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Intellectual Property Rights or Restrictions?

By Michelle Roseborough

Intellectual Property Rights (IPR) pose a challenge to media in South Africa and around the world. This is not surprising, as the regulatory and legal framework surrounding IPR is also imperfect. It seems that without specialist legal knowledge on IPR, it is difficult to understand the various issues surrounding it. This research aimed to examine media coverage and consider what is not covered in regard to IPR.

Two principles are entrenched in the debate on Intellectual Property Rights (IPR): "legal protection for intangible works" and "free expression and exchange of ideas"¹. However, as recent court cases have publicised (i.e. Laugh it Off vs SAB-Miller), IPR has been used globally to censor freedom of expression, with mixed results. This ongoing debate suggests that IPR often hampers access to knowledge and innovation, thereby undermining its primary purpose.

A number of arguments have been placed at the forefront of intellectual property debates. One argument asserts that a "problem we face when it comes to issues of IP... is how to balance artistic and entrepreneurial incentives, with the interests of the larger community of users in a free, unhindered exchange of ideas and products."²

However, "until recently the public and media perception of issues surrounding IPR was that their configuration was unproblematic, [but that] there was only a problem of enforcement," states former Creative Commons lawyer, Andrew Rens. Undoubtedly, there are no clean-cut answers to these current debates, yet better media coverage of these topical issues could improve knowledge and understanding about the complexities of Intellectual Property Rights. It is then imperative that media adequately understands and covers a broad spectrum of IPR issues and informs its readers.

Recent media coverage of Intellectual Property Rights has not been comprehensive. The Media Monitoring Project took a broad view of IPR to attempt to capture any article which may refer to it. The initial monitoring period was extended, because of the few articles that appeared.³ In the trickle of articles between the months of

¹ Crews, Clyde Wayne Jr. & Thierer, Adam. (2001). *When Rights Collide: Principles to Guide the Intellectual Property Debate*. Accessed 23 May 2007 from <http://cato.org/tech/tk/010604-tk.html>.

² Ibid.

³ Monitoring period ran from 1 March- April 30, 2007

March and April⁴, coverage offered little in the way of understanding the complexities of Intellectual Property Rights. Likewise, few articles undertook the responsibility of addressing Intellectual Property Rights legislation and issues therein. Consequently, readers are no better informed with regard to the variety of factors pertaining to Intellectual Property Rights, such as long-term implications of intellectual property right infringement, consequences, and current trends.

Of the articles that were collected, the majority highlighted instances of piracy, yet failed to draw attention to the variety of broad issues that fall within the scope of IPR. For example, 'Software pirates forced to cough up' (*Business Day*, 29/3/07, p.8) specifically addressed that the use of pirated computer software has become a pervasive practice among South African businesses. Although the article states that pirating software is indeed a criminal offence, it did not explain the long-term implications of these actions, which costs SA approximately R1.2bn each year.⁵ However, the article was too short to provide an in-depth analysis of the critical issues at hand.

Likewise, two articles 'Top search engine says sorry to rival' (*The Star*, 10/4/07, p.19) and 'US takes China to WTO over 'piracy'' (*Business Day*, 11/4/07, p.7) covered the international conflict between the US and China over pirated merchandise and information. Although coverage of this conflict highlighted the international gravity of IPR, it could have expanded on the legislative developments that arise between the two countries. Again the articles were quite narrow and failed to provide a broader context.

The majority of articles seemingly skimmed the surface of IPR, providing basic context to the story, yet inadequate analysis or examination of the issues therein. In addition to the previously mentioned articles, an additional seven articles highlighted piracy issues, without adequate coverage of the more complex issues.

Of the articles collected, most failed to mention that Intellectual Property Rights are cross-cutting and often affect a variety of governmental departments, organisations, and advocacy groups. One article covered in *Business Day* 'Keep modified cassava behind glass- regulators' (22/3/07, p.3) illustrated this point. The article suggested that the government's capacity to regulate genetically modified foods⁶ was being questioned by the Agriculture Research Council whose application for more controlled testing of genetically modified foods was turned down. The power dynamics between the two institutions illustrates how a combination of key players can determine how IPR policies are formulated and enforced. Within the context of Intellectual Property Rights, genetically modified foods are a cross-cutting issue. It is understood that: "he who considers that he has created a GMO lawfully intends to

4 Mediums examined were: Beeld; Business Day; Daily Sun; Mail and Guardian; Saturday Star; Sowetan; Sunday Sun; Sunday Times; The Citizen; The Star; The Sunday Independent; The Weekender.

⁵ Mabuza, Ernest. (April 25, 2007). "Crackdown coming on illegal software users." *Business Day*.

⁶ Genetically modified foods are an IPR issue as they are subject to patent laws



defend it from privacy and counterfeit. But since GMO is by nature a biological being, a living being, how can someone allege to have [created] a living being,"⁷ Ultimately the article brings attention to the variety of players that could be involved in the development and enforcement of IPR policies. Yet, genetically modified organisms (GMO) are usually at the centre of economic and environmental debates.

In South Africa, "the Department of Trade and Industry is the custodian of Intellectual Property Rights. Yet, legislation involving intellectual property can originate or involve participation from a number of government departments and statutory bodies, such as, inter alia, Health, Department of Communications, Department of Agriculture."⁸ According to Andrew Rens, "while South African legislation has been updated on numerous occasions, it too is in desperate need of reform. Moreover, current legislation is not optimally configured for the needs of a developing country and rapid technological change."

Finally, the challenge of growing our own intellectual capital in South Africa is real and largely determined by the way we handle Intellectual Property Rights. Likewise, "intellectual property is not just a matter of who owns what, it's also a matter of who has the skills and ability to make, invent and control."⁹ This speaks volumes when protecting our own knowledge base in South Africa. In order to establish a relationship between the most current IPR debates and the broader context, it is necessary that the media provide adequate coverage of IPR and draw attention to the elusive issues that could generate further discussion. In so doing, it is expanding the debate around intellectual property and informing citizens of its importance.

This research by MMP supports Andrew Rens' view that media coverage of IPR should be more critical. The media needs to "distinguish carefully and strongly the difference between large scale commercial criminal infringement... and other possible infringements such as failure to attribute an author, or copying of a text book." Likewise, "while large scale commercial infringement is both criminalised and morally abhorrent it is not the same thing as individual acts such as downloading a song for personal use". Rens asserts that the media should understand this difference to avoid general confusion about IPR infringement. Finally, the media should "understand the essential function of IPR which is to increase access to knowledge and innovation. A system which fails to do so is broken."

The articles collected only served to provide a somewhat narrow representation of the issues pertaining to IPR. As mentioned before, the majority of articles highlighted circumstances of piracy, rather than a broad spectrum of factors that fall within the IPR scope. As a result, the broader issues of IPR were not discussed. Further, the

⁷ Panafrican Workshop held in Mbalmayo and Yaounde, Genetically Modified Organisms (GMO and Intellectual Property Rights (IPR) what Stakes?, 1999: 5.

⁸ The Edge Institute. (n.d.). *Intellectual Property Rights in South Africa: An economic review of policy and impact*. Accessed 23 May 2007 from <http://www.the-edge.org.za/pdf/Intellectual%20property%20Rights.pdf>.

⁹ Ford, Heather. (2005). *Here's a sharper tool*. Rhodes Journalism Review 25.



articles failed to acknowledge that IPR can be cross-cutting and affect a variety of governmental and statutory bodies. Finally, the articles failed to contextualise the long-term implications of poor compliance with IPR legislation and the affects it could potentially have on protecting the knowledge base in South Africa.

There is a clear need for better journalistic practice around IPR and more informed journalists. It is because this is such a complex area that media consumers need more nuanced information to make informed decisions. By discussing piracy and other IPR issues away from the legal framework and alternatives such as creative commons, the issues become limited to piracy. The other side of IPR, that of the creative exchange of ideas for economic and cultural growth is left unexplored.



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