Draft National Policy on Intellectual Property, 2013

Response to Minister of Trade and Industry, Dr Rob Davies invitation for interested persons to submit written comment in respect of the IP Policy Document

The focus of this comment relates in the main to copyright and related rights not addressed in the policy

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Comment

The Executive Summary

The Executive Summary would be improved were the following to be addressed:

a. Skill and qualification requirements in respect of the various types of intellectual property

b. The databases that hold the data concerning works, access to and control thereof

c. The domicilium subsistence requirements of copyright, the property right nature of copyright and the rules concerning the transfer of copyright across borders

d. Ecommerce and the NON-VAT paying suppliers of copyrights, especially foreign copyrights

e. Proper collection society regulations especially concerning Section 6, 7 and 8 works (Copyright Act 98 of 1978 as amended) and rights and accreditation

f. The need for and role of an ombudsman for the different types of IP, and improvements in the dispute resolution access and procedures that are far more inclusive that than the current Copyright Tribunal

g. Recognition of the other different types of IP rights that need to be addressed and covered in policy such as image rights, personality rights, neighbouring rights and in particular 'dramatic rights'.

h. The concept of equitable remuneration

Objectives

The Objectives would be improved were the following to be addressed:

1. To promote skills and qualifications in the IP sector.

   There is a tragic misconception that lawyers know anything about copyright. It is axiomatic that to ask a lawyer to practice copyright is akin to asking a medical General Practitioner (GP) to practice heart surgery. The issue is qualifications. A GP simply could not and would not agree to such. The same cannot be said of the South African legal community which by and large has eschewed investing in Copyright Law qualification. A typical lawyer needs at least two additional qualifications to properly practice Copyright Law as 'experience' does not cut it.

   The IP sector currently experiences an extreme shortage of qualified Copyright Law skills to the extreme detriment of the industry

2. To promote the harmonization of regional IP (copyright) laws

   In order for the European Community (EC) to ever consider and implement the real objectives of the EU, fourteen years was spent harmonizing the patchwork quilt of Common and Civil Law IP regimes. Internal trade within the EU was not possible, in part, without such IP harmonization.

   This challenge faced by the EC many decades ago is no different than that which faces South Africa, as a member of SADC. Proper mutually productive trade within SADC will never occur unless there is a proper harmonization of IP laws of the SADC countries.

   There is even a degree of urgency to pursue IP Law harmonization in SADC, for divided and unharmonized, South Africa and other SADC members are destined to become and remain vassal states geared to consumption and not creation.

   It is not enough to say "to improve national compliance with international treaties

3. To promote access to information concerning IP right ownership and to regulate databases concerned with such

Information concerning copyright information concerning works and ownership is in private hands and not accessible to creators and users. Parties holding the information have no oversight or regulation to respond to and abuses are rank

Trade and the making of markets in copyright are extremely prejudiced by this state of affairs. It is akin to companies whose information the JSE held but who were not able to see that information in any time and instead being 'told' what's there by a privateer

4. To promote regulation of Collection Societies and expand both the competition internally and reciprocal relations externally between societies

   Section 6, 7 and 8 rights societies are currently unregulated and are not accredited by Government.

   Government policy presently supports existing monopolies such as SAMRO

   There has been a complete failure of the Section 9 rights collection societies in South Africa to set up a single reciprocal relationship outside of South Africa which has disastrous impact on overseas earnings. This is purposeful by the incumbents and is against South Africa's interests. It occurs because of a lack of proper regulation.

5. To promote disclosure of trade in IP across borders in compliance with the SARS and Reserve Bank regulations concerning the definition of 'capital' as revised in the 8th June 2013 Government Gazette

   Trade in copyright across borders is currently in practice unregulated to the extent that the State has no clue where the copyrights whose subsistence arises in South Africa but whose domicilium (and thus point of worldwide income collection) has been covertly moved to another country

Itunes and others currently sell South African copyrights in South Africa and elsewhere without any VAT compliance, operating out of tax havens such as Luxembourg. Consumer monies leave the country and anywhere else to such tax havens and even every seeing a royalty in South Africa has no guarantee

6. To promote financial regulation and legal compliance concerning trade in copyright on the internet

   There is no proper or adequate law enforcement relationship with the IP industry as a whole and where such exists, it is fragmented and uncoordinated

   There is a disconnect between .co.za and law enforcement community and no way to report to stop even local abuse

Background

There is a dire and overdue need for an IP policy for South Africa, as there is for a co-ordinated approach.

However to be effective South Africa needs to drop the 'one size fits all' approach to IP. The requirements and challenges for copyright are not the requirements for patents, trademarks and designs. Whilst a lenient approach to limitations and exceptions with generic medicines may be appropriate as policy, the same applied to copyright has disastrous outcomes.

There are other IP rights not addressed or included and as such the concept needs to be properly expanded to address neighbouring rights, image rights and depiction rights and others.

SA's access to TRIPS through the WTO was always an alternative to the WIPO Treaties, however copyright in South Africa has suffered severely under TRIPS. One only needs to consider the UNCTAD statistics concerning trade in copyright for the period 2000 to 2012 to understand the disaster. In short, the clear lack of policy has seen South Africa's:

- Exports increase from US$49 million to US$65 million

- Imports increase from US$245 million to US$2.1 billion (in 2012 South Africa was 72% of Africa's copyright licensing deficit.

The reason for the low exports is fundamentally due to a lack of proper IP Policy and specifically due to the fact the SA created and domiciled copyrights have been moved offshore and out of the country, costing South African hundreds of millions of rands and effectively killing development for decades.

The Problem Statement

The Problem Statement would be improved were the following to be addressed

- The IP legal framework identifies the full IP legal spectrum of subject matters in a manner that does benefit and empower citizens of the Republic

- The IP legal framework and the existing IP system defines and regulates royalty supply chains;

- The IP legal framework and the existing IP system regulates and accredits Collection Societies in respect of all rights not just Section 9 Rights

- The IP legal framework and the existing IP system is geared towards the enhancement and development of IP qualifications and skills that contribute to the South African economy

- The IP legal framework and the existing IP system is geared towards transparency in respect of the ownership of IP works and regulates databases housing IP rights information

- The IP legal framework and the existing IP system is efficiently applied with respect to regulating and controlling internet trade from South Africa and in South Africa with respect to IP goods and services

- The IP legal framework and the existing IP system are geared towards proper enforcement.

Chapter 1: Forms of IP

The statement that “Basically there are four types of IP” is outmoded and outdated and restrictive in respect of the spectrum of IP assets South Africa has, in respect of its own citizens, access to.

There is no reason why, from a policy point of view why the full gamut of what is referred to as IP is not referenced and identified, at the very least.

The outcome of such an approach would increase significantly what IPR’s South Africa actually possessed.

C) Copyright

This section on Copyright is embarrassingly lacking in the extreme. This section clearly does not evidence input of appropriate Copyright Law qualifications, and if any such are rooted in academia and not in practice.

- In the first instance copyright subsistence has a primary consideration – originality, without which regardless copyright will not subsist in a work. Whether such work was an adaptation or not originality still applies;

- In the second instance there are two types of copyright works, authorial and entrepreneurial. Entrepreneurial works by their nature and by existing law, are owned by the parties that made arrangements for such works, not by the parties that necessarily were the authors.

- In the third instance the concept of that copyright is in any way involved with indigenous knowledge is akin to saying that Beethoven, Mozart and Lizt are indigenous to Austria and Germany, and that any classical music since is a ‘derivative’. This would not be correct. The fact that Phuzekemisi performs and creates in the Mbaqanga genre, it does not make his work a derivative of Mbaqanga music, but rather original creations created by himself in the genre of his choice. The same applies to Kurt Darren with tikkie draai, as it does to Thomas Chauke and Shangaan traditional, both of whom create original music in the genres of their choice.

The concept of copyright is premised in the fact that no copyrights can be owned by a person or persons *forever*. At a point in time, a copyright falls into the public domain where it is owned by all people.

"Indigenous knowledge" in copyright law is a repugnant concept to any creator. One only has to imagine the outcomes of the US laying claim to 'jazz' as indigenous or to the music of the "Minstrels" that inspired Solomon Linda's "Mbube" as indigenous.

- In the fourth instance, the idea that "*it has emerged that the best way to control ownership and exploit copyright is to be a member of collecting societies*" is badly researched and without empirical foundation. Operating collecting societies in South Africa, at least those who have been operating for decades, are unregulated monopolies.

- In the fifth instance mentioning the 'area of broadcasting' is indicative that the person or parties who wrote this section do not have copyright qualifications. What does, one ask, the fourth paragraph have to do with policy….as in so what? The broadcasters have long wished that they do not have to pay for content, and long tried to seize control of copyrights through the act of broadcasting……without paying for such rights.

- In the sixth instance SA Copyright Law has jargon defined in the Copyright Act 98 of 1978 which, like in any profession, the use of such jargon is critical to understanding, communication and implementation. There are no definitions in the Copyright Act 98 of 1978 for "producers", "Artists" "promoters" and "recording companies" to the extent that the use of such jargon is without application in Copyright Law, of little to no use in policy and clear evidence again of unqualified Copyright Law involvement.

- "stringent and unfair" have exactly what meaning in respect of the Copyright Act 98 of 1978? Copyright Law, like many others spheres of law, seeks to be objective….not subjective

- In the seventh instance, there are numerous recommendations should be considered in respect of Copyright Law Policy, and not NONE as this policy document would have one believe in respect of Copyright, such as the following recommendations:

    - To expand limitations and exceptions concerning all copyright works in respect of the disabled people, education and libraries

- To expand and improve regulation of databases far more effectively than currently, and not only the obvious ownership issue, but most importantly the access and control regulations concerning archives of record concerning South African domiciled copyrights

- To regulate Section 6,7 and 8 right Collection Societies, and substantially improve collection society regulation in general so as to provide the State with defined involvement and oversight

- To publicize and educate constituents concerning the concerning the relationship between 'Copyright" and "capital" and to specific the procedures required under financial regulations (from the Reserve Bank) to transfer IP rights across SA borders

- To highlight the Legal Deposit of Publications Act 17 of 1982, and the importance to the nation of compliance with the instructions from the State, especially to the SABC in so far as a digital Archive is concerned. This is to the extent that citizens of South Africa have an electronic interface option to deposit works with the State

- To review and overhaul the Performers Protection Act 11 of 1967, the Collection Society Regulations 2006 and the Copyright Act 98 of 1978

- To establish and detail relations and links with law enforcement and police colleges with a view to improving the syllabus concerning copyright infringement at a street level.

- To establish an Ombudsman's position and office to mediate and address complaints

- To introduce interventions to significantly upgrade South African copyright qualifications and skills.

- To regulate movements such as Creative Commons whose sole mission in life is to get creators to irrevocably put their works in the public domain for ever upon creation

- To update the Copyright Act 98 of 1978 with particular emphasis on:

    - The addition of 'Dramatic works" to the works eligible for copyright;

- Amending definitions, such as that of 'broadcast' to align with 21st Century reality, as well as that of a 'literary work' to properly include lyrics from songs
- Including digital language and jargon
- Including a definition for 'Synchronization'
- Amending Sec 9 to include adaptation as an exclusive act restricted to the owner of the copyright
- Beefing up and strengthening Sec 20 'Moral Rights'
- Making the Copyright Tribunal more user friendly and accessible beyond those involved in licensing schemes
- Introducing the 'equitable remuneration right'
- Improving and streamlining a copyright infringement complaints procedures and mechanisms
- Improve the wording regarding 'primary infringement' and secondary infringement and to effectively provide better definition.
- Recognizing the various ISO standards concerning works (ISRC, ISWC, AVI etc)

- To improve and specify in greater detail all acts permitted in relation to copyright works in respect of

    - Visual impairment
    - Education
    - Libraries and Archives
    - Public Administration
    - Computer programs – lawful users
    - Databases: permitted acts
    - Designs
    - Typefaces
    - Work in electronic form
    - Adaptations

- Developing coherent and concise Copyright Law in respect of fair dealing, avoiding the US' 'fair usage'

- To include factors to be taken into account in certain classes of case

    - General considerations: unreasonable discrimination.
    - Licences for reprographic copying.
    - Licences for educational establishments in respect of works included in broadcasts . . . .
    - Licences to reflect conditions imposed by promoters of events.
    - Licences to reflect payments in respect of underlying rights.
    - Licences in respect of works included in re-transmissions.
    - Mention of specific matters not to exclude other relevant considerations

F) Extension of rights granted by the Act

- The Copyright Act is currently a digital abomination and needs very urgent intervention, avoiding where possible everything and anything to do with the US' Digital Millennium Copyright Act (DCMA)

- The dogmatic statement "No innovation will occur without the principle of fair use/fair dealing" could not be further from the truth. Sounds and looks very much like an ill-thought 'chop' from somewhere. The difference between the exceptions of fair dealing (UK Copyright Law) and the fair use (US Copyright Law) need to be well understood and deployed. For instance the reasons why parody acceptable under fair use has not been accepted under fair dealing…yet needs to be understood. Certainly in copyright terms "innovation' has nothing to do with the need for fair dealing or fair use

- As has been mentioned before, Section 6, 7 and 8 rights require proper regulation as there is a paucity of such in South Africa's Copyright Act. State intervention in collection societies should be at a Board level and certainly at the Reserve Bank. Boards currently of SAMRO and NORM reflect domination by members of one sector….white and multi-national publishers and their puppets.

- Yes indeed "Collection Societies" must be administered by Government – very important issue this is

- There is an urgent need to consider harmonization of SA's Copyright Law as regards to its neighbours, and in the context of WIPO, consider an urgent path along the harmonization route of the EU, taking into account learnings and findings and avoiding pitfalls

- The Copyright Review Commission was fatally flawed in many ways and certainly there is evidence that its findings were manipulated. Certainly the Copyright Review Commission did NOT recommend that "*one collecting society must be administered by one powerful collecting society*". There is currently an unregulated monopoly in respect of Section 6 performing rights as in SAMRO and this is not desirable. This is not the preferred route

- Certainly the Copyright Tribunal needs a 'user friendly' overhaul.

- The presumption that all South Africans have to use English, and understand English, in order to have a contract concerning copyright is a terrible indictment on the outcomes of the liberation struggle. If the Tanzanians could use Swahili for agreements, why in South Africa not Zulu? The negative impact of the wrong ink on a misunderstood English language agreements has wreaked havoc in South African creative communities where English is not a first language, denuding communities and condemning generations to poverty

Chapter 6: Copyright, Software and the internet

The writer of this Chap 6 section clearly is not the writer of the previous section on Copyright, otherwise there would not be confusion clearly in evidence as to (erroneously) supporting a monopoly in respect of collection Societies on the one hand, and to saying that SA "must adopt pro-competitive measures under copyright legislation" on the other hand. Certainly the latter is agreed with and the idea of monopolies is all to reminiscent of the Apartheid State and should be chased away from the liberated State that South Africa is today

No question that South Africa needs to involve itself and at the very least update its copyright legislation in respect of the various international treaties, however one must agree that great caution must be taken with the DCMA as well as the EU directives, to extract the nuggets so to speak that have application to SA Copyright Law Requirements.

In the main South Africa wants to coldly stay as far away from US Copyright Law as much as possible and to warmly tread carefully in respect of EU law. Facts are that SA Copyrights outside of SA have far greater protection and economic residual value under EU Copyright Law than under the US Copyright Act