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# Intellectual Property: benefit or burden for Africa?

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## Abstract

This paper highlights some of the issues affecting access to knowledge in South Africa and other African countries, as well as the implications of international intellectual property agreements, focusing mainly on copyright. It will show that the majority of these countries are struggling to meet the very basic requirements of international intellectual property agreements, yet some of them are being pressured by developed countries to adopt even stricter intellectual property regimes through the Intellectual Property Chapter or 'TRIPS-Plus' in Free Trade Agreements. The paper highlights the impact of some of the TRIPS-Plus provisions on education, libraries, and people with sensory-disabilities, as well as public health and development in general.

**Keywords:** Intellectual property; Copyright; Access to knowledge; TRIPS-Plus; Free trade agreements; Africa

## Introduction

Africa has 34 least-developed countries and 20 developing countries. They are all sovereign states, with different laws and jurisdictions.

South Africa is classified as a 'developing country' by the World Intellectual Property Organization. Although it has a high-tech, developed dimension, it has a much larger 'third-world' or 'developing' dimension, where half the population lives below the poverty line.<sup>1</sup> There is a high level of illiteracy, and 40 percent unemployment seriously affects development. 54 percent of the total adult population has not completed a general level of education,<sup>2</sup> while 42.5 percent of the total population is under the age of 19 years.<sup>3</sup> Access to information and education are vital for South Africa and the region. However, serious socio-economic factors, together with restrictive intellectual property laws, hamper the process. If South Africa, 'the Powerhouse of Africa' and most developed country in Africa, is burdened with such problems, consider how far greater the problems are for the rest of Africa.

## What is Intellectual Property?

Intellectual property refers to creations of the mind and is divided into two categories: "Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems, plays and computer programs, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances; producers of phonograms in their recordings; and those of broadcasters in their radio and television programs."<sup>4</sup>

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### The Intellectual Property Situation in Africa

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African countries have different priorities. For most, if not all of them, illiteracy, unemployment, lack of infrastructure and resources, famine, disease, conflict, crippling debt, and mere day-to-day survival are far more pressing issues than intellectual property, especially copyright.

The Western concept of copyright protection is foreign to many African countries, since collective ownership has been their tradition. In many countries, copyright laws were imposed and implemented under colonial rule and have not been updated to meet their current needs.

For industrial property (i.e. intellectual property excluding copyright), there is a cooperative agreement between the World Intellectual Property Organization (WIPO) and the African Regional Industrial Property Organization (ARIPO), the African Intellectual Property Organization (OAPI), as well as the African Regional Centre for Technology, which promote protection for rights-owners.<sup>5</sup> However, until recently there has been no copyright cooperation or harmonization in Africa. Some countries, like South Africa, have limited exceptions for education and libraries, whilst other countries have virtually none. The stricter the copyright law, the more non-compliance there tends to be.

To date, only eight countries (namely, South Africa, Zimbabwe, Kenya, Nigeria, Togo, Malawi, Zambia and Uganda) have reprographic rights organizations to clear copyright permissions, but not all of them are fully functional.

Current copyright regimes in Africa are inappropriate and fail to address the legitimate needs of education, libraries and people with visual and auditory disabilities. They restrict or prohibit access, thus making knowledge available to only those who can afford it.

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### Importance of Access to Information

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Article 19 of the United Nations Universal Declaration of Human Rights states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and

to seek, receive and impart information and ideas through any media and regardless of frontiers.<sup>6</sup>

The International Federation of Library Associations and Institutions (IFLA) and its initiative, Freedom of Access to Information and Freedom of Expression (FAIFE), state:

Freedom, prosperity and the development of society depend on education, as well as on unrestricted access to knowledge, thought, culture and information. This right to intellectual freedom is essential to the creation and development of a democratic society. The state of intellectual freedom in libraries is an important indication of the progress of democracy in a nation.<sup>7</sup>

The former South African Minister of Trade and Industry, Mr. Alec Erwin, stated:

Knowledge is not a commodity, and can never be one. Knowledge is the distillation of human endeavour, and it is the most profound collective good that there is... Education must embrace the intellectual, cultural, political and social development of individuals, institutions and nations. This 'public good' agenda should not be held hostage to the vagaries of the market."<sup>9</sup>

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### Copyright – A Barrier for Education and Libraries

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Copyright is a barrier to accessing information and exchanging knowledge in Africa. Below are some typical examples which educators, librarians and students are faced with, when applying domestic copyright laws in their countries. The pendulum has swung too far in favour of rights owners and consumers' rights have been eroded.

As sheet music may not be copied at all, a lecturer applies for permission to copy a few pages of music for a small group of students. The rights-owner demands a high fee and lays down restrictive conditions. His lecture is delayed, and finally, he has to use alternative material. Not surprising if he does not apply next time!

A distance learner has to pay high copyright fees for all his study material, as there are

no copyright exceptions. Unlike many developed countries, African countries have not been able to take advantage of the legal flexibilities in international intellectual property agreements, due to lack of resources to implement them into their domestic laws. As a result, there are no provisions for distance learners.

Copyright law prohibits a blind student from converting his textbook, or even a portion of it, into a more accessible format, e.g. Braille. He tries to access an electronic book but copyright technological protection measures block the 'text-to-speech' software. He tries to download an electronic article from an electronic database to email, but the licence prevents this, so he is unable to access the information via a voice-synthesizer. He cannot browse in the library, since there are no facilities or legal provisions for him to convert even a small portion to Braille. Copyright protection measures prevent him from exercising his fair use rights.

A deaf person has sign language as a first language, Zulu as a second language and English as a third language. She needs to translate and adapt information from various works, before converting it into a more visual format for study purposes. Copyright law prevents her from making any translations, conversions or adaptations before obtaining copyright permission and paying royalties. (More broadly, copyright affects translations into indigenous languages. A third of the world's languages are spoken in Africa.<sup>10</sup> Consider then, how copyright restrictions hamper translation and exchange of information for research and teaching purposes on the continent.)

A librarian is restricted from digitizing a valuable collection, which is fast deteriorating in condition, as copyright clearance is necessary for each item. Some rights owners are untraceable, some refuse permission, some charge high fees or lay down strict conditions. Should copyright restrictions lock up this valuable knowledge indefinitely?

Unfortunately due to lack of resources, libraries can only purchase one or two copies of well-used books. This means that thousands of students will use and no doubt,

damage these limited resources, since they are unable to purchase them for themselves. The copyright law prohibits a library from preserving the original by reproducing extracts or a section of a book for users to copy from (even if the material is for a short-term study assignment).

The spread of HIV/AIDS in sub-Saharan Africa has far exceeded the worst projections. It has retarded the transformation from illiteracy to literacy. The lack of access to information and education has been one of the major factors in the spread of this disease, and the pandemic itself has affected education in a very serious way. Making multiple copies of extracts or articles from copyrighted works is prohibited by copyright law. In such a catastrophic pandemic, surely the nursing sister needing to disseminate vital information to health-workers and other relevant groups, should be exempt from having to apply for copyright permission and pay licence fees? The urgency and need to distribute essential information for the public good *surely* outweighs commercial interests?

A rural teacher knows her class cannot afford the high fee to copy a few plays and they have no library, so she copies them anyway. She believes (rightly or wrongly) that cultural development in a developing country far outweighs the commercial interests of a multinational publisher that would not have had a sale anyway, because the price of the originals was excessive. (Forty-three percent of government schools in South Africa do not have electricity.<sup>11</sup> Only 19.8 percent have libraries or media centres.<sup>12</sup> The figure is far less in other African countries. The majority of schools, libraries and resource centres are poorly resourced. High book and journal prices, exchange rates and taxes make the acquisition of textbooks virtually impossible. Photostatted material provides an alternative for teachers and learners. However, copyright laws are very restrictive with regard to reproductions for teaching or library purposes.)

In rural areas, oral communication is the main source of information, but the print medium is essential for advancement to

literacy and education. A literacy facilitator therefore offers reading lessons to illiterate people in a shantytown. These people have no fixed addresses, so they cannot borrow from the downtown library. There is no electricity available, so they cannot make 'fair use' copies for themselves in terms of the copyright law. Copyright law prohibits her from making multiple copies for them at the downtown library. It also prevents her from making translations, adaptations or derivative works which would be appropriate for different age groups and different levels of literacy. These people can barely afford food and clothing, let alone pay for expensive books or copyright royalties. So what choice does she have? Make copies and modify works to educate, or perpetuate illiteracy?

Differences in copyright laws, copyright awareness and compliance also make cross-border exchange of information extremely difficult.

If a healthy bank balance, rather than balanced copyright legislation, is the only key to new and varied information, then how will African countries ever become developed?

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### Where is the Balance?

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The world-renowned organization, the Royal Society for the Encouragement of Arts, Manufactures and Commerce (RSA) in its recently launched Adelphi Charter on Creativity, Innovation and Intellectual Property, sets out the need for balance in its fundamental principles for global attention, as follows:

- a) The purpose of intellectual property laws is to enhance creativity and innovation;
- b) All intellectual property rights must be measured against the public interest;
- c) The public interest requires a balance to be struck between the monopoly rights implicit in intellectual property laws and the free competition that is essential for economic and creative vitality.

The Society also calls upon governments to adopt the 'Adelphi Public Interest Test' as follows:

- a) There must be a presumption against extending intellectual property;

- b) Change should be allowed only if it is shown to bring economic and social benefits;
- c) The burden of proof must lie with the advocates of change;
- d) Throughout there must be wide public consultation and a comprehensive, objective and transparent assessment of the costs and benefits."<sup>13</sup>

The WIPO Copyright Treaty also recognizes the need to "maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information."<sup>14</sup>

So where is the balance?

Information has value for rights-owners, but what about its value for the individual, for communities, society at large? There is no balance. Copyright has become a tollgate on the information super-highway. Developing countries *need* the information. Developed countries *control* the information. The knowledge and digital divides between the North and the South continue to widen.

IFLA states that "overprotection of copyright could threaten democratic traditions, and impact on social justice principles ... If copyright protection is too strong, competition and innovation is restricted, and creativity stifled."<sup>15</sup> In fact, too many restrictions may just be encouraging non-compliance.

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### Benefit or Burden?

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Is copyright a benefit or burden for African countries? Clearly, it is a burden for African countries. It is not working for Africans, but it is definitely working for developed countries. It has become a sophisticated income-protection mechanism for rights owners, particularly foreign corporations. Rights owners claim that copyright encourages creativity and provides an income for local authors. Yet, the main beneficiaries of copyright are foreign publishers, not authors nor Africans. In South Africa, apart from textbook authors who can earn up to 25 percent royalties on retail sales, authors can earn between 8 percent and 12 percent royalties, depending on various factors.<sup>16</sup> However, in practice, most authors earn less than 9 percent royalties on sales and very little

on copyright reproduction fees. This is hardly an incentive to encourage creativity.

Scholarly authors generally have to assign their rights to journal publishers (mostly foreign) who claim their royalties. In fact, African educational institutions pay several times for the same material. They pay for the research to be done, they pay for articles to be published in some journals, and they then subscribe to the printed journal and/or electronic version, and then pay copyright royalties over and over again, to make copies of their research articles to teach their students. Also, the majority of works used in tertiary institutions are foreign, and the bulk of royalties collected for reproductions are paid to foreign publishers.

Films, music, CDs, DVDs and e-resources are controlled by restrictive licences, which mostly override copyright law. Copyright fees are included in expensive subscriptions for e-databases, which are payable mainly to foreign rights-owners.

Copyright has become an economic burden for educational institutions and libraries in Africa.

Infringement in educational institutions is not generally with criminal intent. Very often communities cannot afford to purchase books or pay for copyright royalties, but they need the information to become literate and educated. In most African countries, there are few, if any, copyright exceptions for education and often the only way these communities can access information to get educated is to disregard the copyright laws. The stricter the laws, the more infringements there tend to be!

How is copyright benefiting local publishers and authors, if there is such a large outflow of currency to foreign publishers each year? How is copyright benefiting education, if information is over-protected, only accessible to the elite, or locked up altogether?

If copyright were serving its true purpose, then why is it so highly contested by civil society in developed countries and even challenged in constitutional courts?<sup>17</sup> There are many examples in the United States, the European Union and Australia, as well as ongoing debates on treaties in WIPO, for example, on broadcasting, patents and database protection.<sup>18</sup> It is not surprising then, if copyright is not working so well in the developing world.

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## International Pressures

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Despite the burden of inappropriate and restrictive domestic copyright laws, African and other developing countries have to adhere to very strict copyright rules and regulations through international agreements, which developed countries, like the United States, Britain and Japan did not have to, when they were in the developing stages. In fact, these countries actively used subsidies and protective tariffs to protect their infant industries, at the expense of other countries.<sup>19</sup> This situation is analogous to developed countries 'kicking away the ladder' from developing countries, which they themselves used to climb to the top.<sup>20</sup>

Developing countries are net importers of intellectual property. South Africa's research output, for example, is only 0.5 percent of global research.<sup>21</sup> It is less in other African countries. These countries are dependent on advanced countries for the bulk of their research and educational material.

Many of them were pressured into signing international intellectual property agreements even before some developed countries signed them. The US refused to sign the Berne Convention when it was growing its publishing industry. It in fact benefited greatly from other countries in the process. Only in March 1989, when it became a net exporter of intellectual property and began to derive huge economic benefits from it, did it become a signatory to the Berne Convention. Now it dictates how the rest of the world should protect and manage intellectual property.

In addition to current copyright barriers and serious problems in accessing information and exchanging knowledge, African countries are struggling to meet the very basic requirements of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, known as the TRIPS Agreement.

The TRIPS Agreement is one of the most significant achievements of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Signed by 124 nations, together with other multilateral trade agreements and the Agreement Establishing the World Trade Organization, TRIPS is the first comprehensive intellectual property agreement ever executed by most of the world's trading

nations. This is an international treaty which prescribes minimum standards for most forms of intellectual property regulation, including copyright, within all member countries of the World Trade Organization.<sup>22</sup> It also encompasses the clauses of the Berne Convention. TRIPS is legally enforceable and subject to the WTO dispute settlement system. Non-compliance can result in serious trade sanctions. The adopted standards mirror those in force in the industrialized countries. Developing countries therefore have to assume the heavy burden of introducing substantial intellectual property rights reforms.<sup>23</sup> The cost of implementing TRIPS is beyond most of these countries' economic means. They are constantly monitored by industrialized countries and blacklisting is always a threat. In fact, "in the six years since it came into force, there have been ever-increasing levels of concern and evidence of social, environmental and economic problems caused by the implementation of TRIPS. Little, if any, of TRIPS promised benefits of technology transfer, innovation and increased foreign direct investment have materialised."<sup>24</sup>

If that is not enough, some African countries are now being pressured to sign the General Agreement on Trade in Services (GATS),<sup>25</sup> as well as Free Trade Agreements with industrialized countries, e.g. the United States, the European Union and others. The United States and the European Union's Free Trade Agreements contain an Intellectual Property Chapter, hereinafter referred to as TRIPS-Plus. "The TRIPS-Plus concept covers both those activities aimed at increasing the level of protection for right holders beyond that which is given in the TRIPS Agreement, and those measures aimed at reducing the scope or effectiveness of limitations on rights and exceptions."<sup>26</sup> These Free Trade Agreements also force countries to ratify or accede to several other intellectual property related agreements, even if they have not reached the developmental stages to cope with these additional responsibilities and financial burdens.<sup>27</sup>

By now, all developing countries should have TRIPS-compliant intellectual property laws. However, many have experienced difficulty in achieving compliance. Least-developed countries have until 2013 to provide protection for trademarks, copyright, patents and other intellectual property under the World Trade Organization's agreement. However, they will not have to protect patents for pharmaceutical

products until 2016.<sup>28</sup> By adopting TRIPS-Plus, this whole process would be fast-tracked, causing even more socio-economic problems for these countries.

In recent years, Morocco,<sup>29</sup> Jordan,<sup>30</sup> Bahrain,<sup>31</sup> Chile,<sup>32</sup> Singapore,<sup>33</sup> and some Central American states,<sup>34</sup> as well as Australia,<sup>35</sup> have succumbed to this pressure and have adopted the TRIPS-Plus provisions in the Free Trade Agreement with the United States. They have all landed up with much stricter copyright laws.

For some time, the Southern African Customs Union (SACU) (consisting of South Africa, Namibia, Swaziland, Botswana and Lesotho) has been engaging in Free Trade Agreement negotiations with the United States, the European Union and other developed countries. SACU countries are also engaging in multilateral agreements, as well as bilateral agreements with other developing countries, including the Latin American trade bloc Mercosur, India and China.

The Agreement that was of most concern to SACU countries for a number of years was the US Free Trade Agreement. The United States were pressing for negotiations to be finalized by the end of 2006. The outcome of these negotiations is discussed later on in this paper.

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### **African Growth Opportunity Act (AGO) - Stepping Stone to a Free Trade Agreement?**

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Do the countries in the Southern African Customs Union (SACU) or any other African countries need a Free Trade Agreement with the United States? This is debatable, since many of them already enjoy duty-free markets for 95 percent of their exports through the African Growth Opportunity Act (AGO), which is a unilateral piece of legislation passed by the United States Congress in 2000.<sup>36</sup> To date, the United States has designated 37 countries for duty-free tariff treatment for certain products. These countries must have established, or be making progress towards, a TRIPS-compliant intellectual property regime. If these requirements are not met, they could be blacklisted or expelled from AGO.<sup>37</sup>

AGO is subject to annual review by the United States. Although the programme has been

extended until 2015, the United States could withdraw from it at any stage. Sub-Saharan Africa (a region of 48 countries with more than 643 million people) has long been a marginal player in global trade. It accounts for less than 2 percent of US merchandise imports. For those countries that have been participating in AGOA, there have been reasonable trade benefits. However, the main beneficiaries of AGOA are United States' companies, which are guaranteed preferential access in the region.

Lack of permanence and constant monitoring of participating countries, however, perpetuates dependence on the United States. AGOA is an obvious stepping-stone to a Free Trade Agreement, which would bind countries to a more permanent partnership with the United States. Countries could lock in AGOA benefits, boost confidence and attract foreign investment. However, unless a Free Trade Agreement accords developing countries the right space to respond, first and foremost, to their fundamental developmental needs, this step should not be taken, since poverty and inequality would just be intensified.<sup>38</sup>

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### What is a Free Trade Agreement?

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By definition, a Free Trade Agreement is a contractual arrangement which establishes unimpeded exchange and flow of goods and services between trading partners regardless of national borders.<sup>39</sup> As previously mentioned, the United States and European Union Agreements contain a TRIPS-Plus Chapter, which far exceeds all current international obligations for all types of intellectual property. It promotes the controversial United States Digital Millennium Copyright Act, the Sonny Bono Copyright Extension Act and aspects of the European Union Copyright Directive.

Developed countries promote TRIPS-Plus as being beneficial to developing countries. Yet, it extends the term of copyright, patent, and trademark protections, and expands the scope on what can be protected by intellectual property rights. It also eliminates traditional limitations and exceptions, which are especially intended to promote the public interest.

Multilateral trade negotiations through the World Trade Organization have become more complex,

since developing countries have far different interests from those of the industrialized countries. Each round takes much longer to negotiate. By pursuing free trade agreements outside this forum, developed countries can aggressively drive their global trade policies. The assumption is that what they do not get in multilaterals, they will get in bilaterals.

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### Harmonization vs. Competition

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Developed countries promote TRIPS-Plus as a necessary mechanism for global intellectual property harmonization. However, harmonization to date has been very limited. The United States and the European Union may have the same copyright term but their copyright laws are far from harmonized. Just one example, the European Union has strong protection of authors' moral rights, whilst the United States does not. In the Australian/US Free Trade Agreement there has not been harmonization either, for example, the periods covered by copyright extension, fair dealing vs. fair use, standard of originality and moral rights issues.<sup>40</sup>

The US Free Trade Agreements are far from free or fair. Countries that have already signed these Agreements have had to forfeit a great deal to gain access to global markets. They have had to adopt much stricter copyright regimes, with a 20-year extended copyright term. As a result, Morocco's copyright regime is anomalous with most other African countries. This has an impact on education, libraries and cross-border exchange of information. How can this agreement be *fair*, if developed countries are the main beneficiaries? How can it be *free*, if it will drastically increase the outflow of currency to developed countries? Are Free Trade Agreements between developed and developing countries true agents of harmonization? No, they are definitely not. In fact, they are used as competition tools amongst rich countries and as bargaining tools against poor countries.

Agricultural and other trade benefits come with a high price tag for developing countries desperate to enter global markets. They become pawns in the 'carrot and stick' games played by rich countries. Such unequal bargaining power can result in significant restrictions remaining in place, e.g. the European Union's controversial

agricultural policy and the United States' anti-dumping policy. Rich countries promote free trade, yet demand higher levels of IP protection, whilst jealously protecting their own agricultural markets, where developing countries clearly have a comparative advantage.<sup>41</sup> This so-called 'global harmonization' can best be described as 'Americanization', 'Europeanization' or a form of 'Knowledge Colonialism or Imperialism'.

Even though TRIPS-Plus provisions are strongly criticized by their own citizens, especially in the United States, developed countries entrench their TRIPS-Plus regimes through bilateral Trade Agreements with other countries. If developing countries negotiate disproportionate concessions in bilateral Agreements, it may be difficult to rectify the situation multilaterally in the WTO talks. They will no longer have anything of substantial interest to trade away, in exchange for the removal of remaining significant barriers by developed countries.<sup>42</sup>

If negotiations were instead to remain in the WTO with no bilateral free-trade agreements, the smaller countries could at least band together to increase their bargaining power. The result would be a more equal, and quite likely, closer to total elimination of trade barriers, which would benefit all countries.<sup>43</sup> Unfortunately, rich, powerful countries drive the process.

What is of concern is that "Free Trade Agreements might divert the world away from multilateral trade liberalization and lead to the development of large, competing trading blocs such as the United States and the Western Hemisphere; the European Union and nearby countries; and Japan and its trading partners in Asia and the Pacific Rim, a result that would be inferior to multilateral free trade", and detrimental to developing countries.<sup>44</sup>

Unfortunately, governments negotiate Free Trade Agreements behind closed doors, with little, if any input, from other stakeholders. The contents are confidential and therefore not in the public domain. It is believed that the Free Trade Agreement offered to the Southern African Customs Union (SACU) by the United States was similar to the Australian/United States Free Trade Agreement, which was signed during 2004. This latter Agreement has been strongly criticized by educators and librarians in Australia, a developed

country, but a net importer of intellectual property.<sup>45</sup>

Would a similar agreement be fair for developing and least-developed countries in Africa? How could African researchers, teachers and librarians accept an Agreement, which would clearly exacerbate the problems of accessing information, and exchanging knowledge on the African continent? The United States is a major global exporter, whilst Africa as a whole, accounts for less than 2 percent of global trade.<sup>46</sup> How could this possibly be an equal partnership?

In South Africa, various consumer groups and the educational sector made submissions to the South African Government, objecting to the inclusion of TRIPS-Plus and other controversial clauses in any Free Trade Agreements.

The outcome of the SACU countries' Free Trade Agreement negotiations with the European Free Trade Association (EFTA), consisting of Iceland, Norway, Switzerland and Lichtenstein, was the successful exclusion of the chapters on intellectual property, investment and competition from the Agreement.<sup>47</sup>

Discussions with the European Union on free trade issues have stalled for the moment.

With regard to the SACU/US Free Trade Agreement, it was a requirement of US law that its country's trade negotiators bring back US standards of intellectual property protection through a signed Free Trade Agreement with the SACU countries.<sup>48</sup> During 2006, however, the SACU countries decided not to enter into a Free Trade Agreement with the United States, because of insurmountable differences between the negotiating parties on various issues relating to the Agreement. This is seen as a positive step for the region.

South Africa's chief trade negotiator, Mr. Xavier Carim, had said informally that the US Free Trade Agreement took SACU countries "into territory where they were not prepared to go. He said SACU countries would not agree to anything that impinged on their development policies".<sup>49</sup>

It is believed that the United States will now pursue Free Trade Agreements with other African countries.

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### Impact of TRIPS-Plus on African Countries

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Free Trade Agreements with developed countries cover a wide range of issues, many controversial, which go far beyond the ambit of this paper. I will therefore focus on a few aspects of the TRIPS-Plus Chapter in the US Free Trade Agreement, which has serious implications for education and libraries, as well as for people with visual and auditory disabilities, in Africa.

TRIPS-Plus provisions impose a 20-year extension of the copyright term, far exceeding the minimum standards in international agreements, which most African countries have adopted. It clearly distorts the traditional balance of interests between copyright owners and users, fundamental to the concept of intellectual property. Education, research, access to knowledge and development policies would be seriously affected.

Large foreign corporations would have control over knowledge and cultural heritage for a further two decades. Consumers would have less material to use, and twenty more years' royalties to pay, mainly in foreign currency. The outflow of money would be detrimental to the economies of these countries, all net importers of intellectual property. The increased costs would place a huge financial burden on already under-resourced educational institutions.

Public access to books, films and music would be limited for a far longer period. Works that should already be in the public domain would come under protection for that extended period. The burden of copyright regulation would therefore extend to works, whether or not authors wanted them further protected, or commercially exploited. Since only about 4 percent of copyrighted works, more than twenty years old, are commercially available, this would lock up 96 percent of 20th century culture to benefit 4 percent.<sup>50</sup> This would clearly shrink the public domain.

Creative authors would have far less works to use as building blocks in making new creations. The creation of new works is dependent on a rich and vibrant public domain. Problems in accessing and exchanging information, particularly for educational purposes, would be exacerbated. TRIPS-Plus makes no distinction between research, education and entertainment, so dead

authors, film makers and songwriters would all be given an extra twenty years of control over their works – indeed from the grave.<sup>51</sup>

Copyright law is a barrier to digitization projects in educational institutions, libraries (including legal deposit libraries) and archives, as adaptations and conversion to a new format require copyright clearance for every item. Copyright clearance is time-consuming and tedious, especially when rights-owners are difficult to trace. If permission is denied, there would be gaps in collections and access to these valuable works would not be possible. An extended copyright term would therefore have additional administrative and major financial implications for these institutions.

Only 7 percent of South Africans have access to the Internet.<sup>52</sup> Only 12.3 percent of government schools have computers for learning purposes.<sup>53</sup> These figures are much lower in other African countries. TRIPS-Plus provisions would therefore impact significantly on the small percentage of Africans who have access to electronic media. The availability of online material would be significantly reduced or blocked under TRIPS-Plus.

In the case of computer software, even more so than literature, music, films and television, the length of time for which copyright would subsist under TRIPS-Plus, would absurdly exceed the period for which it would be commercially useful.<sup>54</sup>

To date, cross-border agreements have had to be negotiated to facilitate educational projects in Africa, because of different copyright laws and jurisdictions. Shrinking the public domain and extending the copyright term will only create more hurdles for those trying hard to educate African people.

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### Anti-Circumvention Technologies

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The TRIPS-Plus provisions in the US Free Trade Agreement propose anti-circumvention measures that exceed countries' obligations under the World Intellectual Property Organization (WIPO). Ironically, these measures were strongly objected to when they were included in the US Digital Millennium Copyright Act and they remain a controversial issue in the United States.<sup>55</sup> Yet, they are included in the US Free Trade Agreement. These

protection measures ban acts of circumvention and the distribution of tools and technologies used for circumvention. Rights owners have the power to unilaterally eliminate fair use rights, stifle research and block text-to-speech software for blind people. They can institute differential pricing using technological control measures, such as lockup or protection codes on electronic books and CDs, and content-scrambling or regional coding systems on DVDs. These controversial laws can also create monopolies over devices and equipment that handle digital media.<sup>56</sup> Technological restrictions are employed on a growing number of consumer products such as DVDs, printer toner cartridges, and garage door openers, etc., that prevent competitors from building interoperable components.<sup>57</sup> They have the potential to lock up information long after the copyright term has expired. They also have the potential to lock up indigenous knowledge behind electronic databases controlled by multinational corporations operating content industries in developing countries. They are also an impediment to the development of software industries and open access projects in developing countries. They are also capable of creating barriers for ICT solutions in developing countries. The technological restrictions protected by anti-circumvention laws erode and infringe the public's rights.<sup>58</sup>

TRIPS-Plus also strongly regulates Internet Service Providers, even for legitimate purposes. This could place unreasonable responsibilities on educational institutions and libraries in the management of their servers. In some instances, this could impact on freedom of expression, especially where larger corporations unilaterally decide what should be removed from servers. Smaller entities could be open to abuse, harassment or closure by powerful corporations.<sup>59</sup> In this way, large corporations maintain their control over information.

Developing countries must therefore resist anti-circumvention laws, since they have a serious impact on civil liberties, innovation, scientific research and competition. They restrict or even block legitimate fair use and copyright exceptions, allowed in domestic copyright law.

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### TRIPS-Plus and Public Health

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The Doha Declaration on the TRIPS Agreement and Public Health at the World Trade Organization<sup>60</sup>

recognized that the TRIPS Agreement, as an international instrument for the protection of intellectual property, should operate in a manner that is supportive of and does not run counter to the public health objectives of all countries.<sup>61</sup> The UK Commission on Intellectual Property Rights<sup>62</sup> explicitly affirmed the DOHA Declaration.<sup>63</sup> It encouraged developing countries to use compulsory licensing and generic competition, to increase access to essential medicines.

Apart from affecting access to information, including health information, TRIPS-Plus also erodes the DOHA Declaration by eroding TRIPS' legal exceptions. It limits the ability of weaker bilateral or regional partners to promote technological innovation, facilitate the transfer and dissemination of technology, take necessary measures to protect public health and take appropriate measures to prevent the abuse of intellectual property rights by patent holders.<sup>64</sup> It restricts generic drug competition and the export of generic drugs to other countries. Sub-Saharan Africa has more than 70 percent of all cases of HIV/AIDS in the world.<sup>65</sup> If TRIPS-Plus were adopted, public health in this region would be seriously compromised, putting millions of lives at risk.

TRIPS-Plus expands patent protection, which is a perfect way for international corporations to increase monopoly protection, especially in the pharmaceutical field. It also restricts exclusion of inventions from patentability, for example, software, business methods and life forms. This would counter any exclusion clauses in the patent laws of South Africa and other African countries.

By advocating TRIPS Plus, the United States is betraying its public commitment and the international consensus reached at Doha to assist developing countries fulfil their obligation to protect public health. It is arbitrarily interfering with developing countries' good faith efforts to improve and lengthen the lives of their citizens. It should in reality be promoting flexibility in determining appropriate levels of national patent protection, rather than making access to United States markets conditional upon adoption of TRIPS-Plus.<sup>66</sup>

African countries need to prioritize public health and development policies over private commercial interests. They must resuscitate and implement

the DOHA Declaration and TRIPS flexibilities as soon as possible.

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### Should Africa Adopt TRIPS-Plus?

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TRIPS-Plus is all about protection and extension of monopolies and anti-competition. It therefore has an anomalous position in the Free Trade Agreement. Adopting any of the TRIPS-Plus provisions in Africa, would substantially limit traditional private copying rights, fair use privileges, legitimate library and archival functions and scientific research. It would seriously compromise public health and impact negatively on their economies and development policies. It would intensify poverty and inequality.

How would developing countries benefit from laws that overly-protect foreign knowledge product and hinder growth of fragile domestic knowledge industries?<sup>67</sup> How can they possibly benefit if the concentration of wealth in the North is increased, at their expense?

TRIPS-Plus provisions also have serious implications for innovation, privacy and competition. They would also dramatically expand the scope of copyright to permit copyrighting of facts and data, which would clearly restrict access to information in the public domain. A vast universe of technical and scientific data, as well as large classes of facts, such as compilations, would be roped off from the public. This would be most damaging to education and libraries.<sup>68</sup>

TRIPS-Plus provisions undermine democracy and national sovereignty and contradict the clear will of the public.<sup>69</sup> By including this Chapter in any Free Trade Agreement, all chances of developing countries adopting the flexibilities in international agreements would be permanently overridden. The door to better access to global knowledge would effectively be 'slammed in their faces'.

Intellectual property protection cannot be seen as an end in itself. Harmonization of intellectual property laws, whether through multilateral or bilateral agreements, cannot lead to higher protection standards in all countries, irrespective of their levels of development.<sup>70</sup>

It would therefore be more appropriate for African countries to reject the TRIPS-Plus Chapter and to continue supporting the WIPO Development

Agenda,<sup>71</sup> proposed by Argentina and Brazil on behalf of fourteen developing countries, which include the Africa Group. They should also support the Access to Knowledge Treaty (A2K),<sup>72</sup> which consumer groups, civil societies, IFLA and libraries around the world are calling for through WIPO.

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### Copyright Cooperation in Africa

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As rights-owners tighten their control over information, African librarians and educators have to take up the challenge to protect access to information and promote exchange of knowledge. To address this, some form of copyright cooperation is necessary on the continent.

In 2004, the Southern African Development Community (SADC),<sup>73</sup> and the Standing Conference for Central, Eastern and Southern African Library Associations (SCECSAL) in Uganda, supported a recommendation to establish an African Copyright Forum, to address copyright issues and cooperation in Africa.

An international conference was held in Kampala, Uganda, from 28–30 November 2005, with more than 130 delegates attending from 23 countries. The conference was co-sponsored by the Commonwealth of Learning and IFLA, via the National Library of Uganda and the Ugandan Library Association. The conference finale was the establishment of the 'Africa Copyright and Access to Information Alliance', which has subsequently been renamed 'African Access to Knowledge Alliance' (AAKA).

A number of international funding organizations have expressed interest in assisting this new Alliance (AAKA). Once formally registered, AAKA will work closely with the Electronic Information for Libraries Network (eIFL.net) and the Canadian-based Commonwealth of Learning. An academic from Wisconsin-Milwaukee University has offered to assist AAKA with research and legal assistance on a 'pro bono' basis. AAKA will provide advice and assistance to African countries when reviewing their copyright laws and will strongly promote the adoption of legal limitations and exceptions into their domestic laws. It will also encourage educational and library sectors to be involved in the legislative process when their countries review their copyright law. To date, these important stakeholders have not been

included in the legislative process. As a result, rights-owners have pressed for the strictest laws, without addressing the needs of education or libraries, e.g. in Ghana, Cote d'Ivoire, Botswana and Mozambique. Swaziland recently indicated that it would now include librarians and educators in discussions before it finalized its Draft Copyright Bill. Since the conference in Kampala, discussions have taken place between AAKA and the Ugandan Law Commission regarding its new Copyright Act, which unfortunately does not address the needs of education, libraries and persons with disabilities. In time, AAKA will also participate in regional and international fora, such as the World Intellectual Property Organization and the World Trade Organization, to present and debate copyright issues on behalf of its member countries.

### Challenges and Recommendations

To address the *very real* problems of access to knowledge in Africa, I earnestly recommend the following:

1. The TRIPS-Plus proposals are *not* the answer for African countries. As developed countries were given unrestricted time and space to reach their current levels of development, so developing countries today should be allowed to enjoy similar privileges. African countries must strongly resist pressure to adopt TRIPS-Plus or other proposals that strike at the very heart of their economic and development policies. They must not be coerced into the economically skewed trade liberalization programmes of rich countries.
2. International and national intellectual property laws need to be reviewed, liberalized and harmonized, to facilitate, *not restrict*, access to knowledge; to encourage innovation and scientific research; to protect indigenous knowledge; to accelerate development; and to enable cross-border exchange of information. In this way, the balance between the *just* demands of rights-owners *and* consumers would be restored.
3. Legal flexibilities in international agreements, including provisions for education, libraries and people with visual, auditory and other perceptual disabilities, must be incorporated into national laws as soon as possible.
4. To address 'orphan works', where rights-owners are untraceable, African countries should consider legislation similar to that being proposed in the United States.
5. Public-funded research should be made more accessible through open access initiatives.
6. Alliances should be established with international organizations, addressing issues affecting access to knowledge in developing countries.
7. African countries need to work together to find an appropriate copyright solution that works for Africa.

In conclusion, I urge readers of this paper, to challenge developed countries on this issue and to challenge their own Governments to do the right thing. They should encourage them to rather give full support to the Development Agenda for WIPO, the Access to Knowledge Treaty (A2K) and other pro-active initiatives to help their countries fast-track their status from 'developing' to 'developed', so that they will *all* be able to participate as *equal* partners on the global stage.

What a better world that would be for all of us.

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