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Department:
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NATIONAL INTELLECTUAL PROPERTY MANAGEMENT OFFICE
An initiative of the Department of Science and Technology

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NIPMO INTERPRETATION NOTE 10:

WHEN DOES THE INTELLECTUAL PROPERTY RIGHTS FROM PUBLICLY FINANCED RESEARCH AND DEVELOPMENT ACT APPLY?

The National Intellectual Property Management Office (NIPMO) is mandated to promote the objects[1] of the Intellectual Property Rights from Publicly Financed Research and Development Act (IPR Act). One of the functions of NIPMO, according to Section 9(4)(c)(iv)[2], is that NIPMO must provide assistance to institutions with any other matter provided for in the IPR Act.

NIPMO has received numerous queries on the applicability of the IPR Act. Thus, this NIPMO Interpretation Note (NIN10) provides a summary version of when the IPR Act applies. For a more detailed discussion, please refer to NIPMO Guideline 1.2 of 2018 entitled "*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*".

Should you have any questions or comments, please do not hesitate to contact us.

Warm regards

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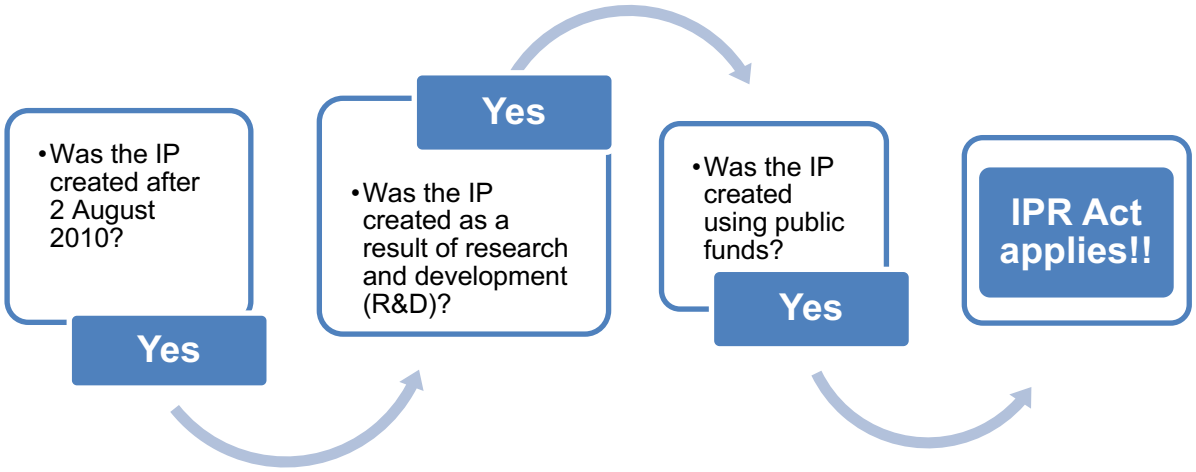
Head: NIPMO
Date: 9 October 2018
NIPMO Ref No: NIN10

[1] Section 2(1) of the IPR Act: The object of this Act is to make provisions 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.
[2] Section 9(4)(c)(iv) of the IPR Act: NIPMO must, furthermore provide assistance to institutions with any other matter provided for in this Act.

1. INTRODUCTION

In order to determine whether the IPR Act applies to intellectual property (IP) created three questions must be asked, they are:



This NIPMO Interpretation Note will briefly discuss the questions posed above.

2. IP CREATED AFTER 2 AUGUST 2010

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.

A presumption against retrospectivity exists and hence one can assume that the IPR Act applies prospectively. This means that the IPR Act only applies to IP created after the commencement of the IPR Act (from 2 August 2010 onwards).[3]

It should be noted that the IPR Act also applies to improvements (so-called foreground IP) on existing IP (so-called background IP) which was publicly financed, resulted from research and development (R&D) and created after 2 August 2010. **In this case only the improvements will fall within the IPR Act.**

3. IP CREATED AS A RESULT OF R&D

A definition for R&D is not provided in the IPR Act. NIPMO therefore elected to turn to the Organisation for Economic Co-operation and Development (OECD), *Frascati Manual.*

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)

> "***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."*

[3] See NIPMO Guideline 1.2 of 2018: Setting the Scene

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.

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*.".

For a 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 please refer to NIPMO Guideline 1.2 of 2018.

4. IP CREATED USING PUBLIC FUNDS

The IPR Act does not define public funds/funding but defines "**publicly financed research and development**" as "*research and development undertaken using any funds allocated by a **funding agency** but excludes funds allocated for scholarships and bursaries*".[4] [own emphasis added]

A "funding agency" is in turn defined as "*the State or an organ of state*[5] *or a state agency that funds research and development.*"

Considering the above definition, in particular organ of state, all funding by national, provincial or local levels 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 of administration functions. Thus all funding by state agencies such as the National Research Foundation (NRF), the Technology Innovation Agency (TIA), or the Small Enterprise Development Agency (SEDA) 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 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). Assuming ESKOM funds all R&D at institutions from income received from electricity sales and not from public funds received from National

[4] Section 1 of the IPR Act
[5] 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."

Treasury, it would not constitute public funding. 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.

5. CONCLUSION

In order for IP to fall within the scope of the IPR Act, it must have been publicly financed, created after 2 August 2010 and as a result of an R&D activity.

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.

Furthermore, if the activity meets the R&D requirement and was publicly financed, but was created before 2 August 2010, it will fall outside the scope of the IPR Act. **Unless** there were improvements made on the IP after the commencement of the IPR Act, that were as a result of R&D and the R&D was conducted using public funds, then the IP related to the improvements will fall within the scope of the IPR Act.