

# **SOME REFLECTIONS ON THE TOOLS FOR ADJUSTMENT OF PROTECTION LEVELS IN INTELLECTUAL PROPERTY**

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# I. INTRODUCTION



Our Segment of this congress deals with tools for adjustment of protection levels. The three speakers have ably dealt with some of the most pertinent issues in the context of this segment and in the context of the theme of the congress. Can one size fit all? Professor Reto Hilty has discussed inter alia, the issues of **duration** and **compulsory licenses**. Professor Andrew Christie has comprehensively dealt with the exceptions and limitations and has effectively analysed the three – step test in great detail.



Professor Severine Dusollier has highlighted the **erosion** and **dilution** of traditional IP rules and principles through the law of contract – the “commercialisation” or “privatisation” of IP Law (especially copyright).



In the light of the above, my comments will deal with three areas:

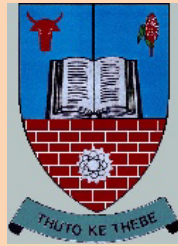
- **Duration;**
- **Distance learning and the compulsory licence; and**
- **The juridification of indigenous knowledge systems (IKS).**

# III. THE ISSUES

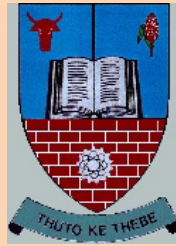


## *a) Duration of copyright*

The traditionally accepted period for the duration of copyright is the life of the author and fifty years after his death. When the fifty years expire, the material that is the subject of copyright falls into the public domain and can be used freely by anyone.

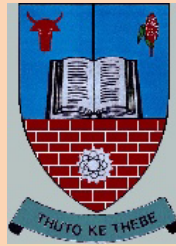


However, the United States of America changed its law and increased the period to 70 years. Gradually, other countries around the world have changed the period of protection from 50 to 70 years.



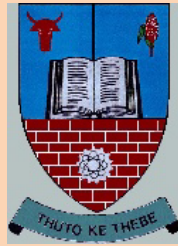
This is an unwelcome development that must be resisted both nationally and internationally.

After enjoying copyright for the life of the author and fifty years after his death, it is only equitable that thereafter the work should go into the public domain. 70 years is excessive and should be resisted. The Botswana Copyright and Neighbouring Rights Act (Cap 68:01) applies the traditional period.



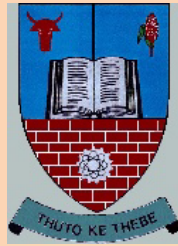
It is submitted that this should be maintained and that Governments around the world should advocate for the retention of the traditional period internationally.





## b) *Distance learning and the compulsory licence*

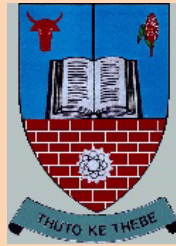
Distance learning is a major component of University education all over the world. Lecturers have to prepare teaching materials in the form of manuals which they send to students all over the country either electronically or in hard copy.



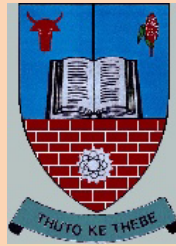
This raises two intellectual property issues. First, these manuals are in most cases compilations of copyrighted material from various sources. Does this amount to copyright infringement on the part of the lecturer or is it covered by the traditional “education purposes” exception? The issue is partly addressed by s.15 of the Copyright and Neighbouring Rights Act (Cap 68:01).



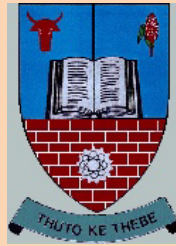
Section 15 (1) (a) allows the reproduction, without the authorisation of the author or other owner of copyright, of a *short part* of a published work for teaching purposes by way of illustration, in writings or sound or visual recordings, provided that reproduction is compatible with *fair practice* and does not exceed the extent justified.



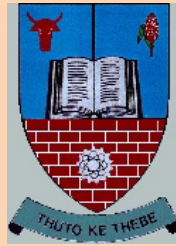
Section 15(1) (b) allows the *reprographic reproduction* (photocopying) for *face-to-face* teaching in education institutions whose activities are not for direct or indirect commercial gain, of published articles, other short works or short extracts of works, to the extent justified by the purpose, provided the act of reproduction is an *isolated one* occurring, if repeated, on *separate* and *unrelated* occasions, and there is no collective licence available, offered by a collective administration organisation of which the educational institution is or should be aware, under which such reproduction can be made.



It can be seen that s.15 does not fully address the use of copyrighted material in the distance learning arena. In some cases, one may find that the book the lecturer is trying to photocopy for his students is the ONLY copy in the entire country. There is therefore a need to introduce a statutory compulsory license to cover this particular use of copyrighted material.

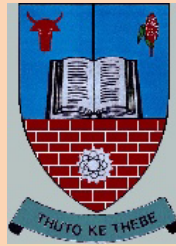


The second issue relates to ownership of copyright in the manuals themselves. Although the manuals are compiled by the lecturers, they are printed and bound at University expense and they sometimes bear the University logo. Some of these materials gradually get better and better and some are eventually published as books. Who owns the copyright in these materials? This is a matter that should be addressed explicitly in any University's Intellectual Property Policy and by national legislation.



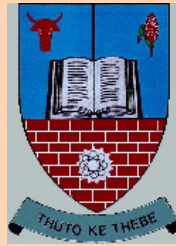
### *C) The protection of indigenous knowledge systems: juridification*

This is a crucially important and burning issue. ‘Indigenous Knowledge’ (IK) refers to the intellectual endeavors of indigenous communities all over the world but mainly those in developing countries such as Botswana. The term therefore covers indigenous works of art, music, literature, medicine and manufacturing process. ‘Indigenous knowledge’ is also referred to as ‘folklore’.



The forms of expression of folklore are: folk tales, folk poetry and riddles; folk songs and instrumental music; folk dances, plays and artistic forms of rituals; drawings, paintings, carvings, sculptures, pottery; terracotta, jewelry; basket weaving; and needlework, textiles, carpets, costumes, musical instruments and architectural forms.





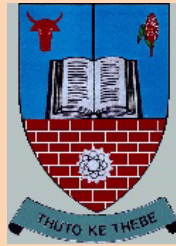
Indigenous Knowledge Systems (IKS) on the other hand refers to the techniques and methods used by indigenous peoples to harness the indigenous knowledge. A very good example that can be used here is the case of the *Hoodia* plant. This cactus is found in three countries: Botswana, Namibia and South Africa.



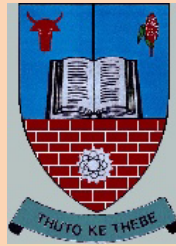
The San people in these three countries have known for centuries that *Hoodia* is an appetite suppressant and that it is also good for the skin. That is the indigenous knowledge. How *Hoodia* is utilised to suppress appetite and produce skin products are what amounts to indigenous knowledge systems of the San people.



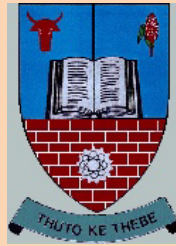
For example, what do you do with the *Hoodia* once you have harvested it? Do you eat it raw? Do you bake/cook it first? Or do you dry it?



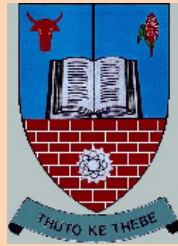
The developing world has always advocated for the **legal** protection of indigenous knowledge but the Western world has consistently argued that indigenous knowledge cannot be protected by conventional intellectual property. It cannot be protected under patent law because an invention is patentable in Botswana only if it is *new*, *involves an inventive step* and is *industrially applicable*.



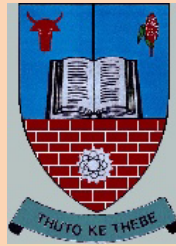
The indigenous knowledge involved in indigenous manufacturing processes and methods of treatment would not meet this criteria. It is in the public domain and has been there for generations. It cannot be protected by conventional copyright law because the three requirements for copyright protection are authorship/ownership, originality and reduction to permanent form (fixation).



Most indigenous knowledge would clearly not satisfy this criteria. The knowledge is communally owned; it is not original because it has been passed from generation to generation; and most of it has never been reduced to permanent form as understood in the western world.

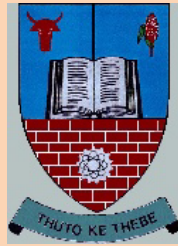


In the context of Botswana, the Copyright and Neighbouring Rights Act (Cap 68:01) has gone a long way in protecting indigenous knowledge albeit indirectly. This is done in two ways. First, the Act contains a very broad list of protected works which covers a large part of indigenous knowledge in the **literary and artistic** category.



Second, the Act provides that a work is protected under the Act by the sole fact of its creation and irrespective of its mode of form of expression, as well as of its content, quality, and purpose. But the Act retains the requirement of originality: a literary or artistic work is not protected by copyright under the Act unless it is an **original intellectual creation**.



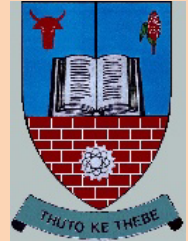


The Government of Botswana has taken another major step to enhance the legal protection of all IKS. An Industrial Property Bill is currently being drafted. When enacted it, will replace the Industrial Property Act 1996. The Bill contains a Part (Part XI) dedicated to the comprehensive legal protection of IKS of an **industrial** nature in Botswana.



The Part covers: registration of traditional knowledge; rights conferred by traditional knowledge; notification of registration; invalidation of registration; expiry of protection; specific rights over IKS; the right to institute proceedings; the transfer and assignment of rights; the exploitation of IKS by third parties; the granting of licenses by owners of IKS; the registration of handicrafts; and the validity of industrial property rights relating to IKS. This is really commendable. The Bill elevates IKS to the level of **MAINSTREAM**. IP Law without the need for *sui genesis* legislation. Can one size fit all?

## II. CONCLUSIONS

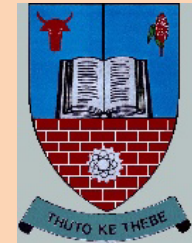


My conclusions are as follows:

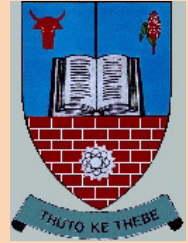
1. One size does not fit all. This becomes even more pertinent with the juridification of IKS thereby making it part of **MAINSTREAM** IP Law together with patents, copyright, trademark and designs, utility models and confidential information.



2. The balancing act is central to the development of tools for the adjustment of protection levels: Intellectual Property Law must continuously strike a balance between the protection of the owners of IP rights and the other stakeholders such as the public, researchers and learners, and the disabled.

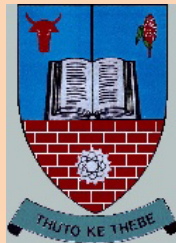


3. The regime (or bundle) of IP rights is increasing and not decreasing. This is clearly illustrated by the juridification of IKS in countries like Botswana, and the current efforts by the World Intellectual Organisation (WIPO) to come up with an international Convention or treaty on the protection of IKS which efforts are supplemented by regional efforts such as those of the African Regional Intellectual Property Organisation (ARIPO) to develop a regional Model Law on the protection of IKS.



4. Compulsory licences are a very good reflection of the flexibilities within the IP system. They work well in the area of patents. It is hoped that a workable compulsory licence system can be crafted in the area of copyright so as to protect teachers and learners involved in Distance Learning.

# THANK YOU



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