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PRACTICE NOTE 4 OF 2016

REFERRAL OF INTELLECTUAL PROPERTY TO NIPMO ON AN IP1 FORM

OVERVIEW

The Intellectual Property Rights from Publicly Financed Research and Development Act, 2008 (Act 51 of 2008) (IPR Act) came into effect on 2 August 2010. The object of the IPR Act is to make provision that intellectual property (IP) emanating from publicly financed research and development (R&D) 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.

The IPR Act also makes provision for recipient¹ that:

- (a) **prefer not to retain ownership of their IP;** or
- (b) **not to obtain statutory protection for the IP,** to obtain **prior approval** from the National Intellectual Property Management Office (NIPMO) **before** abandoning or releasing such IP into the public domain.

OBJECTIVE

This Practice Note sets out:

- (a) what **factors to consider** when making a choice to refer IP to NIPMO on an IP1 Form (Referral of Intellectual Property and Release Form);
- (b) what **documentation to submit;**
- (c) **how to complete** an IP1 Form;
- (d) factors that NIPMO consider prior to **acquiring ownership** of the referred IP;
- (e) consequences of **failure to refer IP** to NIPMO; and
- (f) NIPMO's **timeline** for processing an IP1 Form.

¹ Section 1 of the IPR Act: "**recipient**" means any person, juristic or non-juristic, that undertakes research and development using funding from a funding agency and includes an institution

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1. GLOSSARY OF TERMS

Disclosure	Means the provision of full details of potential intellectual property contemplated in section 5 of the IPR Act (as defined in section 1 of the IPR Act)
Guideline 1	Guideline 1 of 2012: Interpretation of the Scope of the Intellectual Property Rights from Publicly Financed Research and Development Act (No. 51 of 2008): Setting The Scene
Guideline 4	Guideline 4 of 2015: Intellectual Property Ownership
IP1 Form or Form IP1	Referral of Intellectual Property and Release Form
IP7 Form or Form IP7	Intellectual Property Status and Commercialisation Report
Referral	Formal submission of IP1 Form for the referral and/or release of intellectual property to NIPMO for approval

LIST OF ACRONYMS USED

HEI	Higher Education Institution
IP	Intellectual Property (see IPR Act and Guideline 1)
IPR	Intellectual Property Rights (see Guideline 1)
IPR Act	Intellectual Property Rights from Publicly Financed Research and Development Act, 2008 (Act 51 of 2008)
NIPMO	National Intellectual Property Management Office
OTT	Office of Technology Transfer
R&D	Research and Development (see Guideline 1)

2. INTRODUCTION

2.1 Management obligations and disclosure duties

The IPR Act prescribes certain management obligations and disclosure duties. When dealing with disclosures, sections 5(1)(c) to (e) and (h) of the IPR Act is relevant as set out below:

SECTION OF THE IPR ACT	MANAGEMENT OBLIGATIONS/ DISCLOSURE DUTIES	RESULTANT DOCUMENT
Section 5(1)(c)	A recipient must ensure that personnel involved with R&D make a disclosure to it within 90 days , of identification by such personnel of possible IP and before the IP is made public.	Information disclosure Form <i>(internal document of institution)</i> Not submitted to NIPMO
Section 5(1)(d)	A recipient must assess IP to determine whether it merits statutory protection and, where appropriate , apply for and use best efforts to obtain statutory protection in its name .	IPR application document <i>(e.g. provisional patent application)</i> Not submitted to NIPMO
Section 5(1)(e)	A recipient must refer disclosures for which it elects not to retain ownership or not to obtain statutory protection to NIPMO within 30 days of it making such an election.	IP1 Form Must be submitted to NIPMO
Section 5(1)(h)	A recipient must report to NIPMO twice a year , on all matters pertaining to the IP contemplated in the IPR Act, including all IP from which it elects to obtain statutory protection .	IP7 Form Must be submitted to NIPMO

2.2 When an IP1 Form **MUST** be completed and submitted to NIPMO

SECTION OF THE IPR ACT	REQUIREMENT	RESULTANT DOCUMENT
Section 5(1)(e)	A recipient must refer disclosures for which it elects not to retain ownership or not to obtain statutory protection to NIPMO within 30 days of it making such an election.	IP1 Form
Regulation 2(4)	Where the recipient does not wish to obtain statutory protection or retain ownership of IP which can be protected through statutory protection AND: (a) has commercialisation prospects; OR (b) can contribute to socio-economic needs; OR (c) wish to place in the public domain; the recipient must make a referral to NIPMO.	IP1 Form

***Factors which must be taken into consideration before making a referral on an IP1 Form are set out in Annexure A.*

2.3 When an IP7 Form **MUST** be completed and submitted to NIPMO

SECTION OF THE IPR ACT	REQUIREMENT	RESULTANT DOCUMENT
Section 5(1)(h)	A recipient must report to NIPMO twice a year , on all matters pertaining to the IP contemplated in the IPR Act, including all IP from which it elects to obtain statutory protection.	IP7 Form
Regulation 2(2)	Where IP cannot be protected through statutory registration but has potential to: (a) address socio-economic needs; OR (b) be commercialised ;OR (c) the recipient elects to retain ownership; the recipient must report to NIPMO.	IP7 Form

2.4 When an IP1 Form is **NOT REQUIRED** to be completed and submitted to NIPMO

SECTION OF THE IPR ACT	REQUIREMENT	RESULTANT DOCUMENT
Regulation 2(3)	Where IP can be protected but requires further R&D to be protectable, whilst recipient retains ownership and maintain confidentiality of IP	None Not required to report regarding election not to proceed with statutory protection
Regulation 2(3)	Where IP can be protected but has NO prospects of addressing socio-economic needs or being commercialised	

3. DOCUMENTATION TO SUBMIT WHEN REFERRING IP ON AN IP1 FORM

A recipient must² make a referral to NIPMO on an IP1 Form and additionally set out in its cover letter the factors it considered in making the choice to refer the IP to NIPMO, along with the necessary supporting documentation.

A non-exhaustive list of supporting documentation is provided below:

DOCUMENT	COMPULSORY / OPTIONAL
1. Previously submitted and corresponding IP7 Form	Compulsory document
2. Prior art search report 3. International preliminary examination authority's report 4. International search report and written opinion 5. Report on prior art damaging novelty	Compulsory document(s) if reason for referral as stated on an IP1 Form is " <i>not statutorily protectable</i> " or " <i>unfavourable search/examination</i> "
6. Market assessment/analysis report 7. Commercialisation status and strategy report	Compulsory document if reason for referral is " <i>lack of market and commercial potential</i> "
8. Technology cost analysis including costs for protection versus benefits that could be derived	Optional document if reason for referral is " <i>put in the public domain</i> " or " <i>lack of market and commercial potential</i> "
9. Funding agreement with partners that have contributed funds 10. Report on the status of the R&D project	Optional document if reason for referral is " <i>put into public domain</i> " or required action from NIPMO is " <i>waiver of rights to IP creator</i> "
11. Current or pending litigation connected to the referred IP	Optional document if reason for referral is " <i>put into public domain</i> " or required action from NIPMO is " <i>approval to abandon IP</i> ".

² In terms of Section 4(2)(a) and Section 5(1)(e)

4. HOW TO COMPLETE AN IP1 FORM

In the section below an IP1 Form will be broken down in its various components/sections. It will further be accompanied by NIPMO comments on what information should be provided in the specific components/sections as well as general notices.

Recipient			
NIPMO Comments	<p>The full name of the recipient for e.g. university, science council etc. must be completed.</p> <p>Please note that the IP creators are not regarded as the “recipient”. The details of the IP creators should therefore not be included in this section. Please refer to Guideline 4 of 2015: IP Ownership for more clarity.</p>		
Contact Details			
NIPMO Comments	<p>The name, email address and telephone number (optional postal address) of the designated person at the Office of Technology Transfer (OTT)/ recipient that undertake the responsibilities of technology transfer must be completed.</p> <p>Please note that the name provided in this section will be the person that NIPMO communicates with, should you want NIPMO to include any other individual; please indicate it in this section.</p>		
Intellectual Property Title			
NIPMO Comments	<p>The title of the IP should be reflected as it appears on the relevant IP registration certificate or application form.</p> <p>Please note that if the title of the IP on the IP registration certificate or application form differs from that which is provided on the NIPMO IP7 Form, a recipient must kindly report both titles to NIPMO.</p>		
TYPE OF INTELLECTUAL PROPERTY			
(Please Select one or more)	Undisclosed information / Trade Secret	Invention / Patent	Design
	Copyright	Software / Computer Program	New Plant Variety
NIPMO Comments	<p>The relevant box relating to the IP that is being referred must be marked with an ‘X’.</p> <p>NIPMO notes that there is no option to refer a trade mark, which was resultant of or associated with R&D, as such a recipient must please write out the words “trade mark” in any of the open blocks above.</p>		

SUMMARY DESCRIPTION OF THE INTELLECTUAL PROPERTY				
NIPMO Comments	<p>A brief description of the IP should be stipulated herein, typically an abstract of a patent application/ registered patent or explanatory statement of a design application/registration or the classification description in respect of a trade mark application/registration.</p> <p>Please note that the title of the IP would not be regarded as a sufficient summary description of the IP. Recipients further need not include in this section all the claims of the patent or the full patent specification.</p>			
Date of disclosure of intellectual property by intellectual property creator(s) to Recipient			(Day)	(Month) (Year)
NIPMO Comments	<p>This is the date when the IP creator disclosed the IP to the OTT/recipient.</p> <p>Please note that the date indicated on the IP7 Form must be the same as the date provided in this section.</p>			
INTELLECTUAL PROPERTY CREATOR(S)				
First Name		Middle Name	Last Name	
NIPMO Comments	<p>The full names of all of the IP creators should be set out in this section.</p> <p>Please note that the names indicated on the IP7 Form must be the same as the names provided in this section.</p>			
PATENT APPLICATIONS / PATENTS (where applicable)				
	Provisional Patent:	PCT Application	Patent Application	Convention Application
				Non-Convention Application
NIPMO Comments	<p>The correct section/s stating the stage of the patent application should be completed.</p> <p>Please note that South African complete patents applications from South African provisional applications or through national phase must be included under the "Convention Application" section. Please do not manually change the heading of provisional to complete.</p>			
Number				
NIPMO Comments	<p>The allocated IP application number/s received from the relevant IP office should be inserted in this section.</p>			
Date of filing:				
NIPMO Comments	<p>This is the date when the application was submitted to the relevant IP office.</p> <p>Please note that the date of filing and date of grant must differ.</p>			
* Country / Territory				
NIPMO Comments	<p>The place/country/territory where the IP has been filed must be inserted in this section for e.g. South Africa, ARIPO, United States, Russia etc</p>			

Date of Grant:				
NIPMO Comments	<p>This is the date when the application has been registered/ granted at the IP office.</p> <p>Please note that a provisional patent application and PCT application will never be granted. These sections should therefore be greyed out.</p>			
OTHER FORMS OF APPLICATIONS / GRANTED RIGHTS (where applicable)				
NIPMO Comments	<p>The details of any other (excluding patent) IP application filed/applied for should be completed below.</p> <p>Please note patent related information should be completed in the specific block/section above and not in this section.</p>			
Number				
NIPMO Comments	<p>The allocated application number received from the relevant IP office should be inserted in this section.</p>			
Date of filing:				
NIPMO Comments	<p>This is the date when the application was submitted to the relevant IP office.</p>			
Country / Territory				
NIPMO Comments	<p>The place/country/territory where the IP has been filed must be inserted in this section for e.g. South Africa, ARIPO, United States, Russia etc</p>			
Date of Grant:				
NIPMO Comments	<p>This is the date when the application has been registered /granted.</p>			
MONTH AND YEAR OF FIRST REPORTING OF INTELLECTUAL PROPERTY TO NIPMO				
(Month)			(Year)	
NIPMO Comments	<p>This is the date/month that the IP was first reported to NIPMO during the bi-annual IP7 Form submissions (either end of April or October of a specific year).</p> <p>Please note that this date must not differ from that provided on the IP7 Form and can, alternatively, be obtained from the NIPMO IP7 acknowledgement letter.</p>			
FUNDING AGENCY (i.e. the funding agency that funded the conception or development of the intellectual property)				
NIPMO Comments	<p>Section 1 of the IPR Act defines funding agency as the “State or an organ of state or a state agency that fund research and development”.</p> <p>Please refer to table 2 of Guideline 1 of 2012 which sets out examples of the State, organs of state or state agencies which allocate funds for R&D.</p>			

PLEASE INDICATE THE LATEST STAGE OF DEVELOPMENT OF ANY PRODUCT ARISING FROM THIS INTELLECTUAL PROPERTY, ACCORDING TO THE FOLLOWING CATEGORIES

NIPMO Comments	<i>Please indicate the latest stage of development.</i>
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UNDER EVALUATION (i.e. no protection, pending IP and market assessment)	DISCLOSED AND PROTECTED (i.e. no decision and agreement made to commercialise)	LICENSED (i.e. license agreement signed with a third party to commercialise, but pre-revenue)	COMMERCIALISED (i.e. revenue generation stage)
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NIPMO Comments <i>These are IP applications which have been applied for at the relevant IP office but which have not yet been registered/ granted and which are still pending.</i> <i>Please note that provisional patent applications and PCT applications are regarded as pending IP and should therefore be indicated in this section.</i>	NIPMO Comments <i>This is IP that has been disclosed and registered or granted prior to licensing and/or commercialisation</i>	NIPMO Comments <i>This is when an IP transaction has been entered into and signed by the parties (prior to revenue).</i>	NIPMO Comments <i>This is when revenue has accrued to the institution due to the conclusion of an IP transaction.</i>
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REASONS FOR REFERRAL
(please provide supporting documents and arguments as required by regulations)

Put into the public domain	Not statutorily protectable	Abandonment of intellectual property	
		Unfavourable Search and/ or examination	Lack of market and commercial potential

NIPMO Comments	<i>Please indicate the reason for referral and attach the supporting documentation.</i>
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REQUIRED ACTION FROM NIPMO

Approval to put in public domain	Approval to abandon intellectual property	Waiver of rights to intellectual property creators

5. NIPMO MAY ACQUIRE OWNERSHIP OF THE REFERRED IP

The IPR Act makes provision in terms of Section 4(3)³ and Regulation 2(6)⁴ for NIPMO to acquire ownership of the IP referred to it by the recipient.

NIPMO in deciding whether or not to acquire ownership of IP and where possible obtain statutory protection must consider the following factors:

- (a) **Any prejudice that may be suffered by the State** if no statutory protection for the IP is obtained;
- (b) the **norms, culture and practices of the technology sectors** in which such IP applies;
- (c) the **development required** to make commercialisation of the IP viable;
- (d) the **ability and appropriateness** of such IP to be protected in any territory; and
- (e) the **interest of any private entity or organisation**⁵ that has provided funding towards the R&D giving rise to the IP.

Should NIPMO decide to acquire ownership of the referred IP, the obligation is on the recipient, as prescribed in the IPR Act, to transfer the IP to NIPMO⁶. These obligations are also stipulated in regulation 2(12) and are summarised as follows:

- (a) the **rights of IP creators**⁷ to **benefit sharing** must be maintained;
- (b) ensure that the recipient and any private entity or organisation that contributed to funding the R&D which gave rise to the IP retain an **irrevocable, non-transferable and royalty free licence** to use the IP for research, development and educational purposes;
- (c) any publicly financed organisation in the Republic may be granted with an irrevocable non-transferrable and royalty free licence to use the IP for **research, development and educational purposes**; and
- (d) NIPMO may without limitation **grant other organisations access to the IP** while not unduly depriving the Republic of benefits from the commercialisation of IP provided such organisations are prepared to grant equivalent access to their IP that may be beneficial to the Republic.

³ Section 4(3) of the IPR Act: NIPMO may, within the prescribed period, after considering the reasons provided by the recipient in terms of subsection (2)(b) and any prejudice that may be suffered by the State if no statutory protection for the intellectual property is obtained, acquire ownership in the intellectual property and, where applicable, obtain statutory protection for the intellectual property.

⁴ Regulation 2(6) of the IPR Act: In considering the referral mentioned in sub-regulation (4), NIPMO must, in addition to the factors set out in sub-regulation (1), consider the following in deciding whether or not to acquire ownership of the intellectual property and where possible obtain statutory protection in terms of section 4(3) of the Act -

- (a) the provisions of section 4(3) of the Act;
- (b) the norms, culture and practices of the technology sector in which such intellectual property applies;
- (c) the development required to make the commercialisation of the intellectual property viable;
- (d) the ability and appropriateness of such intellectual property to be protected in any territory; and
- (e) the interests of any private entity or organisation that has provided some funding towards the research and development giving rise to the intellectual property.

⁵ Section 15(5) of the IPR Act: 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.

⁶ Regulation 2(9) If NIPMO decides to acquire ownership of the intellectual property in terms of section 4(3) of the Act, it must request that the recipient assign the intellectual property within 30 days of receiving such decision.

⁷ Section 1 of the IPR Act: "intellectual property creator" means the person involved in the conception of intellectual property in terms of this Act and identifiable as such for the purposes of obtaining statutory protection and enforcement of intellectual property rights where applicable;

6. FAILURE TO SUBMIT AN IP1 FORM

All IP1 Forms must be submitted to NIPMO **at least 60 days prior to the IP expiring or lapsing**⁸.

It is important to note that the:

- (a) submission of an incomplete/incorrect IP1 Form (which unnecessarily delays the reviewing process), and/or
- (b) submission of an IP1 Form within a very limited period (i.e. less than 60 days without any valid reason), or
- (c) total non submission of an IP1 Form,

will potentially adversely affect an institution's IP Fund and/or OTT Support Fund applications.

7. TIMELINE FOR PROCESSING AN IP1 FORM

Day 1	NIPMO receives the IP1 Form from the recipient: <ul style="list-style-type: none">(a) a cover letter, which includes an IP7 reference number and which sets out factors considered by the recipient in making the choice to refer to NIPMO;(b) a correctly completed IP1 Form; and(c) relevant supporting documentation.
Day 2 to 8	<p>NIPMO conducts a non-substantive review for compliance with the minimum submission requirements such as completeness of the IP1 Form and the relevant supporting documents submitted. NIPMO will only be reviewing the submission once all the required documentation has been submitted accurately.</p> <p>Acknowledgment of Receipt of the IP1 Form Upon receipt of the referral, NIPMO will send out a Formal acknowledgement letter (via email) to the recipient with an allocated NIPMO IP1 reference number within 7 working days of receipt of the submission.</p>
Day 8 to 45	<p>Evaluation of IP1 Form NIPMO will evaluate the submission by considering the reasons for such referral as well as by reviewing the accompanying supporting documents. In some instances NIPMO may conduct prior art searches or market analysis.</p> <p>NIPMO, in deciding whether or not to acquire ownership of IP and where possible obtain statutory protection, will consider factors as set out in regulation 2(6) of the IPR Act.</p>

⁸ Regulation 2(7) of the IPR Act: Within 60 days of a referral by a recipient in terms of section 4(2) of the Act, NIPMO must notify the recipient in writing of its decision made in terms of section 4(3) of the Act, and the reasons for the decision.

<p>Day 45 to 60</p>	<p>Correspondence with recipient NIPMO will send a response letter (via email) notifying the recipient of its decision as well as the reasons thereof.</p> <p>NIPMO acquiring ownership: NIPMO may, after considering the reasons provided by the recipient and any prejudice that may be suffered by the State if no statutory protection for the IP is obtained, acquire ownership of the IP and, where applicable, obtain statutory protection for the IP.⁹</p> <p>Should NIPMO decide to acquire ownership of the IP, NIPMO must request the recipient to assign the IP within 30 days of receiving such decision.¹⁰ The costs associated with the Deed of Assignment will be borne by NIPMO.</p> <p>NIPMO deciding not to acquire ownership: A decision by NIPMO not to acquire ownership of IP will irrevocably waive the State's rights to such IP under the IPR Act.¹¹</p>
<p>Day 60+</p>	<p>Should NIPMO fail to notify the recipient of its decision within 60 days of referral, NIPMO will be deemed to have decided not to obtain ownership of the IP and the recipient must, subject to section 4(4)(b)¹² of the IPR Act deal with the IP as it deems fit.¹³</p>

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



Dr Kerry Faul
Head: NIPMO
Date: 23 February 2016

⁹ Section 4(3) of the IPR Act: NIPMO may, within the prescribed period, after considering the reasons provided by the recipient in terms of subsection (2)(b) and any prejudice that may be suffered by the State if no statutory protection for the intellectual property is obtained, acquire ownership in the intellectual property and, where applicable, obtain statutory protection for the intellectual property.

¹⁰ Regulation 2(9) of the IPR Act

¹¹ Regulation 2(10) of the IPR Act

¹² Section 4(4) of the IPR Act: (a) Should NIPMO decide not to acquire ownership in the intellectual property in terms of subsection (3), NIPMO must, in writing, notify the recipient of its decision. (b) Subject to the reasons given in terms of subsection (2)(b), and on notification contemplated in paragraph (a), the recipient must give the intellectual property creator the option to acquire ownership in the intellectual property and to obtain statutory protection for the intellectual property, provided that in the case where a private entity or organisation had provided some funding, such private entity or organisation shall subject to section 10 first be offered such option before the intellectual property creator.

¹³ Regulation 2(8) of the IPR Act: Should NIPMO fail to notify the recipient of its decision as contemplated in sub-regulation (7) within the prescribed period, NIPMO will be deemed to have decided not to obtain ownership of the intellectual property and the recipient must, subject to section 4(4)(b) of the Act, deal with the intellectual property as it deems fit.

ANNEXURE A

FACTORS TO CONSIDER WHEN MAKING A CHOICE TO REFER IP TO NIPMO

Only IP, which was generated after 2 August 2010, and which can be protected through statutory protection and has commercialisation prospects; or can contribute to the socio-economic needs of the Republic; or because the recipient wishes to place the IP in the public domain, must be referred to NIPMO on an IP1 Form¹⁴.

A recipient that no longer wishes to retain ownership of the IP or does not want to obtain statutory protection of the IP must after due consideration of the relevant factors (mentioned below) refer the IP to NIPMO by submitting an IP1 Form. The factors are stated in Regulation 2(1) of the IPR Act and reads as follows:

“A recipient, when making the choice referred to in section 4(2)(a)¹⁵ of the Act, must consider the following-

- (a) how the intellectual property may **contribute to the socio-economic needs of the Republic and global competitiveness** of the Republic;*
- (b) **Forms** of intellectual property protection, statutory or otherwise, that are most **appropriate** for the intellectual property in question;*
- (c) the extent to which such intellectual property protection is likely to **undermine the socio-economic needs** of the Republic;*
- (d) the extent of **readiness** of the intellectual property for protection, and any further research and development that would still be required before such protection could be obtained, where relevant;*
- (e) the **costs and advantages** of the various possibilities for protection;*
- (f) the **potential for commercialisation** of the intellectual property; and*
- (g) whether the intellectual property **should be placed in the public domain.**”*

Before submitting a referral to NIPMO, the institution must first consider the reasons to refer such IP and briefly set out in its referral application some or all of the factors it considered prior to referring the IP to NIPMO.

¹⁴ Regulation 2(4) of the IPR Act: Where a recipient does not wish to obtain statutory protection or to retain ownership of intellectual property which can be protected through statutory protection-

- (a) which has commercialisation prospects; or
- (b) which can contribute to the socio-economic needs of the Republic; or
- (c) because it wishes to place the intellectual property in the public domain,

the recipient must make a referral to NIPMO in prescribed Form IP1.

¹⁵Section 4(2) of the IPR Act: A recipient that prefers not to retain ownership in its intellectual property or not to obtain statutory protection for the intellectual property must -

- (a) make the choice in accordance with the regulations and any guidelines published by NIPMO by notice in the Gazette; and
- (b) within the period set out in section 5(1)(e), notify NIPMO of the decision and the reasons therefore.