science, technology & innovation
Department:
Science, Technology and Innovation
REPUBLIC OF SOUTH AFRICA

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

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NIPMO INTERPRETATION NOTE 15

BENEFIT-SHARING AS PER THE IPR ACT

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, 51 of 2008 (IPR Act). One of the functions of NIPMO, according to Section 9(4)(c)(iv)[2] of the IPR Act, is that NIPMO must provide assistance to institutions with any matter provided for in this Act.

This NIPMO Interpretation Note (NIN 15) aims to:

- provide clarity on the rights of intellectual property (IP) creators at institutions[3] to benefit-sharing of revenue which accrued to an institution from the commercialisation of IP.
- provide guidance on non-monetary benefits that institutions may consider providing to IP creators; and
- provide guidance on managing benefits within institutions.

NIN 15 also addresses the following questions, namely:

- when should an institution benefit share with the IP creator?
- How should benefit sharing occur where IP is co-owned? and
- what happens if an institution fails to share with the IP creator/s revenue received?

Should you have any questions or comments, please do not hesitate to contact Ms Naomi Ngoasheng (Deputy Director: IP Specialist) at naomi.ngoasheng@nipmo.org.za and Ms Ntanganedzeni Muanalo (Director: Regulatory and Compliance) at ntanganedzeni.muanalo@nipmo.org.za.

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[1] Section 2(1) of the IPR Act: The object of this Act is 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 a social, economic, military or any other benefit.
[2] Section 9(4)(c)(iv) of the IPR Act: NIPMO must provide assistance to institutions with any matter provided for in this Act.
[3] Institution means:
(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 19197);
(b) Any statutory institution listed in Schedule 1; and
(c) Any institution identified as such by the Minister under section 3(2).

1. DEFINITIONS

"**Benefit**" means contribution to the socio-economic needs of the Republic and includes capacity development, technology transfer, job creation, enterprise development, social upliftment and products or processes or services that embody or use the intellectual property.

"**Benefit-sharing**" means the act of distributing a portion of advantages or profits derived from the use or commercialisation of IP to the IP creators.

"**Commercialisation**" means the process by which any IP emanating from publicly financed research and development is or may be adapted or used for any purpose that may provide any benefit to society or commercial use on reasonable term, and "commercialise" shall have a corresponding meaning.

"**IP creator**" means the person involved in the conception of IP in terms of this Act and identifiable as such for the purposes of obtaining statutory protection and enforcement of IP rights.

"**IP transaction**" means any agreement in respect of IP emanating from publicly financed R&D, and includes licensing, assignment and any arrangement in which the IP rights governed by the IPR Act are transferred to a third party.

"**Licence**" means a legal agreement in which the owner of an asset or property, such as IP, grants another party the right to use that IP under specified conditions without transferring ownership.

"**Net revenues**" means the revenue less the expenses incurred for IP protection and commercialisation of the intellectual property, as may be prescribed.

"**Option Agreement"** means an agreement granting the right to enter into a future IP transaction upon agreed terms.

"**Revenue**" means all income and benefits, including non-monetary benefits, emanating from IP transactions, and includes all actual, non-refundable royalties, other grant of rights and other payments made to the institution, or any other entity owned wholly or in part by an institution as a consideration in respect of an IP transaction, but excludes a donation and "gross revenues" shall have a corresponding meaning.

2. INTRODUCTION

Section 10(1) of the IPR Act grants IP creators at institutions a statutory right to a portion of the revenue received by the institution from the commercialisation of their IP, for as long as that right remains in force. Institutions are obliged to ensure that IP emanating from publicly financed research and development (R&D) is utilised and commercialised for the benefit of the people of the Republic, generating revenues through licensing, assignment or sale of both registrable and non-registrable IP rights.

In line with this obligation, institutions must share revenues from IP commercialisation with the respective IP creator/s, distributing the applicable benefit within 12 months of receipt. This benefit-sharing mechanism, guided by each institution's IP policy as approved by NIPMO, serves to incentivise researcher participation in commercialisation activities and fosters a culture of innovation by recognising the value of their contributions.

The legislation also requires that institutional policies incorporate non-monetary forms of benefit-sharing. These may include opportunities for career advancement, awards, or peer recognition.

The inclusion of benefit-sharing within the framework for publicly funded R&D acknowledges the contribution of IP creators and aims to promote human ingenuity and creativity across the national innovation system.

3. INSTITUTIONAL IP POLICY PROVISION

NIPMO has noted that some institutions have established benefit-sharing provisions in their IP policies that exceed the minimum benefit-sharing percentages as set out in the Act. While this is permissible, institutions must balance higher allocations with funding needs for other priorities, such as further R&D, Office of Technology Transfer (OTT) operations costs and statutory IP protection costs (Section 10(5)). Institutions should consider this balance when deciding on their benefit-sharing strategies while sustaining the overall institutional ecosystem for innovation and IP protection.

4. DISTRIBUTION AND CALCULATIONS OF REVENUES

IP creators at an institution and their heirs are entitled to share in the revenues generated from the commercialisation of that IP receiving at least 20% of the revenues from the first R1 000 000 (R1 million) and at least 30% of the net revenues thereafter.

Benefits must be shared equally among IP creators or their heirs unless there is an agreement or specific institutional policy in place. The minimum 20% benefit share from the first R1 million should be distributed to the IP creator/s before any other institutional deductions.

If revenue from the commercialisation of the IP exceeds R1 million, institutions may deduct certain costs (IP prosecution, legal fees, commercialisation expenses) before calculating the

net revenue available for distribution, as per Regulation 9(2)[4]. Net revenue is calculated as: **Total revenue received – allowable deductions**. After benefit-sharing the 30% net revenue with the IP creators, institutions may distribute the remaining revenues as it deems fit, however must allocate a portion of those funds for further R&D, operations of the OTT and statutory protection of IP[5].

Examples of amount of revenues received and explanation of each scenario

Steps	Scenario 1	Scenario 2	Scenario 3
Step 1: Revenue received by institution	R1 000 000 of revenue received **within 1 year**	R800 000 (1st tranche) + R300 000 (2nd tranche) of revenue received **within 1 year**	R600 000 of revenue received **in 1 year**
Step 2: Portion shared with IP creator/s	Distributes 20% of the gross revenue (no deductions) of R1 000 000 to IP creator/s	Distributes 20% of the gross revenue (no deductions) of R1 000 000 to IP creator/s	Distributes 20% of the gross revenue of R600 000 with the IP creator/s The institution must distribute 20% of the gross revenue until the amount received reaches a cumulative of R1 000 000
Step 3: Revenue received by institution in excess of R1 000 000	Deduct allowable costs, and then distribute 30% of the net revenue to the IP creator/s.	On R100 000 balance, deduct allowable costs, if there are funds left then institution must distribute 30% of the net revenue to the IP creator/s. All revenue received thereafter, deduct allowable costs then distribute 30% of the net revenue to the IP creator/s.	Revenue received in excess of R1 000 000, deduct allowable costs then distribute 30% of the net revenue to the IP creator/s.

5. MONETARY AND NON- MONETARY BENEFIT-SHARING

Institutions must include benefit-sharing provisions, as part of their IP policies, for both monetary and non-monetary benefit sharing. Certain types of IP transactions may generate monetary returns through licensing or assignment of the IP, while others may lead to the establishment of companies, offering non-monetary rewards such as equity in a start-up or access to resources and opportunities that support further innovation.

[4]Regulation 9(2) of the IPR Act: For the purposes of determining nett revenues in terms of section 1 and section 10(2)(b) of the Act, the following costs of intellectual property protection and commercialisation must be deducted from the revenues (a)all out-of-pocket costs, fees and expenses that an institution incurs and pays to independent third parties in connection with any of the following activities: (i) filing, prosecution, development and maintenance of any statutory protection for intellectual property, excluding any amounts recovered by the institution from any third party, including the intellectual property fund established under the Act and any licensee; (ii) auditing, recovery or collection of gross revenues, including bank fees, charges and other expenses of any kind paid by an institution in order to collect, receive, account for, amounts payable to it for the commercialisation of the intellectual property; (iii) defence, validation and enforcement of intellectual property rights in any intellectual property office, court or tribunal; (iv) legal advice and services in respect of the above activities or issuance or conveyance of any securities or other consideration constituting gross revenues, or in respect of any proposed, threatened or actual litigation involving the intellectual property; and (b)costs directly incurred in respect of market research, business development, marketing, advertising, promotion or sales activities or services, and administrative expenses.

[5] Section 10(5)

In instances where the IP emanating from publicly financed R&D is co-owned by two parties, benefit sharing will only be applicable to the institution revenue portion. To ensure fair recognition, institutions should explore a diverse range of benefit-sharing options that include both monetary and non-monetary rewards for their IP creators.

5.1 **Monetary benefit-sharing**

Monetary benefits, or revenues, involve direct financial gains from IP commercialisation, shared as per the IPR Act. In commercialising the IP, institutions may enter into different types of agreements with third parties, including licence agreement (exclusive or non-exclusive), assignment, option agreement or collaborative agreement yielding revenues.

Types of revenues which are most often associated with these IP transactions include (non-exhaustive list):

- Upfront payments: Initial lump-sum payments received by an institution upon entering an IP transaction, typically payable on signing of agreement or within the agreed period.
- Minimum royalty: Royalties are ongoing payments, usually calculated as a percentage of revenue generated from the sale of products or services based on the licensed IP. Payable annually or as agreed and reflect the IP's commercial success over time.
- Milestone payments: Conditional payments triggered by specific milestones, for example granting of a patent, approval of a drug by Regulatory Authority etc.
- Once-off payment: Single, fixed payments made in exchange for an IP transaction, such as an assignment (transfer of ownership) or an exclusive licence.
- Equity sales: In instances where the IP leads to the formation of a spinout company, institutions and/or IP creator/s may receive equity (shares) as part of the IP transaction. Revenue is realised when these shares are sold, often after the company grows in value.

5.2 **Non-monetary benefit-sharing/incentives**

When the IP created is being used to address a societal challenge and no money is being generated, an institution may consider providing non-monetary benefits to the IP creators. Non-monetary incentives refer to benefits that are not, or cannot be, directly measured in financial terms. The IPR Act encourages institutions to define non-monetary benefits in their IP policies, ensuring they complement rather than replace monetary / revenue sharing where applicable. Non-monetary benefits are often misunderstood as less tangible or valuable, yet they play a critical role in fostering innovation, retaining talent, and aligning institutional goals with societal impact.

Non-monetary incentives may include (non-exhaustive list):

- Equity in a start-up company: IP creators may receive shares in a start-up company formed to commercialise their IP. While not an immediate cash payment, equity represents ownership and potential future financial gain if the company succeeds. By providing equity, institutions align the interests of IP creators with the success of the start-up, enabling them to participate in the growth and potential financial success of the start-up company.
- Access to R&D resources: Institutions may provide IP creators with access to advanced equipment, facilities or data resulting from their IP or related projects. This enhances their

ability to conduct further research or refine innovations. Access to R&D resources, though non-financial, directly supports innovation and career growth.

- Public recognition and honour: Acknowledgement through awards, certificates, or other incentives, boosts an IP creator's professional reputation. In addition, recognition enhances visibility, potentially leading to future collaborations, funding etc.
- Training and professional development opportunities: Institutions can offer IP creators access to training programs or professional development workshops as a non-monetary benefit. These opportunities enhance their skills and knowledge, empowering them to advance their research and innovation capabilities.
- Sabbaticals for commercial venture refinement: Sabbaticals offer IP creators with dedicated time to focus on refining and advancing their commercial ventures.

6. EQUITY AS AN EXAMPLE OF NON-MONETARY BENEFIT-SHARING

Should an institution decide to form a start-up, shares may be allocated to various people/parties which may include IP creators, the institutions, potential funders etc. Equity can act as a skills retention tool and IP creators are more likely to stay involved and contribute to the start-up's success if they have an equity in the startup which may increase in value over time. Start-up companies may take before generating a profit and thus complicate share valuation. Valuation will assist in instances where the shares are to be sold, and the revenues are shared with all parties.

The institution`s IP policy may provide the IP creators with benefit sharing options. Some of these options may include:

- **Scenario 1:** The IP creator may be a shareholder in the start-up company and receive benefit sharing according to the percentages as set out in the institutional IP policy that is in line with the IPR Act. This may result in the IP creator benefiting more than once.
- **Scenario 2:** The institution's IP policy can also have a provision where the IP creator can choose to have shares only and not receive the percentage revenues set out in the institutional IP policy. The OTT must inform the IP creator at the formation of the start-up that the value of the shares may be unknown at that stage, only during valuation and selling of some shares the IP creator might know how much the shares are worth.

7. MULTIPLE IP CREATORS ON BENEFIT SHARING

Section 10(3) provides that benefits must be shared in equal proportions between the qualifying IP creators…**unless otherwise agreed** or specified in the institutional IP policy. Institutions may put in place IP policy provisions which will regulate how the revenue generated from IP commercialisation will be shared amongst the IP creators.

8. FAILURE TO BENEFIT-SHARE WITH IP CREATORS

Regulation 9(1) of the IPR Act requires institutions to share with the IP creators their portion of revenues from the commercialisation of the IP, no later than 12 months after receipt of such revenues by the institution. Should an institution fail to benefit share, IP creators should refer to the institutional IP policy for dispute resolution provision or refer the unresolved matter to the institution's highest dispute resolution committee.