

DRAFT NATIONAL POLICY ON INTELLECTUAL PROPERTY (IP) OF SOUTH AFRICA, 2013

Comments

17 October 2013

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Introduction

This document is submitted by a group of experts and scholars working in the various areas of intellectual property law and policy, based at or affiliated with South African universities. It does not purport to speak for all academics, nor reflect the positions of our respective institutions. All the contributors are committed to a pro-public policy perspective on intellectual property matters, and have regularly contributed to the discourse on improving access to public health, knowledge and other technologies.

Our submission is in the nature of an outline document – we comment on the broad issues of principle, and indicate where we find the draft policy desirable or undesirable. We add some of our own recommendations. We are also available to attend any consultations to elaborate on these issues in the finalisation of the IP policy.

Our approach is to engage with the draft policy in a sympathetic and constructive yet critical manner. The comments contained in this document are based on the authors' involvement in many relevant and ground-breaking national and international research projects, including:

- The Open African Innovation Research Project (Open AIR)
- The African Copyright and Access to Knowledge Project (ACA2K)
- Harnessing Intellectual Property Rights for Development Objectives Project
- Global Censorship and Access to Knowledge: International case studies
- IP and Innovation Contributing to the Millennium Development Goals
- South African Open Copyright Review
- Pharmaceutical Innovation, Incremental Patenting and Compulsory Licensing
- Ambush Marketing and the Mega-Event Monopoly
- Access to Knowledge in South Africa, Global Access to Knowledge Academy Report
- 'Intellectual Property, Education and Access to Knowledge in Southern Africa' in: Intellectual Property and Sustainable Development Agendas in a Changing World.

General comments

At the outset, we wish to state that we believe that the intention of the Draft National Policy on Intellectual Property (IP Policy), 2013 is good: it is grounded in a developmental approach appropriate to our country, and seeks to eliminate the many perverse outcomes of IP protection which are detrimental to the broader society. The chapter headings suggest that the drafters of the policy are aware of the many and complex issues related to intellectual property, especially in times of rapid technological advances and globalisation. And it appears the drafters' overarching objective is to strike a fair balance between competing private and public interests in the field – taking into consideration South Africa's specific needs and circumstances.

We do not share the criticism put forward by others that the issues addressed in the draft policy are too distinct to be dealt with in one policy document. Rather, it is our understanding that tackling those issues in separate silos risks missing the bigger picture. While different species of intellectual property do differ markedly from each other in origin, doctrine and justification they have nevertheless become part of a global political economy which links them under the auspices of the World Trade Organisation's Agreement on Trade Related Aspects of Intellectual Property Rights (WTO-TRIPS). Segregating issues and categories of IP protection also ignores the practical reality of how IP is managed and experienced on the ground. Any innovator, creator and entrepreneur would attest to the fact that the key, real-world issue is how valuable intangible resources are protected, managed and mobilised. Whether the legal regime of patents or trademarks or copyrights is the particular tool enabling that to happen is largely irrelevant to these stakeholders. In fact, many stakeholders affected by IP rights may be unaware of the technical distinctions among these areas. A holistic approach is therefore necessary to achieve the objectives of this policy.

That said, addressing rather diverse issues in one policy document inevitably requires focusing on the broader principles as the details are better left to legislation and the experience of judges. Some commentators have mistaken for vagueness the necessary formulation of broad and flexible guiding principles.

However, a key concern is that in its current form the policy document is confusing due to its drafting, which appears to an outside observer to be the result of a process which included multiple interventions by a number of interlocutors. Hence, the document is, among other things confused by repetition, inconsistencies, contradictions and omissions. These obvious shortcomings have enabled detractors of the policy to dismiss the many positive and progressive aspects of the policy. While this may be the result of the policy process to date we urge that the final policy should be subject to a rigorous editorial process to address these issues. The confusing drafting distracts from the important issues addressed by the policy.

A more fundamental problem – leading to some of the unwanted repetitions, inconsistencies and

contradictions – relates to the general structure of the policy document. While chapters 2 to 16 discuss policy challenges “by issue” rather than “by category of IP” (copyright, patent, trademarks, design etc.), Chapter 1 addresses a miscellany of issues – some of which are discussed again later - through the lens of the different categories of IP. Perhaps this chapter was originally intended to merely describe the different species of IP. As many of the issues discussed here are cross-cutting in nature - i.e., they impact on different categories of IP - our recommendation is to significantly shorten Chapter 1 and in essence merely describe the general categories of IP in that chapter or even eliminate chapter 1 altogether. Substantive issues currently discussed in chapter 1, together with recommendations linked to these discussions, should be moved to and aligned with the relevant parts in Chapters 2-16. If Chapter 1 addresses an issue not currently discussed elsewhere, a new chapter should be added to the document. The policy recommendations should then be repeated in the final or penultimate chapter of the policy document and perhaps even in the executive summary of the document.

It is also noteworthy that while the policy correctly identifies intellectual property as a crosscutting developmental theme it lacks reference to the fundamental rights in the Bill of Rights, which is the framework within which all government in South Africa is to operate. Important rights that impact on the policy include the right to freedom of expression (section 16), including the right to receive and impart information and freedom of research, the right to education (section 29) and the right to health (section 27)¹. In addition, the right to equality (section 9) bears directly on whether South African intellectual property laws discriminate against disabled persons including the blind, visually impaired and other reading disabled persons by prohibiting them from converting reading materials into formats which they can use. It is thus disappointing that the policy makes no mention of the urgent need to change South African laws to enable equal access by the blind, visually impaired and other reading disabled persons. It is particularly surprising since representatives of the South African government have been engaged in arguing for a treaty to facilitate access to reading materials by the blind, visually impaired and other reading disabled persons for several years. This advocacy for the blind and others was inspired by South Africa's commitment to equality. The successful conclusion of the Marrakesh Treaty to Facilitate Access to Published Works by Persons who are Blind, Visually Impaired or otherwise Print Disabled in June this year will make the overdue changes to national law more effective.

On a general note, it is unfortunate that the draft policy largely omits references or other sources. The provision of sources or evidence on which the policy is based would have enriched the policy by enhancing its credibility. It would also enable those who wish to engage with the policy to do so from an evidence-based perspective so that debates are rational rather than emotive.

Finally, the drafters of the policy are to be commended for their boldness and willingness to

1 The reference to fundamental rights should not be taken as indicating that we accept the claim in some other submissions that intellectual property rights fall within the right to property in the Bill of Rights.

fundamentally question some of the existing IP paradigms and practices in South Africa in their quest to develop an IP framework that truly benefits the people of South Africa and propels the country's IP framework into the 21st century. Some of the proposed strategies and changes are not at all reflected in current legislation and IP-related practices on the ground, and in several instances significant upgrading of the available infrastructure will be necessary to implement such changes (e.g., the introduction of a "search and examination" procedure in the area of patents). Further, creating a fairly balanced IP regime is no easy task as proposing changes benefiting one group of stakeholders will almost inevitably be met with opposition from others – usually the beneficiaries of the current system. It is our hope that such opposition will not deter the drafters from their chosen path. If done correctly, the IP Policy can help improving South Africa's competitiveness and the well-being of its people in many ways. And it could serve as an example for the entire continent and beyond.

Executive Summary

A carefully crafted Executive Summary is crucial given the vast array of topics and recommendations contained in the draft policy. However, the section currently entitled “Executive Summary” is a mere list of contents, superfluous in our view in light of the fact that the policy already contains a table of contents.

Objectives

It is important to highlight that the policy should serve all sectors of society and, in view of the extreme inequality and poverty in our country, it should prioritise the most vulnerable.

A general question is whether the policy should target all South African *citizens* or all persons residing in South Africa.

The content of the remainder of the policy will be judged against whether the proposed measures are suited to meet the objectives of the policy; this requires a set of clear and strong objectives.

Currently, this section is a mixture of objectives, mostly laudable, some means to achieve these objectives, and sometimes a bit of both. This section should focus on real objectives. In some instances re-phrasing can help place emphasis on the underlying objective (e.g., no. 14 could read as follows: “To align national IP laws with the level of development and innovation of the country”).

Platitudes should be avoided.

Some of the objectives can be merged (e.g., no. 11 and no. 18) or at least be clustered in a logical manner.

Conflating disparate issues should be avoided. One example of the conflation of disparate issues can be found in objective 5: *Improving* IP enforcement through, for example, reducing the availability of certain enforcement mechanisms such as interdicts, which may actually benefit the general populace, whereas *strengthening* enforcement will almost always work to the advantage of rights holders, often at considerable cost to the public purse.

Other submissions to the IP Policy suggest that some of the objectives stated here appear to be in conflict with each other. We do not regard this as an appropriate reading of the policy: None of these objectives is absolute; in other words if such a conflict exists, the conflicting interests need to be fairly balanced against each other. That being said, conflicting objectives should be avoided as much as possible.

Background & Problem Statement

In its current form the Problem Statement does not fulfill its function as it merely consists of a list of aspirations for the IP system. It would appear to us that this section ought to have identified, in addition to the lack of coordination between policies and programmes of different spheres of government, the fundamental problems of access to knowledge materials, medicines and other goods that the current system of IP protection has fostered. It would be useful if the problem statement were to:

- Specifically state the undesirable outcomes that it sees as problematic
- Point to the causes of these undesirable outcomes
- Gauge the prevalence and the extent of the problem
- Point to evidence of the system.

Chapter 1: Forms of IP

We refer to our general concern regarding the structure of the document mentioned above.

The introduction (i.e. the first paragraph of the chapter) as well as the “brief description for each form of IP” provided throughout this chapter are inadequate and need to be re-written.

Chapter 1 addresses a number of important issues such as: the shortcomings of our current patent grant system; parallel importation; compulsory licensing; the role of IP for development, poverty alleviation; public health/ access to (generic) medicines; misappropriation of IP etc. Unfortunately, however, most of these important issues are addressed without providing sufficient context (see, e.g., the discussion of “strong” patents vs. “weak” patents or the discussion concerning “petty patents”). In some instances, the same issue is discussed in different sections of Chapter 1.

We commend the drafters of the policy for stressing that cost-benefit analyses and Regulatory Impact Assessments should not only be calibrated in monetary terms; instead social costs and benefits must equally be considered. Also, we align ourselves with the drafter’s conclusions in the area of copyright law that:

- The duration of copyright protection should not be extended beyond of what is required as the minimum term for protection under the Berne Convention;
- The current system of collecting societies is unsustainable and disadvantages creators;
- Broadcasters should not be granted copyright-like control over the content of their broadcasts;
- The WIPO Internet Treaties must be evaluated in the context of South Africa’s needs and requirements.

Currently, chapter 1 contains several factual and legal statements that appear to be erroneous, which require to be rectified, including the following:

- Contrary to what is implied in Chapter 1, business methods are not patentable *per se* in Europe, nor in South Africa.
- Technology transfer does not require patents but can to some extent be effected using open source for software and other types of technology.
- The definitions and criteria for patentability are misconstrued; for example, ‘newness’ and ‘novelty’ are the same thing; also, the law requires the invention to be ‘capable of industrial application’ and not ‘useful for trade/agriculture’.
- Technology transfer or licensing are confused with patenting.
- The issuing of a patent on a pharmaceutical product is conflated with its registration by a medicines regulatory authority – 2 distinct issues handled by different authorities. Brazil successfully coordinated these processes and provides an example South Africa should consider.

- The full impact of the Doha Declaration is undertreated, namely, the extent to which public health flexibilities may be written into the law is not fully explored.
- The effects of data exclusivity are misconstrued – owners of clinical trial and other data are not only demanding non-disclosure, but also a ban on regulators from using the data to approve follow-on generics.
- Generics are not only manufactured on patent expiry but could be via the Bolar type exception, or under a compulsory licence,
- Examination of patents cannot co-exist with simple registration. If what is envisaged is a two-tier system consisting of simple registration for some types of inventions and an examination system for others, this must be clarified.
- South Africa recognises some trade marks that are not registered here if they meet the criteria for well known marks, unlike patents which must be registered in a country in order to be recognised in that country.
- Trade marks can be opposed on the basis of bad faith or prior user rights, or that they are not in fact trade marks.
- Plant Variety Protection (also known as “Breeders’ Rights”) is not a “patent” and designating it as such is the source of much confusion. Even the title (“Patents in Plant Varieties”) misrepresents the concept. A clear distinction should be made between protection for new varieties of plants and patents.
- The IP Policy states that Plant Breeders’ Rights should not be “at the expense of other traditional agricultural systems or natural seeds and plants.” This needs elucidation. Is this a statement in support of what is called the “farmers’ privilege” which permits farmers to reuse, exchange and/or sell the seed of their own plants? Is this a statement in support of “Traditional Knowledge” – governed by a separate international agreement, the Convention on Biodiversity? South Africa should avoid combining different forms of protection, and great efforts in other countries to do so have met with little success. Food security is vital to South Africa’s continued stability as a nation therefore any changes to the current systems should be carefully considered preferably on the basis of empirical research.

The chapter raises the importance of incorporating TRIPS flexibilities, including the pro-public health resolution contained in the Doha Declaration, into the law. While some of them are mentioned, it should be stipulated that the full repertoire of flexibilities should be available. In particular:

- **The policy should require strict patenting standards with proscription on new use and new formulation patents to prevent ever-greening.**
- **Full disclosure in patent applications.**
- **Pre- and post-grant opposition procedures.**

- **Parallel importation under an explicit international exhaustion regime.**
- **Compulsory licensing (simplified procedures, expanded grounds for grant, remuneration guidelines limiting extensive royalties).**
- **Compulsory licences for anti-competitive conduct.**
- **Extensive early working exceptions, as well as other exceptions for educational, scientific and research purposes.**
- **Exclusion of diagnostic, therapeutic and surgical methods; plants, animals and genetic material.**
- **Broad exceptions to patent rights for research and education**

Finally, the draft policy should also consider other alternatives to IP such as patent pools and other mechanisms aimed at rewarding innovation based on its therapeutic or other public policy impact, as well as the notion of a Research and Development Treaty. In the copyright arena, another approach might be to encourage the use of flexible open licences, such as Creative Commons licences. Publicly procured resources such as software and textbooks should be disseminated under such open copyright licences, for all citizens to use.

Chapter 2: IP & Public Health

It is indeed commendable that the draft policy dedicates an entire chapter to the impact of IP on public health. Unlike other commentators who would prefer that this issue remain invisible, we applaud the drafters of the policy.

Again, however, there are some statements that seem mistaken or inconsistent:

- South Africa does have some generic manufacturing capacity in medicines, an asset that should not be overlooked.
- Astronomically high medicine prices are not the sole or even primary reason for compulsory licences. Compulsory licences can be issued on any public interest grounds including inadequate supply to the market, desire to make fixed-dose combinations of medicines owned by different right holders, desire to allow commercialisation of a follow-on, dependent patent that is technologically important, desire to have multiple sources of supply to prevent shortfalls of stock, and even a desire to promote local production where there have been failures in technology transfer from right holders.

It is also important to address misconceptions that the flexibilities enumerated in the Doha Declaration on TRIPS and Public Health are available only in situations of public health emergencies. This argument is often advanced by parties who seek to limit the ambit of the

Declaration. It is clear from any ordinary reading that the Declaration was a response to ‘the gravity of the public health problems afflicting many developing and least-developed countries’ and that the TRIPS Agreement ‘does not and should not prevent members from taking measures to protect public health.’ This much is clear also from Article 8 of TRIPS. The language of ‘national emergency or other circumstances of extreme urgency or in cases of public non-commercial use’ is used in TRIPS with regard to the waiver of the requirement to obtain the prior authorisation of the right holder, and should not be presented as the *sine qua non* for the utilisation of flexibilities.

In advancing the use of compulsory licensing, the draft policy appears to confine this flexibility to the version available pursuant to the Paragraph 6 Decision of the TRIPS General Council of 30 August 2003. This is only one, albeit limited, form of compulsory licence requiring a complicated system of bureaucratic notifications which has resulted in only one use in ten years. There is nothing that constrains a country from issuing ‘regular’ licences for non-predominant quantities of a product on a wide range of grounds which it has the freedom to determine (as specified above). For example the United States routinely issues government use licences.

In addition, South Africa should implement an efficient parallel importation scheme based on the principle of international exhaustion, as well stringent standards for what would qualify for a patent.

Generally, we align ourselves with the joint submission made by the Treatment Action Campaign, Medicins Sans Frontieres and Section27.

Chapter 3: Agriculture & Genetic Resources

Generally, we align ourselves with the submission made by the Africa Centre for Biodiversity.

Chapter 4: IP & Indigenous Knowledge

The draft policy correctly states that the IP system may not be the best vehicle to protect indigenous knowledge. Instead a so-called *sui generis approach* is preferable. This is, *inter alia*, because of the clash of paradigms – IP rights are private rights in the context of a market economy, whereas indigenous knowledge is regarded as community property where innovation is viewed as cultural property. One possible alternative may be the use of the framework of the commons which will enable communities to share knowledge on terms that will ensure the sustainable use of natural resources.

Chapter 5: IP, Competition, Public Policy-Making, Compulsory Licensing & Technology Transfer

This is an important chapter which speaks to policy coherence across government departments and regulatory structures, and the need to protect sovereignty in key areas of the economy from demands made through bilateral and regional trade negotiations.

The correlation between IP law – which effectively grants monopolies to IP right holders - and competition law is all too obvious. Conduct arising from abuses of IP rights is sanctioned both under the Patents Act, as well as the Competition Act. Hence, one of the competent orders to be made by the Competition Tribunal in the event of a finding of a prohibited anti-competitive practice is ‘divestiture’ – a strong expropriatory remedy which can easily accommodate a compulsory licence (a partial divestiture), and which is entirely consistent with section 25 of the Constitution.

The IP Policy correctly points out the dangers inherent in Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs), one of which is that much-needed flexibilities granted by multilateral treaties and agreements such as TRIPS are undermined by way of creating so-called TRIPS-plus regimes. Existing flexibilities in multilateral treaties must be identified, utilised and preserved. It is also important to emphasise that BITs allow investor-state dispute resolution before private arbitrators, frequently bypassing national judicial review. Countries have had billions of dollars awarded against them where they have tried to implement prudent regulatory reforms, such as the issuance of compulsory licences. It is therefore important that the IP Policy resists the imposition of heightened IP protection through BITs.

On technology transfer, the IP Policy correctly identifies the extent to which BITs have downplayed technology innovation, dissemination and transfer to developing and least developed countries.

We support the recommendations put forward in Chapter 5.

Chapter 6: Copyright, Software & Internet

This chapter takes a progressive approach and contains sensible recommendations. In particular, it acknowledges a need for:

- broad and meaningful exceptions and limitations, and the need to ensure that these are not abrogated online through the use of technological protection measures protected by anti-circumvention provisions;
- careful consideration of international treaties in the field before acceding to them;
- recognising the problematic relationship between copyright legislation on the one hand and the ECT Act on the other; and
- emphasising the general principles underlying the Government’s FOSS Policy.

The policy's statement that "South Africa should allow software to be adapted to local needs through copyright legislation that allows reverse engineering of computer software programs consistent with its international treaty obligations" is also appropriate. Some commentators have suggested that the current exception in the 1978 Copyright Act adequately permits reverse engineering. The exception only permits observing a computer program in order to understand its operation. That is not reverse engineering and certainly does not enable interoperability of computer programs. It is thus unsuitable for the contemporary digital environment in which every computer program must interact with multiple other programs. A good example of a specific reverse engineering provision is contained in the United Kingdom Copyright Act which South Africa might usefully adopt. However the best reverse engineering provisions in copyright law will be ineffective if software patenting is permitted to continue. Although in principle computer programs may not be patented in South African law, because patents are not examined many thousands of software patents which originate from the United States where software patenting is currently permitted, have been accepted under the current system. Therefore the introduction of a patent examination system with pre- and post-grant opposition must extend to all categories of invention which may be used to patent software. In addition there must be an accessible process which enables South African entrepreneurs to challenge patents that have already been granted under the depository system.

Furthermore, Chapter 6 could be improved in a number of ways. First, flexibilities contained in international instruments are not confined to fair use / fair dealing. Fair use and fair dealing provisions – which by the way should not be confused – fall into one category of flexibilities, namely *copyright exceptions and limitations*. Below, we make some suggestions as to how to improve the current landscape of copyright exceptions and limitations. Other categories of flexibilities contained in international instruments pertain to the *scope of copyright protection* as well as the *duration for protection*. Second, while it is true that existing flexibilities in international instruments such as TRIPS do not fully cover the needs of a country like South Africa, it should also be stressed that until now South Africa's domestic legislation makes insufficient use of these existing flexibilities. Third, it is recommended that the overall objective of copyright law must be stated clearly, i.e., to create and maintain a fair balance between the legitimate interests of rights holders and the public interest in far-reaching access opportunities. It is this overarching objective that should inform policy- and lawmaking in this field. This is especially the case since some of the technological advancements brought about by the digital age have further jeopardised the aforementioned balance of conflicting interests. What is needed urgently, therefore, is a copyright regime that takes into account the new realities and provides an appropriate and just framework for all stakeholders in the copyright arena. Our current copyright legislation, developed in 1970s, is hopelessly outdated.

Selected measures to improve copyright exceptions and limitations in South Africa

Exceptions and limitations concerning access to learning materials and knowledge

The current exceptions and limitations for accessing learning materials are inadequate. For instance, their applicability to online and distance education is moot. Research suggests that once copyright enforcement begins in earnest, then, without well-developed mechanisms in place to secure non-infringing channels of access to knowledge, many learners will be in a precarious situation. Section 12(4) of the Copyright Act provides for a fair dealing exception for 'illustration in any publication, broadcast or sound or visual record for teaching' provided that such use constitutes fair practice and the work is attributed to its author. This provision raises several issues, two of which will be discussed here briefly. First, there is no definition of 'teaching' so the question arises as to whether other modes of teaching, besides face-to-face teaching are included. Second, no guidance is provided as to what would constitute 'fair practice'.

It is recommended that the Copyright Act be amended to provide a broad definition of teaching that includes current modes of delivery and would be flexible enough to cover future innovation. It is also recommended that guidance on the parameters of fair practice be included. In this regard, it is worth looking at the US *fair use* clause which contains the following four parameters (referred to as the "four part test") to establish fairness:

- the purpose and character of the use;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

Notably, Canada's Supreme Court – in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37 (12 July 2012) – recently applied a set of very similar factors to their fair dealing provision, which is akin to South Africa's fair dealing provision. In light of the fact that South Africa – unlike Canada - has very limited copyright case law it is recommended that such factors be expressly provided for in the Copyright Act, rather than left for the courts to develop and apply.

Other exceptions and limitations

Exceptions need to be provided to cater for the use of copyright protected works by visually impaired individuals. This is imperative following South Africa's participation in the conclusion of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, in June 2013.

Exceptions also need to be provided for satire and parody. Satire and parody are important forms of cultural life and entertainment. They also relate to the exercise of an individual's freedom of expression. Exceptions & limitations for satire and parody have thus been created in several jurisdictions (including Australia and Canada).

Orphan works are works that are still copyright protected but for which the copyright holder is not identifiable or locatable. The fact that the copyright holder cannot be contacted prevents any transaction to secure the rights to use the work. Unlike copyright legislation in other countries, our Copyright Act is silent in respect of orphan works. Our recommendation is for an amendment to the South African Copyright Act that permits use of orphan works on reasonable terms when copyright holders cannot be identified or located.

Many countries permit consumers to back up digital copies of music, movies and games that they have purchased, and to time shift, format shift and device shift these copies.

Contractual over-riding of exceptions and limitations

Another important issue is whether contractual clauses that over-ride exceptions and limitations should be invalidated by the Copyright Act. Contract clauses are too often used together with technical measures that prevent users from engaging, for instance in fair dealing activities, requiring users to waive the rights awarded to them by law. This is also often a cause for concern where educational institutions enter into blanket or transactional licenses that 'give away' the rights granted by the Copyright Act to deal fairly and freely with protected works. One solution would be for copyright legislation to provide that any contractual provision that purports to over-ride an exception or limitation is of no force or effect.

Chapter 7: Patent Reform

The IP Policy makes the interesting observation that developed countries view patent reform as (a particular brand of) enforcement and harmonisation strategies, which are not necessarily in the best interests of resource-strapped and IP-importing countries.

The caution against the adoption of the WIPO Roadmap is timely, and the same could be said for hasty acceptance of ARIPO decisions, which may be based on rather lax patentability standards.

A more detailed discussion is contained in chapters 1 and 2 above, but central to any reform measures in this area will be the institution of a patent examination system.

The Department is to be commended on (finally) proposing a patent "Search and examination" procedure for the granting of patents thereby bringing it in line with virtually all developed industrialised countries and, more importantly, emerging economies such as India. The benefits of such a system have been well described with the primary advantage being a "strengthening" of granted patents as intellectual property legal documents.

However, merely legislating such a procedure is insufficient. A competent examining authority requires qualified individuals capable of not only performing searches of prior art but who also have the knowledge and experience to evaluate the patent application in light of the prior art. Examiners in established patent offices are not only at the Ph.D. level in their area of expertise but

well versed in the many sources of prior art, whether local or foreign. It goes without saying that to complete searches at this level, examiners must have high-speed access to all relevant databases around the world. The policy itself speaks of South Africa retaining “sovereignty” over its patent granting system so relying on the searches performed through the PCT system, for example, and then have examiners “rubber stamp” the results defeats this goal. Funding for training of examiners should be a policy priority. Pre and post grant opposition by competitors and by non-profit organisations able to offer expertise will however provide a great deal of expert information in respect of any patent claim. It is therefore important that opposition proceedings should be open to a wide variety of actors and easily accessible to entrepreneurs.

Just as important as accessing other databases, all should be able to access the South African patent database. It should therefore be freely available and fully searchable on-line by anyone.

Lawyers also will need to handle more technically complex patents, therefore government should enable lawyers particularly those from historically disadvantaged communities who serve Small and Medium Enterprises to study further to obtain the necessary expertise. It may also be necessary to provide technical assistance and skill development of judges.

Almost all countries prohibit the patenting of computer programs. Recent experience in the United States - which does permit patenting of computer programs - is that the money that computer technology companies spend on patents and patent litigation exceeds their gains from royalties. South Africa also prohibits the award of patents over computer programs, at least, in principle. However, because South Africa has a depository system, patents over computer programs are granted in practice. As there is no examination of these patents not only are patents over computer programs granted but they are more extensive than those granted in the United States, since at least in the United States examining officers reject more extravagant claims. One result is to stifle the development of Free and Open Source Software in South Africa, since by applying for a patent, but without writing a single line of computer code a patent applicant can acquire the right to block anyone trying to actually write a computer program to solve a particular problem (See Bob Jolliffe 'The word-processing patent - a sceptical view from a person having ordinary skill in the art' South African Computer Journal (SAJ) 35:2-9 (2005)). Countries that have a similar provision prohibiting the patenting of computer programs to that currently in South African patent legislation have experienced repeated attempts to circumvent the prohibition. One of them, New Zealand, has recently passed legislation which makes it harder to circumvent the prohibition on patents over computer programs. This experience will prove useful to South Africa in reforming our patent legislation.

Chapter 8: Institutional Capacity

It is encouraging that the policy regards a search and examination system for patents as a fundamental necessity. There are, however, other inherent dangers in some of the proposals advanced in this chapter:

- Contracting out or reliance on patent examination elsewhere could backfire if entities apply different or weaker standards than those adopted in South African law. As stated earlier, it is extremely important for South Africa to develop strict standards of patentability
- The PCT examinations are only partial and do not fully address rigorous patentability standards.
- There have been successful models of reliance on peer review systems in other countries, the peer-to-patent system that has been used in the US, UK and Australia. The Patent Office might want to have access to outside expertise, including the health/medicines expertise of the MCC or its successor (as is done in Brazil), but it still needs to develop a fully capacitated cadre of patent examiners.
- It is unclear why utility patents are being introduced – no case has been made for granting exclusive rights in instances of even lesser inventiveness, and reference to utility patents should be removed. If it is intended to persist with this line of thinking fuller motivation is required. In which case, lessons may be drawn from Australia and Kenya's utility patent systems.

It is critical that South Africa invests in patent examination to avoid monopoly prices. Absent that, if weak patents are granted, health departments will pay excessive prices for improvidently granted pharmaceutical and medical device patents. Patent examiners can be partially funded through fees, including differential fees in different fields of technology where warranted. South Africa should in addition seek or insist upon IP technical assistance that is development oriented.

The search and examination system is fundamentally different from the depository/registration system. The IP Policy does not offer any analysis of where one or the other might be used. There have been suggestions that there be search and examination for medicines and other health technologies, and perhaps with respect to other public goods as well. But the principles for differential systems need to be developed. In any case, to avoid the barriers to innovation in the Information and Communications sector created by patents over computer programs all patent applications dealing with technologies that might incorporate computer programs will have to be examined.

Government will have to commit to educating, training, and hiring examiners.

Chapter 9: International Architecture

We agree with the drafters of the IP Policy that WIPO's Development Agenda is an important instrument for addressing some of the needs of developing countries within the international IP framework. We also strongly agree with the drafters' assessment that coordination in relation to IP on both the international and the national level is essential. Further, it is correct to state that technical advice on IP matters from developed countries may not be sensitive enough to a developing country's public policy objectives.

We support the IP Policy's recommendations in Chapter 9; in particular, it is sensible to recommend a strengthening of ties between the DTI and national and international NGOs, and no trade agreements aimed at limiting existing flexibilities contained in multilateral treaties should be concluded.

In addition to the identified flexibilities which bilateral and regional trade agreements seek to constrain, there are many other TRIPS-plus elements to US and EU trade agreements including: relaxed standards of patentability, restrictions on TRIPS-allowable exclusions from patentable subject matters, restrictions on use of limited exceptions under Article 30, mandatory patent-term extensions for regulatory delays, disallowance of pre-grant opposition procedures, data exclusivity, and patent-registration linkage.

With respect to IP enforcement there are also many TRIPS-plus provisions including: mandatory injunctions/interdicts, enhanced deterrent damages, stronger border measures and criminal enforcement, and investment-chapter enforcement including investor-state dispute resolution.

South Africa would do well to also source expertise from various UN agencies, including the UNDP, as well as the growing number of NGOs (as suggested) working on policy development specifically tailored for developing countries.

Chapter 10: IP & Development

This chapter recognises the strong link between IP frameworks and development. Human development, including economic growth and the capability for longer, healthier and more fulfilling lives, depends on innovation and creativity as well as sufficient access to essential goods. In this context, IP rights play an increasingly important role. The policy correctly observes that developing countries are not reaping the benefits of IP protection and harmonisation. The overarching critical question is: what implications does the existing intellectual property system have for access to essential goods, for the prospects for local innovation, and for the need to attract foreign direct investment (FDI) into the country? In order to further strengthen this Chapter, we would like to highlight some relevant and recent studies in this area (some of which we were involved in):

Many of these issues relevant to Chapter 10 were canvassed in a recent study of five developing countries – Argentina, Brazil, Colombia, India and South Africa – in relation to pharmaceutical patents (Correa ‘Pharmaceutical Innovation, Incremental Patenting and Compulsory Licensing’ 2011). The study concluded that despite a decrease in the number of new chemical entities for pharmaceuticals, patents on products and processes covering minor, incremental innovations abounded. This proliferation of ‘evergreening’ pharmaceutical patents has the potential to block generic competition and thus limit access to medicines. The study found no evidence that such a patenting environment necessarily supported local innovators. The opposite was found to be the case – foreign companies were the overwhelming beneficiaries of lax patenting and examining standards. The report also suggests that applying well-defined patentability standards could obviate the need to issue compulsory licences – a highly contentious and politically-fraught measure, to which developed countries are intractably opposed. In the case of South Africa, the following observations were made:

- The patent office granted some 2442 pharmaceutical patents in a single year (2008).
- This is due primarily to the fact that there is no substantive examination of patent applications.
- There is an inordinately large volume of ‘weak’ patents, and more than half of the studied patents were based on ‘Markush claims’ namely, ‘claims that include a general formulae with multiple options that allow for the protection, under a single patent, of up to several millions of molecules’.
- The validity of patents can only be tested when infringement or revocation proceedings are brought before court. However, the volume of such litigation is miniscule (a mere seven such cases were litigated for the period 2003-2008).
- Even so, courts are applying a low standard of patentability, as evidenced by the case of *Pfizer & Ano v Cipla Medpro & Ors* 2005 BIP 1, where the court refused to revoke a patent, ruling that formulating a besylate salt was unexpected and, therefore, constituted an advance on the state of the art, and thus represented an inventive step, whereas an expert would regard the formulation of a besylate salt as neither novel nor inventive.
- Only 16 pharmaceutical patents (1% of the total granted during 2008) were granted to South African inventors, the main beneficiaries being the USA and UK companies holding 49% and 10%, respectively, of granted patents (Vawda ‘Pharmaceutical Innovation, Incremental Patenting and Compulsory Licensing - Country Case Study: South Africa’ 2011).

Other South African studies have arrived at similar conclusions. In one instance, it was ‘found that the current intellectual property rights regime not only fails to support the objectives of the national innovation system but also that it facilitates exploitation by foreign interests and creates substantial social costs’ (Pouris and Pouris ‘Patents and economic development in South Africa: Managing intellectual property rights’ 2011). The authors suggest that the registration system employed in South Africa, one of the cheapest patenting regimes in the world, opens the doors to frivolous and useless patents being granted. It ‘increases uncertainty, increases search and

monitoring costs by interested patentees and makes more difficult the dissemination of prior art by useful or real inventions'. Furthermore, it creates an 'asymmetry' which disadvantages local innovators, as foreign inventors are able to file their patents in South Africa cheaply, with local inventors finding the costs of protecting their inventions abroad prohibitively expensive. Using a sampling approach they conclude, most tellingly, that had an examining system been utilised, more than 80% of current applications at the patent office would not have been granted.

Several commentators have canvassed the effect of strong intellectual property rights protection on economic development (Maskus 2000; Lerner 2002; Moser 2002). Increased IP protection appears to have little effect in the developing country context. Qian suggests that 'domestic innovation accelerates in countries with higher levels of economic development, educational attainment, and economic freedom' (Qian, 2007). Lerner surveyed patent laws in over sixty countries, and concluded that strengthening patent rights resulted in an increase in filings from foreign applicants, with no effect on filings by local inventors (Lerner, 2002). In similar vein, a more recent study involving over seventy two countries concluded that 'to date, there is no robust empirical evidence that stronger patent rights indeed stimulate growth' (Hu and Png, 2010).

Another key consideration is the correlation of IP protection with foreign direct investment (FDI). While there are no available studies of the impact of the IP system on the inflow of investments into the country, Kaplan argues that South Africa has attracted far less FDI than other countries whose IP system appears to offer potential foreign investors weaker protection (Kaplan, 2009). The correlation between strong IP protection and FDI is yet to be established. Indeed, the evidence supporting the theory that IP is good for economic growth, foreign direct investment and incentivising local innovators is, at best, inconclusive.

Lastly, over the last three years, a large pan-African, multi-disciplinary research project – Open AIR (www.openair.org.za) - involving researchers from more than 14 countries in Africa set out to investigate how IP regimes can be harnessed in Africa to facilitate development and innovation through collaboration – and to make processes more participatory, knowledge more accessible, and benefits more widely shared. Sixteen interconnected, empirical case studies explored a range of research questions in countries across the continent. The case studies are connected to six themes: copyrights, patents, trademarks, the WIPO development agenda, the traditional knowledge (TK) commons and IP from publicly funded research. At the same time, the project conducted foresighting research to develop scenarios for the future of IP, collaboration, innovation and development in Africa. The project's findings will be published in book format in December 2013 on the occasion of this year's Global Congress on IP and the Public Interest in Cape Town. Among other things, the research team made the following observations:

- The African context seems to be predisposed towards *innovation of necessity* (or 'accidental' innovation) rather than oriented towards so-called "frontier" or "high" technologies.
- Orthodox categories of IP remain often ill-equipped to appropriately deal with innovation originating in Africa.

- The IP policy context is divorced from actual innovation practices on the ground.
- Institutional infrastructure for R&D and IP management is often poor.

The case studies present potential middle-ground models of IP policies and practices in which absolute openness is not necessarily required to facilitate collaborative innovation; nor does IP protection inevitably preclude access to all but the individual proprietor. The authors refer to this dynamic as a ‘phenomenon of selective inclusion’ or ‘*collaborative IP*’. Rather, formal or informal collaboration with varying degrees of openness are a crucial engine for innovation and development in many African settings.

Chapter 11: IP & Sporting Events

First, we offer some comments on the description of the topic:

- *Re: ‘The common law of passing off is not able to deal with this issue of ambush marketing by association.’*

This statement is rather simplistic. It is assumed that this refers to practical problems regarding legal action by event organisers against potential ambushers in the run-up to or during the short duration of an event (e.g. the time element in respect of litigation). In principle, though, the passing off action is more appropriate as a basis for protection against association ambushing than some of the sui generis legislative causes of action created in special event laws (such as that found in the Merchandise Marks Act, as amended). It is suggested that special measures to cope with the practical hurdles would be preferable to the creation of new ‘quasi-IP rights’ for event organisers.

Additionally, event organisers’ routine claims to control of the thematic space of sporting events for marketing purposes are, generally, grossly overstated. In the absence of actual IP infringement or passing off (the association ambushing cases) there is no legal justification for providing a pseudo-monopoly in publicity surrounding an event. A provision such as section 15A(2) of the Merchandise Marks Act, which purports to do just this, is without basis in first principles of law. In light of its potential constitutional implications for the freedom of (commercial) speech and the freedom of trade, this provision is very tenuous in terms of its legitimacy. These provisions do not make sufficient provision for pre-existing rights holders or for the use of disclaimers in marketing. These provisions are not aimed at protecting against consumer confusion (and proof of such confusion is not required for civil or criminal liability of potential ‘infringers’), and they do not require event organisers to prove any harm. The criminal offences created in order, ostensibly, to protect purely commercial interests of large sports organisations and multi-national corporations add insult to injury in respect of potential contraventions of these provisions.

- *Re: ‘Parliament of the Republic required that in order to qualify for a “protected event” status the organisers of the event must create business opportunities for small businesses, in particular those from previously disadvantaged communities’.*

This statement is accurate and reflects the provisions contained in sec. 15A (1)(b) of the Merchandise Marks Act, as amended. However, although Parliament required the above it is unclear to what extent, if any, there was compliance with this provision in the declaration by the Minister of protected event status for the 2010 FIFA World Cup. We are not aware whether any such requirement was ever actively enforced against FIFA or the Local Organising Committee, or whether any investigation into compliance was ever conducted by the Minister or the DTI prior to the publication of protected event status for the event. To our knowledge no report on this aspect of the event was ever made available to the public.

This is especially troubling if one considers the widespread unhappiness amongst small business owners and informal traders at the time of the 2010 FIFA World Cup. Public perception appeared to be that business opportunities had only been created for Coca-Cola, Budweiser and a number of other large multinational corporations, and there is little evidence of small businesses and particularly those from previously disadvantaged communities having benefited from the event.

At the very least, such requirement for the conferral of protected event status in terms of the existing legislation should involve an investigation, prior to declaration of such status for an event, of the measure of compliance with these requirements by the event organiser. A report in respect of such compliance should be released for public comment prior to conferral of protected event status. These requirements are central to the justification for the legitimacy of sui generis commercial rights protection for a protected event, as they relate to the promotion of the public interest through the hosting of such event and through the protection of the event organisers' and sponsors' commercial rights. Also, as mega-event commercial rights protection measures now invariably include the use of 'clean zones' in host cities and around event venues, this involves existing small businesses (pre-existing rights holders in this geographical locale) actually being forced to suspend trading for certain periods around event dates. At the very least it should be ensured that these businesses (including informal traders), who are most directly affected by the relevant laws, should be provided with alternative business opportunities or some form of compensation for any loss suffered.

- *Re: 'South Africa has an advanced legal regime that protects sporting events and this attracts the staging of sporting events in South Africa.'*

It is debatable whether South Africa's extremely strict anti-ambushing legal framework constitutes an 'advanced legal regime', although it is accurate to say that this regime is in fact attractive to sports event organisers. It would, however, be short-sighted to favour the attractiveness of this regime in the context of bid requirements and to ignore the growing global backlash against draconian laws to protect commercial rights to sporting events (compare the recent furore in the British media in the weeks before the start of the 2012 London Olympic Games). This is troubling, as the current laws are probably not legitimate in a constitutional democracy such as South Africa. There is growing realisation in other jurisdictions that such strict laws, which are pursued by event organisers as a requirement in

the bid process, are aimed at providing event organisers and their commercial partners with a monopoly in the events, and are in fact simply a form of market control which is inappropriate in a free market economy. Such laws are, in fact, anathema to the public interest in events, and the promotion of commercial opportunities for small businesses and the previously disadvantaged.

- *Re: 'Entrepreneurs and local governments or metros must exploit business opportunities that emanate from these sports events when they take place in their areas.'*

In light of the imperative of support for small local businesses as contained in section 15A (1)(B) as referred to above, steps by government to address existing hurdles should probably be incorporated in the process of investigating compliance by event organisers and local organising committees prior to the declaration of protected event status in terms of the existing legislation. This should include addressing possible procurement problems (including corruption in the awarding of tenders) as well as requiring the active involvement of event organisers in ensuring business opportunities for small businesses, at least to the extent of offsetting the sometimes draconian measures employed to protect the commercial rights of such organisers' large multi-national corporate sponsors.

We now comment on the recommendations:

- There is no objection to the first recommendation that a threshold level for protection of an event by means of special anti-ambushing legislation should be set. This is in line with calls internationally to avoid what one commentator describes as 'vertical creep'. In terms of this notion, special event legislation passed to protect commercial rights to major or mega-events such as the FIFA World Cup or the Olympic Games subsequently serve as motivation for the passing of new (or application of existing events commercial rights protection) legislation for smaller events, where there is less justification for such draconian laws. However, a threshold size for the application of special event protection laws does not detract from the need for critical consideration of the legitimacy, legality and constitutionality of the content and enforcement of such special laws.
- There is no objection to the second recommendation regarding the need for metros and local governments in the locality of event venues to exercise effective control over tenders in order to empower small businesses. Such tenders must, however, comply with general procurement legislation and controls, in order to avoid wastage and corruption in such processes. It is suggested that reference should be made to the report regarding, inter alia, of alleged corruption surrounding tendering and other aspects of the 2010 FIFA World Cup.
- There is no objection to the third recommendation regarding the suggested limited duration of special event protection measures, save to note that this issue should also be considered seriously in future regarding the negotiation of (and event organisers' demands for) tax breaks in respect of revenues earned from the events. FIFA's widely reported 'African tax bubble' for the 2010 FIFA World Cup does not provide suitable precedent for

the objective to exploit the public interest element of international-level events to be hosted in South Africa in future. This public interest element of mega-events hosting is a significant ground often advanced by event organisers in their justification of strong, *sui generis* event commercial rights protection laws. The level of taxes and other revenues raised for the South African government should feature prominently in this regard (including consideration of ways in which such public revenues could be trickled down to small businesses, especially those whose trading activities may be specifically suspended or otherwise affected by 'clean zone' and other regulations implemented in terms of such anti-ambushing laws).

- There is no objection to the fourth recommendation. In fact, it is suggested that traditional forms of IP protection (such as trademark law) should preferably be utilised to protect against ambush marketing, rather than the passing of new or implementation of existing *sui generis* anti-ambushing laws. Mention is made in the descriptive section of Chapter 11 of the submission by the South African group to the International Association for the Protection of Intellectual Property's EXCO meeting in Buenos Aires in 2009 on Question 210. It should be noted that a number of the other country reporters were of the view that *sui generis* event legislation is not the preferred route to protect organisers' and sponsors' commercial rights to events.
- There is no objection to the fifth recommendation regarding the suggested ministerial power to withdraw the protected event status of an event. The exercise of any such power, as well as the initial declaration of an event's protected status, should involve a fair and transparent process whereby full public disclosure should be made of the reasons for decisions taken. Such reasons and decision-making by the relevant authorities should be in the public domain and should also be open to legal or other challenge, as this relates directly to the public interest element in the hosting of events, which is often used as a primary justification for *sui generis* commercial rights protection laws relating to events.

In respect of the second part of the fifth recommendation, it is suggested that while government might justifiably view South Africa's strict *sui generis* event legislation as attractive for event organisers to bring their international events to South Africa, it should be noted that such legislation is partly attractive to event organisers because it is much more strict and far-reaching than the legal protection that such event organisers are able to obtain from democratic legislatures elsewhere. The South African legislation has been criticised as being probably the most strict to be found anywhere in the world currently (even eclipsing the UK's 2012 London Olympics and Paralympic Games Act, 2006), and its constitutionality is yet to be properly tested before a South African court. It should also be noted that the implementation of such strict laws by event organisers may serve in future to significantly embarrass South Africa and its government, as happened in respect of the Bavaria beer ambush during the 2010 FIFA World Cup, when diplomatic relations between South Africa and the Netherlands government were strained as a result of the heavy-handed conduct of FIFA and the South African Police Services.

Finally, there remain concerns regarding the contents, legitimacy and constitutionality of the relevant South African anti-ambush marketing legislation. The DTI is encouraged to engage with such concerns in the interests of bringing our special event legislation (specifically the provisions of section 15A of the Merchandise Marks Act, as amended) in line with the foundational principles of our constitutional democracy, specific provisions of our Bill of Rights and first principles of law (including IP, competition and human rights laws).

Chapter 12: IP of the State

Chapter 12 should state more clearly the reasons why the government would either register (for patents, trademarks or designs) or seek to restrict the use (for copyright) of its works. One of the key objectives of granting IP-based monopolies is to incentivise private sector innovation and creativity. Therefore, IP protection for government works should only be sought in order to attain an important government objective (e.g. to prevent misuse of State symbols). Ultimately, government works are being created with taxpayers' money and the argument could be made that the general public should therefore be able to access such material without having to pay royalties. In recognition of this argument, governments around the world increasingly release their IP under open licences or altogether exclude (some or most) government works from the scope of IP protection.

Notably, Chapter 12 does not address the issue of government-supported patented inventions and their commercialisation. South Africa has recently passed the Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008 – patterned on the US Bayh-Dole Act – that has been widely criticised. In particular, it contains significant ambiguities (does the irrevocable and royalty-free licence include health, security and emergency needs) and omissions (provision of a research exception which can facilitate the free flow and exchange of information). The legislation and ensuing regulations have also been criticised for not being favourable to open source and open access applications of innovations; and for potentially falling foul of constitutional freedom of expression guarantees, including academic freedom.

Chapter 13: Outreach Programme

It is important to communicate the policy, strategy and legislation to stakeholders that are impacted by the policy and legislative framework. Education and awareness on IP matters need to be improved. However, it is crucial to develop an outreach programme that goes beyond merely advising entrepreneurs on how to best protect their inventions and creations through IP and enforce their rights. In other words, outreach programmes spearheaded by the State must cover the entire spectrum of issues discussed in the IP Policy and in this submission.

It would be a mistake to expend State resources on outreach programmes without first ensuring that the state has the appropriate capacity to meet the increased demand for State services likely to follow on an outreach programme.

In light of limited State resources, it may also be useful to first focus on the legal profession as knowledge of IP is still limited to a few experts. A good initial use of resources could be to ensure wider knowledge of IP amongst lawyers particularly amongst those who serve historically disadvantaged communities so that they are able to assist Small and Medium Enterprises in the strategic use of IP.

Chapter 14: Drivers of the IP Policy

The broad objectives of this chapter are acceptable.

Particular attention should be paid to our comments (concerning the considerations and evidence which should underlie any policy) made under chapter 10 above, as well as elsewhere in our submission.

Chapter 15: Enforcement of IP

In our view, the issue of enforcement – while being important – is a subsequent issue to creating topical and progressive IP regimes in our country. As is clear from the IP Policy and the comments contained in this submission, many areas of South Africa's current IP legislative framework are in urgent need of reform. Thus, overzealous enforcement, at least in some areas, may at present have undesirable consequences. For instance, it was mentioned above that a likely consequence of strict enforcement in the area of copyright is that many learners will be in a precarious situation.

Special care should be taken to avoid customs/border enforcement of patents and civil trademark violations, especially with respect to medicines. South Africa should mainly foster enforcement by allowance of private rights litigation with a balance of procedural protections for both patent holders and alleged infringers.

Regional enforcement arrangements should be considered carefully. Certain AU countries have adopted draconian anti-counterfeiting legislation and enforcement measures – these should not be imported into our rules.

Chapter 16: Overall Recommendations

As far as we are aware the current draft policy does not contain *overall recommendations*.

Chapter 17: Conclusion

As far as we are aware the current draft policy does not contain *conclusions*.

Concluding remarks

Our concluding remarks are confined to the following general areas:

The principles informing IP policy

- IP policy must be development-oriented, aimed to benefit all sectors of society, particularly the most vulnerable, and consistent with the fundamental rights under our Constitution.
- The policy should not under any circumstances endorse any more than the minimum requirements of the TRIPS Agreement and other international obligations to which South Africa is a party.
- All available flexibilities (drawn from TRIPS, Doha Declaration, and other international, foreign and domestic law sources) should be incorporated into the policy.
- In view of the severe public health impact of unexamined pharmaceutical patents, an express commitment is needed to the establishment of a patent examination system.
- IP laws and administration should comply with the requirements of the Bill of Rights.

Some urgent measures to be taken

- Further extensive public-wide consultation on this IP Policy, and on each legislative and policy draft emanating from this process.
- The establishment of a working group comprising government, academia and civil society, to advance the objectives of this policy process.
- The necessary investigations, and cost and impact assessments of the institution of an examination system.

Specific legislative and regulatory enactments

- The relevant IP legislation should be amended in line with the reforms suggested in this submission.

We view this IP Policy as the beginning of an important process of public participation which must result in a policy and legislation of which all South Africans can justifiably be proud. While the process itself will have to be extensive and rigorous, we cannot over-emphasise the urgency of this project. South Africans have waited for too long for the IP laws and policies that they deserve. Government must move with great expedition.

For our part, we are willing and able to make our contribution to this project.