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NATIONAL INTELLECTUAL PROPERTY
MANAGEMENT OFFICE

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GUIDELINE 1.3 OF 2019

INTERPRETATION OF THE SCOPE OF THE INTELLECTUAL PROPERTY RIGHTS FROM PUBLICLY FINANCED RESEARCH AND DEVELOPMENT ACT (ACT 51 of 2008) (IPR ACT): SETTING THE SCENE

SUMMARY

Guideline 1 of 2012 entitled “*Interpretation of the Scope of the IPR Act: Setting the Scene*” was first published on 12 December 2012 and was the first in a series of guidelines to be released by the National Intellectual Property Management Office (NIPMO) to assist in interpreting and applying the IPR Act. In particular, this guideline “*sets the scene*” for the subsequent guidelines and aims to answer the questions “*To what does the IPR Act apply*” and “*To whom does the IPR Act apply?*”. Furthermore, the issue of retrospective application of the IPR Act is discussed. This is largely be achieved via a number of pictorial scenarios, in order to clarify whether a particular research and development (R&D) project, and the associated intellectual property (IP) generated, as well as any subsequent IP transactions are subject to the prescriptive obligations and reporting requirements of the IPR Act.

Guideline 1.1 of 2017 takes into consideration the updates made in the *Frascati Manual* (2015) with specific reference to what is regarded as R&D. In addition, a number of stylistic amendments have been made to facilitate easy reading. Guideline 1.2 of 2018 provides further updates and clarifications but most importantly aims to simplify the Guideline. Guideline 1.3 sets out that a higher education institution may be regarded as an “organ of state” and hence a funding agency.

This Guideline is issued in terms of Regulation 3 of the IPR Act Regulations (dated 2 August 2010).

Please do not hesitate to contact NIPMO (Jetane Charsley; Jetane.Charsley@nipmo.org.za; 012 844 0228) should you have any questions with regards to any matter in this Guideline.

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Date: 28 March 2019

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1. GLOSSARY OF TERMS

confidential information	This term refers to any non-public information and, for example, would be the form an invention would take at the outset before it has been placed in the public domain. Should the confidential information never be placed in the public domain, and provided it has value to a party, it may be regarded as a trade secret.
contain(s); comprise(s) shall have a similar meaning	This word, typically precedes a list, and provides a number of examples or scenarios that apply to the topic at hand. This is a closed list and shall be regarded as exhaustive.
factual encounter	This term refers to the investigation that is conducted to determine the date the intellectual property was created.
include(s)	This word, typically precedes a list, and provides a number of examples or scenarios that apply to the topic at hand. This is an open list and should not be regarded as exhaustive
industrial property	This term refers to intangible property such as inventions, designs and trade marks
not exhaustive	This term is used to indicate that the list of examples provided is not a complete list and further examples may exist that are equally applicable
Commencement of the IPR Act	The date the IPR Act came into force with the Proclamation of its' commencement on 2 August 2010
Promulgation of the IPR Act	Following ascension by the President of the Republic of South Africa to the IPR Act on 17 December 2008, the IPR Act was published in the <i>Government Gazette</i> on 22 December 2008
such as	This term may be used interchangeable with the term "for example" and indicates that the terms that follow are mere examples and are not exhaustive

LIST OF ACRONYMS USED

HEI	Higher Education Institution
IP	Intellectual Property
IPR	Intellectual Property Rights
IPR Act	Intellectual Property Rights from Publicly Financed Research and Development Act (Act 51 of 2008)
NIPMO	National Intellectual Property Management Office
OTT	Office of Technology Transfer
R&D	Research and Development

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2. PREAMBLE: THE IPR ACT IN CONTEXT

The National Research and Development (R&D) Strategy of 2002 identified “*inadequate intellectual property legislation and infrastructure*” as one of several factors that require addressing in South Africa’s R&D strategy going forward. In particular, “*inventions and innovations from publicly financed research (are) not effectively protected and managed*”.

Against this background the IPR Act was promulgated on 22 December 2008 and put into operation on 2 August 2010 with the publication of Proclamation for the commencement of the IPR Act.

The long title of the IPR Act reads as follows:

“To provide for more effective utilisation of intellectual property emanating from publicly financed research and development; to establish the National Intellectual Property Management Office and the Intellectual Property Fund; to provide for the establishment of offices of technology transfer at institutions; and to provide for matters connected therewith.”

In particular, the objects of the IPR Act (Section 2(1)) are to:

“make provision that intellectual property emanating from publicly financed research and development is identified, protected, utilised and commercialised for the benefit of the people of the Republic, whether it be for social, economic, military or any other benefit.”

The IPR Act and its’ overriding objectives are by no means unique to South Africa. In fact, the IPR Act is loosely based on its’ United States’ equivalent, namely the Bayh-Dole Act which was incorporated by amendment into the Patent and Trademark Laws Amendments of 1980 (Pub. L. No. 96-517).

Similar legislation has since been enacted in, for example, Germany, Taiwan, Korea, Brazil and China, or systems put in place to achieve the same goals in, for example, Switzerland, the United Kingdom and Turkey.

3. PROSPECTIVE APPLICATION

3.1 LEGISLATION AND CASE LAW – “PRESUMPTION AGAINST RETROSPECTIVITY”

Section 81 of the Constitution of the Republic of South Africa, 1996 states:

“A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act.”

The Act then becomes applicable or effective on the enactment date (in other words, the date on which it is published in the *Government Gazette*) or on the commencement date (in other words, a specific date identified by the Act and typically by proclamation in the *Government*

Gazette). Unless specifically provided for, the Act applies prospectively.

The Appellate Division (*Jockey Club of SA v Transvaal Racing Club*, 1959 (2) 54) held that:

“The general rule is that, in the absence of an express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation.”

3.2 APPLICATION TO THE IPR ACT

The IPR Act was promulgated on **22 December 2008** and commenced on **2 August 2010** following the publication of a proclamation for its’ commencement in the *Government Gazette*. Furthermore, no provision was made in the IPR Act indicating that the IPR Act has retrospective application. Therefore, in the absence of such provision, a presumption against retrospectivity exists and one can assume that the IPR Act applies prospectively.

The scope of the IPR Act should thus be interpreted as being prospective.

4. SCOPE OF THE ACT

4.1 TO WHAT DOES THE ACT APPLY?

According to Section 3 of the IPR Act:

*“This Act applies to **intellectual property emanating from publicly financed research and development.**”* [emphasis added]

Turning to each of the emphasised terms:

4.1.1 Intellectual Property

“Intellectual Property” (IP) is defined in Section 1 of the IPR Act as:

*“**any creation of the mind that is capable of being protected by law** from use by any other person, whether in terms of South African law or foreign intellectual property law, **and includes any rights** in such creation, but **excludes copyrighted works** such as a thesis, dissertation, article, handbook or any other publication which, in the ordinary course of business, **is associated with conventional academic work.**”* [emphasis added]

Turning further to each of the emphasised terms within the definition of IP:

a) **“any creation of the mind that is capable of being protected by law”**

The term *“any creation of the mind”* is very broad and so this term is qualified by *“that is capable of being protected by law from use by any other person, whether in terms of South*

African law or foreign intellectual property law”.

Table 1 below provides a non-exhaustive list of the different types of creations of the mind that may constitute IP, indicates whether they qualify for statutory protection or protection in terms of common law and, in the case of statutory protection, the relevant legislation is provided.

Please note that all forms of IP which may find protection in terms of statutory law, only qualify for such statutory protection provided the creation of the mind meets a number of inherent requirements. For example, an invention must be novel, involve an inventive step and be capable of use in trade, industry or agriculture before the invention will qualify for patent protection.

TABLE 1: EXAMPLES OF CREATIONS OF THE MIND, THE FORM OF LEGAL PROTECTION AFFORDED AND THE CORRESPONDING STATUTE (WHERE APPLICABLE)

<i>Creation of the mind</i>	Example(s)	Possible IP Right and associated legal protection afforded	Statute (where applicable)
<i>Confidential information/ Industrial Property</i>	Invention	Patent (statutory) or trade secret (common law)	Patents Act No. 57 of 1978 (as amended)
	Industrial and/or aesthetic design	Design (statutory)	Designs Act No. 195 of 1993 (as amended)
	Plant variety	Plant Breeders' Right (statutory) and patent (in the case of, for example, a genetically modified variety; statutory)	Plant Breeders' Rights Act No 15 of 1976 and Patents Act No. 57 of 1978 (as amended)
	Mark	Trade mark (statutory or common law through use)	Trade Marks Act No. 194 of 1993
<i>Copyrighted work</i>	Literary work; Musical work; Artistic work; Cinematograph film; Sound recording; Broadcast; Programme-carrying signal; Published edition; and Computer program	Copyright (statutory)	Copyright Act No. 98 of 1978 (as amended)

b) “and includes any rights in such creation”

Within the definition of IP, the legislature has included the creation of the mind as well as the right, in other words the intellectual property right (IPR).

Consider, for example, where the creation of the mind is an invention, and the IPR is the patent which is granted as an exclusionary right to protect the underlying invention. In practice, the IP is created as **confidential information** during the step of R&D. Unless it is a common law right, statutory IPRs are only obtained once the particular right has been granted. Furthermore, these granted rights are then maintained following payment of renewal fees (also

known as maintenance fees or annuities).

Depending on the type of IPR obtained, the duration of the right will vary (subject to the payment of renewal fees). Consult the various statutes to determine what the duration of the particular right will be.

c) “excludes copyrighted works....is associated with conventional academic work”

This proviso should be interpreted within the scope in which it was intended and using the non-exhaustive list introduced by the term “*such as*” as an indication as to which copyrighted works fall outside the scope of the IPR Act.

The key to understanding the scope of this proviso lies in the term “*conventional academic work*”. “*Academia(c)*” may be defined as: “*relating to education and scholarship*”.

The aim of this proviso in the IPR Act was to provide that the actual thesis, dissertation or article does not fall within the scope of the IPR Act because, for example, the underlying invention would already have been disclosed and protected (where applicable) before the thesis, dissertation or article was put into the public domain via its publication. A further aim of this proviso is to exclude academic works such as lecture notes or handbooks which are generated and distributed to learners during the course of their studies.

4.1.2 Emanating

The IPR Act does not provide a definition for the term “*emanating*”. Turning to the definition in the Concise Oxford English Dictionary (11th edition), the word “*emanate*” is defined as: “*issue or spread out from a source*”; or “*to give out or emit*”.

Considering the provided definition, it is clear that the scope of the IPR Act only extends to IP that arises from R&D activities undertaken using public funds. The definition of “*publicly financed*” and “*R&D*” are thus key to further understanding the scope of the IPR Act (see below).

4.1.3 Publicly Financed

“*Publicly financed research and development*” is defined in Section 1 of the IPR Act as:

*“research and development undertaken using **any funds allocated by a funding agency** but **excludes funds allocated for scholarships and bursaries**” [emphasis added]*

Turning further to each of the emphasised terms within the definition of publicly financed R&D:

a) *any funds allocated by a “funding agency”*

The IPR Act does not provide a definition for the term “*allocated*”. Turning to the definition in the Concise Oxford English Dictionary (11th edition), the word “*allocate*” is defined as: “*to assign or distribute*”.

The key to determining whether funding received by a recipient constitutes public funding, lies in the word “*allocate*”. In other words, the money must have:

- (i) moved through the fiscus (or treasury of the state) to constitute public funding; AND
- (ii) must have been allocated:
 - a. by National Treasury for R&D;
 - b. within the budget of a funding agency for R&D; or
 - c. within the budget of a recipient for R&D

then the funding constitutes public funding for R&D.

In the latter instance, it becomes clear that public funding is not limited to monies received for R&D but extends to monies used for R&D, and will most certainly include indirect contributions in the form of salaries, facilities, overhead costs *etcetera*, which are typically the overhead costs borne by a recipient, and in particular, a institution.

A “*funding agency*” is defined in Section 1 of the IPR Act as:

*“the State or an **organ of state** or a **state agency** that funds research and development.”* [emphasis added]

An “*organ of state*” is defined in the Constitution of the Republic of South Africa (Act 108 of 1996) as:

- “(a) any department of state or administration in the national, provincial or local sphere of government; or*
 - (b) any other functionary or institution*
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*
 - (ii) exercising a public power or performing a public function in terms of any legislation,*
- but does not include a court or a judicial officer.”*

When interpreting point (b)(ii) above it is noted that a HEI can be regarded as an organ of state as it performs a public function in terms of the Higher Education Act (Act no 101 of 1997). This conclusion was established in the judgement of NUTESA v Central University of Technology, wherein Judge Molahlehi accepted that an HEI is an organ of state following the applicant’s argument. Thus it follows that ,as a HEI can be regarded as an organ of state, it can in turn function as a funding agency in terms of the IPR Act.¹

Thus all funding by national, provincial or local levels, as well as by any higher education institution, of government for R&D constitutes public funding.

The term “*state agency*” is understood by NIPMO to mean a permanent or semi-permanent organisation or institution of government, responsible for overseeing and performing a number

¹ The judge in the case of Nutesa v Central University of Technology, Free State (JR 2043/08) [2008] ZALC 146; [2009] 4 BLLR 369 (LC); (2009) 30 ILJ 1620 (LC) (19 November 2008) accepted that an HEI is an organ of state following the applicant’s argument. The Higher Education (HE) Act does not specifically define a HEI as an organ of state. In fact, Section 51 of the HE Act states “*Registration of private higher education institutions: No person other than a public higher education institution or an organ of state may provide higher education unless that person is*”. With the inclusion of the “or” it could be argued that a HEI and an organ of state are separate from one another. However, when referring to the definition of an “*organ of state*” as defined in Section 239 of the Constitution, an HEI is considered an organ of state and therefore may act as a funding agency

of administration functions.

Thus all funding by state agencies such as the National Research Foundation, the Technology Innovation Agency, the Support Program for Industrial Innovation, the Technology and Human Resources for Industry Program [designed and managed by the Department of Trade and Industry (the *dti*), THRIP is a funding scheme in which the *dti* and industry jointly invest in research projects. THRIP funding is thus a source of public funding for R&D and any recipient of THRIP funding is a recipient in terms of the IPR Act and must comply with the requirements of the IPR Act]; **or the Small Enterprise Development Agency etcetera, constitutes public funding.**

However, when a state agency/ public entity (scheduled in terms of the Public Finance Management Act (No. 1 of 1999)) does not use public funds as defined in 4.1.3(a) above, and instead funds R&D from funds accrued from performing a service or function, then the funding provided is not regarded as public funding even though it comes from a state agency [For example: ESKOM conducts R&D in their environment and further funds R&D at institutions (as per the definition of the IPR Act). Currently, ESKOM funds all R&D at institutions from income received from electricity sales and not from public funds received. Thus, despite ESKOM being recorded as a public entity, when ESKOM funds R&D using income received from electricity sales, this does not constitute public funding. In terms of section 15(5)² of the IPR Act, ESKOM are regarded as a private entity or organisation].

b) excludes funds allocated for scholarships and bursaries

Scholarships and bursaries are not regarded as public funding for the purposes of determining public funding in terms of the IPR Act. However, these costs are unlikely to be the only costs in the R&D project.

4.1.4 Research and Development (R&D)

a) Frascati Manual's definition of R&D

A definition for R&D is not provided in the IPR Act. Turning to the Organisation for Economic Co-operation and Development (OECD), in an extract taken from the *Frascati Manual* entitled "Guidelines for Collecting and Reporting Data on Research and Experimental Development, The Measurement of Scientific, Technological and Innovation" (2015), R&D comprises:

"Research and experimental development comprises creative and systematic work undertaken in order to increase the stock of knowledge – including knowledge of humankind, culture and society – and to devise new applications of available knowledge."

Furthermore, R&D covers three (3) types of activity namely basic research, applied research and experimental development, which may be defined as follows:

² Section 15(5) of the IPR Act: (5) For the purposes of this section, private entity or organisation includes a private sector company, a public entity, an international research organisation, an educational institution or an international funding or donor organisation.

“Basic Research is experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any particular application or use in view.

Applied Research is original investigation undertaken in order to acquire new knowledge. It is, however, directed primarily towards a specific practical aim or objective.

Experimental Development is systematic work, drawing on knowledge gained from research and practical experience and producing additional knowledge, which is directed to producing new products or processes or to improving existing products or processes.”

A difficulty remains in determining whether or not an activity may be regarded as an R&D activity.

According to the *Frascati Manual* (2015) an R&D activity can be distinguished from a non-R&D activity if five core criteria are met; namely the activity must be:

- (a) **novel** i.e. aimed at new findings;
- (b) **creative** i.e. based on original, not obvious, concepts and hypotheses;
- (c) **uncertain** i.e. uncertain about the final outcome;
- (d) **systematic** i.e. planned and budgeted; AND
- (e) **transferable and/or reproducible** i.e. leads to results that could be possibly reproduced.
- (f)

According to the *Frascati Manual* (2015) **“All five criteria must be met, at least in principle, every time an R&D activity is undertaken whether on a continuous or occasional basis.”**

As most R&D activities can be grouped into R&D projects, the table below provides a verbatim account (*Frascati Manual* (2015)) of the type of questions which can be asked to determine whether a project is an R&D project:

TABLE 3: EXAMPLES OF QUESTIONS FOR IDENTIFYING AN R&D PROJECT

QUESTION	COMMENT
<i>What are the objectives of the project?</i>	The pursuit of original and challenging objectives through the creation of “new knowledge” (such as seeking previously undiscovered phenomena, structures or relationships) is a key criterion for R&D. Any use of already available knowledge (adaptation, customisation, etc.) which does not entail an attempt to expand the state of the art should be excluded. (Novelty)
<i>What is new about this project?</i>	In addition to the development of “new knowledge”, an R&D project should have a creative approach, such as devising new applications of existing scientific knowledge or new uses of available techniques or technologies. (Creativity)
<i>What methods are being used to carry out the project?</i>	Methods used in scientific and technological research, as well as in research in the social sciences, humanities and the arts, are accepted provided that they address uncertainty about the project’s final outcome. The uncertainty could be about how much time and resources will be needed to achieve the

QUESTION	COMMENT
	planned goal. The choice of method could be part of the project's creativity and a means of dealing with uncertainty. (Creativity and uncertainty)
<i>How generally applicable are the findings or results of the project?</i>	To be generally applicable, the findings of an R&D project have to meet the criterion of being transferable/reproducible, in addition to the other four criteria. Transferring the results may, for example, be demonstrated by publication in the scientific literature and the use of instruments of IP protection. (Transferable and/or reproducible)
<i>What types of staff are working on the project?</i>	A range of skills is assumed to be required to undertake an R&D project. Research personnel in projects are classified as researchers, technicians and other supporting staff, but only researchers, working as researchers, are needed to identify an R&D activity which, implicitly, satisfies all five core criteria.
<i>How should the research projects of research institutions be classified?</i>	In selected cases, an "institutional approach" can be used to distinguish between R&D and non-R&D projects. For instance, most projects carried out in research institutes or research universities can be qualified as R&D projects. Projects launched in other domains – like business enterprises or institutions not totally devoted to R&D – should be checked against the five R&D criteria.

Table 4 provides an expanded list of the activities that should be excluded from falling within the definition of R&D, as well as nuances of the activities which should be regarded as R&D.

TABLE 4: ACTIVITIES THAT SHOULD BE INCLUDED/EXCLUDED FROM THE DEFINITION OF R&D AND SPECIFIC EXAMPLES, WHERE POSSIBLE

ACTIVITY CATEGORY OR ITEM	INCLUDE/ EXCLUDE/ SPLIT	COMMENTS
<i>R&D AND INNOVATION ACTIVITIES</i>		
<i>Prototype</i>	Include	Include as long as the primary purpose is to make further improvements.
<i>Pilot plant</i>	Split	Include if primary purpose is to obtain experience and compile engineering and other data. Exclude if/when operating as a normal commercial production unit.
<i>Industrial Design</i>	Split	Include design required during R&D. Exclude design for production process.
<i>Industrial engineering and tooling up</i>	Split	Include "feedback" R&D and tooling up industrial engineering in innovation processes. Exclude for production processes.
<i>Trial production</i>	Split	Include if production implies full-scale testing and subsequent further design and engineering. Exclude all other associated activities.
<i>Clinical trials</i>	Split	Include clinical trials phase 1 to 3. Phase 4 to only be included if further testing of the drug or treatment brings about further scientific or technological advance.
<i>Pre-production development</i>	Exclude	-

ACTIVITY CATEGORY OR ITEM	INCLUDE/ EXCLUDE/ SPLIT	COMMENTS
After-sales service and trouble-shooting	Exclude	[exception is “feedback” R&D which is to be included]
Patent and licence work	Exclude	Exclude all administrative and legal work associated with patents and licences. [include patent work connected directly with R&D projects].
Routine tests	Exclude	Even if undertaken by R&D personnel
Data collection	Exclude	Even when an integral part of the R&D
Routine compliance with public inspection control, enforcement of standards regulations	Exclude	-
R&D AND DESIGN		
Design	Split	Described as “a potential multi-faceted innovation activity aimed at planning and designing procedures, technical specifications and other user and functional characteristics for new products and processes.” Include when design plays a key role in development and implementation of innovations [particular consideration should be given to the “uncertainty” criterion as this may be absent and will guide when design should not be regarded as an R&D activity].
R&D AND ARTISTIC CREATION		
For the arts	Include	Include when developing goods and services to meet the expressive needs of artists and performers.
On the arts	Exclude	Exclude as is largely covered by existing data collection.
Artistic expression	Exclude	[this is a new expression not new knowledge]
R&D AND RELATED SCIENTIFIC AND TECHNOLOGICAL ACTIVITIES		
Scientific and technical information service or a research laboratory library	Split	Include when maintained for the benefit of the researchers. Exclude when a central university library, electronic library and data repository. Collecting, coding, recording, classifying, disseminating, translating, analysing and evaluating are to be excluded unless conducted solely or primarily for R&D.
General purpose data collection	Split	Include when data is collected, processed and interpreted solely or primarily as part of the R&D process and when a specific project (data collection) is aimed at developing totally new statistical methods. Exclude when data is collected for general purposes such as unemployment. Market surveys are also to be excluded.
Testing and standardisation	Split	Include for the process of devising new or substantially improved methods of testing. Exclude the maintenance of national standards, the calibration of secondary standards and routine testing and analysis of a variety of materials, components, products and processes etcetera.

ACTIVITY CATEGORY OR ITEM	INCLUDE/ EXCLUDE/ SPLIT	COMMENTS
<i>Feasibility studies</i>	Split	Include feasibility studies on research projects. Exclude the use of known methods to decide whether, for example, an engineering project should be implemented.
<i>Big data projects</i>	Include	Include if all five criteria are present. In particular the project must be undertaken in a systematic manner i.e. specifically identifying the knowledge gap and focussing specific resources on addressing it e.g. Human Genome Project
<i>Space exploration</i>	Split	Include the development of vehicles, equipment, software and techniques. Exclude placement of satellites in orbit or establishment of tracking and communication stations.
<i>Mineral exploitation and evaluation</i>	Include	Include when new test and substantially improved methods and equipment for data acquisition, processing and interpretation; and any data acquisition, processing and interpretation of geological phenomena.
<i>Specialised health care</i>	Split	Include if these activities are carried out in a university hospital. Exclude as this involves routine investigation and normal application of specialised medical knowledge.
<i>Policy-related studies</i>	Exclude	Exclude as these refer to national, regional and local policies and those of business enterprises and should be excluded.
R&D AND SOFTWARE		
<i>Software</i>	Split	Include if the completion of a software development process is dependent on a scientific and/or technological advance, and the aim of the project is the systematic resolution of a scientific and/or technological uncertainty. For example: the development of new operating systems or languages; the design and implementation of new search engines based on original technologies; the effort to resolve conflicts within hardware or software based on the process of re-engineering a system or a network; creation of new or more efficient algorithms based on new techniques; and the creation of new and original encryption or security techniques. Exclude routine software activities, for example, the development of business application software and information systems using known methods and existing software tools; adding user functionality to existing application programs (including basic data entry functionalities); creation of websites or software using existing tools; use of standard methods of encryption, security verification and data integrity testing; customisation of a product for a particular use, unless during this process knowledge is added that significantly improves the base program; and routine debugging of existing systems and programs, unless this is done prior to the end of the experimental development process.
R&D AND EDUCATION AND TRAINING		
<i>Education and training</i>	Split	Include all post-graduate research by students (especially that conducted by a PhD student). Exclude all education and training of personnel in the natural sciences, engineering, medicine, agriculture, social sciences

ACTIVITY CATEGORY OR ITEM	INCLUDE/ EXCLUDE/ SPLIT	COMMENTS
		and the humanities at higher education institutions should be excluded.
R&D IN SERVICES		
Services	Split	Described as “ <i>the result of a production activity that changes the conditions of the consuming units, or facilitates the exchange of products or financial assets.</i> ” Include activities in projects for services that result in new knowledge or the use of knowledge to devise new applications. In addition to the five criteria for an R&D activity, give consideration to the following (a) links with public research laboratories; (b) involvement of staff with doctoral degrees or doctoral students; (c) publication of research findings in scientific journals <i>etcetera</i> .
R&D AND TRADITIONAL KNOWLEDGE		
Traditional knowledge	Split	Include activities which adopt a scientific-based approach to establishing the content of traditional knowledge, in disciplines such as ethno-science or cognitive anthropology; the application of scientific methods to identify the active ingredient of local health remedies and/or their effectiveness for certain medical conditions. Include activities undertaken by traditional knowledge practitioners to expand the stock of traditional knowledge, through the combined use of traditional and other, scientific methods if the five core criteria are met. Exclude the regular/continued use of traditional knowledge by practitioners, for example, in treating ailments or managing crops; routine development of products based on traditional knowledge; storage and communication of traditional knowledge in traditional ways (by the test of novelty) and traditional handing down of religious or cultural beliefs and practices.
ADMINISTRATION AND OTHER SUPPORTING ACTIVITIES		
Purely R&D-financing activities	Exclude	The activities of raising, managing and distributing funds for R&D are excluded .
Indirect supporting activities	Exclude	Examples include transportation, storage, cleaning, repair, maintenance and security activities, as well as administrative and clerical activities not undertaken exclusively for R&D

The decision as to whether IP generated falls within the scope of the IPR Act should also be taken relative to the definition of R&D. If the activity that generated the IP **does not fall within the definition of R&D**, then the IP can be said to have arisen from a non-R&D activity and as a result the IP does not fall within the scope of the IPR Act, regardless of whether or not public funds have been allocated for the activity.

4.2 TO WHOM DOES THE ACT APPLY?

4.2.1 Recipients including institutions

The IPR Act applies to **recipients** of public funds which are intended for R&D.

A recipient is defined in Section 1 of the IPR Act to mean:

“any person, juristic or non-juristic, that undertakes research and development using funding from a funding agency and includes an institution”

Section 1 further defines an institution as:

*“(a) any higher education institution contemplated in the definition of “higher education institution” contained in section 1 of the Higher Education Act, 1997 (Act No. 101 of 1997);
 (b) any statutory institution listed in Schedule 1; and
 (c) any institution identified as such by the Minister (of the Department of Science and Technology) under section 3(2).”*

The higher education institutions are indicated alphabetically in the table below:

TABLE 5: HIGHER EDUCATION INSTITUTIONS AS PER SECTION 1 OF THE IPR ACT

NO.	INSTITUTION
1	Cape Peninsula University of Technology (CPUT)
2	Central University of Technology (CUT)
3	Durban University of Technology (DUT)
4	Mangosuthu University of Technology (MUT)
5	Nelson Mandela University (NMU)
6	North-West University (NWU)
7	Rhodes University (RU)
8	Sefako Makgatho Health Sciences University (SMU)
9	Sol Plaaie University (SPU)
10	Stellenbosch University (SU)
11	Tshwane University of Technology (TUT)
12	University of Cape Town (UCT)
13	University of Fort Hare (UFH)
14	University of Johannesburg (UJ)
15	University of KwaZulu-Natal (UKZN)
16	University of Limpopo (UL)
17	University of Mpumalanga (UM)
18	University of Pretoria (UP)
19	University of South Africa (UNISA)
20	University of the Free State (UFS)
21	University of the Western Cape (UWC)
22	University of the Witwatersrand (WITS)
23	University of Venda for Science and Technology (UV)
24	University of Zululand (UZ)
25	Vaal University of Technology (VUT)
26	Walter Sisulu University (WSU)

The statutory institutions, as per Schedule 1, are indicated alphabetically in the table below:

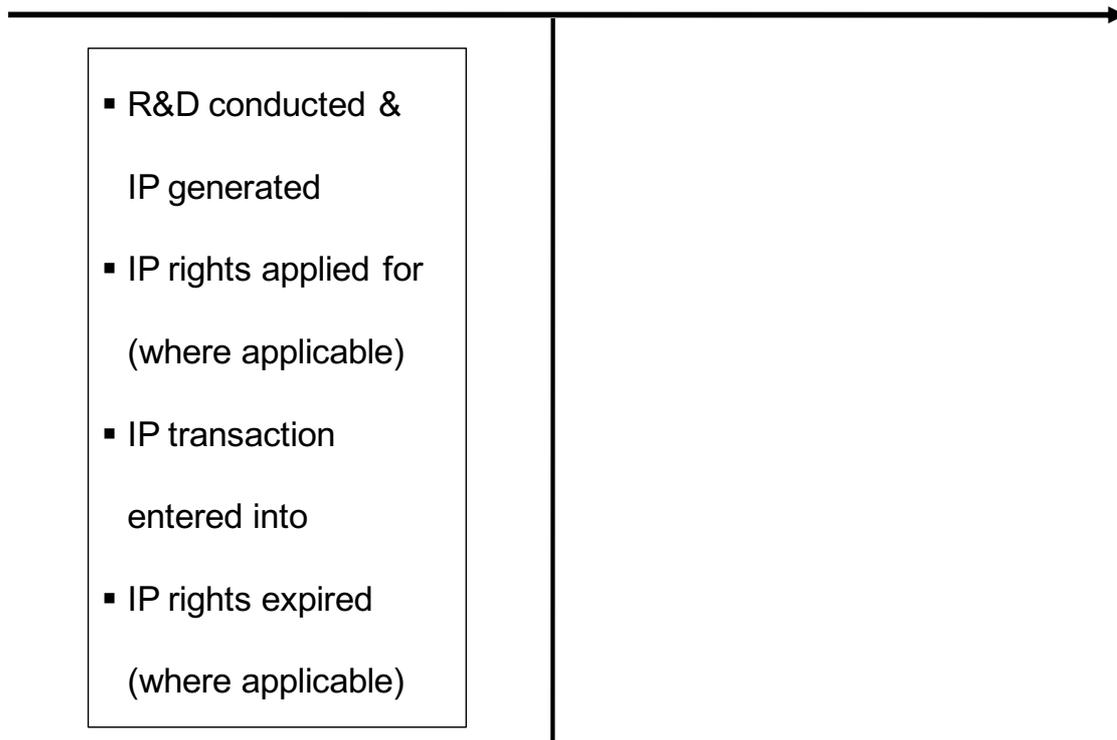
TABLE 6: STATUTORY INSTITUTIONS AS PER SCHEDULE 1 OF THE IPR ACT

NO.	INSTITUTION
1	Agricultural Research Council (ARC)
2	Council for Geoscience (CG)
3	MINTEK
4	Council for Scientific and Industrial Research (CSIR)
5	Human Science Research Council (HSRC)
6	National Health Laboratory Service (NHLS)
7	National Research Foundation (NRF)
8	South African Bureau of Standards (SABS)
9	South African Medical Research Council (MRC)
10	South African Nuclear Energy Corporation (NECSA)
11	Water Research Commission (WRC)

4.3 APPLICATION OF THE DEFINITIONS TO VARIOUS SCENARIOS

SCENARIO 1

2 August 2010



In Scenario 1, public funds were provided for R&D. R&D was performed and IP was generated. A **factual encounter** will reveal when the IP was generated. The IP was protected (where applicable; i.e. the priority date was obtained), an IP transaction (for example, a licensing agreement, assignment of the IP *et cetera*) was entered into and the IP rights expired (where applicable).

Although all activities fell into the period **PRIOR** to 2 August 2010, the factor for determining

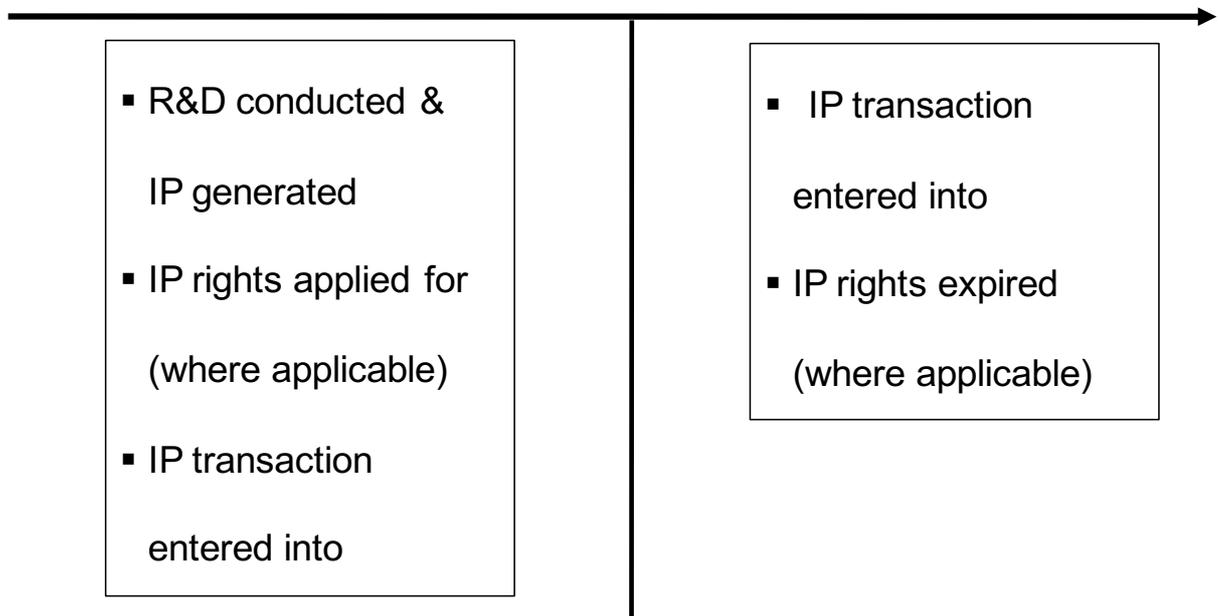
whether the IPR Act applies is the **DATE OF CREATION OF THE IP**.

As the IP was created **PRIOR** to 2 August 2010 in Scenario 1, the IP generated and subsequent IP transaction(s) fall **OUTSIDE** of the scope of the IPR Act and there is no requirement to report on any of these activities or to observe the obligations of the IPR Act.

Please note that any new IP (so-called foreground IP) which was created after 2 August 2010 based on the IP created before 2 August 2010 (so-called background IP) will fall within the scope of the IPR Act.

SCENARIO 2

2 August 2010



In Scenario 2, public funds were provided for R&D. R&D was performed and IP was generated. A **factual encounter** will reveal when the IP was generated. The IP was protected (where applicable; i.e. the priority date was obtained). An IP transaction (for example, a licensing agreement, assignment of the IP etcetera) was entered into **PRIOR** or **POST** 2 August 2010.

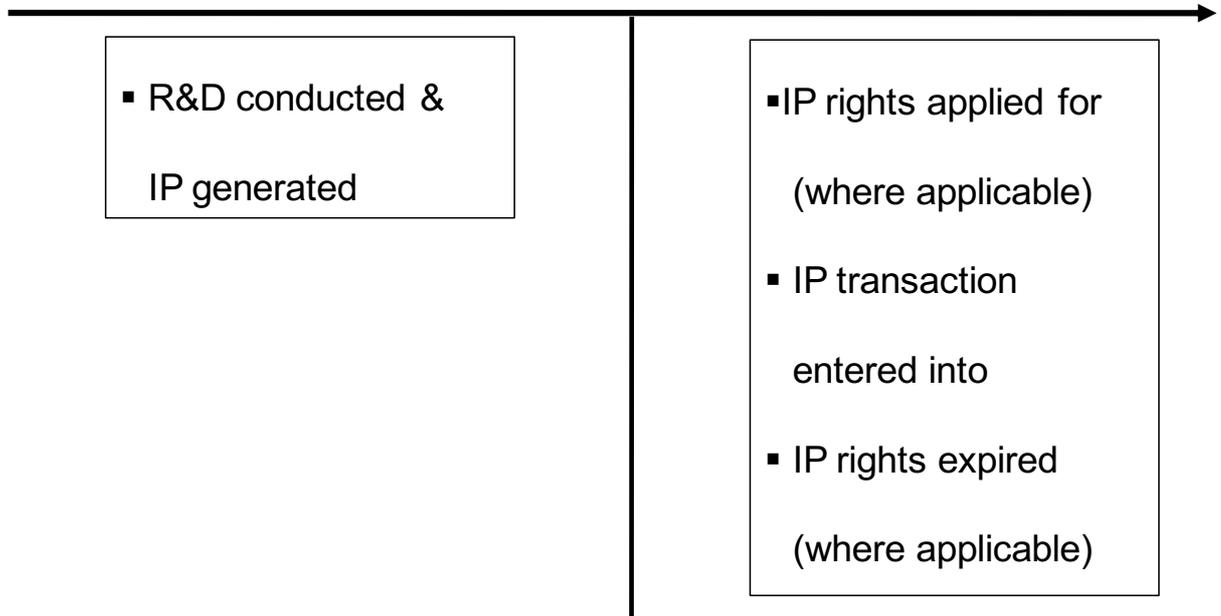
The factor for determining whether the IPR Act applies is the **DATE OF CREATION OF THE IP**.

As the IP was created **PRIOR** to 2 August 2010 in Scenario 2, the IP generated and subsequent IP transaction(s) fall **OUTSIDE** of the scope of the IPR Act and there is no requirement to report on any of these activities or to observe the obligations of the IPR Act.

Please note that any new IP (so-called foreground IP) which was created after 2 August 2010 based on the IP created before 2 August 2010 (so-called background IP) will fall within the scope of the IPR Act.

SCENARIO 3

2 August 2010



In Scenario 3, public funds were provided for R&D. R&D was performed and IP was generated. A **factual encounter** will reveal when the IP was generated. These activities were conducted **PRIOR** to 2 August 2010.

The IP was subsequently protected (where applicable; i.e. the priority date was obtained) and an IP transaction (for example, a licensing agreement, assignment of the IP *et cetera*) was entered into **POST** to 2 August 2010.

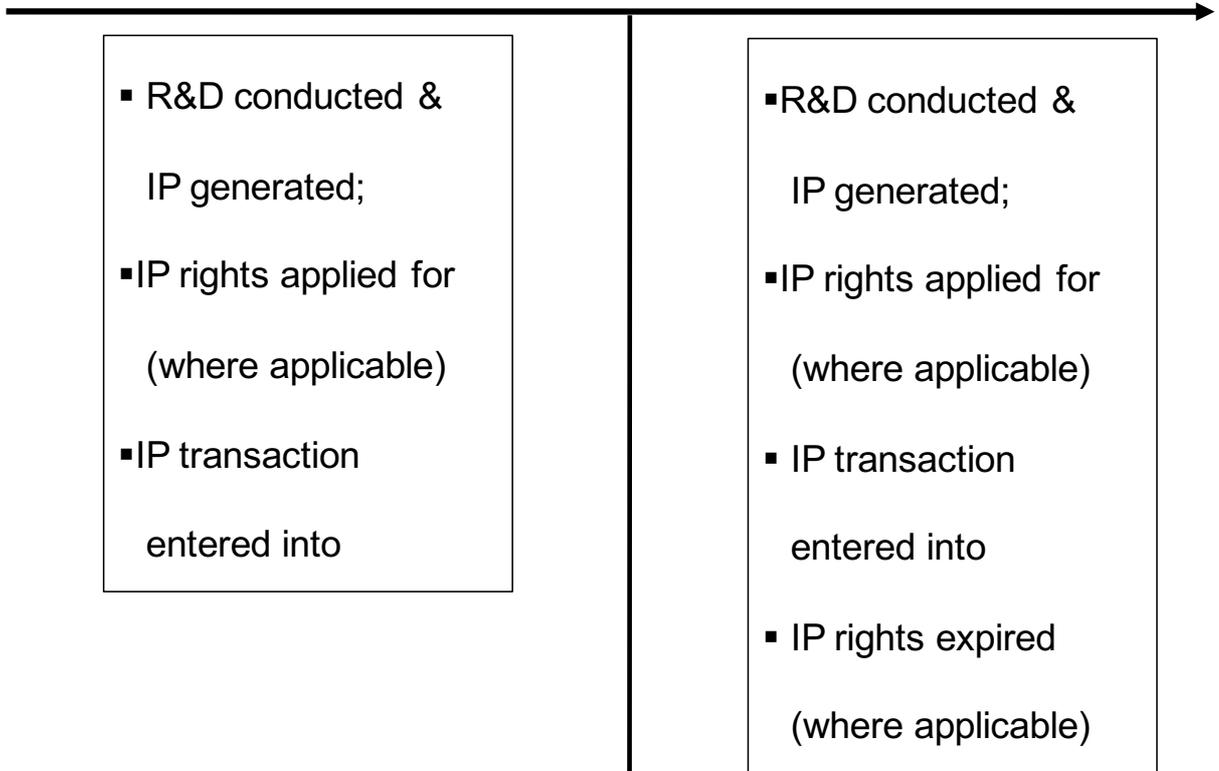
The factor for determining whether the IPR Act applies is the **DATE OF CREATION OF THE IP**.

As the IP was created **PRIOR** to 2 August 2010 in Scenario 3, the IP generated and subsequent IP transaction(s) fall **OUTSIDE** of the scope of the IPR Act and there is no requirement to report on any of these activities or to observe the obligations of the IPR Act.

Please note that any new IP (so-called foreground IP) which was created after 2 August 2010 based on the IP created before 2 August 2010 (so-called background IP) will fall within the scope of the IPR Act.

SCENARIO 4

2 August 2010



In Scenario 4, public funds were provided for R&D. R&D was performed and IP was generated. These activities were conducted **PRIOR to 2 August 2010** and **POST 2 August 2010**. A **factual encounter** will reveal when the IP was generated.

The IP was subsequently protected **PRIOR to 2 August 2010** and/or **POST 2 August 2010** (where applicable; i.e. the priority date was obtained) and an IP transaction (for example, a licensing agreement, assignment of the IP *etcetera*) was entered into **PRIOR to 2 August 2010** and/or **POST 2 August 2010**.

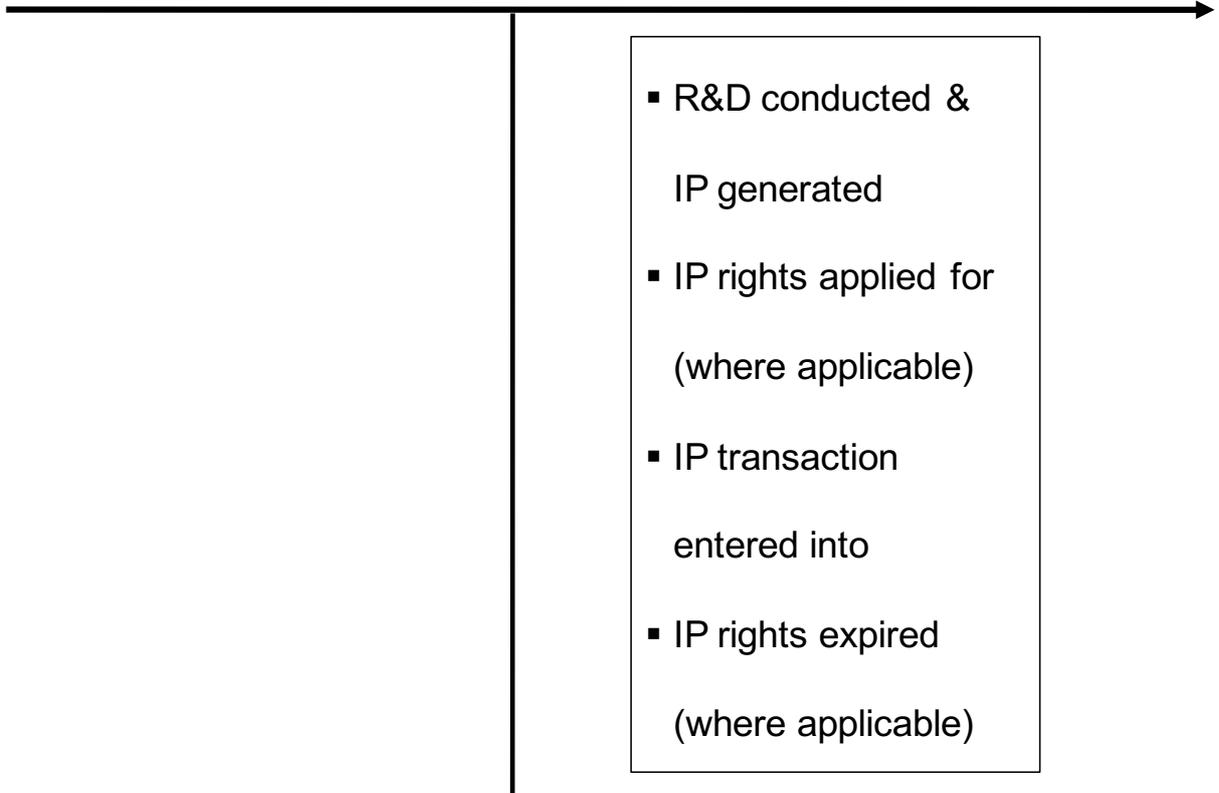
The factor for determining whether the IPR Act applies is the **DATE OF CREATION OF THE IP**.

For the portion of the IP that was created **PRIOR** to 2 August 2010, the IP generated and subsequent IP transaction(s) fall **OUTSIDE** of the scope of the IPR Act and there is no requirement to report on any of these activities or to observe the obligations of the IPR Act.

For the portion of the IP that was created **POST** to 2 August 2010, the IP generated and subsequent IP transaction(s) fall **WITHIN** the scope of the IPR Act and there is a strict requirement to report on these activities and to observe the obligations of the IPR Act

SCENARIO 5

2 August 2010



In Scenario 5, public funds were provided for R&D. R&D was performed and IP was generated. A **factual encounter** will reveal when the IP was generated. The IP was protected (where applicable; i.e. the priority date was obtained), an IP transaction (for example, a licensing agreement, assignment of the IP *et cetera*) was entered into and the IP rights expired (where applicable).

The factor for determining whether the IPR Act applies is the **DATE OF CREATION OF THE IP**.

All activities effectively fell into the period **POST** 2 August 2010.

Therefore the R&D conducted, IP generated and subsequent IP transaction(s) fall **WITHIN** the scope of the IPR Act and there is a strict requirement to report on these activities and to observe the obligations of the IPR Act.