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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 7:

ARE DATA INTELLECTUAL PROPERTY IN TERMS OF THE INTELLECTUAL PROPERTY RIGHTS FROM PUBLICLY FINANCED RESEARCH AND DEVELOPMENT 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 (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 queries about **whether data are considered intellectual property (IP)** and **whether data fall within the scope of the IPR Act**.

Following the queries received, this NIPMO Interpretation Note (NIN 7) provides clarity on when data are regarded as IP and when data are not regarded as IP in terms of the IPR Act.

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

Warm regards

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Head: NIPMO
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[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. DEFINITION OF IP AND SCOPE OF THE IPR ACT

Countries have laws to protect IP for two main reasons. One is to give statutory expression to the moral and economic rights of **creators in their creations** and the rights of the public in access to those creations. The second is to **promote**, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development.[3]

Section 1 of the IPR Act defines **intellectual property** 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"*.

When considering the definition above, the term "*any creation of the mind*" is very broad and is further 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".*

The scope of the IPR Act is to make provision that IP emanating from publicly financed research and development[4] (R&D) is identified, protected, utilised and commercialised for the benefit of the people of the Republic.

Taking the above into consideration, one can deduce three (3) requirements that must be met it order for IP, which may be regarded as data, to fall within the scope of the IPR Act. There must be a (i) creation of mind that (ii) is capable of being protected by law (South African law or foreign IP law) which (iii) emanates from publicly financed R&D.

We will discuss these 3 requirements briefly below:

2. REQUIREMENT 1: CREATION OF THE MIND

Creation is defined in the Oxford dictionary as *"the action or process of bringing something into existence".* Creation **of the mind** would therefore mean any action or process that brings something into existence due to human activity.

For example: If A conducts research on animal behaviour and writes down the behaviour, this is just factual information and there is no creation of the mind as A is just factually recording what is being observed. These are often referred to as data points or factual data.

However, if A compiles the data points or factual data in a specific form interpreting the way the animals behave when there is danger and when there is no danger (interpreting animal language) there is now a creation of the mind because A came up with a way of presenting the facts collected. The presentation of information constitutes a "creation of the mind" and hence will meet the first requirement.

[3] WIPO Intellectual Property Handbook: Policy, Law and Use

[4] Section 1 of the IPR Act: "publicly financed research and development" means research and development undertaken using any funds allocated by a funding agency but excludes funds allocated for scholarships and bursaries

3. REQUIREMENT 2: PROTECTION BY LAW

3.1 Copyright Act

In terms of section 2 of the South African Copyright Act (Act 98 of 1978), a literary work is eligible for copyright protection. The term "*literary work*" includes, "*irrespective of literary quality and in whatever mode or form expressed- tables and compilations, including tables and compilations of data stored or embodied with a computer, but shall not include a computer program*".[5]

Therefore, tables and compilations of data including tables and compilations of data stored or embodied on a computer (irrespective of the literary quality and bearing in mind that the work must be original) is capable of being protected under South African Copyright law. The definition provided is further sufficiently broad to make provision for both 'hard copy' databases and electronic databases used in computers, in conjunction with computer programs.[6]

In considering the three (3) requirements for IP to fall within the scope of the IPR Act, **databases** (protectable under the Copyright Act (second requirement)) would fall within the scope of the IPR Act, if it was compiled by or compilation was caused by a person or author[7] (creation of the mind – first requirement) and if it was as a result of publicly financed R&D (third requirement).

3.3 Other foreign considerations

The European Directive on the Legal Protection of Databases (EU Database Directive) defines the term database as "*a collection of independent works, data or other materials, which are arranged in a systematic or methodical way, and are individually accessible by electronic or other means*".

This EU Database Directive is regarded as a "*sui generis*" right that has been created to protect databases and operates irrespective of whether the database, or any of its contents, attracts copyright protection.

The EU Database Directive may be regarded as foreign IP law in terms of the IPR Act and may be used in South African courts when referring to international legislative rights or internationally acceptable protection of databases which do not necessary attract copyright protection.

It should however be noted that given the low threshold for copyright protection in South Africa, databases which are not considered original under the EU Database Directive may receive copyright protection in South Africa. South Africa law may therefore arguably provide wider protection for compilations. [8]

[5] Section 1 of the Copyright Act
[6] Dean and Dyer: Introduction to Intellectual Property Law
[7] Section 1 of the Copyright Act: An author in relation to literary work or computer program which is computer-generated, means the person by whom the arrangements necessary for the creation of the work were undertaken.
[8] Dean and Dyer: Introduction to Intellectual Property Law

In considering the three (3) requirements for IP to fall within the scope of the IPR Act, **a collection of independent works or data** (protectable under foreign IP law - EU Database Directive (second requirement)) would fall within the scope of the IPR Act, if it was compiled by or compilation was caused by a person (creation of the mind – first requirement) and if it was as a result of publicly financed R&D (third requirement).

4. REQUIREMENT 3: PUBLICLY FINANCED RESEARCH AND DEVELOPMENT

The IPR Act defines **publicly financed research and development** as "*research and development undertaken using any funds allocated by a funding agency*[9] *but excludes funds allocated for scholarships and bursaries*".

Thus all funding by national, provincial or local levels of government and all funding by state agencies for R&D **constitutes public funding**. See exceptions in NIPMO Guideline 1.2 of 2018[10].

The IPR Act does not provide a definition of R&D. NIPMO relies on the *Frascati* Manual as updated in October 2015 to determine which activities would fall within the definition of R&D.

According to the *Frascati* Manual, 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.

Please refer to NIPMO Guideline 1.2 of 2018 for 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.

5. CONCLUSION

In considering the three (3) requirements for IP to fall within the scope of the IPR Act, **databases or collection of independent works or data** (protectable by law - second requirement) would fall within the scope of the IPR Act, if it was compiled by, or a compilation was caused by, a person or author (creation of the mind – first requirement) and if it was as a result of publicly financed R&D (third requirement).

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[9] Section 1 of the IPR Act: **"funding agency"** means the State or an Organ of State or a State Agency that funds research and development

[10] NIPMO Guideline 1.2 of 2018: 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) of the IPR Act, ESKOM are regarded as a private entity or organisation].