

Government's Walk-in Rights and Public Access to Medicines: Implications of the IPR Act on State-funded Pharmaceutical R&D Outcomes in South Africa

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The last objective of the US Bayh-Dole Act talks to public interest as it empowers US government with 'march-in' rights that enable the government to, in favour of the public, effect corrective action in the event of non-use, misuse or abuse of intellectual property rights. However, after a period of almost 35 years since the commencement of this legislation, US government has never exercised these rights despite a number of instances where the public's right to health, and more specifically access to patented medicines was compromised. This situation has compelled many scholars to view the 'march-in' provisions as dummy clauses or a mere 'paper tiger'. The State's 'march-in' rights are one of the key features of the South African Intellectual Property Rights from Publicly-Financed Research and Development Act (IPR Act) as borrowed largely from US legislation. With South Africa being a developing country that also regards health as a human rights issue, it is important that the State's 'march-in' rights are practical, implementable and can be explored whenever necessary to ensure that the public's right to patented medicines is respected. US case law provides some insight into technical and legal challenges that may accompany implementation of the said rights. This paper therefore reviews the current 'march-in' provisions in the South African Patents Act and the IPR Act and proposes policy options that may ensure that these rights offer practical value to the people of South Africa.

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