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Department of Trade and Industry
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ACA2K: Submission to the Department of Trade and Industry on the *Intellectual Property Laws Amendment Bill, 2008*

Contents

A) Executive summary

South Africa is particularly rich in indigenous knowledge resources. However, legal protection of such resources for the benefit of local communities against misappropriation and exploitation has, for various reasons, proven difficult. Many solutions have been suggested, ranging from international remedies to solutions anchored in domestic laws, and from approaches favouring a *sui generis* protection to those preferring the use of existing intellectual property (IP) categories such as copyright law and trademark law. With the Bill addressed in this submission, South Africa has opted for a domestic solution which regards existing IP laws as the main tool for protecting indigenous knowledge.

This submission is not intended to generally question the DTI's decision, although it appears that (a) an amicable international solution would have many advantages and (b) the traditional IP system is in many respects unsuited for the protection of indigenous knowledge resources. Furthermore, it seems that any developing country arguing for stricter/ broader IP protection regimes in areas in which such systems suit its needs will henceforth have problems to fundamentally criticise proposals for broader IP protection in other areas by the main beneficiaries of strict IP protection regimes, i.e. developed countries.

Having said this, this submission aims to ensure that access to knowledge considerations are sufficiently taken into account within the Bill. Inevitably, the Bill is going to have an adverse impact on the public domain. It is submitted here that the adverse impact can be reduced by expanding the current framework of copyright exceptions and limitations.

B) About ACA2K

The African Copyright & Access to Knowledge (ACA2K) Project was officially launched on World Intellectual Property Day 2008 (26 April). It is probing the relationship in eight African countries (Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda) between national copyright environments and access to hard-copy and digital learning materials. The project is probing this relationship within an access to knowledge (A2K) framework – a framework which regards the protection/ promotion of user access as one of the central objectives of copyright law. The A2K approach seeks an appropriate balance between the rights of content users and the rights of the content rights-holders, with particular attention to the types of balancing necessary in developing country contexts. The ACA2K network also has a clear focus on the opportunities and challenges offered by the digital, Internet era – in which there are greater opportunities for learning materials access, but also new technological, legal and behavioural barriers. Of central concern to the network is to find out which copyright law flexibilities are being deployed in each of the study countries, and the effects these flexibilities have in these countries. Also of concern to the network are the gender dynamics at play in the national copyright environments and at play in the realities of access to learning materials, both digital and hard-copy. The eight initial study countries have been chosen to provide a wide range of African contexts, in terms of legal, linguistic, cultural and historical experiences/traditions. The project is supported by Canada's IDRC and South Africa's Shuttleworth Foundation, and managed by the Wits University LINK Centre in Johannesburg.

The ACA2K Methodology Guide and other information on the project can be found at the ACA2K's website: www.aca2k.org.

This submission is made by the South African ACA2K research team which consists of members of the University of Cape Town's (UCT) Intellectual Property Research Unit as well as expert legal practitioners from Johannesburg. The author of this submission is Tobias Schonwetter.

C) Discussion of issues

ACA2K understands that the Intellectual Property Laws Amendment Bill, 2008, amends the following four Acts:

(1) the Performers' Protection Act, 1967;

(2) the Copyright Act, 1978;

(3) the Trade Marks Act, 1993; and

(4) the Designs Act, 1993.

In short, the Bill at issue aims to extend the current IP system in a way that it also covers indigenous knowledge. For this purpose, a number of definitions are inserted as well as amended, and various new rights are introduced. These rights are granted to the indigenous community from which the indigenous knowledge originated and acquired its traditional character.

As part of the Access to Knowledge (A2K) movement, ACA2K researchers are generally concerned about the impact of strict(er) IP, especially copyright regimes on access possibilities for users of protected material. It is however understood that the impetus behind the Bill is not so much a further strengthening of current IP protection as such but rather a realisation of the need to guard South Africa's indigenous knowledge against appropriation and exploitation. As a matter of fact, such appropriation and exploitation is often carried out by individuals and corporations from developed countries. These individuals and corporations take advantage of the fact that indigenous knowledge is in most cases not protectable under the (Western) concept of IP protection, e.g. because an individual author can seldom be determined or due to the fact that predominantly orally transmitted indigenous knowledge naturally lacks the requirement of being reduced to some sort of material form. Once appropriated, conventional intellectual property rights do, however, usually apply in favour of the new “owner”.

In light of several failed attempts to achieve recognition for a *sui generis* protection of indigenous knowledge on the international level, the Bill at issue is, as a tactical manoeuvre, comprehensible.

ACA2K South Africa wishes to raise two concerns: First, the author of this submission is, in line with numerous other commentators, of the opinion that a less restrictive intellectual property protection regime is in the best interest of developing countries such as South Africa since these countries are net importers of most knowledge material. However, the introduction of an IP protection regime for indigenous knowledge resources represents, after all, a protectionist attitude that developed countries are often criticised for by developing countries. The bottom line is that developed countries are arguably driven by similar considerations when they argue for ever-stronger IP protection regimes: they are trying to protect knowledge material which is created in their respective territories. While a closer look reveals that the Bill at issue takes a primarily defensive stance by way of preventing misappropriation, resorting to conventional IP protection as such may weaken South Africa's credibility when it, in the future, opposes calls for stronger IP protection from developed countries as being self-serving. In other words, it appears problematic to credibly argue on the one hand for a less restrictive protection regime in areas where such protection is detrimental to the interests of developing countries, while calling, on the other hand, for stronger protection where it serves the country's interests. Such an approach may be derided as illegitimate cherry-picking.

Secondly, and arguably more importantly, indigenous knowledge forms, at present, part of the public domain. Although the term “public domain” is not consistently defined, it essentially refers to all material which is not, or not any more, protected by intellectual property laws. The public domain, in turn, is a crucial knowledge pool whose importance for future creations can not be underestimated. By way of awarding IP protection to indigenous knowledge, this knowledge is effectively removed from the public domain. This would hinder further development as the source of inspiration, or the starting point provided by the public domain, would be less accessible. In light of the decisive significance of (widely accessible) indigenous knowledge for South Africa's culture, it is submitted here that, at the very least, a series of well-crafted copyright exceptions and limitations is necessary to counter, or balance, some of the prohibitive impacts of IP protection on access to indigenous knowledge.

D) Summary, conclusion and recommendations

From ACA2K's point of view, it is generally doubtful whether the protection of indigenous knowledge against (mis-)appropriation and exploitation is indeed best achieved by way of using the traditional IP protection framework.

However, if it is decided to pursue this path, it is suggested here to counter the prohibitive impacts of IP protection on access to indigenous knowledge by way of introducing a strong set of copyright exceptions and limitations. These exceptions and limitations should, at the very least, pertain to educational uses; non-commercial uses; private uses; translations; uses by museums, archives and libraries; uses for the benefit of people with a disability; and uses during religious celebrations. They should also take recent technological developments sufficiently into account. Yet, it is cautioned against confining these exceptions and limitations to indigenous knowledge since, for the average user of such material, it may often not be transparent whether or not the work in question qualifies as indigenous knowledge. The following Annex reproduces Article 5 of the European Copyright Directive; the list of copyright exceptions and limitations contained therein may provide a useful starting-point for the discussion of what kinds of exceptions and limitations should be considered.

E) Annex

Article 5 of the European Copyright Directive

Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

(a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;

(b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;

(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;

(d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;

(e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the right holders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;

(c) reproduction by the press, communication to the public or making available of published

articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organised by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

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