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#### **Free Trade Agreements and TRIPS-plus: implications for developing countries in Africa**

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**Abstract:** This paper will focus mainly on issues affecting access to knowledge in African countries and implications of international intellectual property agreements. It will show that the majority of these countries are struggling to meet the very basic requirements of the TRIPS Agreement, yet they are now being pressured by developed countries, to adopt even stricter intellectual property regimes through the IP Chapter or "TRIPS-Plus" in Free Trade Agreements. My paper will highlight the impact of Free Trade Agreements and TRIPS-Plus on education, libraries, people with sensory-disabilities, public health and development in general.

#### **INTRODUCTION**

As this is a very broad topic, my paper will focus on the following aspects:-

- The current intellectual property situation in Africa
- Copyright as a barrier for education
- International pressures
- The African Growth Opportunity Act (AGOA)
- Free Trade Agreements and the TRIPS-Plus Chapter
- "Global harmonization" of intellectual property
- The impact of the "TRIPS-Plus" on Africa
- Challenges and recommendations for Africa

## INTELLECTUAL PROPERTY BURDEN ON DEVELOPING COUNTRIES

Developing countries have had 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 infant industry and various kinds of protective tariffs and subsidies, at the expense of other countries.<sup>1</sup> This is analogous to developed countries 'kicking away the ladder' from developing countries, which they themselves used to climb to the top.<sup>2</sup>

Developing countries are net importers of intellectual property. South Africa's research output, for example, is only 0.5% of global research.<sup>3</sup> It is less in other African countries. These countries are dependant 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 United States only signed international agreements when it became a net exporter of intellectual property and derived huge economic benefits from it.

The title of this paper makes reference to 'developing' countries, but in fact Africa has thirty-four least-developed countries and twenty developing countries. They are all sovereign states, with different laws and jurisdictions.

My country, South Africa, is a developing country, with a high-tech first-world dimension, within a larger third-world dimension, where half the population lives below the poverty line.<sup>4</sup> There is a high level of illiteracy and unemployment which seriously affect development. 54% of the total adult population has not completed a general level of education.<sup>5</sup> 42.5% of the total population is under the age of 19 years.<sup>6</sup> Education is vital for development. Serious socio-economic problems and restrictive copyright laws affect access to information.

If South Africa, the most developed country in Africa, is burdened with such problems, consider how far greater the problems are for the rest of Africa. Priorities differ considerably in African countries. For some countries, conflict, illiteracy, unemployment, lack of infrastructure, lack of resources, famine, disease, crippling debt, and mere day-to-day survival are far more pressing issues than 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 co-operative 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.<sup>7</sup> However, to date, there has been no copyright co-operation 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.

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 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.

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>8</sup>

The International Federation of Library Associations and Institutions (IFLA) and its initiative, Freedom of Access 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>9</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>10</sup>

## **COPYRIGHT IS A BARRIER FOR EDUCATION AND LIBRARIES**

Copyright is a barrier to accessing knowledge and cultural treasures in Africa. Below are some practical problems which educators, students and librarians encounter when applying domestic copyright laws: -

- a) A lecturer applies for permission to copy ten pages of music for ten students. This is not a tall order. 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!
- b) A distance learner has to pay high copyright fees for all his study material, as the limited exceptions for education in his country's copyright law only apply to a classroom situation and cannot be applied to his situation.

- c) A blind student tries to convert his textbook, or even a portion of it, into a more accessible format, e.g. Braille, but there are no provisions for people with disabilities in his country's copyright laws. He tries to access an electronic book but copyright protection measures block the "text-to-speech" software. Anti-circumvention technologies prevent him from exercising his fair use rights.
- d) A deaf person has sign language as a first language, Zulu as a second language and English as a third language. She first needs to translate the information and then convert it into a more visual format for study purposes. She is prevented from doing this, since copyright law prevents her from making any translations, conversions or adaptations before obtaining copyright permission and paying royalties. A third of the world's languages are spoken in Africa.<sup>11</sup> Copyright is a huge barrier when translations or adaptations are required for reading and studying, and for teaching purposes.
- e) 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?
- f) 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. People are abandoning educational goals to care for the dying and cope with serious problems at home. HIV/AIDS has ravaged Southern African societies, striking down wage earners, teachers and professionals in all sectors and leaving behind an estimated 11 million AIDS orphans in the region. Eight out of every ten children in the world whose parents have died of AIDS live in sub-Saharan Africa.<sup>12</sup>

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 royalties? In this instance, the need to distribute essential information for the public good *surely* outweighs commercial interests?

- g) 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 multi-millionaire publisher, who would not have had a sale anyway, because the price of the originals was excessive.
- h) Oral communication is the main source of information in rural areas, but the print medium is essential for advancement to literacy and education. A literacy facilitator therefore offers reading lessons to illiterate people in a shanty town.

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 derivative works to educate, or perpetuate illiteracy?

- i) Rural schools, libraries and resource centres are poorly resourced. Only 19.8% of government schools in South Africa have libraries or media centres.<sup>13</sup> The percentage is far less in other African countries. 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 educational and library purposes.
- j) Differences in copyright laws, copyright awareness and compliance also make cross-border exchange of information extremely difficult.

If a healthy bank balance is the only key to new and varied information, then how will African people ever progress from illiteracy to literacy? How will they ever help their countries move from the status of 'developing' to 'developed'?

## **IS COPYRIGHT WORKING?**

Copyright is indeed 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 earn up to 25% royalties on retail sales, authors can earn between 8% and 12% royalties, depending on various factors.<sup>14</sup> In general, however, most authors earn less than 9% royalties. This is hardly an incentive to encourage creativity.

Scholarly authors 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 generally override copyright law. Copyright fees are included in expensive subscriptions for e-databases, which are payable mainly to foreign rights-owners. So how is copyright benefitting local publishers and authors in developing countries?

If copyright were serving its true purpose, then why are *developed* countries still challenging it so vigorously? It is not surprising then, that it is not working in the developing world.

Infringement is not always with criminal intent. Very often communities cannot afford to purchase books or pay for copyright royalties, but they need the information and knowledge to become literate and educated. In many instances, disregarding the copyright law is the only way they can access information and gain knowledge. This clearly shows that the current international copyright system is not working in Africa.

### **WHERE IS THE BALANCE?**

The world-renowned organisation, the Royal Society for the Encouragement of Arts, Manufactures and Commerce 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>15</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>16</sup>

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 divide between the North and the South continues 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>17</sup> In fact, too many restrictions may just be encouraging non-compliance.

### **INTERNATIONAL PRESSURE**

In addition to current copyright barriers and serious problems in accessing information and 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. This is an international treaty which prescribes minimum standards for most forms of intellectual property regulation, including copyright, within all member countries of the WTO.<sup>18</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.

If that is not enough, developing countries are now being pressured to sign the Agreement on General Trade in Services (GATS)<sup>19</sup>, as well as Free Trade Agreements with industrialized countries, e.g. the United States, the European Union and others. The U.S. and EU Free Trade Agreements contain an intellectual property chapter, known 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>20</sup> These Free Trade Agreements also force them to sign further intellectual property related agreements, even if they have not reached the developmental stages to cope with these additional responsibilities and financial burdens.

Developing countries have until 2006 to ensure that their intellectual property laws are TRIPS-compliant. Many are far from meeting this deadline. Least-developed countries have until 2016 to address pharmaceutical and related issues to meet their TRIPS commitments.<sup>21</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>22</sup>, Jordan<sup>23</sup>, Bahrain<sup>24</sup>, Singapore,<sup>25</sup> Australia, Chile<sup>26</sup> and some Central American states<sup>27</sup> have succumbed to this pressure from developed countries.

For some time, the Southern African Customs Union (SACU) (consisting of South Africa, Namibia, Swaziland, Botswana and Lesotho) has been engaged 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. As a result, countries could find themselves in opposing trading blocs, in time.

### **AFRICAN GROWTH OPPORTUNITY ACT (AGOA)**

Do the countries in the South African Customs Union (SACU) or 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% of their exports through the African Growth Opportunity Act (AGOA), which is a unilateral piece of legislation passed by the United States Congress in 2000.<sup>28</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 AGOA.<sup>29</sup>

AGOA 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% of U.S. 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. Whilst U.S. exports to Africa form only about 1% of the total U.S. exports, it exports nearly 80% more to sub-Saharan African than to all the former Soviet republics and Eastern European countries combined.<sup>30</sup>

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>31</sup>

## **WHAT DOES A FREE TRADE AGREEMENT MEAN FOR AFRICAN COUNTRIES?**

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>32</sup> The United States and European Union Agreements contain an intellectual property (IP) Chapter, known as "TRIPS-Plus", 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 unashamedly 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 restrictions, which are especially intended to promote the public interest.

Multilateral trade negotiations through the World Trade Organization (WTO) 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.

## **HARMONIZATION vs. COMPETITION**



TRIPS-Plus is promoted as a necessary mechanism for global intellectual property harmonization. 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/U.S. 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>33</sup>

The U.S. 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 twenty 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. There is clear duplicity on the part of rich countries in preaching free trade, while jealously protecting their agricultural markets, where developing countries clearly have a comparative advantage.<sup>34</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 craftily 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>35</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>36</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>37</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 between the Southern African Customs Union (SACU) and the United States could be similar to the Australian Free Trade Agreement with the United States, which was signed during 2004. This Agreement has been strongly criticized by educators and librarians in Australia, a developed country, but a net importer of intellectual property.<sup>38</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% of global trade.<sup>39</sup> The percentage is far less in the SACU countries. How could this possibly be an equal partnership?

Various consumer groups and the educational sector in South Africa have made submissions to the South African Government, objecting to the inclusion of an IP Chapter and other controversial clauses in any of the Free Trade Agreements.

The SACU countries did succeed in excluding the chapters on intellectual property, investment and competition from the Agreement with the European Free Trade Association (EFTA), consisting of Iceland, Norway, Switzerland and Lichtenstein.<sup>40</sup> Discussions with the European Union on this issue have been stalled for the moment. After a long lapse, negotiations with the United States resumed in October 2005 and the target date for completion of the negotiations has been set for December 2006.<sup>41</sup>

South Africa's chief trade negotiator, Xavier Carim, has said informally that the Free Trade Agreements take SACU countries "into territory where they are not prepared to go". Anything that impinges on the SACU countries development policies is not negotiable.<sup>42</sup>

It will not be an easy task for SACU countries to challenge the aggressive trade policies of the United States. However, for the sake of education and libraries at least, it is hoped that they will succeed in rejecting controversial clauses, including the IP Chapter or TRIPS Plus.

## **IMPACT OF IP CHAPTER OR TRIPS-PLUS ON AFRICAN COUNTRIES**

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 IP Chapter in the US Free Trade Agreements, for example, which have serious implications for education and libraries, as well as for people with visual and auditory disabilities in Africa.

The IP Chapter imposes a twenty 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 twenty years. 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 further twenty years. Works that should already be in the public domain would come under protection for a further twenty years. 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% of copyrighted works, more than twenty years old, are commercially available, this would lock up 96% of 20th century culture to benefit 4%.<sup>43</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. The IP Chapter 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>44</sup>

Copyright law is a barrier to digitization projects in educational institutions, libraries and archives, as adaptations and conversion to a new format requires copyright clearance for every item. An extended copyright term would therefore have additional administrative and major financial implications for these institutions.

The IP Chapter would also significantly impact on the already small percentage of Africans who have access to electronic media. Only 7% of South Africans have access to the Internet.<sup>45</sup> 43% of the government schools do not have electricity.<sup>46</sup> Only 12.3% of government schools have computers for learning purposes.<sup>47</sup> These figures are much lower in other African countries.

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>48</sup>

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

## **ANTI-CIRCUMVENTION TECHNOLOGIES**

The TRIPS-Plus provisions in the U.S. Free Trade Agreement propose anti-circumvention measures that exceed countries' obligations under the World

Intellectual Property Organization (WIPO). They 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 like lockup or protection codes on electronic books, CDs, and content-scrambling systems on DVDS. These controversial laws can also create monopolies over devices and equipment that handle digital media.<sup>49</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>50</sup> They have 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. Since the technological restrictions protected by anti-circumvention laws do not track the balance struck under copyright law, they circumvent the public's rights.<sup>51</sup>

TRIPS-Plus also strongly regulates Internet Service Providers, even for legitimate purposes. They are required to pull down infringing material from their networks upon notification by the copyright owner. This would have an impact on freedom of expression and smaller entities would be open to abuse, harassment or closure by powerful corporations.<sup>52</sup> Again, larger corporations have 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.

## **TRIPS-PLUS AND PUBLIC HEALTH**

The Doha Declaration on the TRIPS Agreement and Public Health at the World Trade Organization<sup>53</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>54</sup> The UK Commission on Intellectual Property Rights<sup>55</sup> explicitly affirmed the DOHA Declaration.<sup>56</sup> It encouraged developing countries to use compulsory licensing and generic competition, to increase access to essential medicines.

TRIPS-Plus, however, erodes the DOHA Declaration by eroding TRIPS 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>57</sup> It restricts generic drug competition and the export of generic drugs to other countries. Sub-Saharan Africa has more than 70% of all cases of HIV/AIDS in the world.<sup>58</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 would in fact be betraying its public commitment to assisting developing countries fulfill their obligation to protect public health. 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>59</sup>

African countries must prioritize public health and development policies over private commercial interests. They must fully implement the DOHA Declaration and TRIPS flexibilities as soon as possible.

### **SHOULD AFRICA ADOPT TRIPS-PLUS?**

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>60</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>61</sup>

The IP Chapter's extreme provisions undermine democracy and national sovereignty and contradict the clear will of the public.<sup>62</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>63</sup>

It would therefore be more appropriate for African countries to reject the IP Chapter and to continue supporting the WIPO Development Agenda<sup>64</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>65</sup>, which consumer groups, civil societies, IFLA and libraries around the world are calling for through WIPO.

## ESTABLISHMENT OF AN AFRICAN COPYRIGHT FORUM

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 co-operation is necessary on the continent.

To this end, in 2004, I recommended to the Southern African Development Community (SADC)<sup>1</sup>, and to the Standing Conference for Central, Eastern and Southern African Library Associations (SCECSAL) in Uganda, that an African Copyright Forum be established to address copyright issues and copyright co-operation in Africa. This Forum will be established at an international conference in Kampala, Uganda, from 28-30 November 2005.

## 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 and auditory 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 the proposed Public Domain Enhancement Act in the United States.
5. Public-funded research should be made more accessible through open access initiatives.

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<sup>1</sup> SADC includes 14 developing countries, namely, Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe

6. Alliances should be established with international organizations, addressing issues affecting access to knowledge.

In conclusion, I urge readers of this paper, whose countries *are* pressuring developing countries to adopt TRIPS-Plus in Free Trade Agreements, to *challenge* their Governments on this issue. 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 these 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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