

COMMENTS ON THE DRAFT NATIONAL
POLICY ON INTELLECTUAL PROPERTY
2013



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COMMENTS ON THE DRAFT NATIONAL POLICY ON INTELLECTUAL
PROPERTY, 2013

PART ONE

OVERVIEW

PREFACE

1. The Department of Trade and Industry issued a document entitled “***Draft National Policy on Intellectual Property, 2013***” (“DNPIP”) in General Notice No.918 of 2013, published in the Government Gazette of 4 September 2013. In this notice an invitation was extended for the public to comment on the DNPIP.
2. The Anton Mostert Chair of Intellectual Property Law at the University of Stellenbosch (“CIP”) has responded to this invitation and submits its comments on the DNPIP. The CIP’s comments comprise a suite of separate, but related, complementary documents comprising the following:
 - 2.1 An overview of the DNPIP as a whole prepared by Professor OH Dean, Chair of IP Law.
 - 2.2 A commentary on those aspects of the DNPIP dealing primarily with copyright, trade marks and related issues prepared by Professor OH Dean.
 - 2.3 A commentary on primarily patents, design and technology transfer matters prepared by Dr M Kleyn, a Fellow of the CIP.
 - 2.4 A commentary dealing primarily with matters pertaining to the internet prepared by Mr C Jooste, a Fellow of the CIP.

- 2.5 A commentary dealing primarily with computer programmes prepared by Dr S Karjiker, a Fellow of the CIP.

3. The present document is that referred to in paragraph 2.1.

INTRODUCTION

4. The layout and presentation of the DNPIP makes a discussion of it a difficult process. This is because, with respect, its layout and presentation have shortcomings which are not conducive to a systematic and consequential analysis of it. The document's language and syntax, as well as its classification of subject matter, are often confusing with the result that it is often difficult to comprehend what the author is saying. It has indeed been described as "an incoherent stream of consciousness". For purposes of this overview it will be dealt with under certain specified topics or heads of discussion. Concrete and focussed discussion of the merits of the contents of the document and its shortcomings will be discussed in the other documents referred to in paragraph 2 above.

STRUCTURE AND TEXT OF DNPIP

5. The document has sections of its initial portion dealing with "objectives" and "background-problem statement". The stated objectives are perfectly laudable but are not comprehensive for purposes of a policy document. For instance, the section is silent on the issues of joining and implementing the provisions of International Intellectual Property Agreements, and most importantly, taking steps to ensure that our Intellectual Property Legislation stays up to date and relevant in a rapidly evolving intellectual property environment. Furthermore one of the objectives ought to be the promotion of foreign exploitation of South African intellectual property by means of tax incentives and the like.
6. The purported problem statement lists a series of characteristics with which it is apparently suggested that the current situation in South Africa complies. When

this list is weighed up against the objectives of the policy, one cannot help but asking: “what is the problem?” because it would appear as though the stated objectives are already met.

7. The layout of the document, which provides discussion in various chapters, which overlap somewhat, and which collectively do not provide comprehensive coverage of the field of intellectual property, makes it difficult to ascertain what the document in its entirety has to say on any particular topic, for instance copyright. Chapter 1 deals with “forms of IP” and sub-section (c) thereof, deals with copyright”. Certain recommendations, pursuant to discussion of the subject, are given in this sub-section. However, without any cross referencing, in order to glean what the document as a whole has to say about copyright, one has in addition to look at various other apparently unrelated sections of the document. Examples are Chapter 1, sub-section (f) (dealing with “extension of rights granted by the Act - without “the Act” apparently referring to the Copyright Act); chapter 6 dealing with copyright, software and the internet; chapter 10: IP and development; chapter 4 : IP and indigenous knowledge, which refers to, and purports to incorporate, a previous policy document, the contents of which, however, do not form part of the present document.
8. The document purports to be an exposition of the Government’s policy on Intellectual Property. Outwardly, it has the appearance of a policy document consisting of a number of issues on which there is a discourse, followed by statements labelled as “recommendations”. However, as will appear more clearly below, the discourses are frequently renditions of the subjective views of the author on wide ranging and disparate issues of intellectual property without giving rise to any meaningful resolutions as to what stances should be adopted or action should be taken by the Government. The range of subjects covered by the document is by no means comprehensive or exhaustive of pertinent issues pertaining to intellectual property and one is left wondering why certain important issues are omitted from the review. For instance, the document is silent on the Performer’s Protection Act, the Registration of Copyright in Cinematograph Films Act, the Counterfeit Goods Act and counterfeiting in general, and the Intellectual Property Rights from Publicly Financed Research

and Development Act. Is one to assume that the Government has no policy on these matters or that they do not rank as sufficiently important to be covered by a statement of policy? On the other hand, the document makes reference to the Heraldry Act and suggests that it is part of the general body of law dealing with intellectual property. Nowhere in the world, that we are aware of, is heraldry considered to be a species of Intellectual Property Law.

9. The document has a few basic themes about which it pontificates. These include the imbalance between the strengths of the positions of developed countries and developing countries (into which group it is considered that South Africa falls); the fact that there should be co-operation and co-ordination between the various government departments and entities that are seized with various aspects of intellectual property, such as the Department of Trade and Industry, the Department of Science and Technology, the Department of Communications and others; the fact that developed countries attempt to impose obligations on developing countries over and above those imposed by the various international treaties in the field and that on the contrary, there is rather a need to limit the restrictions on free activity imposed by the Intellectual Property Treaties; Patent Law, and especially the non-examination of South African patent applications is a direct cause of excessive costs for medicines; Intellectual Property laws are anti-competitive and our law provides little redress for this situation. Regrettably, the discourses on these issues, while being pertinent issues appropriate for being addressed, give rise to very little if any concrete and positive proposals as to what the way forward should be.
10. There are instances where the document focuses on issues and discusses them critically, despite stating unequivocally, and correctly, that these issues are not, or are no longer, pertinent in contemporary intellectual property. For instance, on page 13 it is stated that :

“Although WIPO (World Intellectual Property Organisation) is no longer pursuing the issue of harmonising the patented agenda to produce a “world patent” it is important that South Africa not renounce “sovereignty” over a patent grant”.

“RECOMMENDATIONS” COMPRISED IN THE DOCUMENT

11. The document is littered with recommendations. As a general pattern, these recommendations follow on after a discourse on a particular subject. There are some recommendations which are reasoned and which flow from the preceding discourse. Examples are the recommendation on page 28 that South Africa should not enter into bilateral treaties that would undermine discretionary measures that are allowed in multiple agreements such as TRIPS (Agreement on Trade Related Aspects of Intellectual Property Rights); on page 29, that South Africa must put systems in place that encourage foreign companies to transfer technology to domestic companies – incentives / tax breaks may be devised to achieve this; and on page 41, appropriate incentive policies should be put in place to promote technology transfer, e.g. tax breaks for companies that license technologies to local companies. On the other hand, there are several recommendations which have nothing to do with the discourse that they follow. Examples of these are the following:

11.1 On pages 14 and 15, under the heading “Patent Extensions/Restoration” it is recommended that technology transfer contracts should be standardised to regulate restricted/prohibited technologies subjected to export controls and maximum percentages; South Africa should not support a patent reform at international level that would undermine its public policy making options; and South Africa should amend its legislation to address issues of parallel importation and compulsory licensing in line with the Doha decision of the WTO on IP and public health. What these issues have to do with patent extensions and restoration is beyond comprehension.

11.2 On page 16 under the heading “Patents affected by Competition Law” it is recommended that South Africa should not support a patent reform at international level that would undermine its public policy making. What relevance does this issue have to Competition Law?

- 11.3 On pages 45 and 46, under the heading of “Enforcement of IP” it is “recommended” that the “Copyright Tribunal (which deals with the granting of compulsory licenses under the Copyright Act) also functions as the trade mark tribunal and is highly technical and legalistic”. (text in brackets added). Licensing and enforcement of IP rights are somewhat unrelated topics.
12. There are several instances where “recommendations” simply restate the present position, and therefore are meaningless. Examples of these are the following:
- 12.1 On page 20 it is recommended that the Copyright Tribunal should play a key role in the determination of fair royalties and creating a framework in which new users are able to easily determine the full business entry costs. The Copyright Tribunal is essentially the High Court carrying out a specific function of adjudicating license disputes between licensees who wish to acquire licences and licensors that are unwilling to grant licences or licences on reasonable terms. It has been in operation since 1965.
- 12.2 On page 42, discussing the issue of so-called “ambush marketing” and sporting events, it is recommended that *“protection of sporting events must be of limited duration, preferably a few days or months after the last game”*. Section 15A of the Merchandise Marks Act provides exactly that, namely that the protection afforded in that Act expires six (6) months after the completion of the relevant event.
- 12.3 On page 42 it is recommended that *“trade mark and any other applicable IP should be in terms of the relevant legislation, e.g. trade mark protection must be for a period of ten (10) years subject to renewal and investment or use of the trade mark in the country”*. This is a statement of the existing law, albeit somewhat inelegantly phrased.

13. The section of the document which purports to deal with the subject of copyright, commencing on page 17, does not contain a single recommendation. In other words, the discourse on copyright does not lead to any conclusions whatsoever. Conversely, chapter 14 – Drivers of the IP policy – on page 45, includes the statement that the discourse on the subject in fact constitutes the recommendations made in regard thereto. On the other hand, there are recommendations which are not preceded by any discourse and are thus unmotivated..
14. In some instances, recommendations are self-evident, trite or are platitudes. The following are examples:
- 14.1 *“South Africa should develop awareness campaigns on the use of designs to promote their products both culturally and otherwise(sic!)”* on page 18. A profound and innovative thought!
- 14.2 *“IP and health legislations must be amended to allow competition laws to apply”*. Currently both IP and health laws are subject to the Competition Act. This is to be found on page 28.
- 14.3 *“Contracts must contain only minimum conditions as per contract law”* - on page 20.
- 14.4 Awareness campaigns on the advantages and disadvantages of trade secrets should be embarked upon - on page 21.
- 14.5 *“Health infrastructure, such as the distribution of medicines and manufacturing capacities, must be enhanced as lack of them may impede affordability of medicines”* - on page 24.
- 14.6 *“Due to the fact that the IP system hardly stimulates research on diseases that affect poor people, public funding for research on health problems should be directed and increased”* - on page 24.

- 14.7 *“Entrepreneurs and local governments or metros must exploit business opportunities that emanate from sports events when they take place in their areas” – page 41.*
- 14.8 *“Government should control the ownership and usage of military IP, in particular patents as they may fall in the hands of a group that takes over a state by means of a coup d’état, after coup d’état does not comply with international obligations and is therefore considered dangerous or likely to cause problems” – on page 43.* It is astonishing that it is felt that IP policies should take account of a possible coup d’état, but in any event the recommendation is nonsensical since a coup d’état would by its very nature place the new regime in control of all government properties.
15. As previously stated, as a general proposition, the recommendations lack particularity and do not specify concrete steps or procedures to give rise to their practical implementations. On the whole, they amount to little more than vague expressions of intent or hope.

INCORRECT ASSUMPTIONS ABOUT EXISTING LAW

16. In general, the document displays an alarming lack of understanding or knowledge of existing IP law and several of the discourses and recommendations flowing from them are tainted and undermined by this factor. The following are examples of this problem :
- 16.1 There does not appear to be a proper realisation that South African IP law is governed and regulated by various international treaties of which we are a member. The most important ones are the Paris Convention dealing with patents, trade marks and designs; the Berne Convention dealing with copyright; and the TRIPS Agreement dealing with all forms of intellectual property and binding its members to the provisions of the aforementioned two treaties, as well as to certain other treaties of which South Africa is not a members (e.g. the Rome Convention

dealing with the rights of performers and broadcasters). These treaties lay down minimum conditions with which the laws of other countries must meet and provide for members to protect each other's items of intellectual property on a reciprocal basis. The reciprocal protection is founded on the principle of so called "national treatment". This means that each country must afford to foreign items of IP the same protection, in all respects, as it affords to its domestic items. At the risk of breaching its international obligations, South Africa, and our IP legislation, must conform with the dictates of these treaties. In particular, when it comes to making exceptions to general IP protection, such exceptions must be in conformity with the obligations imposed by these treaties. South Africa can perform not unilaterally amend these treaties nor the obligations imposed by them. With the exception of the TRIPS agreement, which is administered by the World Trade Organisation, the other international treaties to which South Africa subscribes are administered by the World Intellectual Property Organisation (WIPO).

- 16.2 On page 17, under the heading "Copyright" it is stated that "*copyright is not an absolute right, but is limited in terms of the Berne and Paris Conventions of which South Africa is a member*". The Paris Convention has nothing whatsoever to do with copyright and our copyright legislation is determined by the dictates of the Berne Convention and the TRIPS agreement. In this respect, copyright is no different from any of the other branches of intellectual property law and the South African legislation dealing with such branches are similarly regulated by the relevant international conventions and more particularly the Paris Convention and the TRIPS agreement.
- 16.3 On page 15, under the heading of "Industrial Designs", the recommendation is made that "*the designs that should be amended to allow the competition laws to combat anti-competitive practices as already recommended in the areas of patents and trade marks*". The Designs Act, like all the South African Intellectual Property statutes, is

subject to the provisions of the Competition Act. Any anti-competitive use of Intellectual Property can be raised with the Competition Commission and if it is found that the conduct in question offends against the Competition Act, it can be declared unlawful. There is thus no need to amend the Designs Act, or any other intellectual property statute in this respect.

- 16.4 Chapter 2, dealing with IP and public health, seems to be based on a lack of awareness that the Patent Act makes provision for the granting of compulsory licences in appropriate circumstances and in the circumstances identified in the policy documents and has done so for many decades.
- 16.5 On page 33, in Chapter 6, dealing with copyright, software and the Internet, the recommendation is made that South African Internet users must be entitled to fair use and rights such as making and distributing copies from electronic sources in reasonable numbers for educational and research purposes and using reasonable excerpts in commentary and criticisms. Provisions to this effect already exist in Section 12 of the Copyright Act, which section is as applicable to Internet users as it is to any other users of copyright material.
- 16.6 Chapter 11, which deals with IP and sporting events and discusses the issue of so called “ambush marketing,” omits to recognise that there are two forms of ambush marketing, namely “association” and “intrusion”. Although reference is made to somewhat ambiguously to “both types of ambush marketing”. It further omits to state that intrusion is precluded in terms of the Merchandise Marks Act, although it goes on to discuss the elements of the activity as set out in that Act. The statement is made that the Common law of passing off is not able to deal with the issue of ambush marketing by association. This is incorrect as “association” is nothing more than a form of passing off. The common law of passing off is amplified by and complemented by the Trade Practices Act.

- 16.7 As previously mentioned, heraldic symbols are said to be a form of intellectual property. This is not so.
- 16.8 The statement is made on page 45, under the heading “Enforcement of IP,” that *“patents enforcement is dealt with under health and SAPS legislation and the enforcement of designs is generally neglected”*. Patents and designs, are, respectively, enforced under the Patents Act and the Designs Act and there are perfectly good and effective provisions in place for this purpose. Patents are not enforced by health authorities or by SAPS. Infringement of a patent is not a criminal offence.
- 16.9 On page 46 the statement is made that the Copyright Tribunal also functions as the Trade Mark Tribunal. The Copyright Tribunal exists under chapter 3 of the Copyright Act, which is actually entitled “Copyright Tribunal”. It is seized exclusively with the adjudication of disputes relating to copyright licences and has nothing whatsoever to do with trade marks. It certainly does not, and cannot, function as the Trade Marks Tribunal.
- 16.10 On page 33, under the heading “Copyright, Software and the Internet,” the recommendation is made that South Africa should allow software to be adapted to local needs through copyright legislation that allows reverse engineering of computer programmes consistent with its international treaty obligation. It is common cause that current South African law allows for reverse engineering of computer software and no changes in this regard are therefore necessary.
17. It is apparent from the foregoing that little or no consultation has taken place with experts in the field of intellectual property when compiling the DNPIP. It is submitted that it is imperative that there should be proper consultation with, and input from, acknowledged IP experts in formulating and giving expression to IP policy. IP is a very complex and technical area of the law and sufficient

expertise in regard to this area of the law does not exist within the Department of Trade and Industry, thus making outside consultation essential. Indeed, the Department would be well advised to delegate the formulation and expression of intellectual property to appropriate and specialised consultants.

TERMINOLOGY USED IN THE DOCUMENT

18. The DNPIP document has been made available for comment by the public and it is therefore presumably intended to be comprehensible to the general public. For a number of reasons, not in the least its tortuous presentation and expression, it will be largely incomprehensible to the general public. Their ability to comment meaningfully on it is therefore seriously undermined. Part of the reason why the document will be incomprehensible to the general public is that it makes use of terminology (without appropriate explanations) with which the public are unfamiliar. The following are examples of this phenomenon:

18.1 The statement is made on page 12 that “the WTO Doha Development Agenda process resolves to allow TRIPS to have further patent flexibility. No explanation is given as to the nature of the WTO Doha Development Agenda and this sentence, together with other numerous references to it, is meaningless to the general public.

18.2 Reference is made on page 14, under the heading “Connectivity of Databases of MCC and Companies and IP Commission (CIPC), to the “BOLA provision” without any explanation as to what this is. Consequently, all references to the BOLA provision will be lost on the general public.

18.3 There can be no doubt that the general public will not understand the sentence on page 38 under “recommendations” pertaining to “International Architecture” which reads “*many BITS deal with IP issues and introduce TRIPS – PLUS, TRIMS – PLUS and SCM – Plus in*

many respects". Indeed, this statement is barely comprehensible to the specialist IP community.

19. Apart from the general public having difficulty in understanding the policy document, it is difficult to see how members of government, who ultimately will be seized with the adoption or otherwise of the policy, will be able to understand it and be able to evaluate its worth or lack thereof.

CONCLUSION

20. In the final analysis, the DNPIP is unsatisfactory and it requires to be redrafted so as to make it a comprehensive policy document dealing with all aspects of intellectual property law which is rational, well-motivated and comprehensible to the uninitiated. It is recommended that the present document should be regarded no more as a first attempt to highlight some (but by no means all) of the issues which may possibly have to be addressed in formulating a policy on intellectual property. Once the DTI has collected its thoughts properly on the issue of IP policy, professional consultants, skilled in intellectual property and in drafting documents such as policy reviews, should be commissioned to prepare an appropriate document. In this manner the process of adopting a policy on intellectual property can be taken forward in a rational, practical and effective manner.

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COMMENTS ON THE DRAFT NATIONAL POLICY ON INTELLECTUAL
PROPERTY, 2013

PART TWO

COPYRIGHT & TRADE MARKS

INTRODUCTION

1. In this document I will comment on the draft National Policy on Intellectual Property, 2013 document published for public comment by the Department of Trade and Industry in General Notice No. 918 of 2013 published in the Government Gazette of 4 September 2013 (the “DNPIP”).
2. The commentary will deal with what is stated in the DNPIP regarding copyright and trade marks, and also with what is not covered in the document; in other words issues which the DNPIP has omitted to address. . This commentary must be read in conjunction with the Overview which I have written and to which it is supplementary.

COPYRIGHT

3. Copyright is dealt with in the DNPIP in Chapter 1(c) and (f), entitled, respectively, “Copyright” and “Extension of Rights Granted by the Act,” and in Chapter 6, entitled .”Copyright, Software and Internet.” It is also referred to sporadically throughout the DNPIP. The fact that it is dealt with on a piecemeal basis in this fashion is not conducive to obtaining a clear overall picture on what the document envisages by way of policy on copyright

CHAPTER 1(c) : COPYRIGHT

4. According to the DNPIP Copyright is not an absolute right but rather is limited in terms of the Berne and Paris Conventions of which South Africa is a member. This may in a sense be true of the Berne Convention (Brussels text, 1948), but the Paris Convention does not deal in any way with copyright. In addition, of course, South Africa is also a member of the TRIPS agreement and is bound by it. The TRIPS agreement in turn binds member countries to the terms of the Berne Convention as revised in 1971 (Paris text) and the Rome Convention. South Africa is accordingly bound in addition by the provisions of these treaties, read together with the TRIPS Agreement. The effect of the membership of these treaties is to bind South Africa to provide the prescribed minimum measure of protection for works and only to provide exceptions to the stipulated protection in the manner and to the extent provided for in the treaties. South Africa must provide national treatment for works emanating from all other member countries of these conventions. Accordingly, the content of the Copyright Act is determined to a significant extent by the prescriptions of the aforementioned treaties, other than the Paris Convention, which is irrelevant to copyright.
5. It is noted that the author of DNPIP is of the view that South Africa should not extend the basic 50 years of protection granted to copyright works to 70 years or longer. This view is supported.
6. It is stated that where indigenous knowledge (traditional knowledge) is used in creating works there should be disclosure of the origin of such knowledge and that prior informed consent should be obtained from, and benefit sharing agreements or co-ownership negotiated with, the rights holders in respect of these works. It is common practice for works eligible for copyright to be based on, be derived from, or be inspired by, existing works. The practices and procedures which relate to attribution of derivation in respect of copyright works in general should also apply to works of traditional knowledge. Of course, it should only be necessary to obtain permission from rights holders in respect of traditional works, or to negotiate agreements with them, if their rights are

encroached upon in terms of copyright law. This means that deriving ideas from traditional works or using less than a substantial part of a traditional work will not require any consent or any sharing arrangement in respect of the new work. There is no reason why traditional works should be in any different a position to all other works. Accordingly no special attribution requirements should apply to works of traditional knowledge.

7. Whether or not licenses in respect of works or categories of works are granted on behalf of copyright owners by collecting societies is a matter for decision by the relevant copyright owners. This is the position which currently prevails in South Africa and it is compatible with the long established principle of freedom of contract. There is no good reason why copyright owners should be under any obligation to entrust the granting of licences in respect of their works to any collecting society. A case can be made out for the state to regulate the administration of collecting societies, but that is not the same as making it obligatory for copyright owners to entrust the licensing of the works to a collecting society.
8. It is agreed that is it undesirable that broadcasters making broadcasts comprising pre-existing copyright works should have proprietary rights in such pre-existing works, unless such rights are transferred to them by the copyright owners. Any international movement to bring about this situation ought to be opposed. Moreover, South Africa should not incorporate any such provision in our Copyright Act (see paragraph 15 below).
9. It is inappropriate, impractical and undesirable that the law should provide that contracts between recording companies, promoters, producers and artists should have the bare minimum conditions as prescribed by the Minister. This interferes with the principle of freedom of contract. Moreover, many factual situations arise in the granting of rights of this nature which cannot possibly be foreseen by the Minister in any predetermined agreement.
10. It is noted that no recommendations whatsoever, as such, are made in Chapter 1(c) of the DNPIP. It is inconceivable that a policy document on intellectual

property can contain no recommendations on copyright. A properly reasoned policy document on copyright law ought to obtain recommendations and proposals and this question will be addressed below.

CHAPTER 1(f) : EXTENSION OF RIGHTS GRANTED BY THE ACT

11. Chapter 1(f) has the heading “Extension of rights granted by **the Act**” (emphasis added). It is not immediately apparent that “**the Act**” referred to in the heading denotes the Copyright Act, particularly since the section follows on after sections dealing with industrial designs and geographical indications, certification and collective trade marks. However, the context suggests that the heading envisages the Copyright Act and we will proceed on that basis and view the contents of this section of the document as relating to copyright.
12. The Copyright Act is indeed outdated from a digital perspective. This will be dealt with more fully by a commentary by Cobus Jooste dealing specifically with copyright and the internet. What is particularly outdated about the Copyright Act in the context of the digital era is the lack of the enhanced enforcement measures provided for in the WIPO Copyright Treaty and the WIPO Performance and Phonograms Treaty, dating from 1996. It is welcomed that the document perceives a need to join these treaties (although it equivocal as to whether South Africa should actually go ahead and do so). The need is even greater to amend the Copyright Act so as to embody in it the provisions of these treaties and the measures comprised therein. This issue should be given immediate and urgent attention. An appropriate amendment should be made to the Copyright Act without delay.
13. On the one hand it is stated that “*there is, however, a need to join WIPO treaties*”. On the other hand, it is said that the WIPO treaties must be viewed in the context of the countries’ needs and requirements. These two statements, which are not compatible with each other, raise the question: is it recommended that South Africa should join the WIPO treaties, or not? It might be mentioned that South Africa signed the treaties in 1996, but has never

ratified them. Clarity and finality are required on this issue. This issue is discussed further in paragraph 18 below.

14. It is an overstatement to allege that no *innovation* (copyright is not concerned with “innovation,” but rather with “creativity”) will occur without the principle of fair use/fair dealing. There is, however, some substance in the view of fair use/fair dealing may perhaps facilitate creativity. The practical application of the principle of fair use / fair dealing is not straightforward and to date our Court has not had occasion to pronounce upon the issue. Possibly this is what is meant by the use of the phrase “*the only issue is one of monitoring rather than principle*”, otherwise this phrase is unintelligible.
15. The recommendation that South Africa should not support the development of the treaty that seeks to give ownership of contents of broadcasts/websites to broadcasters is supported. Broadcasts are a vehicle which can carry other types of works, in the same way that a cinematograph film can do so, and there is no justification for bestowing the ownership of the copyright in the content of the works being carried on the broadcaster, as a matter of law (see paragraph 8 above).
16. The statement that state intervention is only necessary in the operation of collecting societies to the extent that it guarantees, transparency, corporate governance and fair distribution of the proceeds of works is supported. State intervention should go no further than this. Accordingly, the somewhat contradictory recommendation that collective management of copyright must be introduced into the copyright regime as a whole is not supported if this is intended to mean that the state should prescribe which, and how many, collecting societies should exist and operate. Collecting societies are essentially voluntary entities, as is membership of them. Copyright owners must be free to decide whether or not they wish to collect the proceeds of the use of their works for themselves, or whether they wish to entrust this function to a collecting society. In which areas of the copyright industries collecting societies operate, is also a matter of free choice by copyright owners and the copyright community. Not all areas of the commercial exploitation of copyright works lend

themselves to the operation of collecting societies. It is not a case of “one size fits all.”

17. The document states that the Farlam Commission on Copyright Review *“recommends that one collecting society must be administered by one powerful collecting society(sic!)”*. In the first place, this is not correct, there being no such recommendation in the report of the Farlam Commission. What the Commission recommends is that it is desirable that there should be only one collecting society for each group of rights in respect of which the market dictates that a collecting society is desirable. For instance, there should be only one collecting society administering public performance of musical works and it is not expedient that there should be competing collecting societies in such a narrow field. There may some substance in this contention, but in the final analysis, it should be the market that dictates whether, and if so, how many, collecting societies exist in a particular area of exploitation of rights under copyright.
18. It is not known what is meant by the “recommendation” that *“copyright law must not allow for the use of ‘registration’ symbols of indigenous peoples and/or state without permission(sic!)”*. Copyright is essentially a negative right, in other words the right to prevent others from performing certain activities in relation to a work, and there is no system of registration of copyright. Accordingly, this recommendation appears to be meaningless and redundant.

CHAPTER 6 : COPYRIGHT, SOFTWARE AND INTERNET

19. This chapter deals largely with computer programmes and the dissemination of copyright works over the internet. It will therefore be dealt with in the complementary commentaries submitted along with this document.
20. The Chapter enhances and aggravates the ambiguity and confusion regarding the government’s attitude towards the WIPO Copyright Treaty (see paragraph 13 above). The views expressed in chapter 1(f) of the document, which are

ambivalent on the question of whether South Africa should accede to the WIPO treaties, are further confused by the recommendation in chapter 6 that “*South Africa should consider carefully before acceding to the WIPO Copyright Treaty*”. Furthermore, it is recommended that South Africa “*should per se not join international copyright treaties that may compromise its stance on socially economic developments goals*”. It is not readily apparent how joining this treaty might have this effect. The question is reiterated: does the policy recommend that South Africa joins the WIPO treaties, or not? It is inappropriate that a policy document should present contradictory and conflicting views without making an election to pursue a particular course. It is submitted that there is no doubt that South Africa should join the WIPO treaties, and more especially, should amend the Copyright Act to incorporate in it the measures provided for in the WIPO copyright treaties.

COPYRIGHT ISSUES OMITTED FROM DNPIP

21. The DNPIP deals in a perfunctory and incomplete manner with the question of copyright. A very narrow range of issues is discussed and recommendations are sparse. The recommendations that are offered are of dubious merit in some instances, as discussed above. There are, however, several other issues in the field of copyright that warrant consideration and positive attention in the DNPIP. Some of these will be dealt with below.
22. South Africa’s interaction with WIPO treaties is uncoordinated and not consequential. We are signatories of the Brussell’s text of the Berne Convention, dating from 1948, insofar as its substantive provisions are concerned, and a signatory of the Paris text, dating from 1971, as far as the administrative provisions are concerned. However, by virtue of the TRIPS Agreement, South Africa is obliged to implement the Paris version of the convention. Our membership of the Berne Convention requires us to give protection to works emanating from all other member countries. This is achieved by the Minister of Trade and Industry formally proclaiming the Berne Convention countries as beneficiaries of our copyright law, in terms of section

37 of the Copyright Act. This means in effect that works emanating from a Berne Convention country are not protected under our copyright law unless, and until, the Minister has designated that country in a proclamation. In terms of our membership of the TRIPS Agreement, the Minister must also by proclamation designate those members of that agreement, that are not also members of the Berne Convention as beneficiaries under the Act. The proclaimed list of countries to which the operation of our Copyright Act has been extended by virtue of our international treaty obligations was last updated in 1996. Since that date in the region of 50 additional countries have joined the Berne Convention and / or the TRIPS agreement. This means that there is this number of countries, the works of which South Africa ought to be protecting, but are not doing so in breach of our obligations under the treaties. This position is highly undesirable and unacceptable and places South Africa at the risk of having coercive measures brought against it by the World Trade Organisation. It is therefore recommended that the list of countries enjoying copyright protection in South Africa should be updated forthwith and should be constantly supplemented from time to time as new countries join the treaties. The Policy document should resolve to this effect.

23. While the DNPIP has touched on the WIPO treaties without unequivocally expressing a view as to whether South Africa should join them, it is submitted that it is imperative we should at least incorporate the provisions of those treaties into our copyright law, even if we do not join the treaties. The provisions of the treaties represent the manners in which copyright law has been updated internationally to keep pace with the circumstances of the digital environment. No country can afford to fall behind in keeping its copyright law updated. The pace of the evolution of technology makes this imperative.
24. Although there is an Intellectual Property Advisory Committee in existence in terms of Section 40 of the Copyright Act, experience over the past decade has shown that little or no recourse is had to this committee by the DTI and it has become largely a dead letter. The Committee ought to be resuscitated and staffed with people who are well versed in matters pertaining to intellectual property law in general, and copyright in particular. Furthermore, the DTI should

regularly consult this committee and heed its advice. ThisCcommittee should be charged with ensuring that South African copyright law remains up to date, and with drafting whatever amendments are required from time to time in order to achieve this objective.

25. Sections 12 and 13, together with the Regulations published in terms of Section 13, dealing with exemptions from copyright protection, should be reviewed and brought up to date with modern circumstances. Countries such as Canada and Australia, which have similar copyright legislation to our own, have recently updated their laws in this respect, and the examples posed by their legislation, should be considered and where appropriate, adopted. In addition, further exemptions should be contemplated, all the while being mindful of our obligations regarding minimum levels of protection prescribed in the Berne Convention and the TRIPS Agreement.
26. The government should have due regard to international trends and developments in copyright law and should act consistently and in harmony with such trends and developments. On account of the strong emphasis placed on reciprocal protection in the international environment, no purpose is served by adopting courses of action which cut across, or are at odds with, international trends. The government has been guilty of this in the past, notably in the case of its approach to the protection of so-called “Traditional Knowledge”, but more correctly in this context “Cultural Expressions”. The government is misguidedly resolved to protect traditional knowledge by means of amending the Copyright Act and certain other IP statutes to incorporate in them provisions granting protection to works of this nature. WIPO itself has adopted a stance that protection of traditional knowledge should be provided for *in sui generis* legislation, and not by means of amending the Copyright and other IP statutes and this view has been supported by the ARIPO group of African countries in the recently adopted Swakopmund Protocol. This maverick and isolationist approach on the part of the government should cease.
27. Remedies to enforce copyright should be available to copyright owners as easily and as inexpensively as possible. In this way copyright can operate to

the benefit of all copyright owners irrespective of their financial standing. To this end the Copyright Act should be amended to streamline and simplify the proof of the subsistence of copyright, and title to, copyright. This can be achieved by introducing procedural provisions into the Act so as to reduce the evidential burden on copyright owners in the proof of their locus standi. The British Copyright Act contains appropriate provisions in this respect and they should be emulated.

28. The preeminent position of authors of works under copyright law should be fortified. and exceptions to the general principles of the initial ownership of copyright that are to the detriment of authors should be reviewed. In particular, the vesting of copyright in persons giving commissions for the making of works, rather than in the authors of such works, should be rectified.
29. The long established and basic principles of copyright law, in particular those relating to the conditions which a work must meet in order to qualify for copyright, should be respected and maintained. The introduction into the Copyright Act of species or categories of works which are incompatible with the basic principles of copyright law should be avoided. In particular, protection for traditional works or cultural expressions which cannot meet the normal conditions for the subsistence of copyright should not be introduced into the Copyright Act. The abiding principle should be that protection for any new species of IP should be catered for in custom made sui generis legislation.
30. The rights of performers in their performances as provided for the Performer's Protection Act should be upheld and reinforced. To this end the Performer's Protection Act should be reviewed with a view to updating it and making it relevant in all circumstances of the digital environment.

TRADE MARKS

31. As in the case of copyright, issues relating to trade marks are spread throughout the DNPIP and it is necessary to peruse the entire document in order to glean from it the material relevant to the policy on trade marks. More particularly, it is necessary to study Chapter 1(b): "Trade Marks"; Chapter 1(e): "Geographical Indications (GI), Certification and Collective Marks"; Chapter 11: "IP and Sporting Events"; Chapter 12: "IP and the State"; and Chapter 15 "Enforcement of IP".

CHAPTER 1(b) : TRADE MARKS

32. It is said that the trade mark protection applies for ten (10) years and can be renewed as long as trading takes place. This statement is not entirely accurate. It is true that trade marks can remain registered for periods of ten (10) years at a time, provided they are formally renewed, but it is not necessary for use of the trade mark in question to be demonstrated in order that it might be renewed. In the even that a mark remains unused for a continued period of five (5) years, it is open to cancellation at the instance of a third party.
33. It is contended in the document that, given that a trade mark can remain on the register for ten (10) year periods indefinitely, subject to renewal, the trade mark system can be used to empower BMBE or SME enterprises and to ensure geographic spread in rural areas to stimulate economic activities in line with business decisions. It is not understood what is meant by this statement and its validity is doubtful. An enterprise giving effect to BEE, or a SME, can adopt and use a trade mark in order to denote its products or business, and this can take place wherever the enterprise may be situated within South Africa, but that is the extent to which it can fulfil the stated function. There is nothing about a trade mark that makes it particularly suitable for promoting a development agenda
34. The document goes on to "recommend" that *"licensing of franchising activities should be intensified for empowering B-BBEE and other small and medium*

enterprises, in particular, informed by a geographical spread(sic!)". Franchising operations which operate under trade marks abound in South Africa and the stated types of businesses are free to obtain franchise licences wherever they choose to operate, provided the conditions for the granting of a franchise by the franchisor can be met. There is nothing new about this and there is no reason why it should be the subject of a "recommendation". Indeed, the "recommendation" amounts to a description of the present situation and a statement of the obvious.

35. Reference is made to the "Madrid Agreement/Madrid Protocol," an international arrangement set up by treaty under the auspices of WIPO, which facilitates the filing of trade marks in a multiplicity of countries. There has been an on-going debate in South Africa for decades as to whether South Africa should join the Madrid Protocol (it is preferable to the Madrid agreement, and joining the protocol makes joining the agreement somewhat redundant). One would have expected a policy document to give a lead and to resolve the issue of whether or not South Africa should join the Madrid protocol. However, apart from "recommending" that South African enterprises should be assisted to register their trade marks nationally and internationally, the policy document is silent on the question of whether or not South Africa should join the Protocol. What is the government's position on this issue? The DNPIP makes us none the wiser.
36. In addition to the Madrid Protocol, there is another regional collective trade mark filing system known as ARIPO, the members of which are all South Africa's neighbours and trading partners in southern and central Africa. The ARIPO system is also operated under the auspices of WIPO. As in the case of the Madrid Protocol, there has been a long raging debate as to whether South Africa should join ARIPO. This ought to be addressed in a policy document on trade marks, but the DNPIP makes no mention of ARIPO, let alone any recommendation in respect of it.
37. The foregoing is the sum total of the discussion relating to trade marks in that portion of the DNPIP in which one would expect government policy relating to trade marks to be dealt with comprehensively.

CHAPTER 1(e) : GEOGRAPHICAL INDICATIONS (GI), CERTIFICATION AND COLLECTIVE MARKS

38. It is alleged that the abovementioned types of marks are referred to as “shared” marks”. This appellation or description is unknown and it is not apparent by whom it is used. Be that as it may, there is measure of sense in the description since marks of this nature are generally owned by collectives in one form or another, although they may be structured as a company, state enterprise, or cooperative association, all of which take the form of a single juristic person. The famous “Wool Mark” is indeed an example of a certification mark. Flowing on from a statement of the currently prevailing situation, various “recommendations” are made, namely the following:

38.1 Awareness of the existence and utilisation of these types of marks should be promoted and cooperatives (it is not clear why this form of juristic person is singled out) should be assisted to register marks of this nature nationally and internationally. The notion that owners of these types of trade marks should be assisted to register their marks both nationally and internationally is supported, but in the final analysis whether this should happen depends upon the decision of the proprietors of the marks and the state cannot usurp such a decision..

38.2 The DTI should prepare regulations and guidelines “for simplification and utilisation of these items”. The Trade Marks Act requires a registration of these types of marks to be underpinned by regulations circumscribing the use of the marks but these regulations must be compiled by the trade mark proprietor and they deal with the trade mark proprietor’s conditions and terms on which the marks can be used. The circumstances of one such mark may differ substantially from the circumstances of another such mark. It is therefore difficult to see how the DTI can prepare such regulations and guidelines and this “recommendation” has no practical value.

- 38.3 The state should play a major role in creating associations or boards to conduct the regulation and use of these types of marks. The practical feasibility of this proposal is limited. The mark “Stellenbosch Wine Route” is for instance a collective mark. It has been formed by a group wine farmers in order to promote the Stellenbosch area as a tourist destination and a source of wine purchases.. It is difficult to see how the state can play any role in causing a group of persons who have a collective commercial interest to devise, register and use a collective mark. The same applies to the other types of “shared” marks.
- 38.4 Presumably arising out of the mention of the Madrid Agreement/Protocol, it is “recommended” that South Africa should not agree to join an international treaty without following the process of ratification/accession and regulatory impact assessments should be conducted prior to ratification. Apart from the fact that it is trite under international law that a country cannot join international treaty without ratifying or acceding to it (and it is therefore nonsensical to state this as a recommendation to joining a treaty) there is merit in first conducting a regulatory impact assessment on the effects of joining a treaty and implementing it by incorporating its provisions into domestic law before taking a decision to become bound by it. This however begs the question as to whether South Africa should join the treaties relating to the Madrid Protocol and or ARIPO, which are the real issues which require to be addressed in a policy document.
39. The TRIPS agreement provides that, if a company wishes to have a geographical indication protected internationally, it must first take steps to protect that indication adequately in its domestic law. South Africa has to date been tardy in the extreme in obtaining local protection for its geographical indications (such as ROOBOS) and this is largely due to inertia on the part of the government. The Merchandise Marks Act enables geographical indications to be protected in a simple and speedy manner yet the government is reluctant, if not unwilling, to take steps to utilise this measure to obtain the requisite protection. The DNPIP should recommend that all viable GI’s should be

identified and should forthwith be granted protection under the Merchandise Marks Act, whereafter the protection should be extended internationally.

CHAPTER 11: IP AND SPORTING EVENTS

40. This chapter deals with the issue of so-called “ambush marketing” which has already been the subject of comments in the overview of the DNPIP. Ambush marketing generally entails the use of trade marks and for this reason this chapter has relevance to the issue of trade marks.
41. Although part of the common law, passing off is generally regarded as an aspect of trade mark law. It is incorrectly stated in the DNPIP that the law of passing off is not able to deal with ambush marketing by association. It is reiterated that this statement is incorrect as ambush marketing by association is effect a form of passing off. The DNPIP is thus misguided in expressing this view.
42. Ambush marketing in the form of intrusion, as provided for in Section 15A of the Merchandise Marks Act, requires that the organiser of an event should apply to the government to declare the event as a “protected event”. Various conditions and terms laid down for the approval of such an application by the Minister. There is no stipulation as to what the size of the event should be in order to qualify for protection. The DNPIP proposes that the ambush marketing legislation **must** apply to sporting events that attract at least 20 000 spectators. It is not clear whether this proposal means that, if an event is likely to attract more than 20 000 spectators, the ambush marketing provisions in the Merchandise Marks Act will immediately and automatically apply to it, thus making application to the Minister unnecessary, or whether it means that the Minister should not approve an application unless the event is likely to attract at least 20 000 spectators. In either event the recommendation is undesirable and it is far preferable that the present position should continue to obtain and the Minister be given a discretion to take a variety of circumstances, including the number of the spectators that the event is likely to attract, into consideration

when deciding whether to approve an application for an event to be declared a protected event. The “recommendation” that “protection of sporting events” (presumably ambush marketing protection) must be of limited duration is superfluous and redundant because the existing law provides that that is the case.

43. The recommendation is made that *“trade mark and other applicable IP should be in terms of the relevant legislation, e.g. trade mark protection must be for a period of 10 (ten) years subject to renewal and investment and use of the trade mark in the country”*. As previously mentioned, this recommendation is merely a restatement of the present law (which has applied for a round the past century) and it is superfluous and redundant.
44. The recommendation is made that the Minister must *“not be shy to withdraw the “protected event” status” of an event if it appears that the conditions upon which this status was granted are not being met*. The existing law gives the Minister such a discretion and powers. A “recommendation” in this regard is therefore superfluous and redundant.

CHAPTER 12: IP OF THE STATE

45. It is suggested that the rights granted to heraldic emblems under the Heraldry Act constitutes a species of intellectual property. As previously mentioned, nowhere in the world is there recognition that heraldic emblems are a form of IP and there is no substance in the espousal of this suggestion in the DNPIP. All references to heraldry should be omitted from the policy document.
46. It is suggested that heraldic emblems can be part of domain name registrations. Domain names consist entirely of words and it is accordingly not understood on what basis this averment is made. It is nonsensical. Moreover, all the domain name registration systems make provision for objections to be lodged against domain names and provide for a speedy and informal arbitration process by means of which these objections can be adjudicated. In the event that the

holder of a heraldic registration should wish to object to a domain name, there is every opportunity to do so.

47. It is proposed that member countries of the Paris Convention and the TRIPS Agreement should prevent their IP officers from granting registrations and therefore protection of the emblems of member states. It is difficult to comprehend how a tenet of South African IP policy can have effect on WIPO or the WTO, the administrators of the respective treaties, or on the laws of foreign countries. In any event, most countries do prevent the unauthorised registration of national emblems as trade marks. Furthermore, in every trade mark system in the world, an aggrieved person can object to the registration of a trade mark and this facility would be open to the South African government or any other South African person.
48. It is pointed out that the Minister of Trade and Industry has the power to prohibit certain names, words, logos, emblems and the like from being used (under the Merchandise Marks Act). Having made this statement of the existing law, a comment is made that *“it is disturbing to discover that emblems of state organs are not protected through this process”*. This is a very strange statement to appear in a policy document issued by the Department of Trade and Industry because the authors of the document are the very people who are falling down on the duty that is described. Rectification of the position lies in the department’s own hands and incorporation of this notion in a policy document is redundant and nonsensical.
49. The recommendation is made that the government should become a trading entity and should develop a business franchising its emblems, trade marks and other intellectual properties. The document further recommends that it *“should consider seriously developing criteria on how commercialisation of its IP should be regulated”*. This is an astonishing proposition and it raises the policy issue of the proper function and powers of government. This is a far broader issue than a mere question of IP policy. Should the government go into business as a franchisor? The inclusion of this concept in IP policy should be subservient to a policy decision in this regard on a higher and broader level. Presumably on the

basis that the government is about to enter the franchising business and become a franchisor, the document recommends that international avenues should be utilised to protect state emblems internationally. It would thus appear as though the government proposes to enter as a player into the international franchising market! No doubt, with a view to taking stock of its “commercial” assets in the IP field for purposes of its proposed franchising business, it is “recommended” that the government compile a database of all the IP that it owns. There is nothing wrong with the government preparing a database of its IP but one must question the uses to which this database will be put. The cost and utility of the database should also be examined.

50. A major issue is made of the national and international protection of state emblems and it is suggested, inter alia, that *“various legislations such as IP, agriculture and cultural areas in government must be amended and reconciled to protect state emblems”*. The reality is that the existing law provides very adequate measures for protecting state emblems, and the granting of such protection lies peculiarly within the discretion of the government. It is difficult to see exactly what the problem is perceived to be.

CHAPTER 15: ENFORCEMENT OF IP

51. It must be borne in mind that all the intellectual property treaties require member countries to grant so called “national treatment” to foreign IP. This means, as previously stated, that foreign items of IP must be protected in exactly the same manner, and to the same extent as domestic IP. It therefore comes as a surprise that, with regard to the enforcement of IP, the DNPIP suggests that *“South Africa should do the bare minimum under TRIPS and build accordingly.”* In other words, in effect what is being said is that South African IP law should give the minimum possible degree of enforcement to South African IP. This is an astonishing proposition and the sentiment is strongly disputed. On the contrary, South African items of IP, including trade marks, deserve and warrant to receive the maximum amount of protection

possible in order that the IP system may deliver its objective of encouraging and promoting technical and cultural innovation and development.

52. Although Chapter 15 does not say so, it seems on a close analysis of it that what is being dealt with is enforcement through criminal law and administrative measures such as are applied by customs authorities and the like. If this is not the case, the chapter is anomalous, and if it is indeed the case, the document should make this clear.
53. The proposal is made that “*common strategies at regional level on enforcement strategies may be devised. These may include having a common registration office and cooperation among the police force and customs authorities*”. This is a sensible proposal but it is out of character with the attitude that the government has adopted to date in regard to regional cooperation in IP matters. South Africa has refrained from becoming a member of ARIPO (which provides for regional trade mark registrations) and it has distanced itself from the Swakopmund Protocol dealing with the protection of traditional knowledge (which envisages adopting the *in sui generis* legislation approach in direct contrast to the South African approach of integrating the protection of traditional knowledge into existing IP statutes). In fact, South Africa is out on a limb as far as the neighbouring countries are concerned and serious consideration should be given to bringing our approach to the protection of IP into line with the shared approach of the neighbouring countries.
54. Repeated reference is made to the “Trade Mark Tribunal”. The Trades Marks Act makes no provision for such a tribunal, and it is not clear precisely what the DNPIP is referring to in this regard. In terms of the Companies Act, a Company and Intellectual Property Commission has been established and this commission has the responsibility for, and jurisdiction over, the operations of the Trade Marks office in registering trade marks. In addition, the commission has an intellectual property enforcement division which is primarily concerned with enforcing the criminal provisions of the Counterfeit Goods Act, the Copyright Act and other IP legislation that provides for criminal sanctions for infringement. In exercising his functions under the Trade Marks Act, the

Registrar has a judicial function and is charged with adjudicating disputes relating to the registration or cancellation of trade marks. It is surmised that it is this judicial function of the Registrar which is being described as the “Trade Marks Tribunal”. It has already been pointed out that the averment that the Copyright Tribunal functions as the Trade Marks Tribunal is completely incorrect.

55. The document waxes eloquent on how costly and complicated disputes adjudicated by the “Trade Marks Tribunal” are and it proposes a simplified and more user friendly procedure. There is nothing wrong with simplifying opposition and rectification proceedings before the Registrar of Trade Marks and making them less costly, but it is difficult to see what can be done in this regard. The fact is that trade mark litigation raises intricate and complicated legal and factual issues and the procedures before the Registrar must take account of this reality. No proposals or even hints are advanced as to how this simplified and inexpensive procedure in contemplation will work and in the absence of any such information it is not possible to form a view on the merits of the proposal. This proposal will have to be properly thought through and the proposed procedure must be comprehensively set out. Similar lofty suggestions are made about simplifying arbitration and other alternative dispute resolution processes in order to accommodate intellectual property disputes and the foregoing comments apply equally to this notion.

RECOMMENDATIONS OMITTED FROM THE DNPIP

56. The appraisal of trade marks in the DNPIP is far from comprehensive and there are certain obvious issues which have been omitted but should be covered. These include the following:
 - 56.1 Whether South Africa should join the Madrid Protocol and/or the ARIPO arrangement. There are pros and cons to this question and a proper evaluation of them leading to an informed decision should be undertaken.

- 56.2 A strong stance on combating trading in counterfeit goods should be maintained. In this regard the Counterfeit Goods Act and its practical implementation should be thoroughly evaluated in order to see whether it is meeting the required objectives. In particular, a stance should be adopted on whether the Act should apply to goods in transit through South Africa and whether the Act should be amended so as to clarify that such activities are covered in conformity with the corresponding customs legislation.
- 56.3 A stance should be adopting on whether South Africa should join the Nice Treaty on the classification of goods and services for purposes of trade marks registration. At present South Africa is not a member of the treaty, but the classification adopted in terms of the treaty is in practice applied in South Africa.
- 56.4 It should be resolved that South Africa should comply with its obligations under the Paris Convention in regard to the declaration of all member countries of that treaty as being so called “convention countries” for purposes of IP law. This has relevance to the facility of foreign applicants for registration of trade marks being able to rely on the priority date of their domestic trade mark applications. The list of so called “convention countries” has not been updated since the late 1990s and there are many countries which have since joined the Paris Convention in the meantime but which are not being afforded the status of convention countries under our law.
- 56.5 The basic principles of trade mark law should not be undermined by making provision for marks that do not meet such requirements being registered, for instance “traditional” marks which are incapable of fulfilling the function of a symbol denoting origin of goods or services in a particular source.

- 56.6 A regional trade mark registration system incorporating the countries of the Southern African Customs Union, in terms of which a single registration can cover all such countries, should be considered, and if found to be beneficial, should be implemented in conjunction with the other members of the Customs Union.

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COMMENTS ON THE DRAFT NATIONAL POLICY ON INTELLECTUAL
PROPERTY, 2013

PART THREE

**PATENTS, DESIGN & TECHNOLOGY
TRANSFER MATTERS**

INTRODUCTION

1. Noble the cause..... unprincipled the result. The long awaited South African Intellectual Property Policy (IPP) was published for comments on 4 September 2013.
2. A policy, in laymen terms, is a plan or course of action, of a government, political party, or business, intended to influence and determine decisions, actions, and other matters for the good of a country. It is questionable whether the IPP is meeting these requirements. The IPP introductory statement promises an interesting read: *"A well-moulded IP system must suit the economic, social and technological environments of developing countries. It can contribute to the eradication of poverty, the enhancement of technology development and transfer, the promotion of access to medicines, education and learning materials."* The IPP is meant to co-ordinate and streamline intellectual property legislation within South Africa. According to the IPP's objectives, it aims *"to improve access to intellectual property-based essential goods and services, particularly education, health and food"* and to *"introduce a public health perspective into intellectual property laws"*. Unfortunately the IPP fails in this attempt. It contains many contradictory statements, material errors in fact and law, duplication of the same concepts and/or aspects slightly differently worded and it lacks substance. It is furthermore not apparent which role players were consulted in the process of preparing the IPP, but the lack of reference to key intellectual property bodies or external experts are evident.

3. The executive summary omits to identify the main objectives, problem statement and high level recommendations but rather provide a content index leaving the reader perplexed as to what the IPP is to accomplish and how the set goals are to be achieved.
4. The purpose of this commentary is to focus on the aspects of patent, design and technology transfer of Intellectual Property Rights (IPR) in the IPP.

DEFINITION OF INTELLECTUAL PROPERTY

5. The Authors of the IPP shows limited knowledge and understanding of Intellectual Property (IP) and Intellectual Property Rights (IPR's) as the definitions are poor, subject matter incomplete and in some aspects factually incorrect.

FORMAT

6. The unsystematic manner in which the IPP is formulated renders a sensible response almost impossible.
7. Instead of having a well-defined and structured approach which addresses the subject matter that logically groups together defining the subject, followed by the problem statement and/or challenges that are to be addressed, supported by empirical evidence or supporting research; the IPP randomly addresses IP issues as they came to mind which confuses the reader. Numbering of paragraphs and sub-paragraphs are not in chronological order for most of the chapters.
8. For example, the relevance of international conventions and treaties are randomly arranged in the patent section and repeated in later chapters. With this format it is difficult to contextualise the problem statements and recommendations.

9. Aspects that address patent examination and pre- and post-opposition are placed in between paragraphs that address data protection and access to the MCC database. There is no clear identification or complete reference to the different laws that the policy refers to (either by way of footnote or in the text itself) and the reader is often confounded with vague and incomprehensible arguments left in mid-air.
10. Contradicting arguments are made for and against compliance with international treaties by implementing flexibilities of TRIPS and at the same time changing the IP legislation to “*foster the enforcement of IP in its entirety*” and to “*conduct technology transfer within the rules of TRIPS as BITS and maybe TRIPS-plus*” (p25).
11. A further contradiction that creates uncertainty: Patent harmonisation is addressed twice (Chapter 1 (vi) – WIPO is no longer pursuing the issue of a world patent and South Africa should guard against this “concept as it may rear its head in the future”) versus Chapter 7 (WIPO is still pursuing the worldwide patent and South Africa should reject the roadmap to harmonisation under proposed worldwide patent rights)
12. The statement is made: “*The South African IP system/“IP Policy” is not informed by other national policies that seek to address national objectives and there is no co-ordinated approach on IP matters by various government departments and other organs of state*”, yet nowhere in the policy are any of the specific policies or various government departments or their activities mentioned as it may, or should have, an impact on the IPP.

REFERENCE TO INTERNATIONAL CONVENTIONS AND TREATIES

13. The IPP makes reference to the implementation of the flexibility of TRIPS, the Doha declaration extending the flexibilities and recognizes the effect Free Trade Agreements (FTAs) that impose TRIPS-plus obligations on developing

countries that are always the weaker partners in such bilateral agreements and which gradually will reverse the effect to overcome patent barriers to promote access to medicines and which could have a disastrous impact on health care.

14. The recommendation in the IPP is to change the Patents Act to incorporate TRIPS flexibilities and to be amendable in issues relating to public health. The Policy did not consider the complexities in any detail or how this is to be done. While the Doha Declaration offered an interpretive paradigm that raised the visibility of public health and universal access to medicines in international trading relations, it offered no concrete road-map for technologically challenged WTO Member States such as South Africa.
15. In a past effort in South Africa to deploy TRIPS flexibilities in the face of genuine AIDS emergencies, the Medicines and Related Substances Control Amendment Act No. 90 of 1997 was adopted. The intent of the Act was to reduce drug prices by allowing generic substitution of off-patent drugs, the parallel importation of on-patent drugs as well as price transparency. The IPP does not make any reference to this Act or the lack of its implementation¹. The IPP is silent on the provisions of compulsory licensing in terms of S56 of the Patents Act and whether this has actually been used in the context of access to patent drugs and to what extent.

PATENTS AND SUBSTANTIVE SEARCH AND EXAMINATION.

16. The patent section of the IPP starts out with reference to patents being associated with technology, citing an arbitrary single reference from the ICTSD to ponder the point of weak patents that cannot stand the “test of competitiveness throughout the world” concluding that South Africa should

¹ In February 1998, the South African Pharmaceutical Manufacturers Association and forty [Multinational Corporations](#) (MNC) brought a suit against the government of South Africa for its passage of this Act. The law suit was dropped as a result of immense international pressure in April 2001.

establish a substantive Search and Examination system for “patents which will result in strong technology”².

17. Frankly, although a Search and Examination regime may be a good idea, it is not apparent how it can render strong technology. What should have been stated is that such a system will result in patents that are most likely valid and more difficult to challenge. As patents are territorial rights, the test of competitiveness throughout the world is irrelevant. The issue here is rather that in the absence of a Search and Examination system, weak patents are granted which stifle local competition and making access to technology increasingly difficult. Large organisations who can afford many patents and the enforcement thereof excludes exploitation opportunities to the man on the street who cannot afford to challenge the weaker patent or afford a license of use.
18. Apart from the repeated reference to the requirement of the Search and Examination system, pre- and post-grant opposition proceedings are mentioned to complement the examination system and includes the following remark “*The purpose of the opposition proceedings to provide a more affordable forum to have patents invalidated that do not meet the "newness", "novelty", "obviousness" and "usefulness for trade/agriculture"*”. An interesting rewrite of our Patent Law? In terms of the Patents Act (S25) a patent may be granted for any new invention which involves an inventive step and which is capable of being used or applied in trade or industry or agriculture, there is no requirement of newness and usefulness.
19. On substantive examination: some comparative analyses are drawn between countries’ examining systems which have very different patent laws than South Africa. One would have expected that a system like ARIPO would have been closer to home for purposes of comparison. Yet ARIPO is not mentioned at all.

² My comments on the technology recommendations are made elsewhere in this commentary.

20. With regards to substantive examination and opposition proceedings, these are proceedings that require skills and require specific knowledge in one or more disciplines from among biology, chemistry, physics, engineering (chemical, electrical, mechanical or computer) and computer science. Training is required to understand procedural, legal and technological aspects of patent examination. Patent examiners need to stay current in their field. Patent examiners perform focused, challenging work that requires superior communication and legal skills in addition to initial education and training in a technical field. It is surprising that no investigation has been made, or if it has, no reference to this has been included, as to why provisions for substantive examination which were in the 1952 Act were omitted in the 1978 Act.
21. The shortage of skills and the duration required to train people, based on these suggestions, good as they are, may not be feasible for South Africa. Even if it was feasible, the ever backlog at CIPC with the present systems presents a further obstacle. Although some alternatives (e.g. university, PCT system) are mentioned in the IPP, there is no proper study of the feasibility of these alternatives.
22. On several occasions the IPP recommends that the Search and Substantive Examination system must be implemented, and at the same time recommends that such a system should be adopted to co-exist with the current registration of patent system (and elsewhere petty patent system) and conclude that *“A cost and benefit analysis should be conducted through the Regulatory Impact Assessment (RIA) process and benchmarks should be based on similar economies such as India, Brazil and Egypt. In this regard, benefits should not only be calibrated in monetary terms as access to public health does not necessarily translate into monetary value”* This leaves the reader rather perplexed with the clear intention of the policy drafters. Must the system be implemented, or should it be considered to be implemented; or should there be a search and examination system and the current depository system? Is South Africa now adopting petty/utility patents as opposed to, or in addition to, function designs?

DATA PROTECTION, DATABASES AND DISCLOSURE OF INFORMATION

23. The inclusion of these aspects in the policy is completely vague and recommendations incongruous. Which databases of the government should be integrated and how is "... so as to not grant patents on medicines that may be expiring (p11)) possible given the novelty requirement for patentability? How is access to information to "*Share information before patents are granted*" married with "*respecting Article 39 of TRIPS*"?
24. A further confusing statement: "*trade secret*" is the customary form of protecting technological information" (and patent protection is not?). The recommendation follows that "*South African IP laws should not undermine the principles of trade secret, i.e. trade secret principles should be allowed to co-exist with the IP system and be a choice of users which system to use.*"
25. Although there is no specific legislation that governs trade secrets or know-how these forms of IP are governed by common law and have always co-existed with statutory IPR's. Trade secrets and know-how are recognised forms of intellectual property and a trade secret can be defined to be any information that can be used in the operation of business that is sufficiently valuable and secret to afford an actual or potential economic advantage over others. Unlawful appropriation or unauthorised use of a trade secret is dealt with by the courts in terms of the law of delict, wrongful acts as part of the common law.

GENERIC MEDICINES

26. The IPP seems not to appreciate the potential of counterfeit goods constituting trademark infringement and merely recommend that "*generic medicines should not be confiscated in transit under the pretext that they are counterfeit*".

DESIGNS

27. Very little is said about industrial designs. It would appear that the policy drafters consider the functional design to be a utility patent when in fact these are different forms of intellectual property:

27.1 The South African Designs Act of 1993, Act 195/1993 (as amended) defines in Section 1(1)(i): *"**aesthetic design**' means any design applied to any article, whether for the pattern or the shape or the configuration or the ornamentation thereof, or for any two or more of those purposes, and by whatever means it is applied, having features which appeal to and are judged solely by the eye, irrespective of the aesthetic quality thereof."*

27.2 A "functional design" is described in the Designs Act in Section 1(1) (xi) as follows: *"**functional design**' means any design applied to any article, whether for the pattern or the shape or the configuration thereof, or for any two or more of those purposes, and by whatever means it is applied, having features which are necessitated by the function which the article to which the design is applied, is to perform, and includes an integrated circuit topography, a mask work and a series of mask works".*

27.3 Section 1(1) (xii) gives a definition of an "integrated circuit": *"**Integrated circuit**' means an article, in final or intermediate form, containing electrical, electromagnetic or optical elements and circuitry, which is capable of performing an electrical or an optical function, and in which at least a part of the electrical, electromagnetic or optical elements and circuitry are integrally formed, in accordance with a predetermined topography, in a semiconductor material".*

28. A petty patent or utility model, although overlapping with a functional design, is in fact not the same. Petty patents are generally issued for inventions that do not meet the requirements of ingenuity and novelty necessary for a full patent.

In other cases, they are used to protect minor changes to an invention that already has a regular patent.

29. It is thus not clear what the policy drafter's intention is with industrial designs, specifically whether there is limited understanding of the law, or whether there is a suggestion that South Africa adopts the petty patent system, and if so, there is very little substance in the policy on the implementation thereof.

IP AND INDIGENOUS KNOWLEDGE

30. Chapter 4 of the IP policy confirms what most IP practitioners have been supporting, i.e. that TK should not be protected using the IP systems (and one has to assume the policy drafter is referring to the Patents, Designs, Trademark and Copyright Act). Unfortunately no recommendations are made as to how the matter will be addressed.

TECHNOLOGY TRANSFER

31. Apart from the reference to technology in Chapter 1 being contextually misplaced (it should have been discussed in Chapter 5), the statements on technology transfer in chapter 1 are confusing, to say the least.

"Licensing approval for technology-transfer contracts are subjected to rules that are not so strong, even if some are heavily regulated ("restricted/prohibited") technologies. Certain technologies may be subject to export controls and maximum cap for percentages, e.g. not more than 5%."

32. There is neither licensing rule, nor general license approval for technology contracts and South Africa does not regulate technology transfer with respect to restricted or prohibited goods. There is not any specific legislation that governs licence agreements in general or any specific type of licence agreement. However, certain formalities, restrictions and prescriptions relating to dealings

with specific types of intellectual property right (IPR) form part of the Copyright Act, Trade Marks Act, Patents Act and Registration of Designs Act. The restrictions make certain types of conditions in the contract null and void. Typically a licensor is prohibited from extending its monopoly beyond its protected rights. Other legislation that may have a bearing on licence agreements is the Competition Law, e.g. a licensor may not prescribe minimum prices to licensees and a licensee should not be prevented from purchasing goods or services from third parties if such goods are of an acceptable quality and would not harm the trademark or reputation of the licensor.

33. The royalty cap referred to by the policy drafter can only be assumed to refer to the requirement of Exchange Control approval of royalty payments to a non-resident licensor. Under Exchange Control Regulations made under the Currency and Exchanges Act, Reserve Bank approval is required for agreements that involve royalty payments, including management and services fees, flowing out of South Africa. Once approved, the royalty payments are freely transferable. Generally, the Reserve Bank will allow a royalty of up to 4 per cent for consumer goods and up to 6 per cent for intermediate and capital goods. A higher royalty rate may, however, be approved if the product or process is of strategic importance, or if it can be shown that the economic benefits to South Africa will be substantial. Royalty agreements involving the local manufacture of goods must first be referred to the Department of Trade and Industry (DTI).
34. Although no prescription exists for the terms of the licence agreement, certain practices have evolved over time. For example, the Reserve Bank will not refuse a term of more than five years but may require resubmission of the agreement within five years.
35. The statement *“There is no good model for technology transfer relating to capacity building in the area of human resource.”* indicates that the policymaker seems to be blissfully unaware of activities of SARIMA, who specifically promotes the development of management and administrative skills in support of research and innovation in Southern Africa. One of their roles being

professional development and capacity building of those involved in research and innovation and the promotion of best practice in these fields including technology transfer; or of the Technology Innovation Agency (TIA) (established in terms of the TIA Act, 2008 (Act No. 26 of 2008)), with the objective of stimulating and intensifying technological innovation in order to improve economic growth and the quality of life of all South Africans by developing and exploiting technological innovations.

36. *“Recommendation: Technology Transfer Contracts should be standardised to regulate restricted/prohibited technologies subjected to export controls and maximum percentages.”* Measures of this nature complicate and impede forging commercial relations in respect of intellectual property and could lead to the providers of much needed and desired foreign investment questioning whether it is worthwhile to do business in South Africa. This trend has in fact manifested itself in legislation affecting intellectual property in some form already like the Intellectual Property Rights from Publicly Financed Research and Development Act, 2008 (IPR Act) and the Intellectual Property Laws Amendment Bill (the “Traditional Knowledge Bill”) which introduce a plethora of bureaucratic measures such a state approval of the content of licence agreements and the like.
37. Interestingly enough the policymaker made no mention of the IPR Act, NIPMO or the Technology Transfer Offices (established through this legislation).
38. A technology transfer contract, simply put, is the process by which a technology, expertise, know-how or facilities developed by one individual, enterprise or organization is transferred to another individual, enterprise or organization. Effective technology transfer results in commercialization of a new product or service or in the improvement of an existing product or process. Depending on the nature of technology and the capacity of the recipient, the process of technology transfer may be simple and straightforward but usually is iterative, collaborative, and fairly complex. There are many (very) different forms of technology transfer of which licensing is but one example. The nature of the relationship between the two parties and the type of agreement that will

result from a technology transfer negotiation will depend on a number of factors including some of the following: the complexity and the level of development of the technology that is to be acquired; the technological capacity of the transferee and ability to use and/or adapt the technology being transferred; the relevance, availability and cost effectiveness of alternative technology; value of the technology and royalty charge; technology development, improvements and grant-backs; non-asserts and liability, indemnity, warranty; technical support and training for use of new technology and related licensed equipment, etc.

39. A recommendation to have technology transfer contracts standardised is thus completely impractical and preposterous.
40. Chapter 5 that supposedly addresses “IP, COMPETITION, and PUBLIC POLICY MAKING COMPULSORY LICENSING AND TECHNOLOGY TRANSFER” is simply illogical dialog that does not address the subject matter appropriately and includes a nonsensical recommendation “*Technology transfer should be conducted within the rules of TRIPS as BITS maybe TRIPS-plus*”.

IP ENFORCEMENT

41. The policy drafters have very little knowledge of the specific rights granted in terms of the various IP Acts. This is evident from the materially incorrect statements made with respect to IP enforcement and the bodies enforcing these rights. I have read the commentary of LTC Harms (Professor: Adams & Adams Chair of Intellectual Property, University of Pretoria) and I concur with his comments in this regard.

CONCLUSION

42. The concept of a national IPP has merit. Although there are many aspects raised that are encouraging and can be supported, the presentation, form and content of the IPP are of poor quality, contains substantial material errors of

fact and law, provides no substance and is without any empirical data or proper studies. The IPP should be referred for redrafting and it is strongly recommended that proper public consultation with the relevant IP role players and experts is done.

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POSTSCRIPT

It may be of importance for the policy makers to take note, inter alia, of the book “Promoting Access to Medical Technologies and Innovation: Intersections between Public Health, Intellectual Property and Trade,” which was launched on 5 February 2013, by the heads of the three bodies — the World Health Organization (WHO), World Intellectual Property Organization (WIPO) and World Trade Organization (WTO)

It includes studies on patents in the pharmaceutical sector; traditional medical knowledge; the importance of knowing what is patented where, and how easy it is to obtain information about these; it addresses questions of affordability and availability of medicines and market failure.

It includes, in some depth, development of medical technologies, modern research and development, ways of providing incentives for innovation, and ways of dealing with market failures, in particular with new products for treating neglected diseases. It contains comprehensive details on trade and intellectual property regulations and the flexibilities for governments to meet various public health objectives.

END.

COMMENTS ON THE DRAFT NATIONAL POLICY ON INTELLECTUAL
PROPERTY, 2013

PART FOUR

INTERNET & DIGITAL WORKS

INTRODUCTION

1. In what follows below, comment is delivered on the Draft National Policy on Intellectual Property, 2013 (hereinafter referred to as “the policy”, or the “DNPIP”) with specific focus on matters related to the Internet and digital aspects of intellectual property (hereinafter “IP”) law.
2. My commentary will deal with matters pertaining to the application, protection and exploitation of intellectual property rights as it is encountered in the digital environment. From the wide range of legal and practical matters related to the Internet and electronic intellectual property law, only a few were selected for commentary that arises in relation to the statements made in the DNPIP. My commentary is by no means an exhaustive discussion of the current position of South African law related to digital IP rights, or a comprehensive commentary on how South African law should be developed to address digital IP rights.
3. The DNPIP purports to deal fully with matters related to IP rights and the Internet in Chapter 6 (along with copyright and software), but failed in this regard. Scattered statements related to digital IP rights and/or the Internet may also be found elsewhere in the policy for no apparent reason and subject to no logical arrangement. Therefore, in order to provide a more accessible review of the DNPIP, its structure cannot be adhered to and will be abandoned in favour of my own arrangement of subject headings for purposes of this document.

IDEOLOGICAL POSITION

4. At the outset it is worthwhile to observe that sound legal development in a democratic dispensation requires *meaningful* engagement between the legislator and those entities it seeks to regulate. For this reason an invitation to comment on the Draft National Policy on Intellectual Property, published by the Department of Trade and Industry (DTI), must be welcomed.
5. However, in order to safeguard the role of the individual that underpins democracy, it is essential that government should *hear* the opinions of those who empowered them and thereafter *act* upon those instructions. Consequently, when Government makes policy it should do so in a manner that *encourages* public engagement and welcomes input from all interested and affected parties so that it may be guided by the will of the people. The fact that Government's primary function is to act in terms of a mandate from the citizenry, requires first and foremost that Government treat all matters that are considered important by the public with respect and particular deference. Therefore, when Government decides to exercise its role as regulator of society by means of law-making, such law (be it in the form of policy, regulation, amendment to legislation or new statute) should only ever exist within the parameters set by the public, operate in the public interest and be drafted to reflect the best and most sound voices of public legal opinion.
6. Unfortunately, in this respect the DNPIP reflects everything that is wrong with legislative development in South Africa and resembles a party-political mission statement more than anything else. It is lamentable to note the carelessness with which the policy is drafted, the incoherent, inaccessible and befuddled writing style, the prolific use of nonsense nomenclature and the manifest lack of engagement with the subject matter. Furthermore, most worryingly is the fact that the DNPIP is devoid of any indication that it reflects the public opinion on matters of IP, on the contrary. Such manifest disrespect for its role leaves one with the impression that the DTI is hostile toward certain instances of intellectual property rights, including its protection in the digital environment.

THE DIGITAL IP AGENDA

7. It does not require particular knowledge of IP law to realise that the drafters of the DNPIP, namely the DTI, are wholly devoid of legal expertise in any field and most certainly confused by intellectual property law. Add to this mix the technical-specific legal knowledge required to opine on matters of the Internet and digital intellectual property rights (let alone draft law relating thereto), and it is easy to see why the DNPIP contains so many amateurish blunders. To name only a few examples:

- 7.1 The argument that if the principles of FOSS (Government's Free and Open Source Software policy) are adhered to, these may incentivise the production and dissemination of textbooks and provide access to such work. Beyond the DTI's view, in the real world, the particular computer program or operating system used to create a work does not determine who may have access to that work or how it can or cannot be distributed. Nor will adherence to FOSS have any impact on the production and distribution of work outside of Government. Therefore, it is plainly ridiculous to imagine that more textbooks will be created or distributed merely because Government is using open source software on their workstations.
- 7.2 The recommendation that South Africa should allow Internet users to distribute copies from electronic sources "in reasonable numbers for educational and research purposes". This recommendation will be discussed in detail below. Suffice it to say for the moment that if South Africa manages to determine and then enforce a "reasonable" number of copies being made of anything on the Internet, it will be the first in the world to accomplish what is commonly known to be an impossible task.

7.3 The blatantly ridiculous statement that South Africa has “the bare minimum of a technological, economic and social base (sic)”.³ According to the DTI’s own figures dating from as far back as 2007, the technological basis of South Africa is far from the bare minimum:

- South Africa was the 20th largest consumer of information technology products and services in the world.
- South Africa is the continental leader in information and communications technology (ICT) development⁴ generating US\$14 billion (R103 billion) in revenue for 2007.⁵
- South Africa operates a telecommunications network that is 99% digital.⁶
- South Africa is the largest Internet market in Africa and the fourth fastest growing mobile communications industry in the world with about 44 million subscribers recorded in 2007.⁷

Furthermore, according to Statistics South Africa, 40.6% of households currently have access to the Internet, the South African economy is by far the largest in Africa, South Africa is classified as an Advanced Emerging Country by the FTSE Group and categorised as a *dual* economy by the World Bank. In light of these facts, the extent to which the DTI relies on the self-imposed status of South Africa as a *developing* economy to support outrageous changes to the IP system is alarming, negligent and misleading. Needless to say, the DTI’s error in this regard fails to support their argument that the DNPIP should, without more, inform a digital IP rights agenda for South Africa that differs from the rest of the developed world. South Africa’s stance toward, and adherence to, international law on the digital aspects of IP law is discussed further below.

³ DNPIP page 5.

⁴ The Department of Trade and Industry 2006 *Investors Handbook* 5.

⁵ The Department of Trade and Industry 2008 *Geared for Growth* 15.

⁶ The DTI *Investors Handbook* 5.

⁷ The DTI *Geared for Growth* 15.

IP LAW AND INNOVATION

8. Once the entertainment value of the DNPIP wears off, a second reading of the policy exposes a most troubling fact – the DTI is of the view that intellectual property law in general, and copyright in particular, present a barrier to innovation and that this (imagined) obstacle may be overcome by amending the law to permit forms of use that are alien to IP law everywhere in the world. This underlies the ideology with which the DTI approaches IP law development and is obvious throughout the policy document.
9. For example, the policy argues, rather clumsily, that “no innovation will occur without the principle of fair use/fair dealing”.⁸ The error in this statement is obvious, but the implication is far more sinister. If the DTI truly believes that *all* innovation is dependent on fair use of existing material (i.e. infringing copyright without risk of liability) it means that the DTI;
 - (i) considers all copyrighted work to be derivative work, and
 - (ii) regards copyright infringement (presumably by means of adaptation) tantamount to innovation.
10. Consequently, the DTI’s ideology is clearly anti-IP (or at least anti-copyright), particularly toward digital IP rights. This may be unbeknownst to the DTI itself, but it is obvious to everyone else. For example, with regard to “cyber counterfeiters” (i.e. creators and distributors of pirated goods) the policy argues that “the **only** issue” to be addressed is “monitoring rather than principle”. Thus, because all derivative work amounts to innovation, so the argument goes, the issue of pirated goods in the digital environment may be effectively dealt with through “monitoring” the situation and that no principle (i.e. legislative measure) is required. This implies that the DTI does not consider piracy a problem at all, but rather a trifling issue that it is being forced to address because copyright law has grown overbroad to protect work on the Internet. If one truly understands IP law and is alert to the reality of copyright infringement by means of the Internet, the DTI’s position as outlined above is nothing short of risible.

⁸ DNPIP page 16, paragraph f.

11. According to a global study by the Business Software Alliance, the software piracy rate in South Africa in 2011 was 35%, amounting to R4.36 billion. Considering that this figure does not include piracy of music, movies, e-books, television programs or any other copyrightable work, the position in South Africa is indeed critical. And yet the DTI seeks to legitimise its foolish attitude toward the enforcement of IP rights in the digital environment by enshrining it in the DNPIP. This is not only reckless behaviour by the DTI but it also flies in the face of the public interest. If the DTI is serious about stimulating innovation by re-regulating IP law, denying creators and authors the means to protect their work in the digital environment is hardly the way to go about it. Lamentably, the DTI's arrogant disregard for its mandate as the current custodian of intellectual property is nothing new and repeatedly decried as a looming disaster by the IP legal and academic fraternities.
12. Furthermore, the DTI's willingness (and in most cases eagerness) to dilute copyright law as far as possible in order to de-legalise it for political reasons is most obvious in the case of the Intellectual Property Laws Amendment Bill 2008 (the infamous Traditional Knowledge Bill). The detrimental effect that this Bill will have on the local economy, not to mention the negative impact on innovation, has been widely reviewed in particular detail by several academics and civil society. And yet, not only does the DTI persist in its ignorant ways, it proceeds to import this same corner-shop ideology into the DNPIP at the point where it is set to cause the greatest harm, i.e. internet piracy. If one considers the possibility, however remote, that the DTI is not composed of fools, the implications of the policy are even more alarming. It would mean that the DTI is actively and soberly attempting to legalise piracy by permitting, through fair use exceptions no less, the "making and distributing" of unauthorised reproductions of copyrighted work.

INTERNATIONAL LAW

13. In its stated objectives, the DNPIP claims to "increase access to foreign [...] technology", to "improve national compliance with international treaties" and

“improve the effective protection of IP [...] in South Africa and its trading partners” to “engender confidence and attract investment”. It is difficult to know where to start with commentary on these objectives, but it suffices to say that herein the DNPIP fails miserably.

14. It requires nothing more than common sense to realise that no foreign entity will entrust South Africa (or honest South Africans) with its investment if it is guaranteed to lose said investment. However, the DTI seems to disagree. It is of the opinion that South Africa will inspire confidence and thereby stimulate growth through foreign investment if it:

- 14.1 Claims for itself all digital content available for download and permits both the reproduction and distribution thereof without more.⁹

- 14.2 Prohibits the licensing of intellectual property rights created by South Africans to any foreign entity regardless of the origin of the funds that facilitated the creation of the work from which the rights arise.¹⁰

- 14.3 Manages all royalties and rights related to copyrighted work through a State-owned collecting society in the best of socialist traditions.¹¹

- 14.4 Actively ignores all international law for the protection of IP rights on the Internet because it is deemed “restrictive” and thus contrary to the needs of a developing nation.¹²

15. This is enough to inspire a state of depression and absolute isolation. However, the DTI in its wisdom is convinced that even more is required, by way of defying our existing international *obligations* to protect IP rights to the extent that South Africa *agreed* to provide. For example; the DNPIP suggests, “South Africa

⁹ DNPIP page 30.

¹⁰ DNPIP page 5.

¹¹ DNPIP page 17

¹² DNPIP page 30.

should *per se* (sic) not join international copyright treaties that may compromise its stance on social and economic developmental goals”. It is difficult to imagine what *stance* South Africa currently takes toward its own developmental goals, but it is assumed that such stance is a favourable one. Based on this assumption, the DNPIP suggests that South Africa should defy its duty under the 1971 Act of the Berne Convention for the Protection of Literary and Artistic Works 1886 and not implement the measures of the WIPO Copyright Treaty (WCT) of 1996 because it is “restrictive” (i.e. it actively protects IP rights) and is thus contrary to the needs of a developing country.

16. There is no other way to comment on this attitude other than to dismiss it as nonsense. However, assuming that the DTI has read the WCT, it appears that the following principles of the WCT are considered unsuitable:

- 16.1 *The storage of a work in digital form, regardless of the storage medium, amounts to a reproduction of a work for purposes of copyright infringement.*¹³

NOTE: Bearing in mind that the Internet functions by means of copying information in the form of data from one source and relaying that data to a destination. Therefore, if storing such data were not considered a reproduction, all forms of downloading or uploading information or streaming content would be deemed an authorised reproduction of the copyrighted work(s) contained in (or embodied by) the data. Furthermore, if the reference to any storage medium were omitted, an individual engaging in piracy would escape liability by merely changing the format of the data message or transferring the data file(s) to external or cloud storage.

- 16.2 *Authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their*

¹³ WCT Article 4(1) read with the Agreed Statements Concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on 20 December 1996.

*works in such a way that members of the public may access these works from a place and at a time individually chosen by them.*¹⁴

NOTE: By including a reference to “wireless means”, this provision makes it clear that copyright will be infringed if a work is uploaded to the Internet regardless of the manner in which that work is digitised, stored or distributed by means of the Internet.

- 16.3 *Parties to the WCT may, in their national legislation, provide for limitations of or exceptions to the exclusive rights of authors.*¹⁵

NOTE: This provision would allow South Africa to enact exceptions to the Copyright Act for the exploitation (fair dealing) of work in the digital environment. Furthermore, any new exception for digital purposes would be considered fair if a comparable exception to the use of non-digital works is acceptable under the Berne Convention. Since the Berne Convention and the Copyright Act long since acknowledge fair dealing exceptions for purposes of research, teaching, education, criticism, review and archival purposes, this provision appears to answer *all* of the concerns raised by the DNPIP in relation to the needs of a developing nation.

- 16.4 *Parties to the WCT shall provide legal protection and remedies against the circumvention of technological measures that are used by authors to enforce or restrict the unauthorized use of their work and the performance of certain acts in relation to works protected by such measures.*¹⁶

NOTE: These provisions would oblige member states to enact measures that prevent users from breaking the access/reproduction/adaption or distribution control measures applied to a digital work, and to provide means for legal redress where such

¹⁴ WCT Article 8.

¹⁵ WCT Article 10 read with the Agreed Statements Concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on 20 December 1996.

¹⁶ WCT Article 11 and 12.

violation occurs. In South Africa, the Electronic Communications and Transactions Act, section 86, contain five broad provisions that criminalise all forms of conduct that achieve such circumvention. In fact, it goes further to outlaw any attempt to do so, all forms of assistance in such an attempt and the mere possession of any means that may be used to facilitate the circumvention of protection measures. Considering that the WCT does not require criminal sanction, South Africa's compliance with this provision is far more restrictive than necessary to meet its obligations. And yet, the DNPIP considers the WCT too restrictive.

17. Therefore, it is difficult to find any justification for the DTI's claim that the WCT does not meet the country's "needs and requirements". Unless of course the DNPIP aims to facilitate piracy, in which case accession to the WCT would be greatly undesirable.
18. Which begs the question, if the WCT is unsuitable to South Africa (for whatever unsubstantiated reason), what approach is the DNPIP advocating? The policy does not give any indication of what is considered *suitable* to a developing nation. It requires fair dealing for selected purposes, but considers the wide existing exceptions in foreign and international law "restrictive" for some reason.
19. This question is impossible to answer. In light of the DTI's obvious negative feelings toward IP legal development, the only fair inference one may draw from the DNPIP is that the DTI does not understand the status of a treaty. It appears to believe that once a treaty is joined, the provisions are transcribed into national law. The DNPIP argues that "the WCT and foreign jurisdictions (sic) seem to abrogate [the] policymaking option available to member states".¹⁷ Of course this is not true – no more need be said on this point.

¹⁷ Page 29.

20. It is lamentable that the DNPIP is so woefully inadequate. Its approach to international law is not only unsound and ill informed but also dangerous to the development of the economy. Intellectual property rights management is but one of many significant issues that require urgent legislative attention in the digital environment. The fact that the DTI would shun the sound guidance offered by international law on these matters, particularly in light of the DTI's disastrous legislative track record, is most bewildering.

RECOMMENDATIONS

21. The 18 stated objectives of the DNPIP on page 4 claims, inter alia, to “create an environment conducive to economic opportunities” (objective 2) and to encompass “other emerging issues in the area of IP” (objective 4). However, at least in so far as it attempts to address issues of intellectual property in the digital environment, these objectives are not achieved by any means. In fact, on those rare occasions when the DNPIP does pronounce on internet-related IP issues, it achieves precisely the opposite and, in a very effective manner, manages to ensure that these objectives will never be completed.
22. Furthermore, the underlying stance of the DTI and the postulating style of the DNPIP make it difficult to advise on how it may be improved. In fact, the DNPIP is best suited to the recycle bin. If anything, it is a cry for help and embodies a desperate need for engagement, however difficult this may be. Therefore, it is necessary to attempt a few recommendations.

PIRACY OF DIGITAL WORKS

23. The effective protection of intellectual property rights in the digital environment should be a priority of the first order. This is true of every nation, and particularly to developing nations who seek, and rely on, foreign investment. As the continental leader, for better or worse, South Africa *must* observe this fact

and act upon it before it can even consider any limitation of rights in favour of its own developmental goals.

24. The alarming prevalence of piracy in South Africa¹⁸ cannot be overstressed, and it is a significant deterrent to innovation. Without a digital copyright regime that is aligned with international law the DTI will never be in a position to “follow one policy, both nationally and internationally, that is guided by developmental objectives”.
25. The needs of a developing nation, so often expressed in the DNPIP, are indeed relevant to a national IP framework. However, in pursuit thereof the DTI has drawn the cart before the horse. It is of the view that the needs outweigh the rule of law. For example, the need for access to copyrighted work for educational purposes is best served by allowing the unlimited (presumably free) access to databases and unrestricted download of materials. Clearly, the DNPIP has lost sight of its own objectives.
26. The best (and indeed only) way of achieving these goals is to observe the essential knock-on effect of copyright law: First adequately *protect* work, thereby stimulating the *creation* of more work, which attracts *investment* in work, which increases the *availability* of work from foreign creators, which *lowers* the cost of access to such work, which increases *competition* in the sector, which further *reduces* the cost of production and distribution, which *raises* the volume of work created per capita, which ultimately *grows* the collective knowledge.
27. This fact underlies all of intellectual property law and is the basis of the creative commons, the root of open source reasoning and the foundation of open access publishing.
28. If South Africa's IP policy is to embrace this basic common sense approach, it will benefit – that is guaranteed. If it persists in its current attempts to

¹⁸ Paragraph 11 above.

nationalise intellectual property it will further delay social and economic development.

29. In addition, if the DNPIP would heed advice and strengthen IP law in the digital environment, South Africa will find itself in a position to influence IP legal development across Africa. Currently, growth, innovation and benefit derived from IP in South Africa are due only to the fact that it once had a first world IP regime that could survive into the electronic age. However, as the Internet continues to grow, the tenuous grasp of South African copyright law on digital content will fail.
30. It is submitted, with due emphasis, that the next draft of the DNPIP recognise the need for rigorous digital IP rights and the attendant fair dealing exceptions established by international law. If it was to do so, any further extension to the rights of users for purposes of social and economic development will meet with support from the international community.

DIGITAL RIGHTS MANAGEMENT

31. The DNPIP correctly observes that in some cases the use of technological measures to restrict the exploitation of digital works result in an undue extension of copyright law. For example, this will be the case where a work cannot be reproduced for purposes of personal study (as permitted by the Copyright Act) because it is protected by a password or encrypted to a specific format that is only accessible on certain devices.
32. These measures, collectively known as digital rights management (DRM), were created in reaction to the digital media and grew out of restrictions on the reproduction of optical discs.

33. However, as mentioned above,¹⁹ the DNPIP is misguided in its assumption that foreign and international law, which recognise DRM as a means to combat piracy, represent a limitation on fair dealing. In fact, the Digital Millennium Copyright Act (DMCA),²⁰ the WCT²¹ and the EU Copyright Directive²² all prescribe that anti-circumvention measures should not be applied in a manner that conflicts with the normal, permitted exploitation of a work protected by DRM measures.
34. Conversely, the only anti-circumvention measures in South African law are found in section 86 of the Electronic Communications and Transactions Act 25 of 2002. As mentioned above, these provisions criminalise the circumvention of DRM measures without more. It does not consider Copyright law at all.
35. Therefore, it is submitted that the only relevant technological protection measures that do limit fair dealing, are those of South Africa. In fact, there are no “clearly demonstrated” limitations on fair dealing to be found in any of the sources mentioned by the DNPIP.
36. Thus, it is suggested that the DNPIP should provide for an amendment to the Copyright Act to include specific anti-circumvention measures that are subject to the fair dealing exceptions of the Copyright Act, and impose both civil and criminal sanctions. Furthermore, it should avoid the overly narrow view that anti-circumvention is a matter related to “the electronic commerce environment”²³ only.

¹⁹ Paragraphs 16.3-20 *above*.

²⁰ Digital Millennium Copyright Act Chapter 12 §1201 (a)(1)(B).

²¹ WIPO Copyright Treaty 1996 Article 11.

²² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Chapter 3.

²³ DNPIP page 29.

DIGITAL BROADCASTS

37. The DNPIP has much to say about the ownership of material contained in broadcasts. However, it is silent on the protection of those broadcasts itself.
38. Save for a single reference to “webcasts”²⁴, the DNPIP does not express a view about the legal protection of broadcasts made by means of the Internet. It seems to assume that a webcast may be treated as a broadcast for purposes of copyright without more. This is an incorrect assumption.
39. A broadcast will only be eligible for copyright protection if it is emitted by means of electromagnetic waves without an artificial conductor. Therefore, a webcast, which consists of data messages conveyed through any combination of wire, satellite, radio and cable connections does not qualify as a broadcast and is currently not protected by copyright law. The same holds true for Internet television and all live-streamed content, despite the use of the word “broadcast” to describe it.
40. Considering the rapid expansion of the South African broadcasting industry, it is submitted that the DNPIP should address the need to update the Copyright Act to provide for the protection of webcasts and Internet-based television services as a matter of urgency.

CONCLUSION

41. Theoretically, intellectual property rights in South Africa are afforded the highest level of protection possible – the recognition thereof as a Constitutional right to property. The owner of such property is therefore safeguarded against, inter alia, the unlawful deprivation of his/her intellectual property. This includes the deprivation of such property through State interference. Where the State, by

²⁴ DNPIP page 17.

operation of law, causes that property to be destroyed, the State would be depriving the owner of his/her property.

42. This fundamental principle is of the utmost importance to IP rights in the digital environment. The Internet is by definition ephemeral and its existence depends on the *rapid* reproduction and distribution of content. Therefore, if the State is to allow the reproduction and distribution of digital work (for whatever purpose) in the manner suggested by the DNPIP without the means to prevent abuse, it will open the proverbial floodgates to infringement.
43. Clearly it is of the utmost importance that the DTI takes to heart its mandate from the public and its sworn duty to uphold the Constitution by taking a pragmatic, informed and vigilant attitude toward the protection of IP in the digital environment.
44. If the DNPIP is anything to go by, the DTI is sailing treacherously close to the wind and will expose Government to widespread liability for the destruction of private property. As illustrated above, several of the recommendations in the DNPIP will destroy intellectual property rights on the Internet and turn South Africa into a pirate's paradise.
45. It is to be hoped that the DNPIP will be abandoned, along with all of its underlying ideas and principles, in favour of a new policy document that prioritises the interests of its people over empty political gestures.
46. By addressing, in a sensible manner, the impact of the Internet on intellectual property, a national policy on IP has great potential. One may only hope that the DTI will be made to realise this.

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COMMENTS ON THE DRAFT NATIONAL POLICY ON INTELLECTUAL
PROPERTY, 2013

PART FIVE

COMPUTER PROGRAMS

INTRODUCTION

1. The purpose of this document is to provide comments on Chapter 6 of the Draft National Policy on Intellectual Property, 2013 (the “Draft Policy”), in particular on its contents relating to copyright protection and software issues. However, before turning to the specific software-related comments, there are some general points on the Draft Policy which need to be made; not to do so in the preparation of these comments would be remiss of me.
2. It is correct that, given the technological advances that have taken place over the last couple of decades, and the growth of the Internet, copyright’s fair-dealing exceptions need to be reviewed in order to ensure that a correct balance is being struck between the interests of copyright owners and those of the public. For example, the application of the existing fair-dealing exceptions in light of developments, like the technical protection measures applied to copyright works, need to be addressed. However, the Draft Policy seems, impliedly, to propose a rather simplistic, and possibly disingenuous, solution to the supposed challenges, in areas like education, faced in South Africa: less protection for copyright (and, generally, intellectual property) is preferable. This approach is justified on the basis that South Africa is a developing country, and the implication is that intellectual property law is damaging to developing countries.
3. It is submitted that, at present, there are bigger obstacles which are inhibiting the achievement of “social and economic developmental goals” in South Africa

than the scope of copyright protection. Copyright protection, or its scope, has not been the reason for the failure to develop human capital and encourage innovation; it is government's failure to, for example, deliver textbooks at schools, or ensure an adequate educational environment for thousands of learners in South Africa. We should not be simply seeking "access to knowledge-related products" but should be ensuring that we have an economy that *produces* knowledge-related products. If we, at all times, bear in mind this goal, we would be circumspect in diluting copyright protection for short-term gain, by adopting a myopic attitude to such protection, as it may harm our economy (and our citizens) in the long term. The lack of delivery on the part of government to ensure that we have an adequate pool of skilled individuals capable of producing knowledge-related products should not be laid at the doorstep of the copyright, or intellectual property, protection.

SOFTWARE PROTECTION

4. At the outset, it is important to note that the Copyright Act 1978 does not provide protection to "software" as a type of protected work. The relevant type of protected work is that of a "computer program," not software, or "computer software program." Although it may be acceptable for a layperson to use the terms "computer program" and "computer software" interchangeably, its use in the Draft Policy is evidence of an inadequate understanding of what it is that copyright protects.²⁵
5. It is certainly necessary to have a proper engagement concerning the term of copyright protection of computer programs — which may be excessive given

²⁵ Software generally refers to more than the computer program. Computer programs process data (input data) and produce output data, which data could, for example, consist of text or images. Often, some of this input data are stored in files associated with the computer program that processes the data. Computer software in the broad sense, thus, refers to the computer program and the associated stored data. However, it is important to distinguish the computer program from the data, which are separately protected.

the commercial life of software — and the current scope of copyright protection of computer programs, particularly the permitted exceptions. The Draft Policy is incorrect to the extent that it suggests that copyright law does not permit the reverse engineering of computer programs. It is lawful to observe the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program, and to replicate the functionality of a program by observing its operation.

6. However, it is desirable that certain exceptions to copyright protection should be introduced, which could, for example, facilitate production of interoperable computer programs. These improvements to the Copyright Act have been long overdue. If the social welfare of South Africans is being harmed by the absence of these exceptions, the blame, again, lies squarely with the government. Instead of maintaining the existing statutory bodies, such as the Standing Advisory Committee on Intellectual Property Rights, and consulting experts in the relevant areas, government departments appear to be adopting one of two positions: either they appear to be indifferent towards developments requiring legal changes, or proceed with headlong haste in the pursuit of costly, and legally questionable, exercises. An example of the latter is the government's on-going attempts to enact legislation to protect indigenous, or traditional, knowledge, and to enact the Intellectual Property Laws Amendment Bill, 2010 (the "TK Bill").
7. Although the Draft Policy is short on detail – or any serious analysis of the respective legal issues – it is suggested that, as a starting point, the UK's fair-dealing exceptions could serve to indicate the types of issues which are necessary to facilitate the use of computer programs, and allow sufficient room for software development. It provides for four permissible rights for lawful users: the right to make back-up copies of a computer program, decompile a program, modify a program to remedy errors, and to study and test a program.
8. The Draft Policy, rather curiously, rambles (there is, unfortunately, no more appropriate word) on about free and open source software (FOSS). Whether it is government policy to only procure FOSS for the use in government

departments is an executive decision, and such policy should not affect the scope of copyright protection afforded to computer programs. It is, therefore, plainly incorrect that “the copyright regime needs to be in line with the [FOSS procurement] Policy.” For the avoidance of doubt, to the extent that the context in which the discussion of FOSS appears in the Draft Policy creates the impression that it is software which is not protected by copyright, or copyright-free software, it is wrong, and misleading. Although it *may* be the case that adopting the use of FOSS by government departments may result in cost savings for the state, it is difficult to imagine how it relates to textbooks. The following statement makes no sense:

“If the principles of FOSS are adhered to, use, production and dissemination of open and access to material such as textbooks can be regarded as an incentive.”

9. Mention of FOSS in the Draft Policy, thus, serves only to indicate a lack of foundational understanding of copyright law, and of FOSS.

CONCLUSION

10. Any initiative to update our intellectual property laws should be welcomed, given the fact that a considerable length of time has elapsed since they were reviewed. However, any exercise of this nature should proceed with a thorough examination of the issues by experts in the field because, at present, there is a danger that if this is not done properly, it will result in harm to our economy and our prospects for growth. While our current intellectual property laws may need updating, they are based on sound principles, which any future legal regime should build on, rather than ignore it.

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