RECOMMENDATIONS AND COMMENTS ON THE DRAFT INTELLECTUAL PROPERTY POLICY 2013

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I wish to applaud the Department of Trade & Industry for finally producing a Draft Intellectual Property Framework for public comment. This is certainly welcomed and initiates a new process of addressing the many problems inherent in our current Copyright legislation and other pieces of legislation that are guided by the Copyright legislation, e.g. laws administered by the Department of Arts & Culture, Dept. of Communication, Dept. of Education, etc.

Below, I have made various suggested amendments, additions, and recommendations for inclusion in the Policy document. Please note that the purple text indicates additions or amendments recommended for inclusion in the IP Policy.

Under Objectives:

No. 6 – the words, research and persons with disabilities should be added to this sentence.

No. 11 is a duplicate and should be deleted as No. 18 addresses this matter.

No. 14 – National IP laws must be appropriate to the level of development and innovation of the country, and in this context, should adopt, where possible, the minimum requirements of those treaties for the benefit of South Africa.

No. 17 is a duplicate and should be deleted as this is addressed in No. 8

An additional objective under No. 19 should read as follows: Promote a fair and equitable intellectual property regime for the benefit of all stakeholders.

An additional objective under No. 20 should read as follows: Establish an Intellectual Property Advisory Committee in the Department of Trade and Industry which includes representatives from major stakeholders across the board.

To date this Committee has consisted of judges and IP lawyers in private practice with no representation from user groups, educational institutions, organisations serving persons with disabilities or libraries and archives. This has created a bias towards the commercial aspects of IP, and has not represented or promoted the rights of information users, such as educators, librarians, researchers, authors, learners and persons with disabilities in the IP environment.
The following Recommendations refer to page numbers at the bottom right-hand of the draft Policy document (not the top numbers as this is confusing):

On page 6 (Note) - The first sentence should be amended as follows:

IP is cross-cutting in nature, e.g. trade, science, agriculture, health, communication and education.

On page 17, under WIPO Internet Treaties recommendations, the bulleted sentence should be amended to read as follows:-

Contracts must contain only minimum conditions as per contract law and should not override or diminish any limitations and exceptions allowed in national copyright law.

On page 19, an additional bullet could be added to read as follows:-

- Promotion of open source software and open access licensing options (including Creative Commons licences) should be encouraged to facilitate access to information for innovation, research and educational purposes. These options provide alternative opportunities, in particular for new creators, authors, inventors and researchers not only for accessing information but for creating, marketing and selling their creations too.

On page 21, an additional bullet should be added to read as follows:-

- South African legislation should facilitate access to and sharing of information amongst medical staff, officials dealing with State security and other crucial issues, as well as researchers, educators and libraries and archives. Currently the Copyright law restricts or prevents multiple copying or sharing of journals articles or book chapters or other information, without permission and payment of copyright fees. For example, making photocopies of various current medical articles for rural doctors and health workers, who do not have the internet resources, or resources to purchase or access current medical resources or treatments. This results in rural health workers using outdated information which could be dangerous for their patients. This also affects Government officials, academics, educators and other citizens of the country, where sharing of articles and other information on critical issues such as State security, food security, climate change, health risks or any other important issue needs to be shared urgently with several people or organisations. For critical issues where time is of the essence and information is essential for policy or other decision-making purposes, there should be an exception to allow this practice. Without an exception, there could be serious implications if permission is denied or if funds are lacking to pay for copyright fees or if copyright holders delay in responding to permission requests, or do not respond at all.

On page 23, Chapter 4 (the following bulleted sentence should be added)

- This policy also makes provision for ‘sui generis’ legislation, to address Traditional Knowledge, where national IP laws cannot adequately protect traditional knowledge, and/or where they restrict rather than facilitate access to information and cultural heritage, and/or where new creations and innovation are stifled due to the perpetual protection afforded to traditional knowledge works. In addition, Government must
compile a database of all traditional community owners and their traditional knowledge works, before implementation of an IP law or sui generis law, so it is clear what this legislation protects. This database should be made accessible to the public via the Government’s official website.

On page 30, Recommendations – The first bullet should be amended to read as follows:

To enhance access to copyright materials and achieve developmental goals for education, research and knowledge transfer. South Africa must adopt pro-competitive measures under copyright legislation. The legislation must provide the maintenance and adopting of broad limitations and exceptions for educational, research, library and archival uses, and appropriate limitations and exceptions for persons with disabilities, as well as for digitisation, preservation and digital curation purposes to protect our cultural heritage for perpetuity.

Page 35, second sentence – the word ‘guarded’ is misspelt – should be ‘guided’.

Also, the last paragraph before Recommendations on Page 35, should read as follows:

Impact assessment, costs and benefit analyses are hardly carried out ……

In the last bulleted sentence on page 35, the sentence should be amended to read as follows:

South Africa should not enter into Free Trade Agreements, Economic Partner Agreements or other agreements that oblige it to adopt TRIPS-Plus or provisions beyond the minimum requirements of international treaties into its national IP legislation. Any term extension or strengthening of current copyright restrictions must first be researched empirically and be subject to an independent Regulatory Impact Analysis (RIA) and public hearings by all stakeholders, before consideration for national IP legislation.

On page 38, just before Chapter 11, an additional last bullet should be added to read as follows:-

South Africa should develop a strong alliance with other African countries and developing countries around the world in the realm of intellectual property to ensure any harmonisation of IP addresses developing issues. This alliance would also form a strong unified platform for developing countries to negotiate with developed countries, so that South Africa or any other developing country would not be forced into stricter copyright regimes through bilateral agreements or pressure from individual developed countries.

Page 39: Chapter 1: These words should be added at the end of the second sentence, after the words ‘tangible IP’:

Since public revenue is used to pay third persons for commissioned works, the resulting research reports and related documentation should be made public on the DTI’s official website, except of course where the findings present issues around the protection of individuals, State security or other risks to the State or people of South Africa.
Page 41: An extra bullet should be added to state the following:

Use of open source software and open access works for innovation, creation and educational purposes should be promoted at all levels, particularly where copyright material is too expensive or not available in South Africa. Creative Commons licences should be promoted as promotional tools, in particular for new authors, musicians, artists, filmmakers and other creators, as well as self-publishers or small publishers, to enable them to market and sell their creations to a wide audience with the least financial burden.

In all outreach educational programmes on IP, the benefits of limitations and exceptions for research, education, libraries and archives and persons with disabilities should be highlighted, particularly for socio-economic development purposes.

Further Comments and Recommendations on Policy Issues:

1. Provisions for Blind, Visually Impaired Persons and other Reading Handicapped Persons:

Despite South Africa being a strong supporter of a Treaty for the Blind, Visually and Other Reading Disabled Persons for several years at WIPO, and despite its strong support of the recently adopted Marrakesh Treaty in June 2013, this Draft Policy makes no mention whatsoever of the need for limitations and exceptions and appropriate provisions to facilitate access for blind, visually impaired and other print-disabled persons. The current situation is that South Africa’s Copyright Act is in contravention of the SA Constitution and international Conventions relating to persons with disabilities as it creates a barrier to access to information, a basic human right.

Recommendation: The provisions of the Marrakesh Treaty need to be incorporated into the South African Copyright Act as a matter of urgency. The Copyright Act can be amended to include these provisions, before the Marrakesh Treaty has to be signed or ratified. South Africa, as a WIPO Member State, and in view of its strong support for the Treaty, has in principal accepted the Treaty and there is no need to wait for ratification before blind and visually impaired persons can benefit from the new rights to access to knowledge.

2. Provisions for Deaf/deaf and persons who are hard of hearing/aurally impaired:

The current SA Copyright Act and Regulations do not provide specific limitations and exceptions to facilitate access to information for Deaf/deaf and hard of hearing persons, especially where conversion into more visual formats and format-shifting are necessary.

Recommendation: I strongly encourage the DTI to include limitations and exceptions for Deaf/deaf persons in any amendments to the Copyright Act, as they are also limited or prohibited from accessing information in various circumstances because of inappropriate, impractical Copyright laws.

and lack of provisions in the SA Copyright law for blind and Deaf/deaf persons. It includes a survey of 150 countries to show which countries have limitations and exceptions for persons with disabilities, and also provides examples of limitations and exceptions in 10 countries, which could possibly be consolidated, contextualised in a developing country framework and adopted into the SA Copyright law. It provides a number of recommendations which the Department of Trade and Industry is encouraged to take into account when amending the SA Copyright Law.

3. Amendment of the SA Copyright Act

The section on Copyright in the Draft Policy is surprisingly brief, considering how important this category of IP is and how it affects every single person and many pieces of legislation in South Africa.

The Educational and Library Sector has been calling for fairer and a more balanced copyright legislation since 1998 and 2000. After a successful lobby campaign in 1998 and again in 2000, by two Task Teams of the higher educational and library sectors mandated by the SA Vice-Chancellors’ Association of South Africa (SAUVCA) and the Committee of Technikon Principals (CTP), proposals promoted by rights owners and published by the DTI were withdrawn. They were too restrictive and had serious implications for education, libraries and persons with disabilities. They did not address the digital environment either. Since then conferences, workshops and meetings have been held by DTI and DAC, with commitments to address at least persons with disabilities, but nothing has been done to date.

With respect back in 2000, the DTI promised to draft an Intellectual Property Policy Framework which would provide direction for amendments to the copyright and other IP legislation. It has therefore been 13 years in the making, not 5 years. The amendment of the Copyright Act and its Regulations is long overdue and should be prioritised as number 1 on the list of ‘to dos’ by the DTI in the next 6 months. Without amendment of the Copyright Act, compliance with other legislation as mentioned above and practical application of legislation relating to education, research, libraries and archives and persons with disabilities are virtually impossible. As a result, high levels of non-compliance will continue as people endeavour to access knowledge. If the laws are inappropriate or too restrictive, as are the SA Copyright laws, then access over compliance becomes more important to citizens of the country. The only way they can access information is often copyright infringement, because the current law does not provide adequate limitations and exceptions for access to information.

**Recommendations:**

- Cognizance of the research findings of 8 countries, including South Africa, by the African Copyright and Access to Knowledge (ACA2K) Project ([www.aca2k.org](http://www.aca2k.org)) should be taken and the recommendations adopted to ensure that the law itself and practical application of the law address the rights of rightsowners as well as information-users. Currently the SA Copyright Act is skewed in favour of rightsowners and has created a serious problem for access to information and knowledge for users. It is outdated and does not address the changing needs of a developing country in the digital age. A holistic amendment needs to be done urgently. I attach a copy of the ACA2K SA Research Team’s Executive Summary and
South African Country Report for consideration and guidance to the DTI, when amending the Copyright law.

- The eIFL Model Copyright Law (as attached) (also accessible at: http://www.eifl.net/eifl-draft-law-copyright), written by IP experts and specialist librarians, provides excellent examples for the DTI to introduce as limitations and exceptions in the national legislation.

- Limitations and exceptions for entertainment and commercial activities have always been in conflict and in unfair competition with limitations and exceptions for non-commercial and educational use of copyright material. This has resulted in restrictions or barriers to access to information for educational, research and libraries and archival purposes, all crucial for socio-economic development and upliftment of our citizens. It is therefore strongly recommended that in new amendments to the Copyright law, limitations and exceptions for entertainment and commercial activities be addressed separately from non-commercial uses, e.g. education, research, libraries, archives, museums, access for sensory disabled persons, digitisation, preservation, technology migration and digital curation to preserve and make our cultural heritage accessible for perpetuity. Currently these non-commercial functions are being severely hampered or prohibited by outdated, inappropriate copyright laws. Also, South Africa is a developing country and limitations and exceptions need to be adopted in that context and in line with what is permitted by international copyright conventions and treaties. These recommendations should be included in the IP Policy.

- The IP Policy should also address ‘Orphan Works’ to facilitate access and preservation of these works, particular when they form part of our cultural heritage.

- It is also recommended that the period for protection of photographs be reduced to 25 years, as is the minimum requirement in international treaties. Many photographs are also orphan works and are inaccessible because of copyright, yet they provide rich historical records or visual presentations of our cultural heritage. Reducing the term of protection will enable them to go into the public domain sooner, thus making them accessible for research, educational and other purposes.

- The IP Policy should also make provision for copyright-free access to all Government documents, particularly for access purposes for research, libraries, archives, education and to enable individuals to exercise their rights in terms of the SA Constitution. This provision should be included in the IP Policy document.

- The IP Policy provides for ‘fair use’ (but without suggested criteria) and exceptions for education, research and libraries, for which the DTI should be commended. However, the Policy makes no mention of the need to address outdated and inappropriate legislation in other Government Departments, which is being negatively affected by the current Copyright law, e.g. the Third Cultural Amendment Bill (DAC), the National Archives Act, the National Library of South Africa Act and the Legal Deposit Act (DAC) and others. The current Copyright law prevents or restricts libraries, educational institutions, organisations serving persons with disabilities and other providers of information from carrying out their legal mandates to provide access to information and to preserve our cultural heritage for the future. Without a policy commitment in the IP Policy itself, these matters may not receive the urgent attention they deserve.

- The IP Policy also needs to provide for appropriate exceptions to allow circumvention of digital rights management or technological protection measures, for legitimate uses. Such
measures create barriers to accessing information, e.g. they prevent legitimate library functions from being carried out; they block text to speech software for blind persons, etc.

- Article 86 of the Electronic Communications and Transactions Act (ECT) also needs to be amended as it has no limitations and exceptions and is currently unconstitutional. This should be mentioned in the IP Policy as amendments to the Copyright law will have a bearing on how the ECT Act is amended too.

4. Other WIPO Treaties

- **Beijing Treaty on Audiovisual Performances**
  The Beijing Treaty on Audiovisual Performances adopted in 2013 needs to be addressed in the IP Policy and in relevant legislation, with appropriate limitations and exceptions for libraries, research, education and persons with disabilities, where applicable, too. South Africa also needs to consider signing and ratifying the Treaty in due course.

- **Current Proposals at WIPO for Treaties for Libraries and Archives, Education, Research and Disabled Persons.**
  The Policy should make provision for adoption of international Treaties that South Africa is strongly supporting at WIPO at the moment, such as the Proposal for a Treaty on Copyright Limitations and Exceptions and the Africa Group’s Proposal for a Treaty for Education, Research, Libraries and Archives and Disabled Persons. It is not necessary for these Treaties to be adopted, signed and ratified before South Africa can implement their provisions into our national IP laws and other relevant laws. Amendment could precede ratification of a Treaty or Treaties. Implementation of such Treaty(ies) would then commence with the amended Copyright and other relevant laws, rather than after ratification of such Treaty(ies).

5. Collecting Societies:

Collecting Societies should be a voluntary option for users of information and not compulsory. Choice of where to obtain copyright permission should be that of the user of information. Where collecting societies are economically and/or administratively beneficial for educational and other institutions, proper licensing terms and affordable fees must be negotiated in the context of a developing country, so that limitations and exceptions for education and libraries are not overridden or diminished in any way.

Full accountability and transparency must be part of the collecting societies’ services, including an annual audited report or annual audited statements setting out exactly where all monies collected from educational and other institutions have been distributed to. Currently educational institutions do not receive any confirmation or statements in this regard. Provisions to safeguard all stakeholders in the collection, management and payment of royalties and/or copyright fees need to be addressed in this IP Policy document.
6. **Public Lending Right for Libraries**

Any pressure from rightsholder groups to implement a Public Lending Right in South Africa should be strongly rejected. There is no international, regional or national obligation in Copyright or any other laws for any country, including South Africa and other developing countries, to adopt such a right.

Only a number of countries around the world have adopted this right to date and no developing country has adopted this right. The United States has rejected it to date as have many other developed countries. EU countries are being forced to implement them because of their Union commitments. Less rich countries in the EU, like Spain, Portugal and Eastern European countries are battling to cope with their obligations under the Public Lending Right. Some countries have been ‘disciplined’ by the EU for non-compliance, including Spain, Portugal and Ireland. They, as developed countries, are unhappy with the Public Lending Right but have been forced to implement it by the EU. These examples and other reasons are highlighted in the paper entitled “Public lending right: prospects in South Africa’s public libraries?” accessible at [http://wiredspace.wits.ac.za/handle/10539/8636](http://wiredspace.wits.ac.za/handle/10539/8636), which examines the implications for South African public libraries and concludes that it is not recommended for South Africa.

The International Federation of Library Associations and Institutions (IFLA), the representative body of over 1500 member organisations in about 150 countries around the world, does not support a Public Lending Right for developing countries. See: [http://www.ifla.org/publications/the-ifla-position-on-public-lending-right-2005](http://www.ifla.org/publications/the-ifla-position-on-public-lending-right-2005) ; Also see: [http://www.aca2k.org/en/blog/viewpost/211.html](http://www.aca2k.org/en/blog/viewpost/211.html). The higher education and library sectors in South Africa do not support a Public Lending Right either.

The current economic climate and state of transformation in South Africa are not conducive to the introduction, maintenance or sustainability of a Public Lending Right. Such a right may work in some developed countries because of better state and library resources and because more people can afford to buy books, but there are many other issues to consider in a developing country context. The SA Government has far more pressing socio-economic issues to budget for than paying a Public Lending Right subsidy to commercial authors. Also, South Africa lacks a reading culture and books are often more expensive than in developed countries. Access to information is already restricted by current laws. Adding a Public Lending Right or ‘Tax to Read’ would no doubt exacerbate the already critical literacy situation in South Africa. Authors can find alternative ways of increasing their income through marketing and other initiatives and through tax incentives.

If South Africa promotes or adopts a Public Lending Right, it could well create an unnecessary precedent and economic burden for other developing countries on the continent and further afield, that look to South Africa for leadership and guidance in such matters.

**Recommendation:**

A statement such as the following should be *added* to the IP Policy Document:-

“The Government does not support the introduction of a Public Lending Right in libraries in South Africa through Copyright Law or any other law in South Africa. There are no
international, regional commitments or obligations for South Africa to do so. It would add an additional burden to the already-strained Government budget for socio-economic development, as well as for library infrastructure and resources, and/or it would negatively affect already limited budgets of libraries which are already funded or subsidised from Government national and regional budgets. Introducing a Public Lending Right into public or academic libraries, particularly in the context of a developing country and South Africa’s current state of development and transformation, would not be in the interests of education, research and access to information in general. It would also negatively affect regional and national initiatives to encourage a reading culture in South Africa”.

7. **Additional Documentation and Resources that will provide valuable information and guidelines to assist the DTI when amending the Copyright legislation:**

- Tips for Developing Countries when updating their copyright laws - [http://www.aca2k.org/en/blog/viewpost/229.html](http://www.aca2k.org/en/blog/viewpost/229.html)
- LibGuide on Copyright & Related Matters - [http://libguides.wits.ac.za/Copyright_and_Related_Issues](http://libguides.wits.ac.za/Copyright_and_Related_Issues)

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