

# IP: POLITICS AND BEYOND

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September 2017

## IP: POLITICS AND BEYOND

Inaugural lecture delivered on 28 September 2017

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Editor: Annette van Tonder  
Printing: AFRICAN SUN MeDIA  
ISBN: 978-0-7972-1709-6  
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## ABOUT THE AUTHOR



Sadulla Karjiker was born on 6 January 1970 in Cape Town. He attended the St. Raphael's RC Primary School in Athlone. His secondary schooling was split due, in part, to the 1985 student protests; it started at St. Columba's High School (CBC), in Athlone, and was completed at Livingstone High School in Claremont.

He commenced his tertiary studies at the University of Cape Town, where he completed his BSc (Mathematics) and LLB degrees. In January 1995, he commenced his articles of clerkship with Bernadt Vukic Potash & Getz (BVP&G) in Cape Town. He interrupted his articles in August 1996 to take up the Harry Crossley Bursary and the Wilfred Kramer Law Grant to do his LLM at Queen Mary and Westfield College, University of London. After returning to South Africa he completed his articles, was admitted as an attorney in 1998, and spent two years in BVP&G's corporate and commercial law practice.

In January 2000, he commenced employment with Maitland & Co, London, in its corporate and commercial law practice. During that time he was also admitted as a solicitor in England and Wales. He left legal practice in 2004 to work for a UK legal publisher, Practical Law Company, on its technology-related projects.

In January 2008, he returned to South Africa, and joined the Faculty of Law at Stellenbosch University. Initially, he was appointed in the Department of Private Law, and he then moved to the Department of Commercial Law. He completed his doctoral studies under the supervision of Prof Owen Dean in copyright law in 2012. The topic of his dissertation was *Open-source software and the rationale for copyright protection of computer programs*. He is a co-author of the Handbook of South African Copyright Law (Juta, 2015) and the co-author of the "Intellectual Property in the Digital Environment (eIP Law)" chapter in Dean & Dyer: Introduction to Intellectual Property Law (Oxford University Press, 2014). In addition, he has published articles in the following peer-reviewed legal journals: The South African Law Journal, Stellenbosch Law Review, South African Intellectual Property Law Journal, and Tydskrif vir die Suid-Afrikaanse Reg.

He is currently a professor, and the incumbent of the Anton Mostert Chair in Intellectual Property Law, at Stellenbosch University.



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## INTRODUCTION

**A**s this lecture also serves as this year's Annual IP Lecture of the Anton Mostert Chair of Intellectual Property Law (the "Chair"), I have decided to speak about an aspect of my role as the Chair — or what has occupied a significant amount of my time recently — and some of the research I am currently conducting. As the official title of my position as the Chair makes clear, I am now principally concerned with intellectual property law. This necessarily requires some sought of introduction to intellectual property law, sometimes referred to simply as "IP law."

Being a curious primate, while I was doing my articles of clerkship to become an attorney, I asked a partner at the particular law firm why he enjoyed insolvency practice. His response, rather surprisingly, was that upon insolvency the law is turned on its head. What he meant by that was that insolvency is an event which requires one to think differently about particular relationships, and that it imposes a new hierarchy of priorities. I often think of that particular characterisation in relation to my own chosen field of interest in the law, namely, intellectual property law. While the term "intellectual property law" is now commonly encountered, it is frequently incorrectly used, and what it protects is misunderstood. Moreover, it is the subject of sustained criticism, and even treated with hostility, sometimes outright hostility.

Intellectual property law is probably as esoteric an area of law as you are likely to encounter. For example, the Supreme Court of Appeal, as recently as 2008, still described copyright as an "arcane" area of law.<sup>1</sup> This is not to suggest that it requires any particular aptitude which is distinct from that required in the study of other areas of law. As with most other areas of law, it has an associated legal jargon: seemingly common terms have technical, or specific, meanings. It is probably no surprise that, because of its esoteric nature, it is often misunderstood, and maligned. Of course, its esoteric nature also makes it a very interesting field of academic enquiry. It is, thus, necessary for me, as an academic specialising in intellectual property law (and certainly as the Chair), to fulfil two important roles.

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<sup>1</sup> King v SA Weather Service [2009] 2 All SA 31 (SCA) 36.

First, there is the need to educate people concerning intellectual property law, and to clarify common misconceptions about the law. The task of educating people concerning intellectual property law, almost invariably, involves having to explain why we recognise intellectual property rights, apart from what it protects. My other role is to make a contribution to the scholarship in the area of intellectual property law. In my case, my research interests are in the areas of copyright law, trade mark law and issues concerning intellectual property law generally. Accordingly, this lecture will reflect these two aspects of my role as the Chair.

## INTELLECTUAL PROPERTY LAW

**T**he very concept of "intellectual property law" is somewhat of a misnomer. Intellectual property law is not a distinct legal concept or a unitary set of legal principles, but rather an umbrella, or generic, term for distinct types of legal protection.<sup>2</sup> In other words, intellectual property law is not a homogenous concept, but a collection of distinct forms of legal protection. The most well-known of these forms of protection are copyright, trade mark law, patent law and design law. Having said that, while there may be quite distinct justifications for their recognition and associated rights, they share important common features. These forms of legal protection concern the products of intellectual effort, and the subject matter of the legal protection is of an intangible (or incorporeal) nature.

It is the intangible nature of the subject matter that not only provides the reason that these forms of creation require legal protection (for example, to incentivise their creation), it is also the aspect which tends to present problems when seeking to establish the correct legal position in a particular set of circumstances. Although intellectual property is often embodied in, or conveyed by means of, a physical medium, it is important to note that that which intellectual property law protects is intangible and distinct from the physical thing. There are, thus, almost invariably, at least two sets of legal principles which are applicable in a given situation, namely, property law (with its foundations in Roman law), which regulates the ownership and possession of the physical thing, and the relevant intellectual property law.

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<sup>2</sup> du Plessis E, et al. *Adams & Adams: Practitioner's Guide to Intellectual Property Law* (2011) 1ed 1; Harms L "The Politics of Intellectual Property Laws" 2012 TSAR 3 461 461.

This distinction between the intangible intellectual property and the physical thing in which the intellectual property may be incorporated is one that is often overlooked, and such oversight can lead to erroneous — and potentially embarrassing — conclusions about what the legal position is in a given situation. The legal position in relation to the physical item may appear to be counter-intuitive because of the application of intellectual property law. For example, intellectual property rights may limit what the owner of a physical item, which incorporates intellectual property, may be able to do with such item.<sup>3</sup>

While there may be many reasons why people create matter which is protectable by intellectual property rights, intellectual property rights allow the rights holders to exploit their creations in the manner they consider appropriate. In other words, intellectual property rights do not prescribe how a rights holder should exploit its rights; it merely provides the rights holder with the ability to determine how to exploit its property rights. This is an incredibly powerful device. First, the recognition of property rights serves as an incentive for marginal innovation, which yields new creations. Second, it presents the relevant rights holder with a complete spectrum of choices of how to exploit its creation. For example, the rights holder may choose to donate its creation to the public domain or license the use thereof on very liberal terms.<sup>4</sup>

The role of the Chair is, *inter alia*, to serve as a custodian for intellectual property law, ensuring that the integrity of its underlying rationale, and principles, are maintained and respected. This is not to suggest that intellectual property law is immutable, and is some kind of holy cow. It is constantly evolving, and has developed in response to the emergence of new technologies. For example, under copyright law, sound recordings first became an eligible category of copyright work under the British Copyright Act 1911, and the subsequent British Copyright Act 1956 introduced copyright protection for cinematograph films, broadcasts and published editions.<sup>5</sup>

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<sup>3</sup> An example of this is the use of copyright law to prevent parallel importation of goods. See *Frank & Hirsch (Pty) Ltd v A Roopanand Brothers (Pty) Ltd* 1993 (4) SA 279 (A).

<sup>4</sup> The public domain is the material that can be used by any person, either because it is not protected intellectual property law (because such protection has expired or the material was never protected as such) or its use is permissible as an exception to the protection afforded (for example, the fair-dealing exceptions, or because the rights holder has elected to not enforce any of the rights which it may enjoy).

<sup>5</sup> Cornish W *Intellectual Property* 3ed (1996) 302-3.

These developments were replicated under the South African Copyright Act 63 of 1965, as that act expanded the categories of copyright work to include sound recordings, cinematograph films, broadcasts and published editions.<sup>6</sup> More recently, relatively speaking, pursuant to a 1992 amendment to the Copyright Act 98 of 1978,<sup>7</sup> South Africa started protecting computer programs as a *sui generis*, or distinct, category of copyright work.

It is not only in relation to new products of creative endeavour, or investment, that there has to be periodical consideration of a case for possible inclusion in one or more of the species of intellectual property law. It may be a case that the existing protection offered to a particular type of product may be insufficient to incentivise future production and investment, despite there ostensibly being a potentially huge market therefor. There may be instances in which an aspect of the market may present a challenge which means that the intellectual-property protection available does not yield the desired marginal investment, and the corresponding further production. Put differently, it may be that not even the prospect of obtaining intellectual property rights may serve as sufficient incentive to encourage certain kinds of socially-desirable goods. So much for the argument that the intellectual property rights provide too much protection to rights holders.

A curious, and rather serious, instance of such a situation is the market for new antibiotics, despite the current market being worth approximately US\$ 40 billion.<sup>8</sup> Although antibiotics have been amongst the most important scientific advances of the past century, and have been very effective in treating infections, their effectiveness reduces over time due to bacterial gene mutations. Because of this fact, humans become resistant to antibiotics over time, which, in turn, requires the production of new antibiotics. While the number of people who are resistant to antibiotics at present does not constitute a significant enough market for the necessary research into new antibiotics, there is a looming healthcare issue.<sup>9</sup> Furthermore, the prudential approach to the prescribing of antibiotics ("or good stewardship practice"<sup>10</sup>), namely, that they should only be prescribed as a last resort (due to their reducing efficacy),

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<sup>6</sup> Copeling A *Copyright Law in South Africa* 1ed (1969) 42-6.

<sup>7</sup> Copyright Amendment Act 125 of 1992, which came into operation on 10 July 1992.

<sup>8</sup> Rex J H and Outterson K "Antibiotic Reimbursement in a Model Delinked from Sales: A Benchmark-based Worldwide Approach" 2016 *The Lancet Infectious Diseases* 16 500 503.

<sup>9</sup> 500.

<sup>10</sup> 503.

means that a patentee of a new antibiotic is not likely to realise a sufficient return on its investment during its period of exclusive rights (namely, the life of the patent). It should be borne in mind that a small fraction of research investment into new pharmaceuticals translates into a successful product, and that there are more profitable markets which pharmaceutical companies can invest in, such as, chronic medication.<sup>11</sup> A number of governments are concerned enough to find a solution to this problem, and various possibilities are being considered, such as, providing direct financial incentives to pharmaceutical companies paid for “with proportional financial contributions from, at the very least, members of the G20”.<sup>12</sup> What would South Africa do if called upon to make a proportionate contribution? Of course, another possible solution may be to increase the term of patent protection for antibiotics, given the longer period required to realise an economic profit.<sup>13</sup>

Developments in relation to intellectual property law are not confined to increasing protection; the law also seeks to strike a balance between the rationale for the recognition of those rights and the social costs thereof. For example, there may be situations in which intellectual property law may, at a market level, not be able to provide the necessary incentives for the creation of certain desirable works. The size of the potential market for particular works may, on the basis of realistic business forecasts, not be sufficiently attractive for possible profitable exploitation. If that market need is sufficiently constrained, so as to not undermine the rationale for the particular intellectual property right, it provides a good basis for an exception to the rights which intellectual property law would otherwise have afforded the rights holder. A good example of this type of situation is the need to facilitate access to books for blind, visually impaired or otherwise print-disabled persons provided by the *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (2013).<sup>14</sup>

Critics of intellectual property law are apt to resort to sweeping generalisations about the unacceptable social costs of intellectual-property protection. First, as is the case with many issues concerning indigenous knowledge, these critics, who seek to undermine the property rights established by intellectual property law, often resort to making rather emotive, and sensational, claims, but find it difficult to substantiate their criticisms with good evidence, other than for anecdotal tales. Law is a human construct, and, like its creators, it is not perfect. In almost every area of law there may be situations which may give rise to a seemingly inequitable result; not every grievance or matter of concern means that there is a neat, ready-made legal solution, or that the law has failed. While we constantly seek to improve the law, it is important to bear in mind that the law has to provide general, workable solutions to best regulate society. Law aims to provide the necessary certainty, or predictability, by which persons can organise their affairs. In the absence of legal rules, disputes will be determined by those who have authority, according to their own ethical, or political, preferences. If there is no requirement that disputes be settled according to legal rules or principles, there would be no need for lawyers, or, indeed, the law. Disputes would simply settled by ethicists, or politicians, most probably, the latter, as they would have the authority to impose their will on others. Of course, there are those who think that legal doctrine is passé, and that we should embrace the postmodernist, relativist lottery. I prefer to think that knowledge of the world is possible, and that certain forms of conduct are unequivocally unacceptable.

Second, critics of intellectual property fail to realise, or acknowledge, that intellectual property law — as already indicated — is continually being refined in an effort to maintain an appropriate balance. It is not appropriate today to make broad generalisations about the social costs of any particular species of intellectual property, such as, for example, copyright protection. Even within a particular species of intellectual property law, the courts, and legislation, have sought to minimise the social costs of providing the relevant protection. For example, in the case of copyright protection of computer programs, there has been recognition of the functional nature of computer programs and the technical constraints applicable to their creation. The law has recognised that the creation of computer programs is more similar to an engineering project than artistic creativity. Progress in such a technical field is incremental, and excessive protection would prevent such an incremental, cumulative process from being

<sup>11</sup> Katz M L, et al. “Where have all the Antibiotic Patents Gone?” 2006 *Nature Biotechnology* 24 (12) 1529 1530.

<sup>12</sup> Rex and Outterson 503.

<sup>13</sup> Katz, et al. 1531.

<sup>14</sup> [http://www.wipo.int/wipolex/en/treaties/text.jsp?file\\_id=301019](http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301019) (accessed 30 August 2017).

possible. Given the importance of computer programs in almost every facet of modern-day life, it is necessary that there should be good substitutable products, and the likelihood that they will emerge depends, to some degree, on the scope of protection. Recognition of this context has meant that copyright will provide comparatively thin protection to computer programs, as this level of protection is considered to strike the appropriate balance between providing the necessary incentives and ensuring that there is a sufficiently large public domain.<sup>15</sup> It is, thus, necessary to be more specific in any criticism of intellectual property law. This, necessarily, requires a sound knowledge of the particular aspects of intellectual property law in order for there to be a properly informed debate about these matters. We need more focused scholarship to ensure that the balance is appropriately struck. This is the rational process by which specific challenges ought to be addressed. There is nothing to be gained by appealing to (often sensational) anecdotal tales of hardship caused by intellectual property rights, and the unjustified clamour for wholesale changes. It has been said that “[f]or every problem there is a solution that is simple, direct, and wrong.”<sup>16</sup>

Emerging technology, and business practices, bring with it new challenges to various areas of law. When that happens, the rational response is rarely, if ever, that there is no longer any purpose for a particular area of law. On the contrary, new challenges only serve to highlight the need to sharpen our legal understanding, and regulation, in order to address the particular developments. For example, the emergence of the *Uber* ride service does not render the regulation of transport services in the interests of consumers irrelevant. It asks more searching questions about how best to protect consumers, not only in relation to issues of personal safety, but also the pricing of taxi services. In a similar vein, the *AirBnB* service does not signal the end of the law concerning landlord and tenant, or the regulation of hotel services (with its origins in the Roman law relating to innkeepers). What it may have brought about is a change in the market for rental property, rather than suggest that the relevant legal principles are obsolete. It may also serve to indicate that the distinction between rental property and hotel accommodation have become blurred. It may be necessary to provide legal regulation to protect the market for rental accommodation, by ensuring that there is a clearer distinction between rental property and hotel accommodation.

<sup>15</sup> See Karjiker S “Copyright Protection of Computer Programs” 2016 SALJ 1 51.

<sup>16</sup> McMillan J *Reinventing the Bazaar: A Natural History of Markets* 1ed (2002) 13. This quote is attributed to the American journalist and satirist, HL Mencken.

## POLITICS OF INTELLECTUAL PROPERTY

A source of real concern is the apparent lack of understanding of the fundamentals on the part of those in government responsible for the maintenance of our laws relating to intellectual property law, most notably the Department of Trade and Industry. The Department of Trade and Industry (the “DTI”) is tasked with matters concerning intellectual property law, including the oversight of the Companies and Intellectual Property Commission, which administers the registration system relating to registered intellectual property. Examples of the DTI’s inept, and dysfunctional, management of intellectual property law are its latest draft of the Copyright Amendment Bill 2017 (the “2017 Copyright Amendment Bill”),<sup>17</sup> and the recent publication of the *Draft Intellectual Property Policy of the Republic of South Africa Phase I 2017* (the “2017 Draft IP Policy”).<sup>18</sup>

It is submitted that there is ample evidence to suggest that the drafting of the 2017 Copyright Amendment Bill was done by persons who do not understand the basics of copyright law. There are even signs that those responsible for drafting the proposed legislation were unfamiliar with the existing legislation, namely, the legislation it seeks to amend.<sup>19</sup> But, as the religious minister Matthew Henry said in relation to Psalm 58 of the Bible, “There’s none as deaf as those who are not willing to hear.”

The 2017 Copyright Amendment Bill was the subject of public hearings arranged by the Portfolio Committee on Trade and Industry (the “Portfolio Committee”) on 1, 3 and 4 August 2017. Given my role as the Chair, I attended these hearings to raise my concerns about the proposed changes, and the lack of expertise evidenced by the poor quality of the drafting. At the hearing I presented an excoriating critique on the 2017 Copyright Amendment Bill. Over the three days there were a number of other presentations indicating deep concern about the unwarranted erosion of property rights. To my utter surprise, the very next week a colleague at the Law Faculty was contacted by someone in the secretariat of the Portfolio Committee, indicating that the Portfolio Committee was “considering targeting specific people with extensive experience in the various affected industries”.

<sup>17</sup> Copyright Amendment Bill, version B 13-2017, published on 16 May 2017 pursuant to a notice published about a year ago in the *Government Gazette* (Notice 799 of 2017 (GG 40121, 5 July 2016)).

<sup>18</sup> *Draft Intellectual Property Policy of the Republic of South Africa Phase I 2017*, Notice 636 of 2017 (GG 41064, 25 August 2017).

<sup>19</sup> Copyright Act 98 of 1978 (“Copyright Act”). The Chair submitted extensive comments on the 2017 Copyright Amendment Bill, which can be accessed via the Chair’s website. See <http://blogs.sun.ac.za/iplaw/files/2017/06/CIP-Comments-Copyright-Amendment-Bill-2017.pdf>.

My colleague's area of specialisation is constitutional law, and, to the best of my knowledge, she has never worked in any area of intellectual property law. One gets the distinct feeling that the prevailing attitude on the part of the DTI is to canvass for opinions which support its problematic proposals, because it is not satisfied with what it is being told.

Alternatively, given the degree of opposition to the proposed amendments, the DTI may — through some form of twisted logic — perceive the opposition as some sort of indication, or sign, that its proposals are indeed meritorious. While, logically, I should not discount that possibility, it would be incredibly troubling if that were the case. This would be the equivalent of a stalker — against whom the victim of the stalking has obtained an interdict to prevent the harassment — arguing that the fact that the victim went to the trouble of obtaining the interdict only serves to indicate that the victim has reciprocal feelings for the stalker. Perhaps this is also the type of blind spot which lead to the enactment of the disastrous Intellectual Property Laws Amendment Act 28 of 2013 ("IPLAA"). This act seeks to give recognition to indigenous, or traditional, knowledge within the existing forms of intellectual property law. The IPLAA is a glaring example of a failure to understand the structure of the relevant species of intellectual property law, and the bases for their recognition. It smacks of a politically-motivated sop, without regard for legal principles. A draft bill of that act, version "B8B-2010," was sent to the World Intellectual Property Organisation (WIPO) on 13 September 2011 for comment. The WIPO Secretariat — in a rather euphemistically-worded, diplomatic criticism of the Bill — indicated to the DTI that the proposed legislation was unworkable, and amounted to Procrustean attempt to force the protection of indigenous knowledge into the existing intellectual property framework. That cautionary advice was buried, and the IPLAA was enacted.

In August 2017, the DTI published the 2017 Draft IP Policy. In relation to the issue of copyright law, there appears — almost at the very end of the document — a cryptic note which, in effect, states that the 2017 Draft IP Policy will not deal with copyright law (or indigenous knowledge) because these legislative initiatives have already "commenced or been concluded prior to the formulation of the IP Policy."<sup>20</sup>

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<sup>20</sup> 2017 Draft IP Policy 36.

There is no indication that the legislation which has been passed, such as, the IPLAA, or the 2017 Copyright Amendment Bill are consistent with the policy as set out in the 2017 Draft IP Policy. It is submitted that this was probably done deliberately. As already indicated, there appears to be a failure to apply a proper set of principles by the DTI in relation to intellectual property law.

By this time, it should come as no surprise that, given previous experience in relation to draft legislation and other policy documents issued by the DTI, the 2017 Draft IP Policy is, again, not an exemplary draft document. For example, as a document which should have been drafted with the assistance of legal experts, it falls short of the standard required of a decent undergraduate written assignment. It makes sweeping statements to support an argument, with hardly any references to the source material to substantiate those statements. It mentions a study by a "leading South African university" which apparently "found that a significant number of patents granted in South Africa would not pass muster under an examining system."<sup>21</sup> It also states that there are "major drawbacks" concerning our depository system of patenting, which has been the subject of "numerous studies."<sup>22</sup> There is no further information concerning the particular studies or any references to any documents which the reader could consult to verify the basis for the statements, or examine the quality of the relevant underlying research which is being cited in support of the particular contentions. Further on, the 2017 Draft IP Policy claims that the economic literature "reveals an inconclusive link between increased IP protection and economic development".<sup>23</sup> There are no references to any of the literature which either support a strong link between strong intellectual protection and economic development, or which may challenge that position.

It is perhaps because of this lack of proper support and coherence that the 2017 Draft IP Policy has to resort to the type of language which is more reminiscent of matters which are to be accepted as articles of faith, rather than make a case on the basis of cogent, evidence-based arguments. Indeed, we are required to "verily" accept that our domestic context is so materially different as to depart from the laws which may exist elsewhere.<sup>24</sup>

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<sup>21</sup> 2017 Draft IP Policy 7.

<sup>22</sup> 2017 Draft IP Policy 15.

<sup>23</sup> 2017 Draft IP Policy 8.

<sup>24</sup> 2017 Draft IP Policy 8.

If this is the type of “evidence-based South African perspective” upon which we are to build our intellectual property law, as suggested in the 2017 Draft IP Policy, it does not bode well for the future.<sup>25</sup> When a policy document utilises unsubstantiated claims it leaves one with a distinct concern that it is not the product of a deliberative, evidence-based exercise, but is simply meant to provide a veneer of formal validity, or justification, to implement a particular course of action for political convenience.

As already alluded to, the focus of the 2017 Draft IP Policy appears to be our current patent system. More specifically, the reason for the patent system being the focus of immediate legislative attention is the contention that it is an obstacle to public health.<sup>26</sup> Currently, South Africa has a so-called “depository system” in relation to patent applications. This means that patent applications are not substantively examined to determine if the requirements are satisfied, namely, that the subject matter of the patent is a “new invention which involves an inventive step and which is capable of being used or applied in trade or industry or agriculture.”<sup>27</sup> The validity of a patent is only substantively assessed if its validity is disputed in patent-infringement proceedings, or in revocation proceedings.<sup>28</sup> Patent applications are simply assessed for compliance with the formal requirements. In contrast, in the other major jurisdictions, such as, the US and Europe, patent applications undergo substantive examination before they are granted.<sup>29</sup>

The primary reason why we do not subject patent applications to substantive examination is as a consequence of the lack of capacity to operate an effective system of substantive examination. We simply do not have enough people with the required technical expertise to operate such a system. This reality is — to some extent — acknowledged in the 2017 Draft IP Policy.<sup>30</sup> To put the scale of the problem in context, according to a recent enquiry at the South African Institute of Intellectual Property Law, there are currently, in total, approximately 124 registered patent attorneys in South Africa. In contrast, during a visit to the German Patent Office, I was informed that, on its own, it has approximately 800 patent examiners.

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<sup>25</sup> 2017 Draft IP Policy 32.

<sup>26</sup> 2017 Draft IP Policy 6.

<sup>27</sup> Section 25(1) Patents Act 57 of 1978 (“Patents Act”).

<sup>28</sup> Section 61.

<sup>29</sup> Dean O H and Dyer A *Dean & Dyer: Introduction to Intellectual Property Law* (2014) 1ed 258.

<sup>30</sup> 2017 Draft IP Policy 5.

The 2017 Draft IP Policy suggests that a “substantial part of the problem” in relation to public health is as a consequence of the fact that South Africa does not conduct substantive examination of patents.<sup>31</sup> While it is not suggested, as a matter of fact, that a depository system may not present an opportunity for abuse of the patent system, the 2017 Draft IP Policy does not present convincing evidence for the contention that there is a substantial problem. On the contrary, there may be good reasons why the problem may not be as significant as it is claimed to be. Again, the following counter arguments are not stated as matters of fact, but these are possibilities which a well-researched policy document should have considered. There is no suggestion of that having been the case.

First, the 2017 Draft IP Policy seeks to support its argument by relying on a study which indicates that South Africa grants patents at a much higher rate than other countries.<sup>32</sup> That fact on its own does not suggest that there is a systemic problem with the depository system, or, more specifically, with pharmaceutical patenting. In comparison to countries such as the US, Europe, India and Brazil, the number of applications in South Africa is hardly significant.<sup>33</sup> Furthermore, most of the South African patent applications are foreign applications, that is, the first filing for the patent was in a country other than South Africa. This may be suggestive of two facts: that the South African market is generally not considered to be commercially significant enough to bother with seeking patent protection in respect of patents which have been filed elsewhere; and, therefore, that only patent applications with real prospects of success elsewhere (or those that are really valuable) are also sort to be protected in South Africa.

Second, there is the possibility that the patent profession, mindful of the fact that South Africa has a depository system, has to ensure that it conducts a more rigorous exercise in ensuring substantive compliance, because their clients will look to them for having failed to ensure that their inventions receive the required legal protection, rather than them being able to deflect blame due to an added level of substantive scrutiny by a patent examiner. Moreover, in the case of patents emanating from South Africa, it is highly unlikely that an inventor would only seek to patent an invention in South Africa.

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<sup>31</sup> 2017 Draft IP Policy 6.

<sup>32</sup> 2017 Draft IP Policy 6. The depository system applied in South Africa was not the focus of the study, which mentioned the South African system for comparative purposes.

<sup>33</sup>[http://www.wipo.int/ipstats/en/statistics/country\\_profile/](http://www.wipo.int/ipstats/en/statistics/country_profile/) (accessed 29 August 2017).

Given the limited size of the South African market, an inventor would want to ensure that its product is also protected by patent law in the other major markets, such as, the US, Europe and Asia. In other words, patents which have been filed in South Africa may proportionately be of a much higher quality, despite South Africa having a depository system. Thus, there may be a selection bias for the filing of good patents applications in South Africa, which may account for the significantly higher success rate of patent applications.

Third, it is important not to overstate the benefit of having a substantive-examination system. Substantive examination is not a guarantee that granted patents are valid. While a substantive-examination system will provide an additional level of scrutiny to patent applications, a patent granted under such a system remains open to challenge, particularly in patent-infringement proceedings. This is most certainly the case with our depository system. Rather inexplicably, the proposals in the 2017 Draft IP Policy — which targets the alleged poor quality of the patents being granted in South Africa — actually threaten to considerably dilute the ability to challenge the validity of a patent which has been granted! While its intentions in relation to post-grant opposition procedures are as clear as mud, it proposes, as an interim measure — while it finalises those opposition procedures — that *all* oppositions to the grant of a patent should “proceed by way of administrative review in accordance with the provisions of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).”<sup>34</sup> Administrative review proceedings are very limited forms of legal oversight: they have to be brought within the strict time limits prescribed, and are concerned with the reasonableness of decisions, not the correctness of those decisions. Thus, an administrative review is, strictly speaking, not able to resolve the issue of whether a patent should be granted on the substantive basis of patent law. I am afraid that you would struggle to find many worse examples of proposed legal reform than this cack-handed proposal. This, once again, displays the concerns which I have concerning the level of legal expertise employed by the DTI when formulating proposals. If there really is a substantial problem with our depository system, the proposal will exacerbate the problem, and not provide a solution to it.

Fourth, perhaps most significantly, if the 2017 Draft IP Policy is correct about the fact that the South African patents register is clogged with invalid patents, it begs the question as to why we have not seen a significant number of litigation cases involving issues of patent validity as a consequence.

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<sup>34</sup> 2017 Draft IP Policy 17.

The pharmaceutical market is a highly competitive market. It is, arguably, competition which has yielded us the levels of innovation in pharmaceuticals. In fact, to date, there has been no indication of an alternative system which is likely to produce equivalent results.<sup>35</sup> If a competitor is excluded from a potentially lucrative market (because a particular medicine is sold at inflated prices, well beyond its economic value) due to a patent of questionable validity, what do we expect would happen? Unless the pharmaceutical industry as a whole constitutes a cartel (or some other form of cabal), a rational competitor would make an assessment of its chances of success in any potential patent-infringement litigation, and, based on those findings, possibly enter the relevant market as a competitor. Not to do so would be the equivalent of leaving money on the table for a rival firm with an invalid patent. There is no suggestion that the levels of patent litigation are high in South Africa. Moreover, the fraudulent assertion of patent rights may also amount to a contravention of competition law, if it amounts to an abuse of dominance on the part of the firm which asserts those rights.<sup>36</sup>

The 2017 Draft IP Policy does not address any of these issues, and does not provide a convincing case that our depository system is as problematic as it is claimed to be. It is necessary to hasten to add that I am not insensitive or unsympathetic to the significant issues concerning public health in South Africa. I am not even suggesting that there are no issues concerning intellectual property law in this environment. What I am not prepared to do is simply accept superficial, and uninformed, rhetoric as the basis for decision-making. For purposes of argument, let us assume that the economic literature is inconclusive about the importance of strong intellectual property law to a knowledge-driven economy, the rational course of action would not be to go for broke and dilute, or expropriate, the property rights afforded by intellectual property law. One would expect a cautious, prudent approach to such matters, and not plunging in with headlong haste, or reckless disregard for the economic consequences. There is a real danger that the proposals in relation to the substantive examination of pharmaceutical patents will cause the patenting system to grind to a halt, which could do untold damage to our reputation in relation to the protection of intellectual property. What we could provide for is a group within DTI whose function it is to investigate pharmaceutical patents, and, if any patents are found to be invalid, that group could institute revocation proceedings.

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<sup>35</sup> McMillan 31.

<sup>36</sup> van der Merwe A, et al. *Law of Intellectual Property Law in South Africa* 2ed (2016) 537-8.

The DTI's management of intellectual property exhibits a schizophrenic approach towards its protection. On the one hand, it appears to be prepared to erode the rights of rights holders, such as copyright owners, while, on the other hand, it seeks to cram additional matter into the existing framework of protection, which does not rightly belong there. Again, the tenor of the 2017 Draft IP Policy is not to bolster patent rights, but, instead, it is sceptical of their appropriateness. The Zeitgeist at DTI appears to be that intellectual property protection, if not unwarranted, is an obstacle to government achieving its objectives; intellectual property should, ideally, be freely available for others to use. In contrast, government imposes an obligation on a recipient of state funding to secure the relevant intellectual property rights which may have been created using publicly-funded research for purposes of commercialisation.<sup>37</sup> The default position is not that such intellectual property should simply be donated to the public domain for the benefit of society. In fact, if the recipient wishes to place intellectual property in the public domain, it must go through a bureaucratic process in order to obtain the necessary consent to do so.<sup>38</sup> Hence, DTI's current position is not only internally contradictory, it also conflicts with government's objective to use publicly-funded intellectual property as an economic driver and as a source of funding for educational institutions.

What makes the approach so problematic is the uncertainty which the legislative provisions create. It is no secret that our economy has stalled, which has, arguably, been — in large part — the result of governmental action, not just in relation to intellectual property law. Intellectual property, like any other product, is the result of the investment of resources. We need to create a legal environment which allows our people to unlock the value of their investments, which could serve to spur on economic activity. Our *fiscus* is already under pressure. Our tax revenues, due to the lack of economic growth, is not increasing at the rate required to meet the demands on the *fiscus*. It is important to ensure that every possible source of economic growth is nurtured and maximised to ensure that we increase possible revenues to the *fiscus*. Against this background, we just cannot afford to be cavalier about the possible consequences of changes to our legal institutions, such as intellectual property law. We should not rush into potentially-disastrous experiments, undermining well-established property rights.

<sup>37</sup> Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008.

<sup>38</sup> Regulations 2(4) and 2(6) Regulations made in terms section 17 of the Intellectual Property Rights from Publicly Financed Research and Development Act, 2008 Government Gazette 33433 of 2 August 2010.

In contrast, legal developments elsewhere are focused on ensuring that intellectual property rights are given the same legal treatment as corporeal assets.

We should also be very wary when politicians are professing to be fighting for struggling artists. It, almost invariably, means that someone else — such as, the taxpayer — has to bear the costs of their largesse. There are a number of good reasons why a system of copyright is, generally, considered to be more appropriate than a system of direct government funding or patronage. One of these is that if authors are dependent on government funding, it will compromise their independence, and it could be a shortcut to political censorship or Comstockery.<sup>39</sup> I am sure that most of you will remember the SABC's decision (under the management of Hlaudi Motsoeneng) to increase the local music content on its platforms to 90%, and its decision to increase the royalty rate paid to artists. It has since been reported that that decision caused the SABC's revenues to decline by more than R200 million, as advertisers were not prepared to spend money on a broadcaster that had dwindling audiences due to the significant changes in the content.<sup>40</sup> Now the taxpayer has been asked to, once again, come to the rescue of the SABC. The SABC requires a government guarantee of R1 billion as it "was expecting to end the 2016/17 financial year with a net loss of R1.1bn. It recorded a loss of R411m in 2015/16, up from R395m the previous year."<sup>41</sup>

## CURRENT RESEARCH

**A**t present, there is not a sufficient recognition, or appreciation, of intellectual property rights as being assets on a similar footing to other property, which is of a tangible nature. In particular, there is an insufficient appreciation for the use of intellectual property as a form of real security for financing purposes. Greater recognition of intellectual property rights as assets comparable to tangible assets could allow firms, particularly small- and medium-sized enterprises, to access much-needed financing. Accordingly, one of my current research projects concerns the legal framework within which intellectual property rights can serve as real security for financing transactions.

<sup>39</sup> Tyerman B "The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer" 1974 *Copyright L Symp* 21 1 23.

<sup>40</sup> Babalo Ndenze, "SABC Bleeding as Hlaudi's 90% Local Content Policy Costs Dearly and Audience Goes AWOL" *Sunday World*, 10 May 2017, <http://www.sundayworld.co.za/news/2017/05/10/sabc-bleeding-as-hlaudis-90-local-content-policy-costs-dearly-and-audience-goes-awol> (accessed 22 August 2017).

<sup>41</sup> Bekezela Phakathi and Linda Ensor, "Treasury still mulling over SABC request", *Business Day*, 22 August 2017, <http://businessday.newspaperdirect.com/epaper/showarticle.aspx?article=7fbca46a-a23c-4c75-ae1f-c2e4c2003634&key=JzEHFhiDY0eqZujfx1U8w%3d%3d&issue=1106201708220000000001001> (accessed 22 August 2017).

To illustrate the potential value which intellectual property rights can represent, consider the COCA-COLA trade mark. Until recently, it was considered to be the most valuable brand in the world.<sup>42</sup> If, due to some catastrophic event, the Coca-Cola company were to lose all its bottling plants, inventory, vehicles and immovable property, there would be no doubt that its trade mark (and associated brand) would still be worth a considerable amount of money. The company should be able to unlock that value by offering its trade mark as a form of real security in order to access financing to restart its business operations. Similarly, the copyright owner of the works of the author JK Rowling, no doubt, receives a considerable stream of income from the sales generated from her novels. The copyright owner should be able to offer the copyright in those works as real security (along with the associated income stream) to a bank to access a lumpsum amount for its business purposes. However, there is no uniform, clear, and cheap manner in which intellectual property rights can be offered as real security in South Africa.

In South African law, personal security and real security serve as important devices in the extension of financial credit. Both forms of security secure a creditor's claim should a debtor become insolvent.<sup>43</sup> In the case of personal security, a person other than the debtor undertakes liability on the debtor's behalf, should the debtor default in its obligations to the creditor. In the case of real security, property belonging to the debtor (or another party) is encumbered in order to satisfy the creditor's claim in the event of the debtor's default.<sup>44</sup> While the legislation dealing with certain types of intellectual property (more specifically, trade marks, patents and designs) make express provision for those rights to be offered as a form of real security, those provisions may not exclusively determine the means by which such rights could be provided as real security. In contrast, in respect of other intellectual property, namely, copyright and plant breeders' rights, it is necessary to rely on possible alternative methods by which intellectual property rights could serve as a form of real security. In particular, there is the possibility that real security may be obtained by way of a security cession (or *cession in securitatem debiti*) of the relevant intellectual property rights (in terms of the common law),<sup>45</sup>

<sup>42</sup> <http://interbrand.com/en/best-global-brands/2013/Best-Global-Brands-2013-Brand-View.aspx> (28 August 2014).

<sup>43</sup> Lubbe G F "Mortgage and Pledge" in Joubert W and Kuhne M *Law of South Africa* (2008) para 324.

<sup>44</sup> in para 324. For purposes of this work, it will be assumed that the real security is being provided by the debtor.

<sup>45</sup> In the case of a non-possessory pledge (such as a security cession), the property will have to be secured via an attachment (or perfection) order (see Brits R *Real Security Law* 1ed (2016) 159).

or — to a very limited extent — the registration of a notarial bond over the relevant intellectual property rights.<sup>46</sup>

Depending on the nature of the property — immovable or movable — different forms of real security are available. Immovable property can be encumbered by way of a registered mortgage bond.<sup>47</sup> Movable property can serve as security either by being pledged, whereby the asset is delivered to the creditor,<sup>48</sup> or by registering a notarial bond over the asset.<sup>49</sup> Thus, whether intellectual property rights, as intangible property, is of an immovable or movable nature will — in the absence of statutory measures providing a mechanism for the creation of a security right (or providing clarity on the category of property) — be decisive of the category of real security applicable to those rights. At present, there is no straightforward answer as to the whether a particular form of intellectual property is of an immovable or movable nature. This issue is critical to whether intellectual property for which there is no express statutory provision concerning the creation of a real right of security, namely, copyright and plant breeders' rights. Even in relation to those forms of intellectual property for which there are express statutory provisions, it is still important to know whether they could also be offered as a form of real security by way of a security cession or the registration of a notarial bond over the relevant rights.

Except for copyright, the relevant legislation does not expressly indicate whether trade marks, patents, designs or plant breeders' rights are of an immovable or movable nature.<sup>50</sup>

<sup>46</sup> It should be noted that these possible alternative methods of security may also be used in relation to intellectual property in respect of which express provision has been made for those rights to be offered as a form of real security. The bondholder of a general notarial bond does not obtain a real-security right as such. It only has a real-security right (that is, becomes a secured creditor) when it has obtained physical control over the property which is the subject of the bond (that is, upon perfection) (see Brits 198, 202 and 206). Similarly, a special notarial bond over intellectual property rights will not provide a right of real security to the bondholder. The bondholder only obtains a real-security right on perfection of the bond (see 239, 240 and 262).

<sup>47</sup> Lubbe para 327.

<sup>48</sup> in para 406.

<sup>49</sup> in para 399; Brits 197 – 198. A distinction can be made between a general and special notarial bond — a general notarial bond is registered against all the debtor's movable assets, while a special notarial bond is limited to only certain movable assets.

<sup>50</sup> The Trade Marks Act 194 of 1993 ("Trade Marks Act"); Designs Act 195 of 1993; Patents Act; and Plant Breeders' Rights Act 15 of 1976 do not specify the nature of the relevant species of intellectual property. However, section 22(5) Copyright Act states that copyright shall be transmissible as moveable property.

The statutory provision relating to the hypothecation of trade marks state that it will have the same effect as a pledge, which implies that trade marks are regarded as movable property.<sup>51</sup> In the case of patents and designs, the respective acts do not indicate what the nature of the real-security right is. It is submitted that, reasoning by way of analogy to the position of the statutory provisions relating to the hypothecation of registered trade marks, the nature of the security interest is also in the nature of a pledge. Accordingly, patents and designs are also, by extension, property of a movable nature. However, despite the express statutory provision concerning the nature of copyright, in the context of determining whether a South African court had jurisdiction to decide matters relating to a foreign copyright infringement claim, the Supreme Court of Appeal held that intellectual property rights, including copyright, are immovable incorporeals.<sup>52</sup> If the aforementioned judgment is not construed restrictively (or shown to have been incorrect), it potentially presents a huge problem for the possible creation of a right of real security over copyright (and plant breeders' rights) in the manner indicated, as there is no statutory provision concerning the creation of a right of real security.

While the commercial imperative to create a right of real security over copyright has led to the use of a security cession, doctrinally this approach is not without its problems. There has, however, been no direct engagement with the security cession of intellectual property rights, such as copyright. It has, however, been accepted (without any specific elaboration) that, under South African law, rights to incorporeals or personal rights (or claims), which are capable of transmission by mere agreement, are transferred by way of cession.<sup>53</sup> The requirement that the rights in question must be transferable by "mere agreement" is said to simply mean that there should be no additional required dispositive act, such as the requirement to effect delivery, as is the case with movable property, which distinguishes these respective forms of transfer. Accordingly, it is stated that intellectual property rights are incorporeals and should, *prima facie*, be transferable by way of cession.<sup>54</sup>

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<sup>51</sup> Section 41(4) Trade Marks Act.

<sup>52</sup> *Gallo Africa Ltd & Others v Sting Music (Pty) Ltd & Others* 2010 (6) SA 329 (SCA) [19] and [24].

<sup>53</sup> Lubbe G F "Cession" in Joubert W and Kuhne M *Law of South Africa* (2013) para 129, 131 and 147; Scott S *The Law of Cession* 2ed (1991) 7 and 11; Scott S *Cession for Students* 2ed (2013) 7 and 9.

<sup>54</sup> Lubbe "Cession" para 134 and 152.

However, Susan Scott suggested that cession should — strictly speaking — be confined to the transfer of personal rights arising from the law of obligations (namely, the right to claim a particular performance), and not other incorporeals.<sup>55</sup> She suggested that its use in relation to other incorporeals — which would include intellectual property rights, such as, copyright — is simply a synonym for "transfer."<sup>56</sup> Unlike the other types of legal rights — which have an identifiable object — personal rights are concerned with a claim against a specific person.<sup>57</sup> A fact which seems to support Scott's contention is the fact that copyright is stated as being transferred by way of assignment, and not cession.<sup>58</sup> Of course, we have seen our courts adopting a very pragmatic approach to security cessions of personal rights — in particular, the pledge construction given to it — despite its doctrinal difficulties.<sup>59</sup>

Another problem in relation to copyright is that it is an unregistered form of intellectual property. The only exception to this being the register of copyright in cinematograph films established under the Registration of Copyright in Cinematograph Films Act 62 of 1977.<sup>60</sup> In addition to the provision of an express statutory right to create a right of real security, it would be desirable for there to be a register of rights of real security over copyright. However, we should be moving away from the usual paper-based approaches to registers of this nature. What I mean by that is that while some of these registers are now, of course digitised, they are in essence, still paper-based systems. Consideration should seriously be given to the use of blockchain technology for the creation of new registers. These types of registers could provide for a more resilient and transparent system, and could facilitate a market in the underlying assets.

Thus, for the aforementioned reasons, it should be clear that further work is required in relation to the creation of rights of real security over intellectual property rights.

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<sup>55</sup> Scott *The Law of Cession* 11 and 21.

<sup>56</sup> 21.

<sup>57</sup> 21-2.

<sup>58</sup> Section 22(1) Copyright Act.

<sup>59</sup> Brits 280-1.

<sup>60</sup> It is not compulsory for cinematograph films to be registered for copyright protection to subsist in such works, and registration simply facilitates the enforcement proceedings in relation to cinematograph films. See Dean O and Karjiker S *Handbook of South African Copyright Law* (2015) para 15.2.

Another area of research which has not received any significant attention in South Africa is that of the interface between competition law and intellectual property law. This fact has also been noted in the 2017 Draft IP Policy.<sup>61</sup> The Chair recognised the need for research in this interface for some time now, and has incorporated an optional module in competition law as part of its LLM in intellectual property law. From 2018 we should see the first students who may take the elective module in competition law, which should encourage research at the interface.

## CONCLUSION

The real cause of many of the problems we have in South Africa is not intellectual property law or property law, or the alleged failure to de-colonise our education system. It is poverty, and a government which has failed to fulfil the promises it made. There is no doubt that economically prosperous countries have fewer of the socio-economic challenges with which we are faced with in South Africa, particularly health care. Our focus should be on building a legal system which stimulates economic growth, rather than us adopting the perennial role as victims of the exploitative conduct of others.

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<sup>61</sup> 2017 Draft IP Policy 25.