupulous local entrepreneurs’ (1996b: 317). Dean, on the other hand, made no bones about his disapproval of the lower court judgment and endorsed the subsequent reversal on appeal, referring in articles published at the time to ‘trademark hijackers’, and ‘rustlers’ (1996a, 1996b). He reported that the lower court ruling was

... greeted with incredulity in trademark legal and business circles around the world, particularly in the United States of America. It had far-reaching and significant legal, political, and commercial implications, and gave rise to the contention that South African trade-mark law does not comply with international standards for protecting foreign trademarks. (Dean, 1996b: 408)

The judgment was soon reversed in the Supreme Court of Appeal, which decided that it had been proved that the trademarks were ‘well known’, since a sector of the population was aware of them, and dismissed the application to have the trademarks removed from the register (Job, 1996a: 677). This outcome was described as ‘rather unexpected’, and the appeal court’s reasoning left some issues unresolved. For example, did a failure to trade in South Africa because of sanctions in fact constitute ‘exceptional circumstances’; and did McDonalds’ renewals of their unused trademarks amount to ‘abuse’ of the system? (Job, 1996a: 680).

Contemporary newspaper reports allege that these decisions had an impact on investor confidence, although the evidence remains largely anecdotal. What is clear is that there was widespread concern among IP professionals about national reputation (something that can still be detected in the discourse even today). For example, the president of the South African Institute of Intellectual Property Law (SAIPL) commented in September 1996 that the appeal judgment would help to dispel the perception that South Africans were ‘trademark bandits’ and would encourage foreign companies to go to court to protect their IPRs

(Russell, 1996: 11). Similarly, the City of Cape Town was then preparing an eventually unsuccessful bid to host the 2004 Olympic Games, and it was widely believed that the International Olympic Committee took local IP enforcement standards into consideration in making its decisions (Zaina, 1996: 9). The subsequent ruthless exploitation by FIFA of its trademarks, even before the World Cup in 2010, with over 500 registered or applied for, would tend to support this view (Kelbrick, 2008: 328).

The second major piece of trademark jurisprudence to emerge from South African courts is the Laugh It Off case, which was finally decided on appeal in a Constitutional Court judgment in May 2005. This case (2006 (1) SA 144 (CC)) raised the issue of IP law versus constitutionally-guaranteed freedom of expression, in the broader context of the practice of ‘culture-jamming’, a term coined in the mid-1980s to describe the process of hacking into corporate communications (such as trademarks) to offer a counter-message (Haupt, 2008: 127–128). In this particular case, a small South African company, Laugh It Off Promotions, had produced a t-shirt which parodied the trademark of Carling Black Label beer, produced in South Africa by South African Breweries (SAB). The shirt took the original trademark and re-worked it; thus the phrase ‘Carling Black Label Beer’ became ‘Black Labour, White Guilt’, and the subordinate text was changed to read ‘Africa’s lusty, lively exploitation since 1652. No regard given worldwide’. The success of such a subversion of the original message, as Haupt points out, depends on public familiarity with the brand and its marketing methods (2008: 129). Laugh It Off had also produced shirts parodying such brands as Standard Bank, Diesel and Lego, but the reaction from these companies was mixed: First National Bank reportedly bought the shirts and gave them to its employees (Haupt, 2008: 129).

SAB were much less accommodating however, and sought a remedy for dilution of its trademark through the courts. Both the High Court of South Africa and the Supreme Court

of Appeal found in favour of SAB, commenting that the race-related content bordered on hate speech. The case was finally appealed to the Constitutional Court. Although section 34(1)(c) of the Trademarks Act (no. 194 of 1993) protects trademarks from 'detrimental' use, the Court decided that the section had to be interpreted in conjunction with the constitutional guarantee of freedom of expression. SAB had failed to produce any evidence that harm to its brand would result from the sale of the shirt, merely arguing that the harm was self-evident since the shirt associated the brand with racism. The 'discomfort of a trademark proprietor with criticism' was insufficient (Rens, 2005: 21).

This innovative Constitutional Court judgment was not generally well received by specialist IP lawyers in South Africa. A representative of one of the country's leading firms described it as 'a serious setback for any trade mark proprietor wishing to enforce rights in its well-known trade marks' (Webster, 2005). Another practitioner of IP law argued that the impact of the Constitutional Court decision was effectively to create a new avenue for appeal in trademark matters, beyond the Supreme Court of Appeal (Dean, 2005: 11). Indeed, Dean suggested that the effect of the judgment was to 'shake the foundations of trade mark law as known and practiced in the past' (2005: 11). Commentators later expressed doubt over whether IPR cases were constitutional issues at all, describing the Constitutional Court as 'ill-suited' for IP cases, given the inadequate 'IPR expertise and ... commercial litigation skills' of the justices (Harms and Dean, 2012: 105).

Historically, geographical indications (GIs) are the oldest form of trademark, a rough and ready guarantee of quality based on public knowledge of regional reputation. Examples of this were oranges from Seville or wine from Burgundy (Blakeney, 2006: 295–296). GIs are included in the TRIPS regime, but there is little international agreement about this form of protection, especially between the US and the EU, but also between industrialized and developing countries:

... many problems about the legal treatment and level of protection of GIs continue to be debated ... This has been a long-term source of international controversy ... it may be true that GIs are similar to trademarks in that they function as source indicators, [but] these two different types of intellectual property rights are governed by very divergent systems of laws and bodies of beliefs ... [some] countries disregard the validity of such protection because such names do not deserve protection under trademark law and many product names are considered to be generic terms ... (Cortès Martín, 2004: 287–288)

The absence of clear international agreements on GI standards has exposed South African producers to risk on at least two occasions. Rooibos [*Afrikaans*: 'red bush'] tea is a popular caffeine-free herbal beverage that South Africa exports to the EU and the US. It is grown only in the Cederberg region of the Western Cape, mainly by small-scale black and coloured farmers, and about half the annual production of around 12,000 tons is exported. It is also used in some cosmetic products. In the 1990s, a US company, Burke International, registered 'rooibos' as a trademark, at a time when the tea was virtually unknown in the North American market. Subsequently the company began to demand royalties from tea importers, and in 2004 the matter went to court. Burke agreed to limit its control to cosmetics (Gardiner, 2004: 1), but this was refused. In January 2005 a US court ruled the trademark invalid, and it was voluntarily surrendered six months later (AHPA, 2005).

In 2010 the NGO Natural Justice launched a campaign to draw attention to five patent applications lodged in 2009 by Nestlé related to the use of rooibos and honeybush plants in cosmetics applications. The patents conflicted with the requirements of South African and international legislation, and after negative media coverage the company dropped the applications (Natural Justice, 2011).

In March 2013 the issue arose yet again, this time in France, where *Compagnie de Trucy* applied to register both 'rooibos' and 'South African rooibos' as trademarks (Marais, 2013b: 9). The move attracted

wide press coverage in South Africa. The French position, in summary, was that in the absence of protection in South Africa itself, such protection could not reasonably be claimed in other countries. At the time of writing, the DTI had intervened, requesting the EU to grant protection not only for rooibos, but also for honeybush tea and Karoo lamb (Marais, 2013a: 1). In an analysis of the question, including the fact that it has now surfaced for the second time, Dean suggested a solution under the Merchandise Marks Act of 1941, which allows for the prohibition of the use of a particular word in any trademark, and would amount to local protection. Dean also criticized the government for what he called its failure to take any 'concrete or effective steps to protect and control the use of this term in South Africa or elsewhere' (Dean, 2013b: 6); another report in a popular magazine referred to the government as 'weak' on the issue (McGarrity, 2013: 20).

However, in this case as in others, there are moralizing narratives at work, with casts of characters assigned their roles as heroes or villains. The dominant rhetorical representation has rapacious foreign companies (whether French or American) appropriating GIs to the disadvantage of poor black and coloured farmers without agency, and incompetent government bureaucrats fumbling for a solution. This is not to say that the narrative is a misrepresentation, merely that the relationship of rooibos producers and exporters to their IPRs is more complex than such oversimplification allows. There are poor black and coloured farmers, certainly, but the rooibos export market is dominated by three local firms (including a cosmetics company) as well as several smaller ones (Biénabe et al., 2009: 65). These smaller players have also been very active in claiming IPRs. In fact, three years ago there were 13 rooibos-related trademarks either registered or applied for in the United Kingdom; 16 in the United States; five in Australia; five in Germany; and nine in South Africa itself (Biénabe et al., 2009: 78–82).

COMPETING NARRATIVES IN SOUTH AFRICAN COPYRIGHT

South African copyright law is comprehensively covered in Dean's authoritative *Handbook of South African Copyright Law*, a loose-leaf publication that is regularly updated; the most recent revision was issued in April 2012. The *Handbook* includes a synopsis of the law of copyright, a digest of authorities, a compendium of legislation and a section on precedents (Dean, 2012). Given the current availability of Dean's book, therefore, this section will focus on aspects of the political economy and discourse of copyright. Competing narratives have emerged around the most famous of all South African copyright disputes, the Solomon Linda case; copyright protection is contested terrain in education, and government policy in this area, as in others, remains seriously underdeveloped.

The current South African legislation, the Copyright Act no. 98 of 1978, is outdated. It has been amended eight times, most recently by the Copyright Amendment Act no. 38 of 1997, which incorporated TRIPS-related alterations to the law. Currently, the legislation lists nine categories of work eligible for protection, including computer programs. South Africa has not submitted to pressure to harmonize with US practice, and the copyright term remains at the author's lifetime plus fifty years. Government publications are also protected for fifty years, except for 'official texts of a legislative, administrative or legal nature' (section 12(8)(a) of the Act). There is no presumption of copyright in South African law. The South African publishing industry is highly developed, with a strong emphasis on the English language and to some extent the Afrikaans markets, but with little activity in widely-spoken African languages such as isiZulu or seSotho other than in the school textbook market. Annual turnover for the industry in 2011 was calculated at R3.6 billion (US\$498 million) (PASA, 2011: 210).

The best-known South African copyright case is the lawsuit brought against the Disney Corporation in 2004 by the daughters of

Solomon Linda, a black South African musician who in 1938 had written and recorded a song, *Mbube*. This later became the basis for a series of hits by US musicians, none of whom credited Linda or paid any royalties to him or his descendants. The song was also used in the Disney animated film *The Lion King*. In 2000 the story was broken in a *Rolling Stone* article by Rian Malan, who estimated that *Mbube* earned about US\$15 million just in the film version. In the ensuing court case, with backing from the South African government, Owen Dean, then still practicing rather than teaching law, relied on a little-noticed quirk of the Copyright Act of 1916, which incorporated the Imperial Copyright Act of 1911, and under which Linda's daughters had re-acquired rights to their father's song. An out-of-court settlement was reached in early 2006, for an undisclosed amount and the right to future royalties (Dean, 2006: 10).

This narrative has been told many times and is regarded as a triumph by most commentators. Essentially, the moral of the tale is that the IP system may be abused sometimes, but it can also deliver just outcomes. The *New York Times*, for example, headlined a story about the settlement, published on 22 March 2006, 'In the jungle, the unjust jungle, a small victory'. Dean himself wrote that 'from a South African perspective the saga has a happy ending and there is some pride in having successfully championed the cause of the small creator among entertainment industry giants' (2006: 10). In a recent assessment, he added that this was 'a rags-to-riches fairy tale ... in true fairy tale fashion, the victors ought to live happily ever after' (Dean, 2013a). 'Ought to', perhaps: but there is some evidence that even at the most mundane level things did not work out so well. Some years later, a press report suggested that the Linda family was seriously dissatisfied and relations between them and Dean had soured (Oliphant, 2009c: 6).

There are other possible readings of the story, which do not necessarily serve to legitimize the IP status quo. As Ovesen and Haupt point out, the de-racialized rhetorical

structure of the Linda case fits the 'grand narrative' of post-apartheid South Africa in which justice is eventually done, however belatedly and at whatever cost. The problem is that the property relations and the structures of power

... that enable the continuation of huge socio-economic disparities are still in place ... key problems ... persist in dominant assumptions about intellectual property, the ill-treatment of countless other black musicians during apartheid, as well as racialised class inequalities that persist nearly two decades after apartheid. (Ovesen and Haupt, 2011: 74)

Erlmann argues that the settlement had an impact on 'African cultural industries', not as a correction of injustice, but as the perpetuation of 'power imbalances in post-apartheid South Africa ... both in terms of judicial practice and, more especially, in light of the persistence of race in public discourse pertaining to the appropriation of the country's cultural heritage' (Erlmann, forthcoming). The Linda case provides ideological support for the perpetuation of existing power and property relations. Both the government and the private sector want South Africa to become a 'player' in global IP industries, an effort that

... involves and, at the same time, legitimizes the massive expansion of proprietary rights to cultural practices and artifacts ... Increasingly this IP expansionism is supplemented by the thinly veiled claim that the individual rewards to be reaped from a new spirit of musical entrepreneurship by far outweigh the broader social goods realized in communal, 'traditional' forms of cultural practice as a source of innovation and economic growth. (Erlmann, forthcoming)

The misleadingly titled Copyright Review Commission (CRC) chaired by Judge Ian G. Farlam was set up by the DTI in November 2010 to investigate music royalties, and submitted its report in 2011. When it was established, 'nine years after the enactment of needle-time legislation in 2002, *not a cent had been paid in royalties to musicians and record companies*' (CRC, 2011: 3, emphasis added) and the CRC's primary task was to find out why. The amounts involved totalled

‘millions of rand’ (CRC, 2011: 3). The report concluded that the problem lay in legislation that failed to protect rights-holders sufficiently, but evidence in court cases has pointed to less comforting explanations. The Southern African Music Rights Organization (SAMRO) was sued in early 2009 over royalties allegedly owed to the deceased South African singing star Brenda Fassie. Despite a string of hits, Fassie had received only a few cents in royalties from SAMRO between 1989 and 2003 (Oliphant, 2009a: 3); a former SAMRO CEO commented drily that the record business was ‘a mafia industry’ (Oliphant, 2009b: 3).

The recording industry is not the only arena of struggle over copyright. Students at South African universities and colleges, like their counterparts elsewhere, need but often cannot gain access to affordable learning materials, such as textbooks and course readers (collections of photocopied articles, chapters and excerpts put together by the lecturers themselves). Over the past decade or so, another South African collecting society, the Dramatic, Artistic and Literary Rights Organization (DALRO), has persuaded many universities either to adopt transactional processing of permissions or, more efficiently, to sign blanket licences for the production of course packs, which has ‘progressively ... brought [the problem] under control’ (PICC, 2004: 14), although sometimes at the cost of giving up fair dealing rights. But the market for complete photocopied textbooks continues to thrive, since the

... prevailing form of infringement [is] the unlawful copying by students of whole books as a substitute for buying them. Most piracy takes place off campus, in copy shops usually strategically situated near the gates of the university or technikon ... Publishers are aware of schools in which entire textbooks are being copied and sold by teachers and cases taken up by publishers have revealed wholesale production of pirated, photocopied textbooks being supplied to state schools. (PICC, 2004: 14)

The cost of the original textbooks is a major factor favouring the production of these

infringing photocopies (Luthuli, 2012: 7). In recent years SAFACT has largely taken over from DALRO in running raids and sting operations against the copy shops. This may be an indication either of DALRO’s limited capacity and general unwillingness to engage in litigation, or of its new orientation as a ‘copyright asset management’ organization rather than a mere collecting society (Kennedy, 2012: 7).

There has been no landmark Kinko-type case in South Africa to determine the limits of fair dealing (see *Basic Books v Kinko’s* (758 F. Supp. 1522)), and collecting societies and universities alike tend to avoid litigation. This is not to say that prosecutions never happen; in 1996, in a high-profile action, DALRO went after Prontaprint, a copy shop chain that was offering students pre-bound photocopies of standard textbooks (*Mail and Guardian*, 1996: 10).

With the growth of the loosely-structured global ‘Access to Knowledge’ or A2K movement, however, perspectives have begun to shift. A2K takes as axiomatic the idea that access to knowledge is fundamental to social and economic development and to the exercise of other rights. Hence, it has itself the character of a fundamental human right (Armstrong et al., 2010: 1, 128, 205). The role of the copyright system in limiting rather than facilitating access, especially in poor countries, has been the subject of research by such groups as the heterogeneous Copy South research network, which included South African participants (Story et al., 2006). Similarly, the South African Open Copyright Review was carried out in 2008, and showed that it is almost impossible for a South African citizen to live a copyright-compliant life (Rens et al., 2008: 4–5). The Review argued that permitting parallel imports of non-medical products would have a major impact in facilitating access to learning materials (Rens et al., 2008: 73).

The African Copyright and Access to Knowledge (ACA2K) research network investigated access to learning materials in eight African countries – Egypt, Ghana,

Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda – and found that existing fair use and fair dealing exemptions are inadequate in meeting the needs of learners (Armstrong et al., 2010). The project found that legislation in six of the eight countries studied included provisions forbidding the ‘circumvention’ of technological protection measures (TPMs). These laws made it illegal for users to perform, in the digital environment, actions that would otherwise be entirely permissible (Schönwetter and Ncube, 2011: 65). Indeed, in the case of South Africa, the Electronic Communications and Transactions Act (no. 25 of 2002) has established standards of such rigidity that they are considered stronger than those in force in the US:

It is incomprehensible that South Africa, a developing country, should opt for a system of protecting TPMs that is far more destructive of research and education than the systems adopted in the United States and Europe. Were the United States to conclude a free trade agreement with the Southern African Customs Union (SACU), and were such agreement to mandate the adoption of protection of TPMs along American lines, researchers and educators in South Africa would be better off than they are now. It is a supreme irony that the South African negotiators have been resisting the inclusion of such protection in an FTA, probably because the left hand (one government department) does not know what the right hand (another government department) has done. (Visser, 2006: 62, emphasis added)

It is probably too early to comment on the impact of the ‘Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities’ that was signed in June 2013 by 51 countries. The treaty, which has been widely welcomed, formalizes the reproduction of copyright-protected materials without the permission of the rights-holder for the use of the visually-impaired, and makes it legal to transport such copies from jurisdiction to jurisdiction. It is worth noting that South Africa was not one of the 51 signatories; the South African delegation to the conference that agreed the document was headed only by a deputy minister (who was

not from the DTI); and last, the treaty is not mentioned at all in the government’s draft IP policy published in September 2013 (DTI, 2013). This last omission was criticized by at least one commentator (Low, 2013).

CONCEPTUALIZING IP ANEW: THE SOUTH AFRICAN ROLE

An analysis of the different sectors of South African IP shows various narratives at work, each one largely self-contained and failing to intersect with the others. There is a dominant ‘industry discourse’, driven by the interests of multi-national entertainment corporations, relying on questionable data on piracy levels and pushing for strict enforcement practices and the criminalization of infringement. The general public is bombarded with propaganda equating infringement with theft; ‘newspaper readers and TV audiences ... are exposed to a flood of industry-generated stories about the negative effects of piracy’ (Primo and Lloyd, 2011: 120). Unsurprisingly, however, there is evidence of

... a significant disconnect between the media narrative and actual consumer attitudes, which show much greater diversity and widespread tolerance of piracy ... pirate practices [are] completely normalized and integrated into daily life. (Primo and Lloyd, 2011: 120–121)

There is also resistance to the enforcement agenda for IP infringements from the massively over-stretched judicial system, which generally imposes lenient sentences and fines rather than the more stringent penalties demanded by industry rhetoric.

The discourse of the community of IP practitioners reveals anxiety about South Africa’s global status and a commitment to upholding the letter of the law, but little interest in interrogating basic assumptions about IP. There is academic analysis from a legal-realist perspective, concerned to discover what the impact of the IP system is on society at large. Finally, there are civil society organizations

impatient with the failure of IP to take into account the urgent health and other needs of the desperately poor, or to respect fundamental human rights when profits are at stake.

This has as much to do with the globalization of IP as a regime as it does with specifically South African conditions. The doctrine of national treatment, established in the Berne Convention in 1886, has a long history; both domestic and foreign copyrighted works are equally protected in a given jurisdiction by that jurisdiction's rules. Holders of patents, by contrast, have no easy way of enforcing their rights across national borders (Trimble, 2012: 81–125). What both systems share, however, is the idea that national jurisdictions should establish what is protected, and the question, to what extent? In reality, this is no longer entirely the case. Despite formal recognition of 'national treatment' by TRIPS and the WTO, 'harmonization' is now a much more important concept, meaning the adoption of US standards for copyright terms, anti-circumvention and enforcement measures. IP law is fast becoming a nomothetic, one-size-fits all, global system:

States around the globe are converging upon the same set of intellectual property standards in areas of law such as copyright, patents, trademarks and industrial designs, as well as upon the remedies available for the enforcement of these rights. Moreover, in many cases states are shifting to higher standards than previously prevailed in their domestic law – longer terms of protection, fewer exceptions to the scope of rights and sometimes new rights ... the case for the globalisation of intellectual property rights is anything but persuasive ... [and] intellectual property rules may well be an obstacle to development. (Drahos, 2002: 1, emphasis added)

The WIPO Development Agenda represents a push-back from the countries of the global south in the opposite direction. The history of the development agenda has been told before (e.g. May, 2007a, 2007b), and is dealt with in detail elsewhere in this volume; disappointingly, South Africa has not played a leading role. WIPO's job, as a specialized UN agency, has always been to *promote* IP on the assumption that strong IP supports development. The Development Agenda, by

contrast, is based on the idea that, as an agency of the United Nations, WIPO can and should only be promoting IP *to the extent that it supports the developmental objectives of the UN as a whole* (May, 2007b: 76). Nevertheless, the Agenda is a cautious rather than radical programme; it seeks

... neither to generally reduce the protection for IPRs, nor to suggest that intellectual property [is] the only problem. Rather the Development Agenda seeks a re-orientation of the WIPO towards a more developmental set of concerns, and sets out the argument that the protection and enforcement of IPRs cannot be seen as an end in itself. (May, 2007b: 78)

In this context, is there a shift within South Africa towards a more nuanced understanding and application of IP, an IP that in whatever way supports economic development? Some of the South African jurisprudence seems to indicate that this may be the case; but government policy remains confused and confusing, and is seen by many as uncritically maximalist. The government's position remains that the construction of an appropriately developmental national IP system is best achieved in the context of South Africa's BRICS membership, and using the opportunities of the WIPO development agenda (Davies interview, 2013).

There are indications of government support for a new continent-wide IP organization, the Pan-African IP Organization (PAIPO), supported by the African Union (Daniels, 2013). It is possible that South Africa, which does not belong to either of the two existing African IP bodies (Anglophone ARIPO and Francophone OAPI), will lead the new organization. The draft statute of PAIPO – 'drafted by true believers of IP-maximalist ideology' (Baker 2012) – has been sharply criticized for its failure to take account of any of 'the challenges facing Africa with respect to access to medicines and learning materials' (Ncube and Lailtaika, 2013: 116).

The South African IP landscape is not a well-cultivated garden in which order reigns; to mix metaphors, it is instead a cacophonous environment in which different voices strive

to be heard above the others, and in which agreement about the social, economic and legal function of the elements of IP is rarely found. It is, above all, a fiercely contested terrain, and it is clear that popular awareness of its importance – first of all in public health and then in education – is rapidly growing. It is unlikely that IP will ever again be seen, in South Africa at least, as a boring technical subject best left to the specialists.

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