



The Chairperson,
Committee on Trade and
Parliament of South Africa

Dear Madam

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Submission by South African Civil Society Organisations on Intellectual Property Amendment Bill May 2010

Executive Summary

The Intellectual Property Laws Amendment Bill seeks to address an important issue. However the way it does so threatens to hinder the preservation of traditional knowledge, severely diminish the South African public domain and limit access to knowledge.

South Africa has already enacted legislation which deals with aspects of traditional knowledge which interact with the patent system. The current Bill deals with indigenous creativity that finds expression in narrative, music, design and artwork. Many other countries and local experts propose a special type of protection for traditional knowledge, referred to as *sui generis* protection. However the Department of Trade and Industry propose fitting traditional knowledge into the conventional categories of intellectual property such as trademark, design and copyright.

The likely consequences of the Bill before Parliament are a loss of agency by indigenous communities, the withdrawal of work from the public domain, and increased restrictions on access to knowledge. These consequences are particularly problematic because the interaction of the Bill with other parts of the legislative instruments to be amended is incalculable. If the legislation is to be enacted then it is essential that it contain flexible exceptions and limitations which enable socially beneficial uses of work, and which enable judges to craft reasonable solutions which enable education, preservation and expression. The policy on protection of traditional knowledge requires that indigenous communities are able to benefit financially from it, but also that traditional knowledge is recorded, preserved and understood. Protection of traditional knowledge, therefore, requires that while financial benefits should be shared with communities, the teaching, research and celebration of traditional knowledge in South Africa should be strengthened. This objective is hindered by the Bill which restricts the preservation, teaching, research and celebration of traditional knowledge. Teaching, preservation, research and celebration of traditional knowledge require appropriate exceptions and limitations in the amended legislation.

The Bill is a response to the appropriation of traditional knowledge, often by multinational corporations, without any financial benefits flowing to the communities from which the knowledge is taken. It is important to prevent the

appropriation of traditional knowledge, particularly in ways which threaten indigenous communities not only with loss of revenue but loss of access to markets, loss of autonomy, and loss of livelihoods. The Bill focuses only on loss of revenue, and fails to deal with the cross border nature of appropriation.

The Bill will shrink the South African public domain which is an important source of knowledge and creativity for South Africans, and will severely limit non-commercial uses of works for education, free expression and public use. The balance can only be restored by limitations on the exclusive rights which favour education, research, marginalised communities and public debate.

The authors of this submission call on Parliament to compel the DTI to take full account of the loss to the South African society against the potential financial benefit to a particular community. The allocation of exclusive rights to a community over every work deriving from traditional knowledge means that while the term of a work will expire after 50 years, the traditional knowledge on which it is based never enters the public domain. The loss to the South African public domain is - in effect - permanent and hence incalculable.

Further, as a remedy against the unforeseen and possibly punitive effects of this law on the non-commercial use of traditional knowledge, if the Bill is passed it is imperative to institute fair use limitations on the application of copyright on traditional knowledge. This would allow for the use of traditional knowledge for purposes of deepening understanding and respect for the diverse cultural traditions in the South Africa.

Finally, it is incumbent on the South African government to continue its campaign for global recognition of sui generis rights to traditional knowledge in the global trade and intellectual property system so it may adequately protect indigenous communities against unauthorised appropriation for commercial use.

Recommendations

1. Do not pass the Bill.
2. Require a cost-benefit analysis of any reduction of the public domain.
3. If the Bill is passed then include a fair use limitation, applicable to all copyright, and to traditional trademarks and designs.
4. If the Bill is passed then include exceptions and limitations that will allow access for communities that require them, including compulsory licensing allowing access for the blind, visually impaired and print disabled.

Discussion

The Bill is intended to amend four separate statutes and introduce a number of new rights into South African law. Although serving a single purpose, of guarding against appropriation of traditional knowledge, the Bill is unavoidably complex. This submission does not canvass all the complexities of the Bill, but rather considers it in light of the pressing concerns of ensuring access to knowledge for South Africans, and a vibrant public domain and ensuring the preservation of indigenous knowledge.

Protecting Community Rights through conventional Intellectual Property Rights

The protection of traditional or indigenous knowledge from appropriation emerged as a priority for South Africa. Western, intellectual property laws tend to confer rights when knowledge is ostensibly individually authored, reduced to material form and 'original'. Traditional knowledge is by its nature traditional, communal and frequently oral. As a consequence some developing countries have adopted special separate (sui generis) legislation in respect of traditional knowledge. Sui generis legislation attempts to craft a regime appropriate to traditional knowledge. However most appropriation is carried out by corporations from developed countries, and appropriated knowledge is

exploited in developed countries through the mechanisms of conventional intellectual property. Developing nations including South Africa have advocated strongly for recognition of sui generis traditional knowledge rights through the World Trade Organisation (WTO) and World Intellectual Property Organisation. However some developed nations oppose any recognition of sui generis protection, and rejected the global recognition of traditional knowledge during the Doha round of the World Trade Organisation.

The Bill is intended to amend legislation so that traditional knowledge is protected from appropriation by trying to use the conventional intellectual property system. The Bill intends to give control over copyright works, designs, names and logos which are currently in the public domain to the State acting on behalf of indigenous communities which have created and preserved them. In other words the policy impetus is defensive, to prevent appropriation, but the legislative means is the use of conventional intellectual property instruments which rely on prohibition of any use, including socially important uses.

The rights granted in South African legislation are confined to the borders of South Africa. To be effective in other jurisdictions, the trademarks and designs would have to be registered, if that is possible, in the conventional systems of every other country where protection is sought. The Bill does not make that any easier. The copyright conferred by the Bill on traditional works may not receive protection because the work fails to meet minimum standards of originality, where it would receive protection then it would be protected regardless of this Bill. The Bill therefore does not assist indigenous communities whose works are appropriated by multinational corporations and exploited outside of South Africa.

The use of conventional intellectual property is purely tactical and should not be allowed to result in the adoption of the exclusionary paradigm which

accompanies conventional intellectual property. The exclusionary paradigm of conventional intellectual property is based on a claim that absolute control of an intellectual creation is essential to commercial benefit. The success of FLOSS (Free, Libre and Open Source Software) business models, and the emergence of open business models proves empirically that this claim is unfounded, and undercuts attempts to elevate it to the status of a justificatory principle or even an accurate description of benefiting from creativity and innovation.

Preservation of traditional knowledge

Protecting traditional knowledge means not just the prevention of appropriation, but also ensuring that indigenous communities can continue to use the knowledge; in other words the protection measures must ensure that traditional knowledge continues to live in communities' daily practice. Protecting traditional knowledge cannot be achieved by simply prohibiting use without permission, knowledge can be preserved only when it is shared and preserved, and enriches the public domain, and South African society as a whole. This is especially true with respect to the application of traditional knowledge to sustainable resource use, for example. This requires both that members of the communities have the right to use knowledge but also that the remainder of South Africa should learn about, and have a greater understanding of, and respect for, traditional knowledge. This is necessary to enable South Africa to have the ability to make use of traditional knowledge outside of the communities which have traditionally used it. Further, indigenous communities may not always have the capacity to preserve their knowledge, and may require the skills and the assistance of others to preserve knowledge. Those assisting must be steeped in an understanding of and respect for traditional knowledge, both of which which can only come with the sharing of, education about and research into traditional knowledge. However the Bill largely prohibits those uses of traditional knowledge and creates uncertainty about what uses are permitted.

Shrinking the Public Domain

The Bill will undoubtedly reduce what is available in the public domain, and is indeed intended to do so by its retrospective effect. The public domain refers to the repository of ideas, images, works and systems which are freely available for anyone to use for the creation of new ideas. Intellectual creations, the objects of intellectual property, are non rivalrous and non excludable. In order to confer rights to intellectual creations the law grants an entitlement to exclude others from a portion of what would otherwise be the public domain. Entitlements like copyright are statutory monopolies on the use of knowledge intended to grant incentives for the creation of works which will enrich the public domain. When a creative work is made some elements are immediately in the public domain while the work itself enters the public domain when its term expires. The monopoly given by legislation is entirely artificial, imposed solely in order to benefit the public interest. It must therefore be limited in the public interest. Since a vibrant public domain is essential to access to knowledge, creativity and innovation it is necessary to offset the reduction of the public domain in other ways. Foremost amongst these ways is through the enactment of appropriate exceptions and limitations such as fair use.

Recommended Limitation and exceptions

The recommended limitation of fair use balances the reduction of the public domain necessitated by the Bill. By allowing non commercial uses of works - including traditional works - it enables traditional works to be protected from commercial appropriation without adopting the exclusionary paradigm of conventional intellectual property. It serves to preserve and grow traditional knowledge through enabling research, and education and preservation of traditional knowledge. It provides greater access to knowledge, necessary for development in South Africa.

Limitations, Exceptions and Traditional Works

Section 19C in the current draft of the Bill does apply some of the narrow exceptions in the 1978 Copyright Act to traditional works. However the current exceptions have already been extensively criticised as inflexible, difficult to understand and use, and inadequate in a developmental state. The South African report from an extensive eight country study of copyright law in Africa found that exceptions in the South African Copyright Act are inadequate to enable access to knowledge

(http://www.aca2k.org/attachments/154_ACA2K%20South%20Africa%20CR.pdf). The Open Review of the South African Copyright Act also found that the current exceptions do not advance South Africa's developmental goals, (<http://www.shuttleworthfoundation.org/our-work/intellectual-property-rights/projects/report-sa-copyright-act>). The exceptions listed in section 19C are not adequate to the deal with the unexpected and incalculable consequences of the Bill, nor do they permit access by marginalised communities.

Fair Use Limitation

Fair Use is a flexible provision found originally in United States copyright law. It is incorporated into US copyright law as a limitation rather than an exception to copyright law, in order to ensure that copyright law is constitutional.

Without it copyright law would violate the right to free speech and be regarded as unconstitutional. While there is some criticism that it is difficult to predict the ambit of fair use, it is a flexible provision which has enabled adaptation of the law by courts in a rapidly changing technological environment.

The kind of flexibility provided by a fair use provision is particularly important for the Bill, since it is not possible to predict the outcome of using conventional copyright to prevent appropriation, in particular the conflicting rights of . It is therefore essential to have a flexible legislative device which allows commonsense solutions to unforeseen consequences. It is suggested that similar language to the United States provision, section 107 of the US Copyright Act, be used so that South African courts can make ready use of precedent from the United States and other jurisdictions in interpreting the section. A flexible provision together with the more specific detailed provisions for education offers the best combination of to achieve the objectives of access to knowledge and maintaining an adequate public domain.

An additional advantage of a fair use provision is that its long history in the United States ensures that it complies with international treaties, in particular TRIPS. Fair use provisions have recently been introduced in Isreal, Egypt and Japan.

Wording of fair use provision

Limitations on exclusive rights

Notwithstanding the provisions of sections 6,7,8,9,10,11, 11A, 11B, 11C (alternatively: notwithstanding the provisions of this Act) the fair use of a copyright work, including such use by reproduction or other act specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) the nature of the copyright work;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Application of the Fair Use Limitation

It would be preferable that the fair use limitation should apply to all copyright works rather than being limited to traditional copyright works. There are a number of inter-related reasons. Traditional works are defined in the Bill as literary, musical or artistic works “which is recognised by an indigenous community as a work having indigenous origin and a traditional character”. Since the work takes the form of a literary, musical or artistic work it will not be immediately apparent to the public whether a work is a traditional work or not, and thus the application of exceptions only to traditional works would cause confusion. It would also be inequitable that rights-holders of traditional works should be subject to the important and necessary limitation and exceptions, when other rights holders have enjoyed statutory exclusive rights since the colonial era. It is therefore more equitable that the limitation and exceptions should apply to all copyright works.

Exceptions for marginalised communities

The South African National Council for the Blind is committed to ensuring the equality of visually impaired persons, in law and practice. As a result the Council has been working for changes to copyright and other laws which discriminate against visually impaired people. Daisy SA, envisions a world where people with print disabilities have equal access to information and knowledge, without delay or additional expense, in an accessible, feature-rich, navigable format which also benefits the wider community. DAISY SA, the South African National Council for the Blind, as well as many other stakeholders, have been actively involved at the World Intellectual Property Organisation on the Treaty for Improved Access for Blind, Visually Impaired

and other Reading Disabled Persons (TVI); the aim of which is to create a global standard for limitations and exceptions to Copyright in order to allow for cross-border exchange of accessible formats and equitable access to knowledge for millions of visually impaired and print disabled people around the world.

DAISY, the SANCB and the other organisations represented in this submission are also committed to engaging with Government to amend the South African Copyright Act of 1978 (drafted decades before the advent of a democratic government) in order to bring it in line with the principles of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and to include provisions that explicitly encourage blind, visually impaired and print disabled people to access and contribute to the access to information and knowledge. The visually impaired and print disabled community has long suffered from limitations on access to knowledge. We regard all measures that prohibit access to knowledge as out of place in a developmental state. The right to knowledge is the right to life itself, and cannot be equated with any commercial rights. Therefore we call for measures, including appropriate exceptions and limitations, which in fact enable access to knowledge, to be included in all existing and proposed intellectual property legislation.

Minimum exceptions are necessary to ensure that blind and visually impaired persons have access to reading materials in a technology-neutral way which operates in all environments, and without requiring the consent of any information intermediaries, whether search engines, internet service providers or other intermediaries.

More especially limitations and exceptions should:

- Allow for the production and distribution of copyrighted works in formats that are accessible to persons who are blind, visually impaired or print disabled;
- Ensure that works published under these limitations and exceptions could be legally exported and imported across national borders to facilitate access and resource-sharing;
- Provide legal norms to ensure that digital technologies can be used to greatly expand the number of accessible works;
- Ensure rights for non-profit organisations to create and distribute accessible formats without having to obtain permission from copyright owners;
- Provide for-profit companies with opportunities to use an exception, but only when an accessible format is not available in an identical or equivalent format from the copyright owner, and when the for-profit entity provides notice and remuneration to the copyright owner.

We thank you for your consideration of our proposals and are available to participate in the Parliamentary hearings, should you so desire.

Civil Society Organisations making this submission



The African commons Project aims to turn local and regional communities into active participants in the digital economy and to safeguard, equip and

encourage the freedom of South African societies to create, build upon and share knowledge. We will achieve this by:

- Actively campaigning, through community mobilization and open debate with policy-makers, to encourage intellectual property reform;
- Advocating for opening access to South African heritage online;
- Educating South Africans on how to utilise the power of digital technology to broaden their horizons, with a special emphasis on equipping young South Africans, our leaders and innovators of tomorrow, with the tools of the Information Age; and
- Promoting the highest levels of open access to intellectual products for organisations and individuals - especially those with a public mandate.

More information can be found at <http://www.africancommons.org>



The Association of Progressive Communication's mission is to empower and support organisations, social movements and individuals in and through the use of information and communication technologies (ICTs) to build strategic communities and initiatives for the purpose of making meaningful contributions to equitable human development, social justice, participatory political processes and environmental sustainability. APC is both a network and an organisation. APC members are groups working in their own countries to advance the same mission as APC. In December 2008, APC had 52 members in 37 countries, the majority from developing countries. Four APC members are located in South Africa. Details of the organisation and its membership is available at <http://www.apc.org/>



Daisy SA is a registered non-profit Section 21 organization whose vision and mission is aligned with the International Daisy Consortium and its worldwide network of Daisy organizations. The DAISY Consortium is an international association that develops, maintains and promotes international DAISY (Digital Accessible Information System) Standards. It is managed by a Board made up of representatives from all Full Member organizations. The DAISY Consortium envisions a world where people with print disabilities have equal access to information and knowledge, without delay or additional expense, in an accessible, feature-rich, navigable format which also benefits the wider community. The DAISY Consortium's mission is to develop and promote international standards and technologies which enable equal access to information and knowledge by all people with print disabilities and which also benefit the wider community. The Consortium aims to serve people with diverse disabilities as well as illiterate and indigent communities which do not have access to the written form of communication.



The South African National Council for the Blind (Council) is a Non-Government

Organisation (NGO) striving to meet the needs of all blind and partially sighted people in South Africa. Our services include rehabilitation, education and training, the provision of assistive devices, social and economic development and programmes promoting the prevention of blindness and the restoration of sight. Council comprises 95 affiliated member organisations which share Council's goal of providing services to visually impaired people across South Africa, approximately 90% of whom come from previously disadvantaged groups. We are committed to ensuring that blind and partially sighted people of all ages enjoy all rights promised by the Constitution of South Africa.



Freedom to Innovate South Africa (FTISA) is a non-profit organisation with a mission to promote and assist in the development of patent policy, legislation and practice that will benefit South African National interests, the economy and all of South Africa's citizens. More information can be obtained at <http://ftisa.org.za>