INTRODUCTION

As will be apparent from perusing the articles posted on the IPSTELL blog (www.blogs.sun.ac.za/ipstell) indicated by the keywords “traditional knowledge”, The Vine Oracle (the voice of the Stellenbosch Chair of Intellectual Property) has been forthright in its criticism and condemnation of the Department of Trade and Industry’s Intellectual Property Laws Amendment Bill which seeks to introduce a special form of protection for so-called “traditional knowledge” into each of the Trade Marks, Copyright, Designs and Performance Protection Acts (the Bill is commonly known as the “Traditional Knowledge Bill”). The Vine Oracle has been the proponent of the viewpoint that, if some form of special protection for traditional knowledge is required, this should be provided in a sui generis statute which is customised to meet the requirements and characteristics of the subject matter sought to be protected.

The desired type of protection cannot be achieved by amending the aforementioned intellectual property statutes, without doing serious damage to the basic tenets of such statutes, because specialised protection for traditional knowledge is not compatible with the fundamental principles of intellectual property law as embodied in these statutes and the desired objective is incapable of being achieved for this reason. The Vine Oracle has gone as far as formulating a draft sui
generis bill, which can be found by perusing its earlier article entitled “NEW Traditional Knowledge Bill – Sui Generis Protection For TK.”

INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INTELLECTUAL PROPERTY

One of the foremost non-governmental expert intellectual property institutions is The International Association for the Protection of Intellectual Property (AIPPI). It describes itself on its website as “The world’s leading international organisation dedicated to the development and improvement of the regimes for the protection of intellectual property. It is a politically neutral, non-profit organisation, domiciled in Switzerland which currently has almost 9 000 members representing more than 100 countries. The objective of AIPPI is to improve and promote the protection of intellectual property on both an international and national basis. It pursues its objective by working for the development, expansion and improvement of international and regional treaties and agreements and also of national laws relating to intellectual property.”

The AIPPI dates from 1897 and its membership includes lawyers, patent attorneys, judges, scientists, engineers and academics. It is generally regarded as one of the most authoritative voices on matters pertaining to intellectual property and is held in high regard by the World Intellectual Property Organisation (WIPO).

The AIPPI recently held its 43rd World Intellectual Property Congress in Seoul, Republic of Korea, from 20 to 23 October 2012. One of the Working Sessions at the congress was devoted to the question of “The relevance of traditional knowledge to intellectual property law”.

GAUGING INTERNATIONAL OPINION

Given the writer’s interest in the issue of protection of traditional knowledge and in the field of Intellectual property, he decided to participate in the congress in Seoul with a view to doing some soul searching (not to be confused with exploring the city) in regard to The Vine Oracle’s attitude towards the Traditional Knowledge Bill and the issue of traditional knowledge in general. The question which arose in the writer’s mind was whether The Vine Oracle was being unfair in its attitude towards the Bill and whether its views were in or out of harmony with the international thinking on the question of the relationship between intellectual property and special protection
for traditional knowledge. The writer consequently attended the congress and took part in the discussions and deliberations concerning the relevance of traditional knowledge to intellectual property law. It transpired that many of the delegates participating in the TK discussions were familiar with the South African Traditional Knowledge Bill and had a very low estimation of it, even holding it out to ridicule! It was a source of some embarrassment to the writer to be seen as the representative of a country that had spawned what was perceived to be such poor legislation. The Traditional Knowledge Bill was held up as an example of how not to go about providing for specialised protection or traditional knowledge, and more particularly expressions of folk law which is, of course, what the Bill is really about. To this extent, the writer found that The Vine Oracle’s views were not only shared by the meeting, but indeed even stronger criticism of the Bill than that offered by The Vine Oracle was expressed.

ADOPTION OF RESOLUTION

The purpose of the working session was to prepare a resolution for adoption by the congress reflecting the view of the AIPPI as an organisation on the issue of traditional knowledge.

The workshop duly formulated and prepared a resolution which was adopted at a plenary session of the congress. The resolution thus reflects the official view of the organisation and the collective view of its 100 or so national groups. These national groups reflect a microcosm of the international community and they include many developing, and developed, countries which have a rich heritage of traditional knowledge. They range from South American to European and Oriental countries. Countries, like South Africa, having a western culture as well as an indigenous culture (e.g. Canada, New Zealand, Peru, Australia, India and the like) formed an important component of the group.

The full text of the resolution as adopted is available from the AIPPI website (https://www.aippi.org/download/commitees/232/RS232English.pdf). The product of all the Working Committees on Q232, the summary reports, resolutions and group reports per nation are available from the listing of all AIPPI Committees (https://www.aippi.org/?sel=questions&sub=listingcommittees&viewQ=232#232).
The main thrust of the resolution was to arrive at a harmonised definition of the term “traditional knowledge” with a view to achieving a harmonised international approach to the protection of traditional knowledge.

As a precursor to the congress, the various national groups had been asked to express their views on the manner in which traditional knowledge should be protected. The majority of the groups considered that so-called “defensive protection” of traditional knowledge is in principle desirable but there was no majority in favour of so-called “positive protection”. The draft resolution was prepared taking these considerations into account.

**SPECTRUM OF VIEWS**

In general, views on the nature and extent of protection for traditional knowledge cover a wide spectrum. On the “left wing” of the spectrum are those who take the view that existing intellectual property law gives adequate protection, to the degree warranted, to traditional knowledge and therefore that no special protection is required; moving towards the centre, there are those who hold the view that the existing laws are adequate, but that provision should be made to ensure that where rights are claimed in property by a third party (for instance by registering a patent or design), the rights of traditional communities to continue using their TK undisturbed should be entrenched – this is the so called “defensive protection” of traditional knowledge; moving away from the centre, towards the “right wing” of the spectrum, there are those who believe that some form of special protection for traditional knowledge – so called “positive protection” – may be appropriate, but such protection should be granted in customised or *sui generis* legislation; finally, on the far “right wing” are those who favour amending existing intellectual property laws so as to grant special protection for traditional knowledge (the South African government is the only known proponent of this view).

It became abundantly clear from the discussions that by far the majority of the delegates were of a left wing persuasion favouring no special protection for traditional knowledge, save perhaps for protection of a defensive nature. There were few supporters of the right wing approach of adopting *sui generis* legislation, while no-one subscribed to the far right wing position of amending existing IP legislation to cater specially for traditional knowledge. Needless to say, the writer did not offer any support for the far right wing view and inclined towards the majority view.
WIPO is, of course, sponsoring the *sui generis* legislation approach and this factor was given due recognition by the meeting.

In addition to adopting a harmonised definition of traditional knowledge, the resolution provided that harmonised treatment of TK internationally is to be encouraged, that legal certainty is desirable, protection for TK should be aligned with the principles of existing IP systems, and that this may be achieved by way of *sui generis* treatment. Finally the organisation resolved that defensive protection of TK is to be encouraged and that the specifics of this should be the subject of further study.

**CONCLUSION**

The message that came through loud and clear from the congress was that the mainstream of international opinion on the subject of traditional knowledge is that nothing more than defensive protection is required and that, if it is desired to go further than this, special protection should be provided for in *sui generis* legislation. In the final analysis, it became clear to the writer that the view that The Vine Oracle holds, and has been propounding, is in keeping with international thinking on the subject and, if anything, it inclines towards a somewhat right wing approach by international standards. Its viewpoint that the South African government’s approach to the protection of traditional knowledge is way out of line and is untenable is a generally prevailing one. The far right wing view is supported by no-one and, on the contrary, is simply dismissed. The Vine Oracle can therefore be content in the knowledge that its criticism and rejection of the Traditional Knowledge Bill is reasonable and is in harmony with the general informed international view. There is thus every justification for attempting to apply the brakes to the runaway train being driven by the Department of Trade and Industry.

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