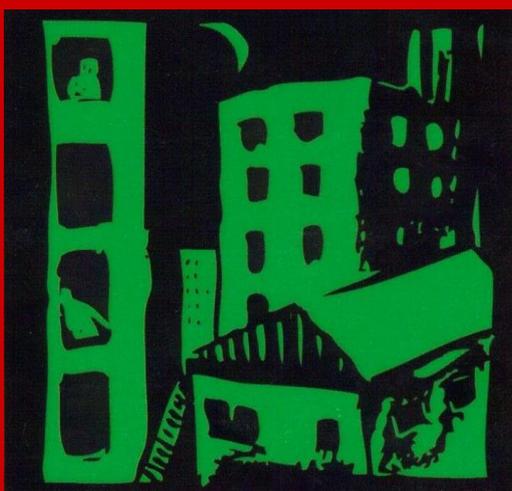


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## The role of intellectual property rights' protection in advancing development in South Africa

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### ABSTRACT

*Notwithstanding some debate, intellectual property remains a necessary tool for social, cultural, economic, and technological development in the 21<sup>st</sup> century. In this century, the global economy is driven by knowledge and technology, and the market is increasingly recognising intellectual property as a valuable commercial asset and a force for technological innovation. South Africa, among other countries, recognises the role of intellectual property rights in several policy measures related to development, trade, and industrialisation. This article seeks to highlight the significant role of intellectual property rights protection in advancing social, economic, technological, and cultural development in South Africa.*

**Keywords:** Intellectual property rights, sustainable development, innovation, traditional knowledge, human rights.

## 1 INTRODUCTION

Despite intense debate on the impact of intellectual property (IP) on development,<sup>1</sup> IP remains a necessary tool for social, cultural, economic and technological development. IP systems are a *sine qua non* for development in the 21<sup>st</sup> century, when the global economy and development are driven by knowledge and technology and the market is increasingly recognising IP as a valuable commercial asset and a force for technological innovation.<sup>2</sup> Many governments have reformed their IP policies to promote their domestic objectives.<sup>3</sup> Equally, IP is increasingly prominent in policy areas such as trade, investment, health, culture and tradition, science and technological advancement. South Africa, for instance, recognises the role of intellectual property rights (IPRs) in several policy measures related to development, trade and industrialisation. Furthermore, the body of law protecting IPRs is one of the significant policy instruments that needs to be exploited by governments to leverage the IP-led development of an economy. IP law encourages and protects innovation, creativity, and human processes and freedoms.

Understanding the role of IPRs as a catalyst for development requires appropriate comprehension and appreciation of the legal, social and economic considerations underpinning IP systems. This article highlights the significant role of IP protection in advancing social, economic, technological and cultural development in South Africa. Drawing some lessons from a published article on harnessing IP for development,<sup>4</sup> the article describes a significant shift in the role of IPRs' protection in advancing development in South Africa. The shift is, in part, due to the United Nations Agenda 2030 for Sustainable Development, the African Union Agenda 2063, and the South African National Development Plan of 2012, among others. These development frameworks are used as the benchmark for the development that the IPR protection should aim to achieve in South Africa.

The article does not provide a comprehensive analysis of South Africa's IP legal and policy framework, and neither does it look at the impact of every IPR on development.

<sup>1</sup> For various positions and arguments on IP and development, see, for example, Correa C & Seuba X (eds) *Intellectual property and development: Understanding the interfaces* Singapore: Springer (2019); Olwan RM *Intellectual property and development* Berlin: Springer-Verlag (2012); Pugatch MP (ed) *The intellectual property debate: Perspectives from law, economics and political economy* Cheltenham: Edward Elgar Publishing (2006); Chin M "Intellectual property and the development divide" (2006) 27 *Cardozo Law Review* at 2821–2832; Yu PK "Intellectual property, economic development, and the China puzzle" in Gervais DJ (ed) *Intellectual property, trade and development: Strategies to optimise economic development in a TRIPS-plus era* New York: Oxford University Press (2007) at 173–220.

<sup>2</sup> Maskus KE *Private rights and public problems: The global economics of intellectual property in the 21<sup>st</sup> century* Washington, DC: Peterson Institute for International Economics (2012) at 1–2.

<sup>3</sup> Mercurio B "Reconceptualising the debate on intellectual property rights and economic development" (2010) 3 *The Law and Development Review* 64 at 65.

<sup>4</sup> Ncube CB "Harnessing intellectual property for development: Some thoughts on an appropriate theoretical framework" (2013) 16 *Potchefstroom Electronic Law Journal* 369–395.

Instead, it examines IP law and policy as they apply to economic and technological development, culture and traditional knowledge. Given that the bulk of the existing literature on IP impacts on development is economic in nature, this article intends to contribute to literature on the effect of IP protection on development from a legal point of view. The article will do so by contextualising the discussion within IPR protection and its relevance towards development. The central thesis is that the protection of IPRs may be usefully harnessed to condition socio-economic development in South Africa.

Since there is a compelling case for pursuing development within the human rights framework,<sup>5</sup> the article adopts a rights-based approach to development.<sup>6</sup> In this regard, IP and development are discussed as legal rights that ought to be realised and protected. Consequently, international law and agreements, and customary international law (CIL) norms related to IPRs and development, will be used extensively to propel the discussion. CIL is part of domestic law in South Africa (unless it is inconsistent with the Constitution or an Act of Parliament).<sup>7</sup> International agreements ratified by the South African government are binding on South Africa and become part of domestic law when incorporated by national legislation or statute.<sup>8</sup> In addition, South African courts are enjoined, when interpreting legislation or the Bill of Rights, to consider or prefer a reasonable interpretation which is consistent with international law.<sup>9</sup>

The article is arranged as follows. Following this introduction, the second part defines IP as legal rights. Part three defines the concept of development as extending beyond economic development and including social and environmental development. Part four examines the linkage between IP and development. Part five discusses the interface between IP and economic development. Part six reviews the connection between IP and culture with a view to revealing the role of IP protection in cultural development and preservation. Part seven discusses the role of IP law in development. Part eight provides concluding remarks.

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<sup>5</sup> Arts K "Inclusive sustainable development: A human rights perspective" (2017) *Current Opinion in Environmental Sustainability* at 58. See also Miller H "Human rights and development: The advancement of new campaign strategies" (2019) 23 *The International Journal of Human Rights* 719 at 720.

<sup>6</sup> The approach is a well-developed conceptual framework for the process of human development normatively based on human rights standards and directed towards protecting and promoting human rights. United Nations Sustainable Development Group "Principle one: Human rights-based approach" available at <https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach#:~:text=The%20human%20rights%2Dbased%20approach,promoting%20and%20protecting%20human%20rights> (accessed 18 April 2021).

<sup>7</sup> Section 232 of the Constitution of the Republic of South Africa, 1996 (Constitution).

<sup>8</sup> Section 231 of the Constitution.

<sup>9</sup> Section 39(b) and 233 of the Constitution.

## 2 DEFINING IP AS LEGAL RIGHTS

IP generally refers to a category of legal rights that protect intangible and invisible creations of the mind. The common types of IPRs include designs,<sup>10</sup> patents,<sup>11</sup> trademarks,<sup>12</sup> trade secrets and copyrights.<sup>13</sup> IPRs also include other *sui generis* rights which enable people to earn recognition or financial benefit from the output of their knowledge, innovation and creativity.<sup>14</sup> IPRs are enshrined as human rights in the Universal Declaration of Human Rights (UDHR)<sup>15</sup> and have been reiterated in key international human rights legal instruments to which South Africa is a party.<sup>16</sup> The UDHR is widely accepted as having attained CIL status.<sup>17</sup> IP is recognised as a protected right in many constitutions,<sup>18</sup> including that of South Africa.<sup>19</sup>

<sup>10</sup> Design “means an aesthetic design or a functional design”. S 1(1)(ix) of the Designs Act 195 of 1993. See also Smit & Van Wyk “Design rights in South Africa” available at <https://www.svw.co.za/design-rights/> (accessed 28 April 2020) stating that design refers to rights “associated with the shape, patterns, and configuration of an item, combination of texture, shape and patterns as well as ornamentation associated with an item”.

<sup>11</sup> Patents refer to “an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem”. World Intellectual Property Organisation “Patents” available at <https://www.wipo.int/patents/en/> (accessed 1 February 2022).

<sup>12</sup> A trademark refers to a mark used or proposed to be used, to identify goods or services, and to distinguish those goods and services from similar kinds of products or marks within the industry. S (2)(1)(xiii) of the Trade Marks Act 194 of 1993.

<sup>13</sup> Copyrights refer to the rights that creators have over their literary and artistic works. The works eligible for copyright protection include literary works, musical works, artistic works, and films. S 2(1) of the Copyright Act 98 of 1978.

<sup>14</sup> Ncube C *Science, technology & innovation and intellectual property: Leveraging openness for sustainable development in Africa* Cape Town: Juta & Co Ltd (2020) at 9.

<sup>15</sup> Universal Declaration of Human Rights, 1996 (UDHR). Article 27 of the UDHR states: “Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; [e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

<sup>16</sup> For example, the International Covenant on Economic, Social and Cultural Rights, 1966 (article 15) (ICESCR), the International Covenant on Civil and Political Rights, 1966 (article 19), and the Vienna Declaration and Program of Action, 1993.

<sup>17</sup> Hannum H “The status of the Universal Declaration of Human Rights in national and international law” (1996) 25 *Georgia Journal of International and Comparative Law* 287 at 317–351.

<sup>18</sup> See, for example, article 51 of the Constitution of the Republic of Belarus, 1994; article 54(3) of the Constitution of the Republic of Bulgaria, 1991; article 39 of the Constitution of the Republic of Estonia, 1992; and article. 47 of the Constitution of the Republic of Macedonia, 1991.

<sup>19</sup> Section 25 of the Constitution. For a discussion of the Constitution and IP in South Africa, see Van der Walt AJ & Shay RM “Constitutional analysis of intellectual property” (2014) 17 *Potchefstroom Electronic Law Journal* 52 at 56–57; and Dean OH “The case for recognition of intellectual property in the Bill of Rights” (1997) 60 *THRHR* at 105.

The classification of IP as “property” within the ambit of section 25 has been pronounced on by South African courts<sup>20</sup> and scholars.<sup>21</sup> Against this backdrop, IP may not be expropriated in South Africa unless it is for a public purpose or in the public interest, in accordance with due process of law, and upon payment of compensation. The Constitution enshrines other rights pertinent to IP including, for instance the right to privacy and freedom of expression. Section 16 of the Constitution of South Africa stipulates that everyone has the right to freedom of expression, which includes freedom of artistic creativity, academic freedom, and freedom of scientific research.<sup>22</sup>

### **3 DEFINING THE CONCEPT OF DEVELOPMENT**

Development is often thought of as an economic idea, yet it is a multidimensional concept. Conceiving of development as multidimensional enables one to regard it as encompassing economic and human progress. Development goes beyond the maximisation of income or wealth to include enhancing the lives and freedoms of the people.<sup>23</sup> Development is also recognised as a right under international human rights law<sup>24</sup> and the African Charter on Human and Peoples’ Rights (ACHPR).<sup>25</sup> Article 22 of the ACHPR stipulates that:

“[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”<sup>26</sup>

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<sup>20</sup> See, for example, *Moneyweb (Pty) Limited v Media 24 Limited and Another* 2016 (4) SA 591 (GJ) (5 May 2016) at para 108. For example, in *Laugh It Off Promotions v South African Breweries* 2006 (1) SA 144 (CC) at para 17, the Constitutional Court of South Africa held that IP such as trade rights and copyright constitute property for the purposes of section 25 of the Constitution.

<sup>21</sup> See, for example, Du Bois M “State use provisions for patent law, and expropriations: Some comparative law guidelines for South Africa during the Covid-19 crisis and beyond” (2020) 23 *Potchefstroom Electronic Law Journal* at 1–35; Van der Walt AJ & Shay RM “Constitutional analysis of intellectual property” (2014) 17 *Potchefstroom Electronic Law Journal* at 52–85; and Du Bois M “Intellectual property as a constitutional property right: The South African approach” (2012) 24 *South African Mercantile Law Journal* at 177–193.

<sup>22</sup> Section 16(1)(b) and (c) of the Constitution. See also *Laugh It Off Promotions v South African Breweries* 2006 (1) SA 144 (CC).

<sup>23</sup> Sen A *Development as freedom* New York: Alfred Knopf (1999) at 14. See also Sen A “A decade of human development” (2000) *Journal of Human Development* 17 at 18.

<sup>24</sup> Declaration on the Right to Development, 1986; Vienna Declaration and Program of Action, 1993 (para 10); and Millennium Declaration, 2000 (para 11).

<sup>25</sup> The African Charter on Human and Peoples’ Rights, 1981 (ACHPR). The ACHPR is an international human rights instrument which is intended to promote and protect human rights and basic freedoms on the African continent.

<sup>26</sup> Article 22 (1) and (2) of the ACHPR. The right to development was eventually enshrined in various human rights legal instruments of the AU including the African Youth Charter, 2006, the Protocol to the ACHPR on the Rights of Women in Africa, 2003, and the African Charter on the Rights and Welfare of the Child, 1990. In addition, many African countries have incorporated the right to development as a fundamental and legally enforceable right in their constitutions. For example, the constitutions of

Equally important, development needs to be sustainable and inclusive of groups that are vulnerable, marginal, disadvantaged or socially excluded, such as women, youth, indigenous and local communities, and the informal sector. Sustainable development entails “development that meets the needs of the present generation without compromising those of future generations”.<sup>27</sup> It requires a paradigm shift from an economic-based standard to extend to environmental and social issues,<sup>28</sup> and must meet the basic needs of all and extend to all the opportunities to fulfil their aspirations for a better life. Sustainable development is the foundation of today’s international framework for development – the United Nations 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs).<sup>29</sup> Among the aspirations of the African Union Agenda 2063 is to realise a prosperous Africa based on inclusive growth and sustainable development.<sup>30</sup> South Africa has adopted its National Development Plan,<sup>31</sup> which outlines the Republic’s sustainable development objectives and principles for 2030.

In view of the foregoing discourse, the notion of development must be construed to encompass economic, environmental and social progress. Ncube observes that economic development is not measured by growth in gross domestic product alone, but, “includes a more comprehensive and systematic reckoning of how people live”.<sup>32</sup> She further opines that environmental aspects of development include concerns about the appropriate management of the earth and natural resources, as well as social factors relating to ideas of equity, empowerment, participation and cultural identity with the primary objective of poverty alleviation.<sup>33</sup> IP is discussed in this article as a driver for this kind of development. The realisation of sustainable development is particularly important given the advent of the United Nations (UN) Agenda 2030 for Sustainable Development and its Sustainable Development Goals (SDGs).<sup>34</sup> The principle of

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Angola (article 200), Benin (article 9); Burkina Faso (article 14); Burundi (articles 52 and 6); Cape Verde (article 1(4)); Central African Republic (article 2); Chad (article 19); Congo (article 8); DRC (articles 16 and 58); Gabon (article 1); Ghana (article 37(2)(a)); Cameroon (preamble); Ethiopia (section 43); Malawi (section 30); and Uganda (section 8(a)1).

<sup>27</sup> Brundtland *Report of the World Commission on Environment and Development: Our common future* (1987) at 17.

<sup>28</sup> Tladi D *Sustainable development in international law: An analysis of key enviro-economic instruments* Cape Town: Pretoria University Law Press (2007) at 94.

<sup>29</sup> The SDGs are universal goals, targets and indicators that UN member states are expected to use in framing their agendas and policies in the years leading to 2030. The SDGs follow and expand on the Millennium Development Goals that were agreed upon by governments in 2001 and expired at the end of 2015.

<sup>30</sup> Aspiration 1 of the Agenda 2063.

<sup>31</sup> National Development Plan: Vision for 2030, 2012.

<sup>32</sup> Ncube (2020) at 15–16.

<sup>33</sup> Ncube (2020) at 16.

<sup>34</sup> Agenda 2030 was adopted by the UN leaders in September 2015. It aims mainly to eradicate poverty, reduce inequalities and unemployment, tackle climate change, and ensure inclusive and sustainable

sustainable development is widely hailed as a principle of international law or CIL,<sup>35</sup> and is contained in several international agreements.<sup>36</sup> Today the realisation of sustainable development has become a guiding paradigm for economic policy. Thus, any economic policy, including that of IP, should be geared towards achieving sustainable development.<sup>37</sup>

The link between IP and SDGs is well established.<sup>38</sup> The World Intellectual Property Organization explicitly and comprehensively explains the link between IP and SDGs particularly SDG 2 (zero hunger), SDG 3 (good health and well-being), SDG 6 (clean water and sanitation), SDG 7 (affordable and clean energy), SDG 8 (decent work and economic growth), SDG 9 (industry, innovation and infrastructure),<sup>39</sup> SDG 11 (sustainable cities and communities) and SDG 13 (climate action).<sup>40</sup> The WIPO Director General, Francis Gurry, opines that:

“[i]ntellectual property as a policy exists to create an enabling environment for – and to stimulate investment in – innovation; to create a framework in which new technologies can be traded around the world and shared. The economic imperative at the heart of innovation is fundamental to the process of societal transformation that the Sustainable Development Goals aim to achieve.”<sup>41</sup>

On the other hand, the SDGs, as an international development framework, can be used to develop development-oriented national IP policies and laws.<sup>42</sup>

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development, among other goals. For more information on the UN Agenda 2030, see <https://www.un.org/sustainabledevelopment/development-agenda/>.

<sup>35</sup> See Tladi (2007) at 65. See also Lowe V “Sustainable development and unsustainable arguments” in Boyle A & Freestone D (eds) *International law and sustainable development: Past achievements and future challenges* Oxford: Oxford University Press (1999) at 36.

<sup>36</sup> For example, the United Nations Convention on Biological Diversity, 1992 and its Cartagena Protocol, 2000; the UN Framework Convention on Climate Change, 1992 and its Kyoto Protocol, 1997; the UN Convention to Combat Desertification and Drought, 1994; the Straddling Fish Stocks Agreement, 1995 of the UN Convention on the Law of the Sea, 1982; the Cotonou Partnership Agreement between the European Union and the African Caribbean and Pacific countries, 2000; the Marrakesh Agreement Establishing the World Trade Organisation, 1994; the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001; and the Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific, 2002.

<sup>37</sup> See generally Meléndez-Ortiz R & Roffe P (eds) *Intellectual property and sustainable development: Development agendas in a changing world* Cheltenham: Edward Elgar (2009).

<sup>38</sup> WIPO “WIPO and the Sustainable Development Goals: Innovation driving human progress” (2021). See also Chon M “Recasting intellectual property in light of the UN Sustainable Development Goals: Toward knowledge governance” (2019) 34 *American University International Law Review* 763–785; Ncube (2020) at 119–122.

<sup>39</sup> SDG 9 expressly recognises the connection between innovation and economic and social progress.

<sup>40</sup> WIPO “WIPO and the Sustainable Development Goals: Innovation driving human progress” (2021).

<sup>41</sup> WIPO “WIPO and the Sustainable Development Goals: Innovation driving human progress” (2021) 5.

<sup>42</sup> Cadogan M “Using SDGs to leverage national intellectual property strategies” Centre for International Governance Innovation Policy Brief No. 2. (September 2019).

#### 4 IP PROTECTION AND DEVELOPMENT

Understanding the connection between IP and development is a prerequisite to comprehending the increasing importance and role of IP protection in accelerating socio-economic development. In the 21<sup>st</sup> century, the development of a nation is largely dependent on the international competitiveness of an economy, industry or business. Progress concerning knowledge and technology is anchored on effective innovation systems which have their core is strong, modern and well-enforced IP systems.<sup>43</sup> In other words, a modern and strong IP system is essential for establishing an enabling environment for knowledge-based and technology-based economic development.<sup>44</sup> IPRs are increasingly gaining traction in policy areas such as trade, investment, health, culture and tradition, and science and technology advancement. Alikhan emphasises that: “strong and effective intellectual protection is a crucial factor in facilitating technology transfer as well as in attracting foreign direct investment in certain sectors of the economy that are vital for sustainable development”.<sup>45</sup>

Notwithstanding the foregoing, the protection of IPRs may also have its downside effects.<sup>46</sup> Strong protection of IPRs may encourage monopolies, hinder research and development and inhibit the interests of society. For example, strong IPRs protection may increase the income of the IP holders, and extreme control by IPRs holders may unduly limit the ability of the public domain to incorporate creative innovation in the long-term interests of society, or create practical obstacles to proper utilisation.<sup>47</sup> It is also worth noting that not all IPRs protection is focused on innovation and creativity. Some aspects of IP, particularly trademarks, and geographical indications as they are applied to traditional knowledge, are aimed at: “the protection of established reputation, distinctiveness and goodwill, such as may be enjoyed by a traditional community in the production of handicrafts, artworks and other traditional products”.<sup>48</sup>

The classical thought is that the rationale for protecting IPRs is to establish private rights in creations and innovations to grant control over their exploitation and provide an incentive for further creativity. While this is true, one should not overlook the

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<sup>43</sup> Chair DR “Intellectual property and technology transfer: Promoting best practices” Report of the Standing Committee on Industry, Science and Technology (2017) at 5.

<sup>44</sup> Mansfield E “Intellectual property, technology and economic growth” in Rushing FW (ed) *Intellectual property rights in science, technology, and economic performance: International comparisons* New York: Routledge (2018) ch 2.

<sup>45</sup> Alikhan S *Socio-economic benefits of intellectual property in developing countries* Geneva: World Intellectual Property Organisation (2000) at 2.

<sup>46</sup> See Lee K, Kim J, Oh J & Park K “Economics of intellectual property in the context of a shifting innovation paradigm: A review from the perspective of developing countries” (2013) 42 *Global Economic Review* at 29–42.

<sup>47</sup> Harms LTC *A casebook on the enforcement of intellectual property rights* 4 ed Geneva: World Intellectual Property Organisation (2018) at 10. See also *Théberge v. Galerie d’Art du Petit Champlain Inc* 2002 SCC 34.

<sup>48</sup> World Intellectual Property Organisation (WIPO) *Intellectual property and traditional cultural expressions/folklore* Geneva: WIPO (1999) at 10

ultimate goal of the public good – promoting progress for the benefit of society.<sup>49</sup> The scope and enforcement of certain IPRs may encroach on other social rights such as health, education and access to information. As such, the government needs to strike an appropriate balance between the public and inventors' interests. This was emphasised in *Mazer v Stein*, where the court argued that: “the economic philosophy behind the clause empowering Congress to grant patents is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and investors”.<sup>50</sup>

In practice, balancing public and private interests can be difficult, particularly with respect to the definition of balance, the conceptual tool to regulate it and the selection of the appropriate mechanism to achieve it.<sup>51</sup> This difficulty can be addressed if the protection of IPRs is realised in harmony with public interests or in a manner that benefits society at large. In South Africa, this can be guided by international law, the Constitution<sup>52</sup> and development policies. IPRs, like any other human rights, are not absolute. They are subject to other rights, must be equally weighed against the public interest, and are dependent on public policy issues. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)<sup>53</sup> provides this normative stance:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.<sup>54</sup>

The TRIPS Agreement also allows WTO members, when formulating or amending their laws and regulations, to adopt measures necessary to protect the public and nutrition and to promote public interest in sectors important to socio-economic and technological development.<sup>55</sup> The *Laugh It Off Promotions* case substantiates the foregoing argument from a South African perspective. In this case, the Constitutional Court of South Africa conceded that the right to IP:

“[i]s not absolute but rather a value which must be weighed against other values of arguably equal importance, such as the right to work, create, compete, talk, write and imitate freely. ... intellectual property does not enjoy special status under the

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<sup>49</sup> Dreyfuss RC “In praise of an incentive-based theory of intellectual property protection” in Dreyfuss RC & Siew-Kuan E (eds) *Framing intellectual property law in the 21st century: Integrating incentive, trade, development, culture, and human rights* Cambridge: Cambridge University Press (2018) at 1.

<sup>50</sup> *Mazer v Stein* 347 US 201, 219 (1954).

<sup>51</sup> Ncube C *Intellectual property policy, law and administration in Africa: Exploring continental and sub-regional cooperation* New York: Routledge (2015) at 6.

<sup>52</sup> Section 36 of the Constitution of the Republic of South Africa, 1996.

<sup>53</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995 (TRIPS Agreement).

<sup>54</sup> Article 7 of the TRIPS Agreement.

<sup>55</sup> Article 8 of the TRIPS Agreement.

Constitution. It is not immune from challenge and therefore its enforcement must be constitutionally tenable.”<sup>56</sup>

IPRs may be limited in terms of the law of general application in accordance with section 36 of the Constitution.

Another way of ensuring that IP protection contributes to domestic development is by adopting national development strategies or policies anchored on IP, among other policies. National development policies should outline how IP can support the core sectors for advancing socio-economic development. South Africa has adopted policies on development, industrial development,<sup>57</sup> and innovation.<sup>58</sup> Its blueprint for development, the National Development Plan,<sup>59</sup> aims to eliminate poverty and reduce inequality through enhanced innovation and productivity, competitive advantage, and the pursuit of a knowledge-based economy. The NDP identifies science, technology and innovation as primary drivers of economic growth, employment creation and socio-economic development in South Africa.

The National Industrial Policy Framework seeks to boost and promote industrialisation and economic diversification through transitioning from dependence on commodities and non-tradable services to an innovative and technologically advanced economy. The Draft White Paper on Science and Technology and Innovation acknowledges modern technology as an enabler of development in the areas of health, education, agriculture, food security, manufacturing, infrastructure and the environment. The attainment of the goals of the above-mentioned policies is largely dependent on IP. An effective IPR system is critical for meeting these development objectives. IP is a significant policy instrument in promoting innovation, technology transfer, industrial development, and economic growth. Khota and Stern underscore that effective management of IPRs must be recognised as an essential foundation for creating core competence and South African businesses need to develop competencies in this regard to promote business development through effective technology exploitation and knowledge transfer.<sup>60</sup>

## 5 IP PROTECTION AND ECONOMIC DEVELOPMENT

The evidence of IP protection’s impact on economic development is complex, difficult to measure and may be interpreted in various ways.<sup>61</sup> This is not to suggest that there is no connection between the protection of IPRs and economic development. One of the practical ways of explaining the linkage between IP and economic development is to

<sup>56</sup> *Laugh It Off Promotions v South African Breweries* 2006 (1) SA 144 (CC) at para 17.

<sup>57</sup> National Industrial Policy Framework, 2014 (National Industrial Policy Framework).

<sup>58</sup> Draft White Paper on Science and Technology and Innovation, 2018 (Draft White Paper on Science and Technology and Innovation).

<sup>59</sup> National Development Plan for 2030 (National Development Plan).

<sup>60</sup> Khota IA & Stern A “Leveraging intellectual property for strategic advantage in product development” (2005) 7 *South African Journal of Information Management* 1 at 6.

<sup>61</sup> Maskus KE “Incorporating a globalised intellectual property rights regime into an economic development strategy” in Maskus KE (ed) *Intellectual property, growth and trade* Amsterdam: Elsevier Science (2008) at 500.

look at IP protection as an incentive for trade and investment, which are important drivers of economic development. Despite counterarguments,<sup>62</sup> strong IP protection may motivate innovation and send a positive signal to foreign direct investment (FDI).<sup>63</sup> Foreign investors will be lured to invest in jurisdictions where their innovation will be protected.<sup>64</sup> FDI activities would, in turn, contribute toward economic development, job creation, technology transfer and productivity in the host economy. In addition, “an appropriately nuanced IP framework would enable and enhance income generating innovative activities”.<sup>65</sup> Markus appropriately summarises the critical role of different types of IPRs in influencing international trade and investment:

“Patents and trade secrets play critical roles in supporting international trade and investment in high-technology goods. Copyrights govern legal exchanges of digital products in the information and entertainment industries. Trademarks and geographical indications offer firms the ability to differentiate their names and quality characteristics in international trade, appealing to consumers of varying tastes and incomes. These and other IPRs permit firms to segment markets and offer different prices across countries and consumer groups in order to raise profits and the returns to innovation and creativity. Indeed, IPRs are ubiquitous in trade and investment, licensing, production, marketing on a global scale ...”<sup>66</sup>

Some studies find that enhanced IPRs result in lower prices, higher wages and increased industrial capacity due to the introduction of advanced technology.<sup>67</sup> Equally important,

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<sup>62</sup> For example, Gathii J “Strength in intellectual property protection and foreign direct investment flows in least developed countries” (2015) 43 *Georgia Journal of International and Comparative Law* at 1-58.

<sup>63</sup> See Kyrkillis D & Koboti S “Intellectual property rights as a determinant of foreign direct investment entry mode: The case of Greece” (2015) 19 *Procedia Economics and Finance* 3 at 4; Nunnenkamp P & Spatz J “Intellectual property rights and foreign direct investment: A disaggregated analysis” (2004) 140 *Review of World Economics* at 393.

<sup>64</sup> Legal uncertainty in IPRs’ protection may dissuade foreign investment. For instance, the European Ambassador to South Africa warned that provisions of the Copyright Amendment Bill (of South Africa) relating to fair use, in combination with an extensive list of broadly defined and non-compensated exceptions, would result in a significant legal uncertainty, with negative effects on foreign investment. The Commission further highlighted that the EU’s creative sector, film industry, and music and publishing industry raised the possibility of revising their investment plans in South Africa due to these concerns. The European Union Delegation to South Africa’s Letter to the President of the Republic of South Africa is available at [https://www.asktheeu.org/en/request/7916/response/26627/attach/2/Doc%2034%20Ares%202020%201713531%20letter%20of%2000320%20Redacted.pdf?cookie\\_passthrough=1](https://www.asktheeu.org/en/request/7916/response/26627/attach/2/Doc%2034%20Ares%202020%201713531%20letter%20of%2000320%20Redacted.pdf?cookie_passthrough=1) (accessed 2 February 2022).

<sup>65</sup> See Ncube (2020) at 120.

<sup>66</sup> See Markus (2012) at vii.

<sup>67</sup> See generally Branstetter L & Saggi K “Intellectual property rights, foreign direct investment and industrial development” (2009) NBER Working Paper 15393; McCalman P “Reaping what you sow: An empirical analysis of international patent harmonisation” (2001) 55 *Journal of International Economics* at 161–186; Chaudhuri S, Goldberg PK & Jia P “Estimating the effects of global patent protection in pharmaceuticals: A case study of Quinolones in India” (2006) 96 *American Economic Review* at 1477–1513.

the analyses of the impact of IPRs on economic development warrant research focusing on more and diverse dimensions and contexts. Research should not be limited to the legal protection of IPRs and how it stimulates innovation and technology diffusion. The discussion needs to be extended to other complementary factors that influence innovation and technology diffusion, including the quality of institutions, skilled human capital, and collaboration on research and development between tertiary institutions and industry.<sup>68</sup> In other words, the protection of IPRs is complemented by other sets of necessary factors such as good governance, trade, industrial, competition and health policies, among others.<sup>69</sup>

Another appropriate way of explaining the role of IP in development is to look at the protection of IPRs through a non-economic lens. IPRs overlap with many significant areas of human well-being and development such as access to medicines, food, education, arts and the preservation of cultural heritage. The protection of IPRs should promote, not undermine, public goals such as culture, human rights and freedoms.

## 6 IP PROTECTION AND CULTURE AND TRADITIONAL KNOWLEDGE

IP has increasingly emerged as a critical policy tool to achieve cultural development and objectives through, for example, protecting indigenous culture or property. Culture forms an integral part of a community's identity, values and meaning, and contributes to a community's self-development and self-determination.<sup>70</sup> Culture is also a source of inspiration, and businesses can create wealth using the materials of traditional culture. For example, in South Africa, the Khoi San people are generating income through craft-making via the Investing in Culture programme.<sup>71</sup>

Legal protection for traditional cultural expressions should be viewed in a broader context of preserving and safeguarding cultural heritage, promoting cultural diversity and exchange, artistic development, respecting cultural rights as well as promoting tradition-based creativity and innovation as ingredients of sustainable economic development. The preamble of the UN Declaration on the Rights of Indigenous Peoples<sup>72</sup> recognises that the, "respect for indigenous knowledge, culture and traditional practices contribute to sustainable and equitable development and proper management of the

<sup>68</sup> Ahn S, Hall BH & Lee K "Introduction" in Ahn S, Hall BH, Lee K (eds) *Intellectual property for economic development* Cheltenham: Edward Elgar (2014) at 3.

<sup>69</sup> See Maskus KE "Intellectual property rights and economic development" (2000) 32 *Case Western Reserve Journal of International Law* 471 at 476-495. See also Mercurio B "Growth and development: Economic and legal conditions" (2007) 30 *University of New South Wales Law Journal* at 437-476.

<sup>70</sup> Guibault L "Intersections of intellectual property" in Kamperman-Sanders A, Ramalho A, Mulder C & Moerland-Dahrendorf A (eds) *Introduction to intellectual property and knowledge management* (2018) at 1-11.

<sup>71</sup> See Investing in Culture programme at <http://www.dac.gov.za/sites/default/files/InvestingInCulture.pdf> (accessed 14 April 2022).

<sup>72</sup> Declaration on the Rights of Indigenous Peoples, 2007.

environment".<sup>73</sup> Article 31 (1) of the UN Declaration on the Rights of Indigenous People Rights states:

"Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."<sup>74</sup>

Culture is a constitutionally protected right in South Africa. Section 30 of the Constitution provides that everyone has the right to use the language and to participate in the cultural life of their choice. Section 31 provides that persons that belong to a cultural community may not be denied the right to enjoy their culture or form join and maintain cultural organisations. Protecting and enforcing cultural heritage, traditional knowledge and traditional cultural expressions by way of IP protection is critical for preserving indigenous intellectual property or culture. IP law is one of the many ways a government can recognise, promote and protect indigenous intellectual property. The preamble to the UNESCO Diversity Convention recognises the significance of IP in sustaining those involved in cultural creativity.

Some authors argue that indigenous knowledge may be protected through copyright law<sup>75</sup> or trademark law and related rights (certification and collective marks and geographical indications).<sup>76</sup> However, these laws are somewhat limited in their potential for protecting traditional knowledge.<sup>77</sup> Indigenous knowledge does not fit

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<sup>73</sup> For a discussion, see Baretti M "The United Nations Declaration on the Rights of Indigenous Peoples: A human rights framework for intellectual property rights" in Rimmer M (ed) *Indigenous intellectual property: A handbook of contemporary research* Cheltenham: Edward Elgar (2015) at 47–63.

<sup>74</sup> Article 12(1) of the Declaration on the Rights of Indigenous Peoples stipulates that "indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains".

<sup>75</sup> Zografos D *Intellectual property and traditional cultural expressions* Cheltenham: Edward Elgar (2010) at 1.

<sup>76</sup> See Rimmer M "Australian icons: Authenticity marks and identity politics" (2004) 3 *Indigenous Law Journal (University of Toronto)* at 139–179.

<sup>77</sup> Copyright is relevant to traditional cultural expressions because these are literary and artistic products. However, copyright is of limited duration and, in the case of traditional designs, may have expired. Trademarks would need to be applied for in different jurisdictions and, in the case of marks emanating from cultural expression or traditional practices, these might need to be applied for as collective trademarks. Rampersadh K & Yeates S "What role do IP rights have in discouraging cultural appropriation?" available at <https://www.adams.africa/intellectual-property/role-ip-rights-discouraging-cultural-appropriation/> (accessed 5 May 2021).

simply into such types of IP.<sup>78</sup> A *sui generis* law could serve as a better means for providing adequate protection for traditional knowledge. The Constitution of South Africa does not provide a comprehensive legal framework for cultural or indigenous IP – traditional knowledge and culture. Indigenous knowledge is protected through comprehensive legislation, the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Act.<sup>79</sup> The Act provides an opportunity for the inclusion of indigenous cultural expressions as part of traditional or indigenous knowledge.

The Act further defines “cultural expressions” to include content that has been assimilated into the cultural make-up or essential character of an indigenous community. More importantly, the Act entitles the traditional knowledge holder to benefit from the commercial use of that traditional and restrain any unauthorised use of that tradition akin to the IPRs holders. The enactment of the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Act is commended as a way of protecting traditional knowledge and benefiting the holders through the commercial use of their traditional knowledge.

Other legislation to mention in this instance is the Intellectual Property Laws Amendment Act.<sup>80</sup> This Act, once promulgated, will bring about significant changes regarding the protection of indigenous knowledge.<sup>81</sup> The Act will create a new system of IPRs specific to traditional knowledge in South Africa. The Act amends the provisions of various intellectual property laws of South Africa relating to indigenous knowledge, including the Performers’ Protection Act,<sup>82</sup> the Copyright Act,<sup>83</sup> the Trade Marks Act<sup>84</sup> and the Designs Act.<sup>85</sup> The Act will amend the Performers’ Protection Act to provide for the recognition and protection of performances of traditional works. The Copyright Act will be amended to provide for the recognition and protection of indigenous works.<sup>86</sup>

The Trade Marks Act will be amended to provide for the recognition of indigenous terms and expressions and the registration of such terms and expressions as: trademarks; to create for this purpose a further part of the trademarks register, to provide for the recording of indigenous terms and expressions, and to provide for

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<sup>78</sup> Karijke S & Jooste C “Commentary on the Copyright Amendment Bill 2017” Submitted by the Anton Mostert Chair of Intellectual Property Law, Department of Mercantile Law, Faculty of Law, Stellenbosch University 4 (2017) available at <https://blogs.sun.ac.za/iplaw/files/2017/06/CIP-Comments-Copyright-Amendment-Bill-2017.pdf> (accessed 5 May 2021).

<sup>79</sup> Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019.

<sup>80</sup> Intellectual Property Laws Amendment Act 28 of 2013.

<sup>81</sup> See Klopper H, Pistorius T, Rutherford B, Tong L, Van Der Spuy P & Van Der Merwe A (eds) *Law of intellectual property in South Africa* 2<sup>nd</sup> ed (2016) for a comprehensive discussion of changes that will be made in IP protection of traditional knowledge.

<sup>82</sup> Performers’ Protection Act 11 of 1967.

<sup>83</sup> Copyright Act 98 of 1978.

<sup>84</sup> Trade Marks Act 194 of 1993.

<sup>85</sup> Designs Act 195 of 1993.

<sup>86</sup> Section 4 of the Intellectual Property Laws Amendment Act.

further protection of geographical indications.<sup>87</sup> The Act will amend the Designs Act to provide for the recognition and registration of indigenous designs, to create for this purpose a further part of the designs register, and to introduce statutory provisions to provide for the establishment of a National Council for Indigenous Knowledge,<sup>88</sup> a National Database for the recording of indigenous knowledge,<sup>89</sup> and a National Trust and Fund for Indigenous Knowledge.<sup>90</sup>

### **7 THE ROLE OF IP LAW IN DEVELOPMENT**

The law related to IP should be enforced as one of the foundations of South Africa's modern policy for accelerating socio-economic development. In addition to signing and ratifying several international legal instruments related to IP,<sup>91</sup> South Africa has adopted a domestic legal and regulatory framework for IP. The international legal instruments on IP have facilitated the harmonisation and cooperation of South African IP law with those of other jurisdictions. South Africa's legal and regulatory framework for IP protection is still evolving, and is fragmented into several legislative texts and regulations covering patents,<sup>92</sup> trademarks,<sup>93</sup> designs,<sup>94</sup> copyrights,<sup>95</sup> and other special categories of rights such as plant breeder's rights.<sup>96</sup>

Fragmentation may not be the best way to achieve a common goal. Fragmented legal and regulatory frameworks may undermine the efforts to achieve effective protection and enforcement of the IPRs. Consequently, South Africa adopted an IP Policy the overarching objective of which is to promote a holistic, balanced and coordinated approach to IP which is in line with the Constitution. Establishing a robust framework

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<sup>87</sup> Section 9 of the Intellectual Property Laws Amendment Act.

<sup>88</sup> Section 28L of the Intellectual Property Laws Amendment Act.

<sup>89</sup> Sections 28C and 43D of the Intellectual Property Laws Amendment Act.

<sup>90</sup> Section 28I of the Intellectual Property Laws Amendment Act.

<sup>91</sup> South Africa is a signatory to several IP treaties and conventions including the TRIPS Agreement (which establishes minimum thresholds for IP protection for World Trade Organization members); the Berne Convention for the Protection of Literary and Artistic Works, 1886 (which provides automatic minimum copyright protection for literary and artistic works); the Paris Convention for the Protection of Industrial Property, 1883 (which protects patents, designs and trademarks); the Patent Cooperation Treaty, 1970 (which permits simultaneous application and filing of patents in multiple countries); and the International Convention for the Protection of New Varieties of Plants, 1961 (which provides for the protection of plant breeders' rights).

<sup>92</sup> The Patent Act 57 of 1978 provides for the registration and granting of patents for inventions.

<sup>93</sup> The Trade Marks Act 194 of 1993 provides for the registration of trademarks, certification trademarks and collective trademarks. The Act was amended by the Companies Act 71 of 2008 and the Intellectual Property Laws Amendment Act 38 of 1997.

<sup>94</sup> The Designs Act 195 of 1993 provides for the registration of designs. The Act was amended by the Companies Act 71 of 2008 and the Intellectual Property Laws Amendment Act 38 of 1997.

<sup>95</sup> The Copyright Act 98 of 1978 regulates copyright in South Africa. The Act has been amended numerous times, with the latest amendments made in 2011.

<sup>96</sup> The Plant Breeders' Rights Act 15 of 1976 provides for the granting, registration and protection of new varieties of plants.

for IP is important, but not an end in itself. Government should ensure that such a framework is implemented effectively to realise the purported objectives. This also calls for emphasising the role of the judiciary in enforcing and protecting IPRs within the prism of the South African law and development objectives. The courts must enforce IPRs in accordance with South Africa's international obligations, constitutional imperatives, and development goals, which provide added impetus to foreign and local investment.<sup>97</sup>

## **8 CONCLUSION**

Although their interrelationship is always complex, IP and development are indisputably intertwined. This article has explored the intersection between the protection of IPRs and development with a focus on South Africa. It has discussed how the protection of IPRs can be leveraged to achieve development issues, focusing on innovation, economic development, public health and culture. The article does not advocate for weak protection of IPRs. Instead, it suggests that IPRs must be protected and enforced in a manner that fosters economic and human development. It also suggests that IP law should take into account both private and public interests. Therefore IPRs' protection must be leveraged in ways that protect and sustain innovation and investment, while at the same time preserving culture and traditional knowledge, and protecting public health and welfare.

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<sup>97</sup> See Harms L "The role of the judiciary in enforcement of intellectual property rights: Intellectual property litigation under the common law system with special emphasis on the experience in South Africa" Paper presented to the WIPO Advisory Committee on Enforcement (2002) at 23 available at [https://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_2/wipo\\_ace\\_2\\_4\\_rev.pdf](https://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_2/wipo_ace_2_4_rev.pdf) (accessed 10 May 2021).

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