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MEASURING & VALUING SOUTH AFRICA'S CULTURAL & CREATIVE ECONOMY



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Introduction

List of Acronyms:

ACH: Arts, Culture and Heritage

AKS: African Knowledge Systems

ARR: Artist Resale Right

BASA: Business and Arts South Africa

CCIs: Cultural and Creative Industries

CCIFSA: Cultural and Creative Industries Federation of South Africa

CIHS: Cultural Industries Growth Strategy

DAC: Department of Arts and Culture

DBE: Department of Basic Education

DHE: Department of Higher Education

DIRCO: Department of International Relations and Cooperation

DOC: Department of Communication

DSBD: Department of Small Business Development

DS&T: Department of Science and Technology

DTI: Department of Trade and Industry

IK: Indigenous Knowledge

IP: Intellectual Property

IPR: Intellectual Property Rights

NAC: National Arts Council

NFVF: National Film and Video Foundation

NHC: National Heritage Council

NPO: Non-Profit Organisation

PANSA: Performing Arts Network of South Africa

PMG: Parliamentary Monitoring Group

SABC: South Africa Broadcasting Cooperation

SABDC: South African Book Development Council

SAMA: South African Museums Association

TK: Traditional Knowledge

TCE: Traditional Cultural Expressions

UNESCO: United Nations Educational, Scientific and Cultural Organization

UNCTAD: United Nations Conference on Trade and Development

VANSA: Visual Arts Network of South Africa.

WIPO: World Intellectual Property Organisation

WSIS: World Summit on the Information Society

Definitions and research approach

i. Definitions

There have been numerous debates about the differences between the 'creative economy', the 'cultural industries' and the 'creative industries', both within South Africa and internationally since the term started appearing in policy discourse in the late 1990's. In South Africa, The Department of Arts, Culture, Science and Technology launched its Cultural Industries Growth Strategy (CIGS) in 1997. However, subsequent national policy has referred to the Creative Economy, the Creative Industries and the Cultural Industries. It has been noted that '(t)o date, South Africa does not have a generally recognised definition of the CCIs, but most policy and discussion documents seem to be moving towards adopting the UNESCO system" (SACO report, 2016: 9). It should be recognized, that the debates referred to above centre on whether to emphasise 'culture', 'industry', 'creativity' or 'economy' and the weight that each concept should hold in the collective descriptive term. For the sake of clarity, this report will be referring to the CCIs, both in the context of South Africa and internationally. However, it should be kept in mind that this may not always be the term used in each instance referred to (but is done so for the sake of convenience and to simplify the report), and that the debates express fundamental concerns about the practical, ideological and political outcomes of using certain language that in principle should be taken very seriously.

- UNESCO defines the **Cultural and Creative Industries (CCIs)** as "sectors of organised activity whose principal purpose is the production or reproduction, promotion, distribution and/or commercialisation of goods, services and activities of a cultural, artistic or heritage-related nature" (www.unesco.org).
- **Intellectual property (IP)** is "a property right that can be protected under federal and state law, including copyrightable works, ideas, discoveries, and

inventions. The term intellectual property relates to intangible property such as patents, trademarks, copyrights, and trade secrets” (legaldictionary.com). According to the WIPO, “Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce. IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create” (WIPO).

ii. Research Approach

This study is primarily comprised of desk-based research, and presents a synthesis and analysis of the wealth of existing literature on the complex and intertwined fields of Intellectual Property and the Creative and Cultural Industries in South Africa. The report outlines key areas of contention both globally and locally in these fields, taking cognizance of the importance of viewing South Africa as a developing country, and thus affected by the developing/ developed polarities in global trade and IPRs, but also recognizing the particularities of the South African context as an emerging economy with strong legal and financial infrastructure. In each chapter, I attempt to provide a concise overview of key treaties, bills and policies that have shaped the trajectory of Intellectual Property and the Cultural and Creative Industries; their public reception and consequent key debates or points of contention that have emerged. I have consulted a wide array of literature on each topic, from policy drafts and bills, to stakeholder submissions, to online articles and personal opinion blogs and academic journal articles. The report incorporates a few selected interviews with experts and stakeholders, to further illuminate issues explored through the existing literature. In terms of the scope and limitations of this report, its primary objective is to present a clear and nuanced picture of IP and the CCI's in South Africa, for a reader who may require an orientation to the field as a whole and an overview of the most critical spaces of contention relevant to the national context. This analysis and overview also serves as the ground for key policy recommendations, included in the final chapter of the report. It should be clear however that the research conducted is by no means exhaustive, and being largely based on existing literature, it aims to organize, synthesise and analyse what has already been established about the relation between IP and the CCIs, rather than present a new hypothesis based on primary research. Consequently, recognizing that fully-fledged policy recommendations may be premature, the report also indicates a number of key areas for further research.

Chapter 1: *The International and Continental Context of IP and the CCI's and Key Debates*

1.1. Brief Historical and Conceptual Overview of Intellectual Property

Intellectual Property is commonly understood to refer to two distinct branches, each replete with their own set of legislation: *Industrial Property* and *Copyright*. Industrial Property includes the following: patents for inventions, industrial designs (aesthetic creations related to the appearance of industrial products), trademarks, service marks, layout-designs of integrated circuits, commercial names and designations, geographical indications and protection against unfair competition” (WIPO, 2016:4). Copyright refers to “literary and artistic creations, such as books, music, paintings and sculptures, films and technology-based works (such as computer programs and electronic databases)” (WIPO, 2016:4). Traditionally then, with regards to IP’s relation to the CCI’s, copyright has been recognised as the most relevant branch of IP. This is certainly the case in South Africa. In the Intellectual Property Consultative Framework adopted by the South African parliament in 2016, the CCI’s are mentioned only with regards to monitoring and evaluation, as they are viewed as already ‘dealt with’ in the following existing initiatives: “a) Copyright and related issues, including IP & creative industries, access to knowledge – libraries and archives/ disabled persons/ copyright, exceptions and limitations/ digital technologies, IPRs in the digital age and b) traditional knowledge (TK)/ and indigenous knowledge” (IP Framework, 2016:2). However, broader objectives of the Framework that relate to the CCI’s are to “(s)trike a balance between the creators and users of IP; (s)timulate innovation; (f)acilitate the development of key industries while striking a balance with the public interest (and) (c)ontribute to the attraction of foreign direct investment and technology transfer” (IP Framework, 2016:2). Later in Chapter 1, I shall consider how new technologies are shifting debates about what constitutes both IP and creative products/ services. As it stands in the South African policy landscape however, the CCI’s are seen to relate to IP primarily in terms of copyright legislation and traditional knowledge (TK) and indigenous knowledge (IK) policy. For this reason, Chapters 3 and 4 respectively deal with existing copyright and TK/ IK policy.

Key Concepts in Copyright: An important conceptual difference between the two branches of IP is that copyright protects the **form** of the idea, not the idea itself (which could be protected and patented as an invention under Industrial Property law). Therefore, “(c)opyright protects the owner of the exclusive property rights

against those who copy or otherwise take and use the particular form in which the original work was expressed” (WIPO, 2016:4). The Berne Convention (1886), which still guides much international legislation and policy regarding copyright, understand the term “literary and artistic works” to include “every original work of authorship, irrespective of its literary or artistic merit. The ideas in the work do not need to be original, but the form of expression must be an original creation by the author” (WIPO, 2016:7). This has a number of significant effects: a) the type of legal protection required – in copyright this is usually declaratory – the work is protected as soon as it exists, b) the duration of protection, which is typically much longer than the lease given to ‘owners’ of inventions and c) the fact that ‘form’ is a requirement means that a list of known formal expressions is what determines what can and cant be protected, and that new ‘forms’ need to constantly be included for protection if copyright is to make sense.

Copyright protects a set of moral and economic rights. There are two introductory points to be made here. While economic rights are transferrable and “allow right owners to derive financial reward from the use of their works by others”, moral rights are non-transferrable, are vested in the author and “allow authors and creators to take certain actions to preserve and protect their link with their work” (WIPO, 2016:9). This key distinction is also important in understanding the difference between ‘author’ and ‘owner’ in copyright. This is a theme discussed at more length in Chapter 3, for now we should note that “(a)lthough it is possible for the author of a copyright work to also own the copyright, and, in fact, that is the default situation, unless one of the exceptions apply (or the copyright has been assigned), it is not necessarily the case that the author is also the copyright owner” (Karjiker & Jooster, 2017: 4). Some of the key issues in South Africa’s policy debates around copyright, as well as the broader arguments for and against copyright relate to the distinction between the author and the owner. The second point is that the ‘digital era’ has certainly complicated a lot of the primary assumptions about the kinds of ‘fixed form’ possible in artistic expression, as well as a number of concepts that fall under the economic rights protected by copyright such as reproduction, distribution, performance, translation and adaptation.

There are certain categories of work that are excluded from copyright (these differ but in many countries include laws and texts around administrative decisions) and there are some forms of ‘exploitation’ that are legal. These fall into two types: “(a) free use, which carries no obligation to compensate the right owner for the use of the

work without permission; and (b) non-voluntary (or compulsory) licenses, which require that compensation be paid to the right owner for non-authorized exploitation” (WIPO, 2017: 15). It seems that in many instances, these two exceptions relate to the imperative of IP to strike a balance between the rights of creators and the public interest. The balance of these factors also manifests differently in different contexts – something which has been the centre of much debate between developed and developing countries as IP has been internationalized and in many ways standardized to varying degrees. Smiers & van Schindel from the Copyleft movement argue that, “(t) here is nothing wrong with a right of ownership in itself, as long as it is imbedded in and limited by interests of a social, socio-economic, macroeconomic, ecological and cultural nature. The impact of these interests should be at least as strong on people’s attitudes to goods or values as on private gain. From a cultural perspective, one might wonder whether it is appropriate or necessary to drape an individual ownership around what artists create” (Smiers & van Schindel, 2009: 11).

Key Moments in IP History: The Paris Convention for the Protection of Industrial Property of 1883 (which primarily covers Industrial Property) and the Berne Convention for the Protection of Literary and Artistic Works of 1886 (which primarily covers copyright) are respectively understood to be the founding conventions of international Intellectual Property legislation. The concept was popularized and became a ‘house-hold’ term only after the establishment of the World Intellectual Property Organisation (as an agency of the UN) in 1967. WIPO remains the administrator of both of these treatises, both of which have wide number of contracting parties (the Paris convention is one of the most widely adopted treatise world wide with 177¹ countries and the Berne convention boasts 172² contracting countries). A formative moment in the international history of IP law and policy was the creation of the TRIPS agreement in 1995, which remains administered by the World Trade Organisation (WTO) and introduced IP law to the international trading system. The TRIPS agreement sets minimum standards for national governments that are part of the WTO to enforce with regards to IP. Unlike the Paris and Berne Conventions, TRIPS famously ‘has teeth’ and is able to enforce many of its requirements through trade sanctions. The Doha Declaration that emerged out of extensive talks in 2001 between developing and developed countries, is concerned with the flexibility of TRIPS to take different development needs into account. The

¹ http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2. *World Intellectual Property Organization (WIPO)*. Retrieved 17 October 2017.

² <https://copyrighthouse.co.uk/copyright/countries-berne-convention.htm>. Retrieved 17 October 2017.

WIPO Development Agenda adopted in 2007 further lays out WIPO's commitment to development and recognizes the role that IP protection plays in either hindering or helping the economies of developing countries. Most recently, the Marrakesh Treaty (adopted by WIPO member states in 2013) was the first instrument to introduce exceptions and limitations to copyright trans-nationally.

According to WIPO, the pervading rationale for the adoption and protection of IP is two-fold: "a) to give statutory expression to the rights of creators and innovators in their creations and innovations, balanced against the public interest in accessing creations and innovations; b) to promote creativity and innovation, so contributing to economic and social development" (WIPO, 2016:3). This rationale is certainly one that has been questioned in some of the debates covered in this chapter, particularly with regards to its applicability in developing countries and its assumption that greater IP protection does indeed empirically correlate with greater social and economic development. In generalized terms, the core argument about the disparity between developed and developing countries in terms of IPR can be summarized as follows by the authors of *Copyleft*: "(h)ow on earth, you might wonder, can poor countries ever develop if the raw materials needed, such as knowledge, are not freely available, but have to be bought, if at all possible? Naturally, it would be cynical to say that, in the 19th century, countries in the North, or the West, whichever way you like to look at it, were able to make unbridled use of whatever knowledge there was in their vicinity, unrestricted by intellectual property rights" (Smiers & van Schindel, 2009: 18).

1. 2. A Brief Historical Overview of the Cultural and Creative Industries

Internationally, the term 'creative industries' is widely seen as emerging from the New Labour government in the UK in the late 90's, and has over the last 27 years become the way of talking about what might have been previously referred to as 'arts and culture' in developed and developing economies alike. This report will not spend much time unpacking the more academic and semantic aspects of the 'terminology' debate around the CCIs, however, it will briefly touch on some of the primary contentions about understanding arts and culture through the language of industry and economy. As Terry Flew suggests, in some cases the use of the terms may be "a restatement of the case for supporting the arts and culture, couched in economic language as preferred by funding agencies" while in others, "it marks the convergence of the arts, media, design and ICT sectors, while some associate it with the tsunami of cultural democratisation associated with networked social media and

DIY online publishing” (Flew, 2014: 11). He goes on to explain that some thinkers have rejected the term altogether, arguing that culture and economy are “basically incompatible, and being fearful of the creative industries agenda being a Trojan horse for the further diminution of public cultural funding” (Flew, 2014: 11). While the term is certainly not one that can be rejected in any way, the core tension around the extent to which a societies’ arts and culture can and should be viewed through a monetising and commercial lens should be kept in mind particularly in relation to the purpose and scope of Intellectual Property. In particular the notion of access to arts and culture as a human right, enshrined in the South African constitution with reference to the Bill of Rights, may at times be odds with the imperative of economic development that the CCIs accommodates. The ‘balancing act’ that Intellectual Property law should play in rewarding creativity and serving the public good has particular pertinence in relation to the CCIs.

The interest in defining, documenting and promoting the Creative Industries through policy and research has largely been driven by the recognition of the unrecognized role that cultural production and consumption plays in national, regional and the global economy. Flew explains that the growing interest in the CCIs over the last two decades results from two important observations: “(f)irst, international trade in cultural goods and services have been growing at a faster rate than overall international trade, and digital technologies and the global internet are important drivers of this growth. Second, under Engel’s Law, cultural consumption is positively correlated with economic development” (Flew, 2014: 12). Policy discourse around the CCIs initially emanated from the work of national governments, particularly in the Global North, until UNESCO and UNCTAD (in 2008 and 2010 respectively) produced reports about the global state of the CCIs. It is recognised that at this point, the purpose of CCI policy discourse was represented as “opportunity for developing countries in particular to tap into the global creative economy by approaching cultural policy as being not simply about support for the creative and performing arts or the protection of cultural heritage, but as a form of industry policy” (Flew, 2014: 11).

However, there were and still are considerable barriers for developing countries to simply ‘tap into’ the global creative economy. First, creative economies in developing nations have been strongly tied to the informal economy. Formalising the creative economies in developing countries would require a simultaneous shift in legal, political and infrastructural development. Within this developmentally unequal context, research indicated that there was “a widening gap between the developed world and developing world with the latter mainly consumers of cultural products from

the former” (van Graan: 2008:8). In a sense, arguments for the promotion of the CCIs, moved beyond an economic imperative and started to gain traction because of the potential of arts and culture as a socially transformative tool. It was recognized that globalization and global trade were creating unforeseen consequences of social exclusion, cultural homogeneity and environmentally unsustainable patterns of growth. Creativity and culture seemed to be plausible responses to these mounting human challenges, ones that economics and planning alone could not tackle. The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions gave a voice to some of these growing concerns. This international policy instrument sought to promote “both an economic movement to encourage fairer trade in cultural goods and services and a political movement to ensure that the worldviews, ideas and values embedded in cultural goods and services that emanate from dominant economies have counterbalancing global forces” (van Graan: 2008:8).

The idea of the CCIs tackling both an economic and human-centred development imperative and to simultaneously achieve “goals of job creation, innovation and export growth while also contributing to social inclusion, cultural diversity and environmentally sustainable growth” (Flew, 2014: 12) has been at the heart of policy discourse and debate on the issue since. With particular reference to developing countries, the most recent and comprehensive study of the global CCIs (conducted by the International Confederation of Societies of Authors and Composers (CISAC) and UNESCO) makes the point that “(c)reators’ rights do not stand in the way of the economy, quite the contrary. They help build sustainable economies, they provide local jobs, they generate revenues and taxes, and they allow a whole class of people, many of them young, to make a living from their talent” (UNESCO, CISAC, 2015:6). This certainly indicates the perceived need to make the case for the dual function of the CCIs to developing nations in particular, many of which neglect governance and policy interest in the creative sphere entirely. From a European state perspective, CCIs remain the dominant model for planning projects, policies and budgets for arts and culture both in the EU and abroad. INTERREG (a series of five programmes to stimulate cooperation between regions in the European Union, funded by the European Regional Development Fund) reports that current issues of policy focus in the CCIs are: “to strengthen the income base of creative workers as well as the turnover of these industries (...) unlocking the potential (spillover effects) of the creative industries to contribute to other industries (...)”. They reported that “(p)eer networking and affordable spaces, on the other hand, are perceived as being

of lower priority” and finally that “(o)pen innovation is an emerging policy tool of key interest for policymakers, creative workers, and stakeholders of this industry” (INTERREG, 3: 2014).

On the other hand, there are many scholars who are becoming increasingly critical of the notion of ‘creative cities’³ (Kong 2014, Scott 2014, Hesmondhalgh 2007), and in fact of the success of the creative industries ‘turn’ in cultural policy and its consequences for the arts. Lily Kong argues that “(t)he commodification of culture involves turning cultural activities and goods into commodities to be “sold” or marketed for commercial benefits. For example, arts and cultural spaces may be built solely for the purpose of urban regeneration and the hope of encouraging economic growth” (Kong, 2014: 598). Consequently, a focus on the profit-making aspects of arts and culture may encourage market forces to thin out a societies range of cultural expression. This is made possible precisely through the link between IP and the CCIs as the: “commercial ‘exploitation’ of culture is made possible by harnessing the institutional, discursive and legislative fact of intellectual property, this is demonstrated by the early definition of ‘creative industries’ by the United Kingdom’s Department of Culture, Media and Sport (DCMS) according to whom creative industries are “those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property” (DCMS 1998; Flew and Cunningham 2010, 114).

I will outline five key points of contention around the CCIs in current scholarly literature. The first relates to defining the scope of the CCIs (this issue will emerge again in the analysis of the UNESCO/ CISAC report of the Global CCIs). What exactly is or is not included in this term? As Kong argues: “definitions can vary widely due to the influence of local politics, histories and geographies (Banks and O’Connor 2009, 366). For example, in Europe, arts-related activities are considered to be the “core” creative industries, whereas fields such as advertising, design, architecture

³ Scott argues explains: “(o)ver the history of capitalism, a distinction was frequently made between cities of industry and commerce, on the one hand, and cities of art and culture, on the other, and, indeed, these two forms of urban development were widely seen as being quite incompatible with one another. Today, this distinction is disappearing in favour of a more syncretic view of cities that is in some degree captured under the rubric of the ‘postfordist city’, one of whose declinations is the ‘creative city’” (Scott, 2014:569)

and the media industries are viewed as peripherally important parts of the creative industries (Throsby 2001; European Commission 2006; Work Foundation 2007). In contrast, definitions of the creative industries in Asia and Australia tend to be wider and may include industries such as online-gaming and even the wedding industry (Creative Asia 2013)” (Kong, 2014: 596).

The second, related issue is around estimating the economic impact and benefits: “there is no conclusive answer as to whether the value of the creative industries is overstated or understated. The fact remains that statistics indicating the economic contribution of the creative industries may not be reliable, and gathering accurate data on the size, growth and output of the creative industries continues to be a challenge” (Kong, 2014: 597). Kong also argues that third, there is a utopianisation of creative labour and a tendency in policy discourse to underplay the sexism, racism and classism at play in the structure of the creative working classes and the potential vulnerabilities that this category of work entails Kong, 2014: 600). This leads to the fourth issue of what kind of labour and market organization CCI focused policies support. There are strong arguments around CCI policy acting as a form of cultural imperialism (particularly in the ‘Creative Cities’ initiatives), and evidence from countries like Australia and New Zealand that suggests that importing policies from abroad and neglecting local historical, social, cultural nuance and fact can have a detrimental effect on local cultural production (Kong, 2014: 600).

Finally, the related problem of ‘creativity for whom?’ points to the potential links between gentrification, widening socio-economic gaps and CCI policies. There is little existing evidence that “the creative industries can play a role in fostering social inclusion or enabling greater community participation” (Oakley 2004, 71). This is particularly pertinent for the South African context, as social cohesion, national healing and cultural pluralism are values promoted by the Department of Arts and Culture and seen as crucial to the broader nation-building project in the post-apartheid era. It would do well to take note of the argument that creativity-focused CCI policies may be problematic because that they “ignore social problems of segregation and poverty, and instead try to transform the image rather than the reality of the central city” (Peck 2007, 10). As Kong argues, these complexities do not indicate that an abandonment of the CCI’s approach is necessary, but rather that “creative industries need/should not be seen as the panacea of all ills. Rather, there is a need to rethink theory and policy, so that a separation is made between creativity

for innovation and economy, and creativity for culture and social (e)quality” (Kong, 2014: 601).

1. 3. A Brief Historical overview of the relationships between developing countries, IP and the CCIs

Doha Declaration (2001): According to WIPO, the “protection of copyright and related rights serves the twin objectives of preserving and developing national culture and providing a means for commercial exploitation in national and international markets” (WIPO, 2016: 32). This ‘win-win’ scenario conceals the more complex history that the developing world has had with WIPO. As mentioned in section 1.1, the TRIPS agreement established in 1995 ushered in a new era for international IP law, as countries were forced to harmonise their national IP laws in order to benefit from trade agreements. Subsequently, counter to WIPO’s rationale for the international importance of IP, research began to show that the TRIPS standard of requiring all countries to create strict intellectual property systems was actually detrimental to poorer countries’ development (Morin, 2014). In 2001, developing countries initiated a round of talks that resulted in the Doha Declaration, which enabled a more lenient interpretation of TRIPS that recognised the enormous social, political and economic disparities between developed and developing countries. It gave developing countries longer timelines to adopt certain laws as well as the ability to weaken some of the laws. Some scholars argued that it was in the interest of most under-developed nations to utilise the flexibility made available in the interpretation of TRIPS (as a result of the Doha Declaration), to legislate the weakest IP laws possible (Blouin, Heymann & Drager, 2007:33).

However, a 2005 report by the WHO found that many developing countries have not incorporated TRIPS flexibilities to the extent that they are authorized to do through the Doha Declaration (Musungu, 2005). A significant factor contributing to this could be the lack of legal and technical expertise to draft legislation that implements flexibilities, and this has in many cases led to a ‘copy-paste’ approach in which developed country IP legislation is adopted wholesale in a developing country (Morin & Bourassa, 2011). There was also a concern that WIPO’s technical assistance in drafting legislation could exploit this lack of expertise for the benefit of monopolies. Smiers & van Schindel argue that in effect, through TRIPS, the “WTO trade regime has taken the ‘design freedom over intellectual property rules’ away from nation states” (2009: 26). This is a view reiterated in South Africa’s own IP Framework adopted in 2016: “WIPO technical assistance has in the past been criticized for

placing too much emphasis on compliance with international IP standards, which were generally seen as favouring multinational corporations from developed countries without due regard for a demand-driven approach that takes into consideration the economic nuances and development objectives of countries receiving the technical assistance” (IP Framework of SA, 2016:16). South African policy developers have certainly been influenced by the idea that South Africa’s unique and developmental context requires a careful approach to IP law that cannot simply ‘copy-paste’ from policy emanating from the Global North.

The Geneva Declaration (2004): In the early 2000’s, a number of developing countries (led by Brazil and Argentina) came to publicly question WIPO’s commitment to focussing on IPRs as an end in itself (which it justified by both moral and economic arguments) and urged a shift to view IPRs as a way of benefitting humanity at large. The key arguments emerging from developing countries can be divided into philosophical and pragmatic ones. In the former category, questions are often posed within a human rights framework - the right to health, education, access to knowledge and arts and culture vs IPRs. The U.N.’s Sub-Commission on the Promotion and Protection of Human Rights declared that “there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement . . . and international human rights law” which manifest in a range of areas: “(1) technology transfer to developing countries; (2) “the right to food;” (3) “bio-piracy;” (4) “indigenous communities’. . . control over their own genetic and natural resources and cultural values;” (5) “access to patented pharmaceuticals;” and (6) “enjoyment of the right to health” (in Schultz & Walker, 83).

There are also pragmatic arguments that posit the needs of the developing world as so great that any impeding factors that hinder the greater project of development (like IPRs) are suspect. Moreover, it was argued, within the developing world it is primarily large corporations that own IP and there are few benefits for developing countries. The assumption that IPRs “provide the necessary incentive to spur innovation in the arts and sciences, thus driving social and economic development” (Schultz & Walker, 92) had come under scrutiny. As Musungu puts it, ‘proof of the correlation between strong IPR and foreign direct investment ... remains elusive’ (Musungu, 2008: 12). There has been much debate about the balance that IPRs should strike between private ownership and public benefit in the developing world. These debates culminated in the signing of the Geneva Declaration in 2004 by a number of non-profit organizations, scientists, academics and individuals. The declaration was

motivated by the argument that “(h)umanity faces a global crisis in the governance of knowledge, technology and culture” and that the current international IP regime is “intellectually weak, ideologically rigid, and sometimes brutally unfair and inefficient” for developing countries” (Schultz & Walker, 83). While the most bitter dispute in this larger debate has been about access to health care versus intellectual property rights (particularly in relation to patents and the pharmaceutical industry⁴), recognition that we are entering an ‘information era’ led to growing concern about access to knowledge, education and indeed culture. The World Summit on the Information Society (WSIS), fearful that in an age of digital expansion, the less developed and ‘offline’ parts of the world would be fundamentally disadvantaged and left behind, sent a strong message to WIPO to rethink IPRs as a tool for rather than against social justice⁵. This perspective has been highlighted by African scholars who argue that “(g)iven the unprecedented availability of literary and artistic works on the Internet, it is highly prejudicial for developing countries and LDCs to adopt copyright laws that make access to this vast resource space more difficult or costly” (Phiri, 2009:14 paraphrasing Okedji, 2004:8).

WIPO Development Agenda (2007): Many of those invested in the WIPO approach to IP remained wary about the ‘IP Skeptics’ and their social and distributive justice agenda. The skepticism around the intentions of the development agenda (first proposed to WIPO in 2004), is captured in the following description: “initiatives that seek to curtail intellectual property rights in the name of development, including the movement seeking “Access to Knowledge” by creating exceptions and limitations to international intellectual property obligations, discussions regarding implementing a “Development Agenda” at the World Intellectual Property Organization, initiatives to make greater use of compulsory licensing to override patents on pharmaceuticals, and the effort at the World Health Organization to create an alternative to the patent system for financing drug research” (Shultz & van Gelder, 2008:3). The acceptance of 45 Development Recommendations in 2007 was seen as a significant gain to many of these movements. The WIPO DA consisted of 45 recommendations, many

⁴ Compulsory licensing (in which a product/ invention is ‘forced’ to be licensed by agents other than the original patent holder for the public good) has been the way to go for necessities like food or medicine.

⁵ WSIS suggested the following principles: “(a)ll stakeholders should work together to: improve access to information and communication infrastructure and technologies as well as to information and knowledge; build capacity · increase confidence and security in the use of information and communication technologies (“ICTs”); create an enabling environment at all levels; develop and widen ICT applications; foster and respect cultural diversity; recognize the role of the media; address the ethical dimensions of the Information Society; encourage international and regional cooperation” (Schultz & Walker, 90-91).

of which were attached to concrete implementable plans that would assist (to name a few) in the establishment of greater IPR infrastructure in developing countries, the facilitation of technology transfer as well as leniency around the implementation of certain IPR norms and cognisance of the needs of particular industries. However, whether WIPO would remain committed to the implementation and realization of many of these ideas was yet to be seen. IPR as a tool for development is expressed in the belief that “(w)ithout clear, enforceable property rights, people in developing nations cannot unlock the value of the capital they hold (...) Not only do developing nations miss the economic benefits such innovation would bring, they miss the benefit of local knowledge being applied to solve local problems” (Schultz & Walker, 85). It should be kept in mind that “a general understanding that as the DA was developed through negotiations, as such it is understood to be a compromise. But it has evolved as a way of conciliating different perceptions, all geared towards promoting the development and protection of IP as an important contributor to the growth of countries,” (Gupta, Roffe, Sibanda, 2017).

1.4. Africa, IP and the CCI's

The Dakar Declaration (2015): So where do African nations stand today with regards to the social, political and economic value of protecting IPRs? This brief history suggests that there have been enormous gains made to encourage powerful institutions like the WTO and WIPO to meet Africa where it is, rather than impose legislation and regulation that either treats Africa as if it is equally equipped (in terms of trade, infrastructure and economy) as developed countries, or indeed impose patronising development programs that retain an equal hold on African nations. While the implementation of the WIPO DA suggests that such power struggles remain a reality, African nations have made significant progress in formulating their own agenda (typified by charters like Agenda 2063 and the Charter for African Renaissance). In 2015, WIPO hosted the African Ministerial Conference 2015: Intellectual Property (IP) for an Emerging Africa. Out of this meeting emerged the Dakar Declaration, which essentially confirms a commitment on the part of African nations to using IPRs as an important tool for development. WIPO's director general issued a glowing statement around the conference: “Africa has a great tradition of innovation and creativity and has extraordinary creative resources but has often struggled to realize their full economic potential. That is changing. Increasingly, African economies are seeking to add value to their innovative and creative resources through the IP system” (WIPO, 2015). I would like to address what this official perspective means for the CCIs. In terms of protecting and encouraging the

CCI's in Africa, there is growing consensus (with few dissenting voices) in the literature on IP that greater IP protection enhances the CCIs. However, while it is encouraged that African states should implement the following measures to promote the CCIs "political commitment to prioritise creative clusters, a focus on combating piracy that provides for effective remedies, training judges, and a hands-off approach to private organisations that are essential in supporting sophisticated creative industries, such as collecting agencies and business associations" (Shultz & van Gelder, 2008:2), it should be clear that allowing a hands-off approach to the private sector comes with its own dangers. In addition, plans to facilitate greater technological transfer and infrastructural development support from institutions like WIPO are essential in enabling the balanced implementation of IPRs. Phiri points out that "membership of the treaties in the absence of the technological infrastructure to access and use digital works may simply transform ACP countries into subsidisers of the global copyright system" (Phiri, 2009: 14).

New institutional economics suggests that the strength of all social institutions need to be considered in terms of their influence on the economy, when it comes to IPRs institutionally strong developing countries like Brazil and India should have different expectations placed on them than countries that recently suffered from war, abject poverty and disease. What is important then, in terms of placing South Africa in this trajectory, is that it should be viewed both in terms of its relatively advanced economic and institutional capabilities, as well as its position as part of the developing world with a large cohort of citizens that struggle to assert their basic human rights.

It has been argued that a common approach from the African bloc is the "desire to utilise IPR for development, while at the same time minimising the costs of integration into the international IP system" (Phiri, 2009:9). A good example to flesh out this idea is that of piracy in the music and entertainment industries of Africa. With regards to piracy in the global entertainment industry there is an ethical dimension to viewing piracy in the developing world that makes it somewhat difficult to feel right about punishing it in all its forms. Terry Flew argues that "(p)iracy is commonly seen, not as theft, but as street-level entrepreneurship in the informal economy, and as resistance to rapacious transnational media and entertainment conglomerates" (Flew, 2014: 13). There are moral questions that arise here: artists might have IP rights in Africa as per western regimes, but if piracy is a primary way in which poor people put bread on the table, should IP be enforced so that a few will become richer

and the poor stay poor/hungry? An oft-quoted example is the film industry in Nigeria (Nollywood), which is known to have the following 'positive' impacts: it creates jobs and income (and addresses the lack of legal cultural distribution channels (such as bookstores) and other cultural infrastructure); it reaches a wide audience and reduces price of DVDS etc (the global CCI report by UNESCO/ CISAC found that relative to incomes, retail prices of CDs, DVDs are 5-10 times higher in Brazil, Russia, and South Africa than in the US or Europe); it improving information and education, motivating legal purchase of HiFi, TV, and home video devices, Internet connections, computer hardware and software, and cell phones (further generating jobs and increasing national revenue).

The question is whether legal content can do the same job, but with a greater benefit to producers, the media industry, and the economy as a whole? Flew argues that "(c)ompliance with global copyright regimes will encourage creative businesses to invest in developing economies, and hence improve production and distribution facilities and enable technology transfers to occur. They also provide important opportunities for creative producers themselves. Widespread content piracy in developing countries has its major impacts, not on global media conglomerates, but on local creative producers, as it promotes a culture where not paying for works appears to be the norm, while transferring wealth to those operating illegally in the informal economy" (Flew, 2014: 13). For these reasons, Flew notes a "formalising imperative, or a need to move beyond the low-cost, fly-by-night arrangements to viewing Nigerian film as a successful local creative industry" (Flew, 2014: 13).

It should also be noted that with regards to policy discourse, the lines between piracy and the operations of the informal economy are often blurred. The UNESCO/ CISAC report takes account of the importance of the informal sector in the CCIs in most developing economies: "(i)nformal CCI sales in emerging countries totalled an estimated US\$33b in 2013 and provided 1.2 million jobs" (2015: 28). It retains a firm anti-piracy stance, arguing that greater IP regulation would benefit the economic development of the CCIs, while recognising that the informal sector provides the majority of jobs. Phiri suggests that "(d)eveloping countries can adopt a staged approach that corresponds to the level of available technology to enhance the music supply chain and to generate new markets for the distribution of domestic music. These countries can also utilise the available price and distribution models to facilitate producer-to-consumer sales between artists in developing countries and the global audience" (Phiri, 2009:14). Another factor to consider in much more detail to

further contextualise Africa's relation to IP and the CCIs is the digital revolution and its impact on IP law and the CCIs.

1.5. The Global CCI's in the digital era

The disputed Legitimacy of Copyright Law: The well-known proponent of reduced legal restrictions in copyright Lawrence Lessig argues that there is a disjuncture between the ability (through technology) to access, copy and reuse potentially copyrighted material and traditional copyright law. According to Lessig, copyright law is antiquated and incompatible with digital media since every "time you use a creative work in a digital context, the technology is making a copy" (Lessig: 98). He argues that 'literacy' has changed in form, and that whereas in an analog era reading and writing were separate activities, today's vernacular is the cutting, pasting and 'remixing' of information and knowledge. He uses the example of iTunes Music store (which it provided digital music it was protected by a Digital Rights Management (DRM) code from re-distribution) to show that it is possible to achieve a business model which balances access and control and is equally attractive to both the consumers and the creators. In addition, digital technologies have changed the way we think about 'access' (in terms of time, space, resources, ascribing value). In his seminal book 'Remix' (2008) Lessig proposes a number of copyright amendments that are relevant to the CCIs, particularly the consumption of music, film and online entertainment and visual media in general:

1) Deregulating Amateur Activity – primarily by exempting noncommercial and, particularly amateur, use from the rights granted by copyright. In addition, this loosening of control will, in turn, remove some of the burden from the corporations' monitoring for misuse of their content; 2) Clear Title - As of now, there is no comprehensive and accessible registry that lists who owns rights to what. In addition to making the above clear, Lessig insists that author/owner should have to register their work in order to extend the copyright after a shorter period of time and for the work, otherwise, to enter public domain. He insists that this change would be instrumental to digital archiving and access for educational purposes; 3) Simplify - building on his previous suggestions, Lessig insists that the system should be simplified. If a child is expected to comply with copyright law, they should be able to understand it; 4) Decriminalizing the Copy - as mentioned before the production of the 'copy' is a commonplace in daily transaction within the digital realm. If our daily activity triggers federal regulation on copyright law, it means that this regulation reaches too far. Thus the law must be rearticulated as to not include uses that are

irrelevant to copyright owner's control; 5) Decriminalizing File Sharing - Lessig suggests this should be done either by "authorizing at least noncommercial file sharing with taxes to cover a reasonable royalty to the artists whose work is shared, or by authorizing a simple blanket licensing procedure, whereby users could, for a low fee, buy the right to freely file-share" (p. 271)⁶

However, there remains an anxiety that greater access and distribution of free material will result in a failure to remunerate creative workers and disincentivize cultural production. A notorious point of contention in this debate is who benefits from copyright. From the Copyleft movement, it is argued that "(t)here is sufficient reason to assume that the link between income and copyright is largely irrelevant for many artists (...) For the majority, it is insignificant as a source of income (see, for example, Boyle 1996: xiii; Drahos 2002: 15; Kretschmer 1999; Vaidhyathan 2003: 5). Economic research has shown that, of rights-related income, roughly ten percent goes to ninety percent of the artists and, vice versa, ninety percent goes to ten percent. (...) Even the official British Gowers report on intellectual property rights in the cultural sectors is forced to concede that 'on average creators receive a very low percentage of royalties from recordings' (Gowers Report, 2006: 51)" (Smiers & van Schindel, 2009: 15). As this remains disputed, it has been argued by scholars that discourse features strongly in attempts to persuade the public how to consume cultural products. While globally, there are "signs that rights holders may be winning their war against 'piracy', as revenues from digital services – be it through online subscriptions, advertising or per-copy payments – increase" (Edwards, 2014: 72), there is much to suggest strong counter currents in popular belief around the extent to which copyright really favours a few big corporations monopolizing⁷ the markets rather than being the lifeblood of the CCI's for ordinary cultural workers. Within this debate, "(r)ights holders are seen as exaggerating the instrumental benefits of the existing copyright system and as ignoring how copyright may obstruct as well as promote creativity" (Edwards, 2014: 70). As ORG (2012d) argues: The digital age is

⁶ [https://en.wikipedia.org/wiki/Remix_\(book\)](https://en.wikipedia.org/wiki/Remix_(book))

⁷ "The music and film industries are rather vocal when it comes to the call for copyright protection. We should not forget, however, that a number of parties have been appearing in the area of image material that are strongly dominating the market. In addition to Microsoft, Bill Gates also owns a company called Corbis, which is buying up visual material all over the world, digitalising it and marketing it. By 2004, this amounted to 80 million works. Getty Images also specialises in similar activities, using the photograph exchange network, iStockphoto (Howe 2008: 7). In actual fact, a considerable proportion of the visual material in the world is coming into the hands of two extremely big enterprises" (Schmiers & van Schindel, 2009: 16).

transforming society: we believe it has the capacity to bring us greater democracy, transparency and new creative and social possibilities. But our freedoms are also under attack in the digital world: from governments and vested business interests" (Edwards, 2014: 68). From the 'creators' or rights holders' side, appeals are made to the national economy, often through the conflation of copyright and 'market failure'. Edwards (2014) argues that "the copyright regime is represented as being essential in order to support and facilitate cultural production. Indeed, creativity tends to be conflated with the copyright regime, such that the only incentive for creativity is financial". However, these arguments must be considered carefully when emerging from large corporations like Warner Bros: "IP [Intellectual Property] rights are the cornerstone to facilitating, creating, distributing, and monetizing creative works. If one thinks of the media and entertainment industries as built upon creativity, then the industry looks at protection and growth of creativity as resting upon IP protection (2006, p. 2)" (Edwards, 69).

On the other hand, user-centered discourse tend to focus on rights to access and co-participation in the cultural life of a community: "Postigo (2008), for example, has examined how members of the campaign group Electronic Frontier Foundation discursively frame the concept of 'fair use' in ways that construct users as legitimate partners in cultural production and attempt to counter simplistic industry notions of 'piracy' and 'theft'. Similarly, Lindgren (2013) examines debates over the morality of piracy and the discourses circulated by pro-piracy groups in the Swedish public sphere" (Edwards 63: 2014). In addition, 'copyleft' proponents dispute the balance between the rights of the user and the rights of the creator. Smiers and van Schindel argue that "(t)he owner of an artistic expression is the only one who can decide how the work can and may function. It may not be altered by anyone other than the owner. It may not, in other words, be contradicted or disagreed within the work itself. Neither may we place it in contexts we consider more appropriate. There is no question of dialogue. We are more or less gagged. Communication becomes terribly one-way and dominated by a single party, namely the owner ... We are only permitted to consume - both figuratively and literally - and hold our own opinions on the work. This is not enough for a democratic society" (Smiers & van Schindel, 2009: 12).

Cultural Imperialism and the Culture of Capitalism: It is significant that the hierarchy of economic dominance in the CCIIs has also changed in the last decade (with the 'ranking' of regions quantified by revenue and employment created by the CCIIs): 1)

Asia Pacific, 2) Europe, 3) North America, 4) Latin America and finally 5) Africa/Middle East (UNESCO, CISAC 2015:16). This shift is indicative both of a) of broader shifts in economic power dynamics and also b) the metrics used to identify CCIs (digital media which could stray into social media and consumption and advertising of commercial goods, architecture, gaming). The growing Chinese and Indian middle consumer classes have been credited with much of the accelerated development of the CCIs. The finding suggests that we may be ushering in an era that is not culturally, politically and economically dominated by the 'traditional' imperial powers of Europe and the USA, which itself will have important consequences for dominant discourses on culture, intellectual property and indeed world trade.

However, the economic and cultural imperialism of the USA, particularly through platforms like Google and Facebook, should not be missed here. Taplin (2017) points out that the economic power of some of the largest companies in the world: Google, Facebook and Amazon, so completely dwarfs their competitors (in terms of media, advertising, book sales, online cultural content sharing) that their impact on these fields is difficult to accurately assess. In fact, Taplin's central argument is that the decentralised, democratising potential of the internet when it was first created in the early eighties has been completely transformed by these few monopolies, and that the production and consumption of cultural content is primarily guided and controlled by the interests of capital accumulation rather than a commitment to the critical social role of arts and culture. The combination of market control and enormous political sway through lobby groups is currently a theme that has placed Facebook and Google in the spotlight⁸. This business approach has been termed 'surveillance capitalism', described as a "model that provides supposedly free services to users in return for "consent" to mine and exploit their personal data and digital trails in order to target adverts at them" (Naughton, 2017). Taplin argues that the lack of regulatory policies applied to mega-companies like Google and Facebook in terms of taxes, antitrust regulation, intellectual property law and unfair competition protection has directly enabled their unprecedented dominance in the sphere of cultural and media production. There are many instances in which Google and Facebook have affected changes in the interpretation of IP and Copyright law through breakthrough cases involving media and entertainment agencies, thus affecting terms like 'original content', 'news' and arguably 'intellectual property' itself.

⁸ <https://www.politico.com/story/2017/10/01/google-facebook-2016-probe-secrets-243319>

<http://fortune.com/2017/07/20/google-facebook-apple-europe-regulations/>

The UNESCO 2005 Declaration on the Diversity of Cultural Expressions can be seen in part as a response to the 'dark side' of globalisation and the emergent threat that localised cultural forms experienced with the influx of cultural products from industrially advanced nations. The cultural hegemony presented by the USA, was a source of significant concern around cultural diversity and provided a strong imperative for developing nations in particular to boost their own cultural production – both as a function of trade and economy but also of cultural identity and politics. Referring to the concerns about USA's cultural dominance through trade, Mike van Graan argues that "(c)ultural diversity is about ensuring that there is not simply one homogenous culture colonizing the world, but that in order to promote global and national democracy and human rights, people should be given the right to choose from different cultural products, including those that emanate from their own life and cultural experience" (2008: 18). The right to partake in and choose cultural products that reflect the diversity of human experience has largely been linked to the preservation of national cultures, which itself reflects a nation based conception of the globe.

More than a decade later, while economies of scale are shifting the balance of power in terms of cultural production and the CCIs, the problem of cultural dominance through the pervasive online sphere has grown to new proportions. It has been widely recognized that we are currently living in an era marked by the unprecedented power of big companies and striking social and economic inequality across the globe (Pickety). The fact that Google and Facebook control 57% of the digital market (Harber, 2017), suggests a level of dominance that has left analysts to play catch up to understand (let alone predict) the influence that digital and social media have on people's personal lives, political choices, economic choices and cultural identities, affiliations and expressions. The 'Russia scandal' currently playing out between Facebook and the investigators probing the role of paid advertising and fake news in the rise of Donald Trump and the political downfall of Hillary Clinton in the 2016 USA presidential elections, suggests one angle of this 'catching up'. The USA's recent withdrawal from UNESCO suggests that the nation based notions of cultural identity and power that have shaped post WW II conceptions of globalization might need some rethinking.

At this juncture, there may be value in thinking through the cultural force of capitalism and consumerism as well as the logic of 'efficiency' that drives the market on the expression of cultural diversity and creative traditions. What emerges from the UNESCO/ CISAC report (in both its findings and methodology) is an understanding

of cultural production and consumption as intimately tied to the practice and logic of consumerism and capitalism. While the 2015 Global CCIs report recognises the importance of “the balance between creation, access (distribution) and care of cultural heritage”, the findings seem skewed towards viewing the CCIs (and indeed celebrating and encouraging them) primarily in terms of their economic power and impact. This is a significant shift from the context in which the CCIs first gained traction: developed Northern countries that had a long and stable history of state support for the arts⁹, strongly through investment in educational institutions and direct investment in CCIs themselves. In fact the impact for many creative sectors of cuts in government spending has been recognised as a fundamental blow to the European CCIs. This begs the question of arts and culture for whom? If left entirely to market forces, do we not risk re-constructing our view of arts and culture as consumption industries and neglect the fundamental human values embedded in arts and culture as the freedoms to create, express and participate in the meaning making of a society? In the UNESCO/ CISAC report; social media, commercialised cultural tourism, advertising, architecture and online ‘cultural content make up a significant portion of what constitutes cultural expression and production. This is not to say that these forms do not have aesthetic and social value, but surely there is an argument to be made to outline and protect forms of cultural expression that might be less commercially successful and able to convert to a tablet or smart-phone format?

The fluid and fast changing nature of the digital sphere in terms of forms of expression and modes of communication and sharing has also placed many of the assumptions on which IP law was historically based, on shaky ground. There are a few aspects of this change that we should recognize in this regard. Few sectors have been as influenced and are as influential on the digital sphere as the CCIs. It has been found that *cultural content* “powers sales of digital devices, which totalled US\$530b in 2013” and that “(d)igital cultural goods are, by far, the biggest revenue source for the digital economy, generating US\$66b of B2C sales in 2013 and US\$21.7b of advertising revenues for online media and free streaming websites” (UNESCO, CISAC, 2015:8). In terms of traditional cultural media being converted to online formats, digital sales are most prolific in “recorded music, where digital accounts for 45% of purchases worldwide, while online and mobile gaming account

⁹ The UNESCO/ CISAC report notes that “(t)he creative economy in Europe is underpinned by strong public support — with variable intensity from one country to another — through purchases, financial and fiscal incentives, subsidies and public employment. In 2013, governments in the EU28 devoted nearly US\$68.6b of spending to cultural services” (2015: 45).

for 34% of sales. In movies, video-on-demand now contributes more than a quarter of sales (26%), while in books, e-books comprise 7% of the global market (2015:24). At the same time, what is known as the digital paradox, live music and book sales appear to be greatly enhanced by the digital sphere” (2015: 27). The report promotes the view that IP laws, copyright and stronger international management of the digital sphere are key in the success of the global CCIs: “to unlock the full potential of CCI, creators must be fairly remunerated for the use of their creative works (...) in particular in the digital market” (2015:7). The imperative to succeed economically is now tied together with a) the mandate to strengthen IPRs and b) the mandate to digitise and invest in the digital sphere. In the following chapter, I will address in more detail what this means for South Africa (as a developing country) both in terms of IP and the CCIs.

Chapter 2

The Creative and Cultural Industries and the Intellectual Property Landscape in South Africa

2.1 A Brief Overview of CCI Policy in South Africa

The Department of Arts, Culture, Science and Technology (DACST) launched the first study into the creative industries in South Africa as early as 1997. In 1998, The Cultural Industries Growth Strategy (CIGS) emerged. Initially, both the definition of the Cultural Industries and the sectors focused on (those that were sufficiently organized or had 'critical mass' to potentially grow, export and create employment) strongly reflected the policy tendencies of the Global North (particularly the UK). In the last decade, there have been a number of studies commissioned by the state to understand the scope of the CCIs, many of which have informed national strategy and policy (for example the DTI's Mzansi Golden Economy Strategy). Emergent debate, research and stakeholder engagement on the part of the state, through a series of drafted policies and consultative processes, resulted in the adoption of term CCIs (as used by UNESCO) in official policy language, as well as more nuanced interpretation of the sectors that constitute the CCIs. The most recently submitted Draft Policy on Arts, Culture and Heritage by the Department of Arts and Culture (2017) recognises that "the level of development of each of the specific industries is uneven. This section focuses on the policies, programmes and strategies needed to promote the development of talent and creativity in all sectors so that the creative industries function in a growing and sustainable manner" (2017: 33). In terms of the relationship between the CCIs and IPR, the 2017 ACH Policy presents significant progress by recognizing the importance of the digital era and its' meaning for cultural production and consumption. This issue will be looked at in more depth in subchapter 2.3, which deals with the consequences of the digital era for the CCI's and IP.

2.2 A Brief Overview of IP Policy in South Africa

As outlined in the introduction, IP law is commonly understood to refer to two distinct branches, each replete with their own set of legislation: *Industrial Property* and *Copyright*. It is the treatment of the second category by the relevant government departments that primarily concerns the CCIs. In terms of IP and copyright policy development in South Africa, this has primarily been the domain of the Department of Trade and Industry (Copyright) and the Department of Science and Technology (Indigenous Knowledge), with policy that has far reaching implications for the domains of arts and culture, communications, media, business, education, innovation, research and development. Chapters 3 and 4 deal in depth with the

respective issues of Copyright and Indigenous Knowledge and their treatment through practice and process by the relevant government departments. This brief overview looks at the state approach to IP law, with reference to the IP consultative framework; the role of the CIPC (Companies and Intellectual Property Commission) in administering, protecting and regulating IP policies in South Africa and a few related bills and policies that address IP in the CCIs. In July 2016, the South African Cabinet approved a new Intellectual Property Consultative Framework, which replaced the 2013 draft IP Policy (Spoor, 2016). IP is presented in the approved 2016 Framework as “an important policy instrument in promoting innovation, technology transfer, research and development (R&D), industrial development and more broadly - economic growth” (IP Framework, 2016:2). Taking into account the broad social, ministerial and institutional reach of IP, the document aims to “put forward the perspective of the dti in a consultative instrument to facilitate what will be continuous engagement with governmental partners and society at large” (2016:2). Broader objectives of the Framework that relate to the CCI's are to “(s)trike a balance between the creators and users of IP; Stimulate innovation; Facilitate the development of key industries while striking a balance with the public interest; Contribute to the attraction of foreign direct investment and technology transfer” (IP Framework, 2016:2). In the Framework, the CCIs are expressly connected to and discussed in relation to: “a) Copyright and related issues, including IP & creative industries, access to knowledge – libraries and archives/ disabled persons/ copyright, exceptions and limitations/ digital technologies, IPRs in the digital age and b) traditional knowledge (TK)/ and indigenous knowledge” (IP Framework, 2016: 2).

The parastatal Companies and Intellectual Property Commission (CIPC) administers, regulates and protects South Africa's intellectual property assets in accordance with the provisions of a range of legislation. Since the IP Amendment Law was recently signed into law by the President, the CIPC is meant to play a role in “the empowerment of the communities through proper recordal of their Indigenous Knowledge, as well as financial benefits of its exploitation. Much work remains to be done by the dti and the CIPC in developing the enabling provisions and systems” (Rob Davies, CIPC Strategic report, 2013: 1). The Minister of the dti, Rob Davies also noted that the “CIPC championed the establishment of the BRICS IP Offices Forum (currently chaired by CIPC) which culminated into the adoption of the BRICS Cooperation Roadmap in Magaliesburg, South Africa. With the identified areas of cooperation between the offices it is anticipated that this partnership will contribute positively to the advancement of IP in BRICS in particular South Africa” (CIPC

Strategic report, 2013: 1). The CIPC runs an “Innovation and Creativity Promotion programme”, designed to support the international IP system and to promote local innovation and creativity “by maintaining accurate and secure registries of patents, designs, film productions and records of indigenous cultural expressions and creative works, as well as by supervising and regulating the distribution of benefits of copyright and IK rights and protecting existing rights. The programme is also responsible to provide policy and legal insight and advice on the co-ordination, implementation and impact of the respective laws” (CIPC, 2014: 11). In terms of intergovernmental collaborations, it should be noted that CIPC, SARS and the DHA work together in the administration of IP related issues. In terms of business development, economic development and by implication creative business, the Department of Communication (DOC), CIPC and the dti have agreements.

The Mzansi Golden Heritage policy document by the DAC considers the contribution that the Arts, Culture and Heritage Sectors could make to the New Growth Path, in particular with respect to employment creation, while “IPAP3 explicitly refers to the employment potential of cultural industries connected with the tourism industry. This is reinforced in the NDP which stresses that ‘South Africa can offer unique stories, voices and products to the world. In addition, artistic endeavour and expression can foster values, facilitate healing and restore national pride” (CIPC, 2014: 21-22). According to CIPC “(t)he DAC policy document, read in conjunction with the NDP, sets out a vision for the creative sector, including the development of the music industry. Given its roles and responsibilities in promoting and protecting IP, CIPC could make a major contribution in this area. The IP Amendment Laws Act is the enabling legislation that further enhances the role CIPC could play in this regard” (CIPC, 2014: 25).

The CIPC provides a list of relevant bills that fall within its purview: Copyright Act, No 98 of 1978 - Provide non-binding advice to the public (Creative industries); the Registration of Cinematography Films Act, No 62 of 1977 - Register films, maintain data (Film industry); Performers Protection Act, No 11 of 1967 - Accredite Collecting Societies; regulate their governance, conduct and disclosure (Music industry) and the Intellectual Property Laws Amendment Act, No 28 of 2013 - Record and register IK, administer the National Trust and Council for IK, accreditation and dispute resolution agencies (Creative Industries). Additionally, relevant documents that relate indirectly to the CCIs include the: dti Medium Term Strategic Plan 2014 - 2017; Industrial Policy Action Plan 2013 – 2016; Strategy on the Promotion of Entrepreneurship and

Small Enterprise; Corporate Law Reform Policy; Policy on Indigenous Knowledge and the Co-operatives Development Policy for South Africa. Third Draft Revised White Paper on Arts, Culture and Heritage (2017); Draft Copyright Bill and the Draft Performers Protection Bill and the Mzansi Golden Heritage policy document by the DAC all refer in varying detail to issues around IP and the CCI's – these documents and their implications are dealt with partly in this chapter and more specifically in chapter 3.

At present there is no existing IP policy in place (IP Watch, 2016). Most recently however, South Africa's Department of Trade and Industry (DTI) released the Draft Intellectual Property Policy of the Republic of South Africa Phase I (2017) on Tuesday, 9 August 2017. The Policy is believed to have built upon the 2013 Draft National Policy on Intellectual Property of South Africa and the 2016 Intellectual Property (IP) Consultative Framework, and has reportedly engaged with a range of submissions by the public on the previous drafts. The Policy's goals are: "to consider the development dynamics of South Africa and improve how IP supports small institutions and vulnerable individuals in society, including in the domain of public health; to nurture and promote a culture of innovation, by enabling creators and inventors to reach their full potential and contribute towards improving the competitiveness of our industries and to promote South African arts and culture" (IP Draft Policy, 2017).

In terms of digital regulation however it should be noted that in 2015, the Film and Publications Board (FPB) presented a Draft Online Regulation Policy. This Policy is still under consideration in parliament despite being met with rigorous critique and general dismay from the South African public and members of the CCIs in particular. The key contention about the Draft Online Regulation Policy was that it allowed the FPB considerable power to exercise prior restraint in terms of almost all forms of content that gets produced and published online – a proposal that was seen as technologically impossible (to physically check, monitor and potentially censor online content), unconstitutional (contradicting the right to freedom of expression), draconian and hopelessly out of touch with the actual functioning of the internet and the digital sphere¹⁰. It would seem wise to reconsider this division of departmental

¹⁰ See R2K and AFAI's submissions to the FPB: <http://www.r2k.org.za/2015/03/10/statement-stop-the-film-and-publications-boards-attempt-to-censor-the-internet/> and <http://www.afai.org.za/wordpress/wp-content/uploads/Final-Submission-to-the-FPB1.pdf>

duties in terms of future thinking about the management of cultural production and digital rights management, as these will become even more important areas of policy development in the future.

2.3 The digital era and some consequences for the CCIs and IP in South Africa

Terry Flew argues: “digital technologies and globalisation present both opportunities and threats to indigenous cultural activity in developing nations” (2014: 12). In terms of IP law itself, the CIPC strategic plan argues that “(g)lobalisation, technological changes, as well as the emergence of low-cost manufacturers in developing countries such as China have fundamentally changed the IP landscape and are challenging the value of conventional IP rights protection and its enforcement” (CIPC, 2014: 20). This sub-chapter addresses the consequences for South Africa. According to a 2005 report by PricewaterhouseCoopers (PWC), entitled *Redefining Intellectual Property Value: The Case of China*: “Technological changes, such as digitization, have made IP more portable and are diminishing the effectiveness of current intellectual property enforcement mechanisms. As more countries are entering and profiting in international markets, the level of intellectual property rights infringement is rising and the distinction between innovation and copying is blurring. Emerging economies are unlikely to implement IP rights and protection practices as those established in North America and Western Europe” (CIPC, 2014: 9). The report emphasizes that “while South Africa must continue to support the international Intellectual Property system, and in particular participate in WIPO, it is important that CIPC clearly establishes what role IP rights and their protection can play in South Africa and how it should be better integrated economically.” (CIPC, 2014: 20). It goes on to explain that South Africa has the potential to play an important regional role in SADC as well as leading in IP law development across the continent.

Phiri explains that the dominant models regulating the IP space in Africa are national registration systems, in which intellectual property owners can register their rights directly in their own countries – South Africa is one of these. Spoor and Fisher (2016) explain that on the other hand there are regional registration systems such as the *Africaine de la Propriété Intellectuelle* (OAPI) in French speaking Africa - “OAPI member countries do not have their own intellectual property systems, so it is not possible to get a national registration in any OAPI member country” (2016). For Anglophone Africa, the African Regional Intellectual Property Organisation (ARIPO) system “covers patents, registered designs and trade marks, although only half the member countries offer ARIPO trade mark protection (...) ARIPO differs from OAPI

in that it is not a single filing system, but rather a designation system. What this means is that applications are filed at a central office, and the applicant designates those member countries that it wants covered. The cost of the filing is dependent on the number of countries designated. Each individual intellectual property office has an opportunity to refuse protection in its own territory within a period of 12 months. Each member country also offers the option of national registrations” (Spoor & Fisher, 2016). South Africa, along with many of the ARIPO member countries, is a common law country. This means that the country needs to “need to pass legislation before an international treaty becomes part of their law - this is in contrast to civil law countries, where an international treaty automatically becomes part of the national law as soon as the treaty is ratified” (Spoor & Fisher, 2016). Consequently, “Africa provides comprehensive protection for intellectual property rights, but registration can be complex because of the various systems that exist, and the problems that sometimes come with these systems” (Spoor & Fisher, 2016).

In terms of policy discourse, South Africa’s perspective on the effect of the digital era on the CCIs is overwhelmingly positive: “(a)ccess to cultural expressions is enhanced by digital technologies in terms of both ease and cost. The range and diversity of content is facilitated by mobile telephones, internet access and e-books. Obstacles remain in that broadband access is still expensive and not widespread and because of the poor human and technical resources for digitizing analogue materials” (ACH Policy, 2017: 41). It also recognises that “(d)igital technologies makes possible innovative remixing, adaptations and cross media narratives affecting most forms of expression such as literature, music, cinema and performing arts. Obstacles in the form of technical and artistic expertise, legal implications of remixing and reuse and the impact of piracy on artists’ income remain critical” (ACH Policy, 2017: 42). In order to address such obstacles, the policy is committed to “work with artists and major internet players to ensure compensation to creators and artists for the use of their work in the digital world and concurrently fight against copyright piracy and (...) address digital rights and business models appropriate to digital technologies” (2017: 42.)

Additional to its commitment to protect the IPRs of online content creators, the policy also commits to addressing technology gaps in the country: “The lack of knowledge for producing high quality digital content is however a key obstacle for young entrepreneurs and artists. Other obstacles include online payment methods, complex

digital standards, poor defined digital copyright management systems, space for traditional cultural circuits and digital piracy” which it aims to address through various mechanisms. At the same time, the 2017 Draft Policy reflects many of the concerns around the effects of mass media and the digital turn on cultural dominance versus local cultural production and expression in Chapter 1: “the mass media reflects the thinking and values of those who own them. When they serve value systems or ways of life that are foreign to the people of a particular place, they tend, in the end, to wipe out the specific values of those people, becoming instruments of cultural alienation, even if unintentionally. (...) the vast quantity of messages dished out to receivers by cultural industries daily can be analysed both in terms of their content and their impact on the dialectic of access and participation. Foreign cultural messages, specifically American, in the main, while promoting access by the local population to certain cultural goods and services, tend at the same time to frustrate local aspirations by alienating such people from active participation in the form of programmes or in the creation of cultural content” (ACH Policy, 2017: 33).

In terms of monitoring, mediating and managing the ways in which creators and users alike utilize the online space, the discussion in Chapter 2 about the online media dominance by mega-companies like Google and Facebook is relevant here. Anton Harber for the Financial Mail (November 2017) points out that Google and Facebook’s dominance “is based not just on the vast number of users (Facebook claims 16m users a month in SA), but their capacity to collect data on their audience and target segments with much greater, almost clinical, accuracy than traditional media who have been slow to keep up” (Harber, 2017). The problem of fake news and the ‘echo-chamber’ emerge as we learn more about the business models of Facebook and Google, both of which influence what media people receive online based on the personal information the companies have on individuals and the targeted marketing it is able to do. Harber explains that “these behemoths like to see themselves as platform providers rather than content creators. But they carry – and have some responsibility for – a ton of content, and take an enormous amount of the global audience’s attention and time” (Harber, 2017). He goes on to quote media industry analyst Arthur Goldstuck who says “(y)ou might argue that business is business, but we know the media has an important role in SA. This is not just business. This is dramatically undermining the role of media in society” (Harber, 2017). Besides the worrying concern over the sustainability of South African media houses, this fact presents an even larger concern. As the UNESCO/ CISAC report pointed out, there is a shift in the way in which societies are consuming cultural

products from analogue to digital. Consequently, these tech giants become hugely influential in not only what people are consuming as news and facts about the world, but they are also steering people's cultural consumption towards what might be commercially lucrative.

In a presentation to the Portfolio Committee of Trade and Industry on the Copyright Amendment Bill, legal expert and member of the Copyright Alliance Graeme Gilfillan pointed out that the contentious provision of "fair- use" in the draft Bill (to be discussed at length in Chapter 3) would be an important way to respond to mega companies like Google, Facebook and YouTube. He argued that "the business models of Google, You Tube and others were based on "fair use" being present in national law and without such there was wholesale copyright infringement afoot. Bringing in fair use provisions brings those at the coalface of the "value gap" and requires Google, You Tube and others into having to deal with copyright owners, it does not shield them. It [would] put the country in a position to do as others had done which was to negotiate a settlement with these parties" (PMG, 1st Public Copyright Hearing, 2017). South African broadcasting companies MultiChoice and M-Net also raised issues in the context of the Copyright public hearings about the effect of global internet based companies like Netflix, YouTube and Amazon Prime on local broadcasting. In a presentation to the said Portfolio Committee, they argued that "(t)hese global players did not make any investment in local content. What this meant was that the economic model for investment in local production was actually being undermined by these global players, while at the same time local broadcasters had strict requirements on local content and a whole other range of regulatory requirements" (PMG, 2nd Public Copyright Hearing, 2017). Consequently, policy should avoid further worsening the position that local broadcasters have found themselves in "by dis-incentivizing investment in local content and constraining the ability to use content rights on multiple platforms" (PMG, 2nd Public Copyright Hearing, 2017). On the other hand, piracy occurs when legitimate alternatives are not available. Netflix is an instructive example. Before Netflix came to the market in RSA, 90% of accounts held in South Arica were illegal accounts created using a virtual private network (VPN) combined with a South African account. As in this case, the general principle is that making the product available legally cuts off piracy. For example, when artists release on iTunes, there is a reduction in piracy (PMG, 2nd Public Copyright Hearing, 2017).

The UNESCO/ CISAC report suggests that there are two main issues to address

here given the transformation of the form of cultural products and copyright-able goods in the digital age: first “trying to persuade consumers to pay for something they may have been accessing for free” and second, “extracting a fair share of the value generated by cultural content, which has been largely captured by online intermediaries” (2015:9). However, some remain sceptical of the possibility of ‘balancing’ creators’ rights with users rights and the principle of access given the impact of the digital era. In an interview with representative of the Copyright Alliance¹¹, Wiseman Ngubo presented the following opinion: “(t)he coming of the Internet Age and the activity of technology companies that use the Internet has disrupted these longstanding principles. Whereas it is so that temporary and ephemeral copies of works must be made in order to have the Internet work, availability of material on the Internet has also created the expectation of its users that everything they find there must be free – an expectation that has no legal foundation and has had a serious impact on the income of the creative industries”. This paper would propose an approach in the South African context that seeks to balance the policy imperatives of a) ensuring greater digital and online access for creators and users alike rather than wishing for a transformation of how people view online content, and b) developing appropriate tools to effectively incentivise formalized cultural production and consumption.

Chapter 3

Key Debates in South Africa around Copyright in the CCIs

3.1 A Brief Overview of Copyright Law and Policy in South Africa

The original Copyrights Act 98 (1978) came into effect in 1979, and since then there have been nine Amendment Acts, the last being the Copyright Amendment Act 9 (2002). In 2015, the dti proposed a Copyright Amendment Draft Bill. The 2015 Copyright Amendment Draft Bill was presented according to the following rationale: “the current policy revision is based on the need to bring the copyright legislation in line with the digital era and developments at a multilateral level. The universal purpose of copyright is to reward and incentivise creators of knowledge and art. The purpose of the Bill is to increase access to knowledge, access to education, learning materials for nationals and persons with disabilities. The creative industry particularly musicians, are vulnerable to abuses by users of their Intellectual Property and the Bill seeks to redress this matter” (<http://www.thedti.gov.za>). The 2015 Draft Bill was met with a diversity of public responses, with a strong message from representatives of the CCIs that while the Bill sought to protect and promote artists, some of the clauses were potentially very harmful to protecting creative practitioners and provided disincentives to creative work.

Subsequently, the dti produced a second Copyright Amendment Draft Bill in 2017, which seemed to take into consideration many of the critiques and commentary received from the creative sectors. According to a report on the first public hearing around the 2017 Draft Bill, “the proposed Copyright Amendment Bill B13-2017 sought to align existing outdated copyright legislation with the many developments in the digital environment at a multi-lateral level. The proposed provisions were strategically aligned with the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty, and the Beijing and Marrakesh Treaties on copyright” (PMG, 1st Public Copyright Hearing, 2017). In one stakeholder interview, Stephan Viollier from law firm Legalese commended the 2017 Draft on its attempt to balance the imperatives of copyright with social justice imperatives: “We commend the intentions and the overarching goals of the new draft bills which seeks a contemporary balance (in step with international trends and the realities of a more open internet / 'remix' culture) between the power and rights of content creators to elicit compensation for their efforts against the right of the public to have access to and make fair use of such works - notably in view of the South African struggle of access to education and an under-served majority population” (Legalese).

At the same time, the 2017 Draft Bill was also met with a litany of responses from the creative sectors. These will be addressed in three primary categories that follow. This chapter was informed by a detailed and extensive analysis of the official submissions presented to the dti on the Copyright Amendment Draft Bill by various entities, the responses by the dti to these submissions, various journal articles (listed in the bibliography) and a few select interviews. The transcripts from the 3 Public Hearings that took place in August 2017 served as a primary source, as well as the attached submissions by the presenting entities. As some of these entities are quoted in the chapter, but many informed the summary, I will outline the relevant bodies that presented here:

- *Hearing 1:* Southern African Music Rights Organisation (SAMRO), the Dramatic, Artistic and Literary Rights Organisation (DALRO), the Global Network on Copyright Users Rights (GNCUR), the Publishers Association of South Africa (PASA), the South African Institute for Intellectual Property Law (SAIIPL), the Copyright Alliance, and a composer and producer.
- *Hearing 2:* The Documentary Filmmakers Association (DFA), Google, Media Monitoring Africa (MMA), Wikimedia Foundation, Freedom of Expression Institute, Kagiso Media, The Composers, Authors and Publishers Association (CAPASSO), South African Guild of Editors (SAGE), MultiChoTCE, M-Net, Recording Industry of South Africa (RISA), Independent Music Performance Rights Association (IMPRA) Cultural and Creative Industry Federation of South Africa (CCIFSA).
- *Hearing 3:* Academic Non-Fiction Authors' Association of South Africa's (ANFASA), South African Book Development Council (SABDC), South African National Council for the Blind (SANCB), The International Federation of Film Producers Association (FIAPF), South African Guild of Actors (SAGA), South African Screen Federation (SASFED), National Association of Broadcasters (NAB), Library and Information Association of South Africa (LIASA), Spoor & Fisher, American Chamber of Commerce in South Africa (AmCham), Innovus from Stellenbosch University.

The following individuals or organisational representatives were reached out to, in order to gain a more nuanced account of the issues discussed, or to further probe some contentious topics. The following 4 were chosen because they seemed to strike a good balance of industry representativeness and academic expertise:

- **SAMRO** (South African Music Rights Organisation) is a distribution society whose primary role is to administer Performing Rights on behalf of their

members by licensing music users (such as television and radio broadcasters, live music venues, retailers, restaurants, promoters and shopping centres), through the collection of licence fees, which are then distributed as royalties.

- **The Copyright Alliance**, which is made up of SAMRO, CAPASSO, DALRO (Dramatic, Artistic and Literary Rights Organisation); RiSA (Recording Industry of South Africa), SAMPRA (South African Music Performance Rights Association), MASA (Musicians Association of South Africa) and MPA SA (Music Publishers Association of South Africa).
- **Monica Seeber** is the treasurer of ANFASA (the Academic and Non-Fiction Author's Association of South Africa) and a publishing consultant, with expertise is copyright, who has consulted to both UNESCO and WIPO in that field. Monica is the co-author and co-compiler of *The Politics of Publishing in South Africa* (2001), has also written numerous articles on copyright and publishing.
- **Legalese** is a creative legal agency, which has redesigned legal services to suit creative, start-up, and tech-based businesses by making them accessible, affordable and understandable. I spoke with Stephan Viollier “a practising attorney licensed in both South Africa and New York with a background in media and commerce. He specialises in intellectual property law, focusing on trade marks, international copyright and technology licenses”.

3.2 Criticism/ Responses to 2017 Draft

3.2.1 CREATOR/ USER/ COMMISSIONER RELATIONS

The first issue to address here is the problem of users' rights versus creators' rights. A number of critics spoke out against “the copyright rights the bill would grant to “users” as well as “authors” of creative works. The bill's wording provides for royalties to be payable to “the user” of a literary or musical work in addition to its creator – a notion which has raised hackles in the creative world” (DM). It has been noted however, that throughout the Bill there is a problem with language, referring in particular to the contended clause about ‘users’ rights, on numerous occasions throughout the Bill, the terms “user, performer, owner, producer or author” are lumped together inappropriately. Karjiker & Jooster note that “(t)he proposed section 9B(3) goes on to state that any of the “user, performer, owner, producer or author”

will be entitled to receive the royalty. This is, of course, nonsense in the context of copyright law, particularly the type of artistic work which this type of provision is meant to deal with" (Karjiker & Jooster, 2017: 5). In many instances (including those relating to resale rights), the granting of rights to users appears as an inconsistency and error. This perspective was reiterated from a legal standpoint: "(t)he right of 'users' to claim royalties as well as other rights given to 'users' (...) makes no sense" (Legalese). This analysis will look more closely at examples in which the intention of providing users with particular rights is clearer.

Dr Tobias Schonwetter, Director: UCT Intellectual Property Unit, argued that "both over-protection and under-protection of right holders and users had impacts, but the proposed Bill should strike a balance between right holders and users since the aim of the Bill was a law that supported people in the rural areas. The challenges in the copyright legislation were not copyright issues, but were instead related to 'unfair competition, the abuse of privacy rights, defamation, and exploitative contract clauses' (PMG, 1st Public Copyright Hearing, 2017). Ms Charmaine Mrwebi, author, publisher, and member DALRO, argued that the Bill "failed to introduce consequence management in the internet environment, because it did not meet the demands of creators and it did not allow the government to fulfil the promises made to creators. She recommended that the South African government acceded to the WIPO Performance and Phonograph Treaty recommendations by not adopting legislation which overrode contractual agreements" (PMG, 1st Public Copyright Hearing, 2017). This perspective was reiterated in an interview with Monica Seeber, who argued that "'fair use' provisions are retained there will be a devastating effect on the publishing industry and authors will be negatively affected as well".

One such case is the matter of commissioned works, and the consequences thereof for creators. Various parties have called into questions whether the Bill adequately protects *creators* of original literary and artistic works, particularly those working creatively in employment or those *commissioned* to create artistic works. This is important given that much creative work happens within organisations or institutions (such as media houses) and not necessarily by 'freelancers'. The Copyright Alliance contested "(t)he automatic usurpation of copyright where composers and authors are commissioned or funded to create musical or literary works". This is an issue discussed by South African Music Rights Organisations' (SAMRO) CEO Nothando Migogo who suggested a scenario in which a TV theme tune was produced, and asked who would own copyright: the body which paid for the work, or the person who

composed the work? “The royalties which composers can earn from this kind of work currently are not negligible: according to Migogo, SAMRO currently pays out between R80-million and R90-million annually in this way” (DM). The Copyright Alliance goes further to explain the consequences of the copyright resting with the commissioner when a work is commissioned: “As a practical example, it will, in the case of musical works, preclude authors and composers from the automatic right to receive royalties for the broadcast of their music by the SABC and other broadcasters (in respect of performing rights royalties payable by SAMRO and mechanical rights royalties payable by CAPASSO). In the case of films whose making was funded by the IDC or NFVF (such as the famous *Tsotsi* and *Yesterday* films), the producers shall not have any copyright ownership in such films and will thus find it difficult to obtain further investment funding from private parties, and would have difficulties promoting the film and getting distribution deals” (CA Submission to DTI, 2017). The role that collecting societies would play in monitoring and ensuring that artists are properly remunerated is widely recognized. As Monica Seeber argues, “(t)he licensing of literary and musical works by a collecting society benefits both the creator and the user”.

Further to understand the consequences of the commissioner owning copyright, we should look at the proposal in the Bill proposes that copyright in state-funded works shall automatically vest in the state. This calls for further clarification is clearly about when a work can be said to have been “funded” by the state. Does the funding have to be direct? Mr Rehad Desai, creator of the ‘Miners Shot Down’ documentary, argued that “(n)early every movie made in RSA is funded, at least in part, by a state entity: through the SABC, through the National Film and Video Foundation grants of the Department of Arts and Culture, or through the Film and Television Production Incentives of the Department of Trade and Industry (DTI). Enacting the proposed change to Section 5 would thus deprive most filmmakers of the right to hold copyright. Rather, should any state entity require licence or ownership of copyright in any specific production contracted and intended for state use, a contract can be required which transfers such rights as part of the tender process” (PMG, 2nd hearing, 2017). Stephan Viollier from Legalese raised the following concern: “we disagree with the overreach into and fettering of the right of content creators (to commercialise their work) by way of wording in the Bill that provides that contractual provisions that prevent or restrict any act that would otherwise be lawful under the Copyright Act, or any provision which requires the renouncement of a right under the Copyright Act, will be unenforceable” (Legalese). Additionally with regards to “(s)ate funded works

owned by state copyright (i)t should be clarified what the funding threshold degree (or percentage) is. For example, we disagree with the idea that if the state funds 1% of the creation of the work should the state become the owner of the copyright" (Legalese).

Karjiker & Jooster explain that "the Publicly Financed IP Act excludes conventional academic works which would enjoy copyright protection, such as, a thesis, dissertation, article, handbook or similar publication. While these types of copyright work will currently, almost inevitably, be owned by an institution, such as a university, because the author is an employee of such institution or because of contractual rights, there is the possibility that the new proposed section 5(2)(a) seeks to change the position" (Karjiker & Jooster, 2017:10). If the new proposal that state funded works are vested in the state is put into effect it would contradict the aforementioned law and would create a situation in which there would be "two regimes dealing with the same matter, with the one regime permitting private ownership of the intellectual property developed through State funding, and the other prohibiting it" (CA Submission to DTI, 2017). This is clearly an inconsistency that would need to be rectified. The concern about whether copyright would vest in the state as an effect of *full* or *partial* funding was raised by a large number of CCI industry representatives (in all 3 Public Hearings) and seems to be a point that will require clarification.

The issue of Resale Rights was also raised by a number of stakeholders. Stephan Viollier from Legalese asked "should the creator of an artistic work (such as a logo) be entitled to a percentage of the value of a logo / trade mark, where the value of the logo is largely resultant to the time and effort spent in building goodwill in a trade mark by the trade mark proprietor (and the value is not necessarily tied to the artistic work itself). Also, how will such a resale royalty right be implemented in practice?" (Legalese). It was noted that "(t)he Bill did not indicate who was responsible to pay the resale royalty -- the seller or the buyer. The principle of resale royalty was supported if the outcome would benefit young and emerging artists. However, the model in the proposed Bill had many flaws, so it should be redrafted" (PMG, 1st Public Copyright Hearing, 2017). Spoor & Fisher: "(t)he scope of the resale royalty rights of artistic works should be clarified, as a broad interpretation of what entailed an artistic work could be interpreted to include works of architecture such as buildings, thereby creating the impression that every sale of such properties would incur royalty fees due to the builders" (PMG, 3rd Public Copyright Hearing, 2017).

3.4.2 FAIR USE

Representatives of the CCI's came out strongly with critique about the 'fair use' clause. To put it simply the general perspective was that "Fair use is actually not fair," as argued by artist Sibongile Khumalo (DM). This perspective was included in submissions about this clause by Safrea (which supported lobbying efforts from the Academic and Non-Fiction Authors in South Africa (Anfasa) and the South African Guild of Actors (Saga)), PEN Afrikaans and PEN South Africa (which contested specifically, the use of unauthorised copies and lack of royalties delivered to authors from the sale and licensing of their books which would impact on writers, journalists, editors, newspapers, filmmakers, news writers and scholarly authors), VANSA and the Copyright Alliance. As summarised in the Public Hearing 2, "disagreement about fair use centred on two key questions: 1) how broad a fair use clause could be before becoming open to abuse, and 2) whether it was appropriate in SA and in particular whether it would lead to an overwhelming amount of litigation. There was no clear outcome on these discussions" (PMG, 2nd Public Copyright Hearing, 2017).

In order to further investigate the contentious 'fair use' clause in the Copyright policy, Wiseman Ngubo, provided very compelling insights. In response to a question about whether the 'fair use' clause, strikes the right balance¹² between artists rights and the social good (particularly with reference to issues of piracy, access to information and knowledge through literature and access to arts and culture for all), Mr Ngubo explained that "(t)he members of the Copyright Alliance are convinced that US-style 'fair use', and even more so, the version of 'fair use' proposed in the Bill, will have disastrous consequences for the creative industries and will have the effect of transferring the earning power of their work to technology companies – thinking particularly of Google, Facebook, Apple and Amazon - to support their business models (...) 'Fair use' is not about permissioned 'uses' (reproduction, etc) of copyright works that are 'fair.' It is the name of a statutory defence to copyright infringement developed under the common law of the United States since 1841 and

¹² Included in Mr Ngubo's response was a quote, which presents an argument against the notion of a 'balance': 'This public debate between copyright owners and users has been framed as a question of finding a copyright balance. I reject this search for a copyright balance. It is a false debate. The idea of a copyright balance imports an implicit assumption that there are two opposing interests: copyright owners' rights and the public interest in access. "Copyright balance" ends up balancing authors' and publishers' rights against the public interest in access. This is a false dichotomy. It is not the case that copyright is a selfish, corporate interest and that exceptions to copyright are in the public interest. Copyright is not against the public interest. Copyright protection is in the public interest.' (In What are publishers for?, 13 April 2016, available at http://www.internationalpublishers.org/images/events/ipa-congresses-events/2016_London/What-are-publishers-for-Charles-Clark-Lecture-2016docx.pdf)

codified into US law in 1976, allowing a judge to decide after the fact whether a 'use' of a copyright work by a 'user' is an infringement or not by evaluating that 'use' against four factors. 'Fair use' was settled in US law by the time it became a member of the Berne Convention in 1989, but there are serious concerns whether some US court decisions finding 'fair use' would meet the minimum requirements of the Three Step Test¹³. 'Fair use' has been used in the United States to develop electronic and Internet 'uses' of copyright works in the courts, often to the detriment of copyright owners. The most notable example is the Google Books case, where Google was allowed to scan (i.e. reproduce) the entire corpuses of literary works in US libraries for their 'snippets' feature, without paying copyright owners a cent¹⁴. However, an interesting counter perspective on the effect of fair use on the CCI's was offered by Legalese: "(a)lthough the expansion of exceptions of fair use / fair dealing exceptions are a narrowing of the rights of content creators and, on the face of it, appear to be detrimental to the CCIs, we do take a broader view of the milieu within which CCIs operate, and acknowledge that ease of access to works may have a positive knock-on effect and encourage the growth and expansion of the creative processes in general, may encourage further free creation and potentially strengthen the SA CCI sector in general" (Legalese).

In an online article, Sean Flynn, researcher and lecturer at American University Washington College of Law in Washington DC, and co-ordinator of the Global Expert Network on Copyright User Rights, also presents an alternative perspective on 'fair use'. He explains that whereas "the US fair use clause is (...) open to application to any purpose. The South African fair dealing clause only applies to a narrow list of purposes including research or private study, personal or private use, criticism or review, and reporting current events". In what can be related to the case about Google Books, Flynn argues that "internet search engines, machine learning, artificial intelligence and data mining – all of which use machines to "read" millions of works to expand our knowledge and improve our lives. But when machines read, they also copy. Requiring a licence for each one of these copies, which do not substitute for any work in the market and do not communicate the work to anyone, would shut

¹³ Mr Ngubo explained that "(t)he international treaties (the Berne Convention being the main one) allow each country to design its own exceptions, so long as they meet the so-called Three Step Test, namely that any exception must (1) apply to a special case, (2) not be in conflict with normal exploitation of the work and (3) not be unreasonably prejudicial to the legitimate interests of the rightsholder"

¹⁴ Mr Ngubo points to an article at <https://www.businesslive.co.za/bd/opinion/2017-08-24-reassurances-about-fair-use-benefits-ring-hollow-to-publishers/>, written by the copyright law adviser to Copyright Alliance members PASA and DALRO.

down the technology” (Flynn, 2017). Additionally, “fair use is not a giveaway to big corporations such as YouTube. Fair use doesn’t let corporations, or anyone else, avoid paying a licence fee to play, perform or copy a work in a way that substitutes for the market of the copyright owner” (Flynn, 2017).

Mr Ngubo expressed concern about the “way the “access to knowledge” narrative is presented, since it pits copyright owners against actors who claim to be acting in the public interest”. Mr Ngubo argued that instead “Copyright is in the public interest, since it is the mechanism that creates the original work that those seeking the knowledge wish to obtain. A consequence of this narrative is lot of misinformation about ‘fair use’, specifically that it is meant to be something that is ‘fair’, and that it allows so-called “non-expressive uses” which supposedly harm nobody. That is not the case – ‘fair use’ is a statutory defense used these days by big technology companies to protect their business models that rely on the unpermissioned reproduction of copyright work, and in other contexts claims of ‘fair use’ pits copyright owners against their customers. The concept of “access to knowledge” is often conflated with free/gratis reproduction of other people’s copyright works on the highly ideological and incorrect basis that publishers of academic works somehow “lock up” the information contained in those works. (...) Often the argument simply comes down to an ideological stance with the very materialistic goal of avoiding paying license fees for copyright-protected uses for the benefit of authors, artists and copyright owners” (Copyright Alliance). In this case too, Stephan Viollier from Legalese presented a favourable reading of the Bill’s commitment to access: “(w)e believe that expanding fair use / dealing exceptions in the context of education and for expanding access for under-served populations is appropriate and necessary in the South African context, where access to education and lowering of costs thereof are paramount” (Legalese).

According to Monica Seeber, “(a)ccess to information is indeed central to the debates, but in SA it has assumed a one-dimensional form, in which intellectual property rights are trumped by access. It’s a complex and contradictory issue, but the way it is playing out in SA is detrimental to authors and publishers”. PEN Afrikaans and PEN South Africa also expressed concern over the provision of fair dealing for ‘underserved populations’. They argued that while “(e)ducation and research are undoubtedly important public policy considerations”, the lack of definition of an underserved community and vagueness of ‘expanding access’, could create a “very broad exception is open to being exploited at the expense of authors” (PEN, 2017).

Related to this argument is the provision in the Bill for Related Exceptions, also criticized by the submission by University of Stellenbosch. In this provision, scholarship, teaching and education are recognized as circumstances under which 'fair use' could be guaranteed. The provision was criticised as unreasonably broad "there is no evidence to suggest that copyright law is a material impediment to education. If government would like to provide cheaper textbooks without having to negotiate with copyright owners, it is quite at liberty to commission, and print, its own material. Again, if there is a desperate need for translations of copyright works into other languages, why is government not entering into arrangements with the relevant copyright owners in getting the required works translated" (Karjiker & Jooster, 2017: 20). The author goes further to argue that "government seeks to expropriate property rights in order to reduce the costs of its constitutionally-mandated obligations to provide education. It is clear that the failure in the education sector is due to non-delivery of services by government, rather than a problematic copyright-law system" (Karjiker & Jooster, 2017: 21). Flynn presents another argument that may respond to some of these concerns: "(t)he test for whether a use is fair asks whether the use would deprive the author of revenue by substituting for the work in the market. (...) For this reason, the idea that fair use would allow a school to make thousands of copies of a book for its students is absurd. Fair use does not provide this right, because the act would clearly be substitutional" (Flynn, 2017).

Mr Ngubo explained that "'Fair use' has no relationship to copyright piracy. If it does, it could be in the sense that it could be relied upon by unauthorised 'users' to legitimise that which is today considered as copyright infringement or even piracy". This is supported by the University of Stellenbosch's policy critique which argued that, "given the fact that there is fair-dealing exception for "personal use" (it) would now be lawful for any person to make copies of sound recordings (such as CDs) or cinematograph films, if it is for personal use" (Karjiker & Jooster 2017:19). According to the interpretation provided by Flynn, this would not be the case. In addition, "existing collective licensing arrangements would be unaffected by the introduction of fair use legislation. Likewise, photographers' revenues from sales for promotion and advertising use or illustrations on websites would be undiminished" (Flynn, 2017).

During the second public hearing on the Copyright Amendment Draft, Mr Sibanda from Google explained that "(f)air use allows creators to depict real life, to respond to other works (for example, Trevor Noah of *The Daily Show* takes snippets from Fox News or CNN to comment on), or to make new creative works. It allows creators to use old content provided they are not substituting for the value of the original content.

It allows people to innovate. For example, a non-commercial remix of a song would be an exception that would enrich the Bill” (PMG, 2nd hearing, 2017). Additions to fair use supported by Documentary Film Makers Association (DFM) and the Freedom of Expression Institute (FXI) include “a) transformative uses of works, such that the new work serves a different audience with a different purpose as the original, such as a “mash up” video; and b) non-expressive uses of works, i.e. technological uses that merely “read” or use a work in a way that does not express it to the public, such as uses through data mining, search, storage, machine-reading, and transmission” (PMG, 2nd Public Copyright Hearing, 2017).

3.4.5 LOCAL CONTENT

While the idea of promoting local content is imperative to appreciation of local culture and the support of local artists, its implementation needs to be managed very carefully. The rationale for local content quotas is that “(m)usic, as a cultural product, assists in developing (national cultural) identities to become more tangible to consumers, consequently providing a platform for the local music industry to grow through the promotion of local talent (Chari, 2013: 6). At the same time, the definition of “local content” and moreover what constitutes national culture are ongoing and disputed, and that the institutions involved in the promotion of local content have historically operated with little transparency. The Independent Communications Authority of South Africa (ICASA) issued a statement in 2015: “The Authority acknowledges that there is no universal definition of social and cultural objectives such as cultural diversity, national identity. However local content programmes should recognize and reflect the diversity of all social and cultural backgrounds in South African society” (2015). A point to consider here is that “(l)ocal content quotas do not exempt local musicians from including elements of international music, nor do they guarantee that local music will preserve national identity or accurately reflect it (Bere, 2008:277; Chari, 2013:30). (...) After the implementation of a 75% music content quota in Zimbabwe, it was found that younger musicians became increasingly culturally ambivalent, as their musical style was neither local nor global” (Chari, 2013: 31). Another one is that in some instances, depending of course on the expected amount of local content provision, broadcasters may have trouble with quality and diversity, being led to substitute both for patriotism and potentially having trouble maintaining listeners and acquiring revenue from advertisers.

In 2015 a Position Paper and Draft Regulations on South African Local Content: Television and Radio was made public, and proposed a ruling that would increase

the quota for local cultural content to be aired by broadcasters. In 2016 the '90%' ruling was introduced, requiring broadcasters to dedicate 90% of their playtime to local music. This happened under contentious circumstances. It was reported in the 2nd Public Hearing on the Copyright Amendment Draft Bill that "in March 2016, ICASA, which was obliged to use measures to ensure compliance with the obligation to promote local programming, issued guidelines of 70% for public and 35% for private commercial radio. The public broadcaster at the time was quick to object and this was well-publicized when a certain Mr Motsoeneng who defiantly, firmly held on to a maximum quota of 60% because of his connection to SABC. It was surprising to discover two months down the line, around election time, the same person boldly and opportunistically announced a 90:10 split between local and international content to be implemented immediately overnight on the national broadcasters radio channels. Members of MASA who had been campaigning for high local content immediately heard alarm bells ringing when on the one side, marginalized local composers and musicians were rejoicing, singing Mr Motsoeneng's praises, while on the other hand a largely Americanized, westernized consumer public, especially amongst the previously and mostly still currently advantaged community sectors went into combat mode to fight the 'scourge of African nationalism' (PMG, 2nd Public Copyright Hearing, 2017).

There were mixed responses about the ruling, and a large amount of skepticism about how it would be enforced, what exactly would count as local and what the outcome would be. The following comment from the R2K campaign illustrates the general mistrust of the M&E systems in place around local content policies: "Due to a number of factors, including the absence of an effective monitoring system, ICASA (Independent Communications Authority of South Africa) has failed to monitor the SABC's adherence to its license conditions and to its local content regulations (quotas). This has led to a situation where the SABC has been allowed to air endless repeats and too great a proportion of international programming" (Right2Know, 2011). In addition, "(c)alculating local content is a complex job, and there are concerns that it is not being done correctly. All minutes of shows aired for the first time count towards the quota, but a first rerun counts just 50% of time, while subsequent flightings cannot be counted" (Marc Schwinges of SA Screen Federation: themediainline.co.za, 2011). Most recently, the SABC has been entangled in scandals around general mismanagement, cash liquidity problems, a loss of

audience and credibility¹⁵. According to local media reports, SABC's CEO James Aguma "has told Parliament that the 90% local content policy has caused losses for the public broadcaster. He said flagship radio stations Metro FM, 5FM, and Goodhope FM, as well as television channel SABC3, suffered a decline in audiences. "The 90/10 local music quota... has an impact of R29-million on radio and R183-million on television," he reportedly told Parliament¹⁶. This finding concludes the discussion on whether or not the 90% ruling was successful, but certainly does not preclude the importance of a local content quota system. Rather it points to the need to demand of the various State instruments greater transparency and integrity.

¹⁵ <https://citizen.co.za/news/south-africa/1496254/sabc-interim-board-plans-to-scrap-90-local-content-rule/>

¹⁶ http://www.huffingtonpost.co.za/2017/05/11/sabc-admits-90-local-content-policy-was-a-flop_a_22080999/

Chapter 4

Key Debates in SA around Indigenous Knowledge and Indigenous Cultural Expressions

Much like Chapter 3, this chapter was informed by a detailed and extensive analysis of the official submissions presented to the DS&T on the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill by various entities (through online articles and official submissions procured online), the responses by the DS&T to these submissions and various journal articles (listed in the bibliography). The transcripts from the 3 Public Hearings that took place in January 2017 served as a primary source (recorded and summarized by the Parliamentary Monitoring Group), as well as the attached submissions by the presenting entities.

4.1 A brief overview of IK and TK Policy in South Africa

In the first public hearing around the IKS Bill, a comprehensive historical account of the policy development that led to the current position was expounded by a member of DS&T, this is quoted at length for context: “(t)he historical genesis of the IKS policy goes back to the late 1990s and began in Parliament within the Arts, Culture, Science and Technology Portfolio Committees. This process went through national consultation and terminated into the IKS Policy of 2004. Before 2004, there was also an attempt by means of a private member bill to obtain the protection of the IKS. The IKS Bill has four driving agendas which is protection, promotion, development and management. To a large extent, the historical context which the IKS Bill addresses is that of redress and transformation within the nation. IKS can be used as a very powerful tool for national identity and social cohesion. The mainstreaming of indigenous knowledge is being addressed by the IKS Bill to deal with the marginalisation of indigenous knowledge. It also recognises indigenous knowledge in the face of globalisation. (...) The IKS legislation seeks to create a balance between various interests in promoting economic and moral rights and create a balance between the public interest and the individual right” (PMG, 1st IKS Public Hearing, 2017). The agenda to address IKS that was initiated in 1990, has subsequently seen a number of ideas about what policy and legislative mechanisms are best suited for its protection, promotion, development and management.

In 2007, the Department of Trade and Industry (DTI) drafted and published the Intellectual Property Laws Amendment Bill (IPLAB) for comment. The IPLAB adopted the general approach of creating new forms of IP (namely, indigenous or traditional

IP) by amendment of certain IP Acts rather than creating a unique and 'new system' for the protection of such forms of IP (also known as a *sui generis* approach). Subsequently, "(t)he IPLAB was subjected to wide and strenuous criticism by the legal profession, especially by IP legal practitioners (as well as a judge of the Supreme Court of Appeal). The fundamental reason for this criticism was that the IPLAB aimed to provide protection for manifestations of indigenous or traditional cultural expressions (TCEs) as various species of IP. This would be achieved by introducing such new species of IP into South Africa's well-established IP Acts by amendment of such Acts, which new species did not rightly belong in, or properly fit into these IP Acts" (van der Merwe, 2014). The consensus to redraft and rethink the policy approach to the treatment of IKS, took policy drafters through a lengthy process of research and reconsideration. The first draft of the IKS Bill in 2011 was met with great consternation from the legal community as well as the interested public because it sought to protect IK/ TCE through existing IP law, which in particular would call upon copyright law for application and enforcement. The general outcry was premised on the perception that the bureaucratic complexity and legal time-frames of copyright law would render much culturally related IK (such as music, poetry, folklore, dances 'unusable' because even works inspired by these traditions) legally 'out of reach'. This could potentially create a disincentive to use traditional material belonging in the public domain and thus slow cultural expression¹⁷ and paradoxically ensure the decline of some traditions.

In 2014, the CIPC commented: "(p) reparations for the implementation of the IP Amendment Law are underway, most notably the aspects relating to the protection of indigenous knowledge and specifically preparations for the recordal of indigenous cultural expressions" (CIPC, 2014: 21-22). In 2015 the Department of Science and Technology published the first draft of the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill, 2014 (the "IKS Bill) and called for comments. This followed the Intellectual Property Laws Amendment Act, 2013 (the "IPLA Act" signed into law in 2014). The 2015 IKS Bill is the second attempt to introduce legislation seeking protection for indigenous (or traditional) knowledge. Most significantly, the 2015 IKS Bill presented an argument for *sui generis* law, that would create a special form of protection for IK/ TK that does not rely on making use of existing copyright laws. While not without its incumbent complexities, this approach presents a much more promising path for the protection

¹⁷ <https://www.ip-watch.org/2012/05/29/golden-oldies-south-african-high-court-looks-at-what-is-traditional/>

of IK/ TCE in the country. The Bill has gone through 3 rounds of public hearings and is currently under consideration by the National Council of Provinces.

What are IK and TCE and why are they important? The definitions understood in this report conform to those used in the 2015 IKS Bill as follows: “*Indigenous knowledge* means knowledge which has been developed within an indigenous community and has been assimilated into the cultural make-up or essential character of that community, and includes – knowledge of a scientific or technical nature; knowledge of natural resources; and indigenous cultural expressions. The eligibility criteria for protection applies to IK, which – has been passed on from generation to generation within an indigenous community; has been developed within an indigenous community; and is associated with the cultural make-up and social identity of that indigenous community. *Traditional cultural expressions* means expressions having cultural content developed within indigenous communities and assimilated into their cultural make-up or essential character, including but not limited to- phonetic or verbal expressions; musical or sound expressions; expressions by action; and action tangible expressions¹⁸”. Van der Merwe notes that “(i)n respect of nomenclature, WIPO and the international community have accepted the clear distinction between TK, on the one hand, that includes aspects of technical knowledge or technology residing in indigenous communities (eg, plants and plant-based medications) and TCEs, on the other hand (eg, literary, musical, artistic, dramatic and spiritual expressions/works that are part of the cultural life and heritage of indigenous communities)” (van der Merwe, 2014). He goes further to argue that “(t)his distinction has not always been properly understood or applied in South Africa, or in the IPLAB. Accordingly in the Act, these terms are used rather loosely and interchangeably. It is assumed that the intention of the Act is not to protect TK per se because the IP Acts that are amended do not protect knowledge or concepts per se (such as in the Patents Act), but instead provide protection for TCEs such as performances, copyright works, (registered) designs and trademarks, respectively” (van der Merwe, 2014).

International perspectives: In the last 20 years, debates about the protection and commercialization of traditional or indigenous knowledge (IK/ TK) and TCE have increased in international policy discourse. This can be attributed to possibilities for commercial exploitation of valuable agriculture and health related knowledge embedded in IK and the possibilities for commercial exploitation (both positive and

¹⁸ retrieved from <https://www.golegal.co.za/iks-bill-indigenous-knowledge-systems>

negative) and potential loss of TCE through globalisation of cultural practices, knowledge's and skills. WIPO notes that although the international debate about IK/ TCE and their protection has largely been "initiated and propelled mainly by developing countries, the discussions are not neatly divided along "North-South" lines¹⁹". As a result of the fact that indigenous communities and governments do not necessarily share the same views, creating a 'national perspective' is a complex task. However, while national policy perspectives are often not necessarily drafted with due consultation of all national stakeholders, the involvement of indigenous communities in defining, disclosing and potentially protecting IKS and TCE is an imperative. It is argued that in the debate around IKS, "(t)he prevailing view is that given the history of persecution of indigenous peoples under colonialism, the fight to include their voices in the protection of indigenous knowledge systems is important and necessary to inform the way forward²⁰".

As argued in Chapter 1, a focus on public health, pharmaceuticals and medicine forms a large part of the international debate about IPRs, their implementation and relevance in developing countries and their impact on international trade. The case is similar for debates around the importance and relevance of IK and TCE, with a large portion of research, policy debate and literature centered on traditional medicine and public health. As the focus of this report is on IP and the CCIs, I will look at IK and TCE in relation to cultural production and education. For this reason, in terms of tracking international debates, I would like to suggest that there are strong similarities between the concerns about protecting IK/ TCE and Intangible Cultural Heritage (ICH). In addition, the terms IK and TCE are not used uniformly in international cultural policy discourse and there remains contention about what the form and content of these two concepts may be, I therefore make a few references to current thinking around ICH and possibilities for its protection. According to UNESCO, ICH refers to "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage" (UNESCO). Authors Farah & Tremolada describe ICH as "the result of inter-generational and fluid social creative processes, lying at the heart of communities and groups" (2014:1-2).

¹⁹ http://www.wipo.int/pressroom/en/briefs/tk_ip.html

²⁰ <https://www.ip-watch.org/2012/05/17/south-africa-hopes-new-bill-brings-traditional-knowledge-protection/>

National perspectives: The HSRC of South Africa reported that a 2009 South African Social Attitudes Survey (SASAS), indicated that “(t)hree-quarters (76%) of South Africans feel that government should do more to document IKS in South Africa. The majority was in favour of the government doing more to support communities involved in IKS, to promote small business using IKS, and to spend more on protecting IKS. The majority (60%) felt that big businesses are exploiting the indigenous knowledge of communities and that government should be proactive in this respect”. All in all, the HSRC suggested that results “mandate government to implement policies that promote and protect IKS, and show that there is a place for a culture-derived and culture-driven development framework based on local knowledge of people and communities”²¹. In the last decade, the debate around IK/ TCE in South Africa has been prolific and somewhat polarized between different legal schools of thought, between the understandings of IK/ TCE from different indigenous communities and as noted by the HSRC survey, in public discourse it has become a racialised issue²². In a recent parliamentary meeting around the 2015 IKS Bill, it was noted that “(t)he Indigenous Knowledge Bill mirrored the discussions happening at WIPO, and was mainly to do with setting up systems for benefit sharing of the access to and use of indigenous knowledge²³”. In addition “IK has emerged as a powerful concept that was linked to sustainable development, particularly within rural contexts. It was knowledge, which rural farmers knew best and could access with ease. The World Conservation Union (IUCN), UNESCO and the World Bank were increasingly linking global sustainability to a greater awareness of IK, even though there was still little consensus about whether, and if so how, IK should be introduced into western-based education systems” (PMG, 3rd IKS Public Hearing, 2017).

Most recently this debate has been reinvigorated by an interest in mainstreaming IKS/ TCE in the educational agenda. This imperative responds to the recent debates in Higher Education in South Africa around decolonizing spaces of learning in the country. The University of the Western Cape’s Science and Indigenous Knowledge Systems program highlights the importance of “developing research skills that would allow students to design curricula that aren’t simply transplants from foreign soil, but that are complemented by knowledge that reflects the character of South

²¹ <http://www.hsrc.ac.za/en/review/november-/local-is-lekker>

²² <http://www.hsrc.ac.za/en/review/november-/local-is-lekker>

²³ <https://pmg.org.za/committee-meeting/23085/>

Africa”²⁴. The need to define, document and engage with African Knowledge Systems and traditions of thought and science has been urged by African academics like Mahmood Mamdani as an essential part of the decolonizing process.

4.2 The relationship between IP law and IK/TCE

Why IK/ TK should not be protected by IP Law: It has been noted that there has been a shift in international debate from very pro-IPR regime to a questioning of the compatibility of cultural heritage protection and IPRs. Some authors have questioned whether the IPR regime is indeed an adequate form of protection for intangible cultural heritage (ICH) (Farah & Tremolada, 2014:1). The primary issues are that a) IPRs are concerned with individual property rights and the protection of ICH concerns communal property (for example copyright, which does not recognize collective rights²⁵), b) the issue of fixation is also a problem in copyright application as so much of ICH, TK and IK is oral; c) ICH, TK and IK are usually intergenerational rather than pertaining to one lifetime (of a single author/ creator etc) and finally c) the protection of ICH through IPRs is very costly. Instead, some have made the case for the creation of a *sui generis* system (an independent system of protection) that could allow “traditional groups and communities to control access and use of traditional knowledge and cultural expressions, enabling the use and access by third parties only under condition of obtaining the needed prior informed consent from the traditional community” (Farah & Tremolada, 2014: 11). As an alternative to IPRs protecting ICH, Farah & Tremolada campaign for “a reinterpretation of existing legal regimes concerning specific aspects of the existing IP framework such as privacy and unfair competition law” instead of adding new IPRs to be recognized. So how should they be protected? “the right to privacy - i.e. ‘...the right of an individual or a community to keep their lives and personal affairs out of public view or to control the flow of information about themselves’-21 might play a fundamental role in safeguarding ICH” (Farah & Tremolada, 2014: 10).

As a result of these complexities, few countries have attempted to enact legislation that may protect IK and TK. South Africa is one of very few countries attempting this, and is thus hard pressed to draft policy in line with international legislation around all issues related to IK/TK because there is none. In South Africa, Karjiker & Jooster

²⁴ <https://www.uwc.ac.za/News/Pages/Mainstreaming-Indigenous-Knowledge-Systems-.aspx>

²⁵ “The concept of perpetual cultural property rights is related to the collective efforts of a community and contrasts with the Western paradigm of the romantic solitary genius” (Farah & Tremolada, 2014: 6).

(SU, 2017: 4) explain that “on the issue of the protection of indigenous, or traditional, knowledge (“indigenous knowledge”), there still seems to be a difference of opinion concerning the best way forward. The Department of Science and Technology (“DST”) still appears to have a preference for protecting indigenous knowledge by way of special (*sui generis*) protection for indigenous knowledge. In other words, the DST does not seek to protect indigenous knowledge in terms of any of the recognised types of intellectual property, such as, patents, copyright, designs or trademarks, which is the DTI’s proposal. There is a sound reason for the DST’s aforementioned approach: indigenous knowledge simply does not conform to such types of intellectual property, and should be dealt with in legislation specially dealing with that subject matter” (Karijker & Jooste, 2017: 4).

A clear case is made by Karijker that the “nature of indigenous knowledge is fundamentally different to that protected by current intellectual property law” and thus needs to be protected by a *sui generis* system. There are a number of reasons for this. In IP law, certain ideas or expressions are recognized as being owned by certain individuals or groups for a certain time-frame (shorter for patents and trademarks etc and longer for copyright holders). After a certain period, these works become part of the public domain, and thus, it can be said that “the purpose of intellectual property law, generally, and rather paradoxically, is to increase the size of the public domain” (Karijker, 2015). This (in theory) should incentivise creative and innovative production and thus benefit the public good. By contrast, Karijker explains “the motivation for seeking the protection of indigenous knowledge is entirely different. Such protection does not, and cannot, serve as an incentive for the creation of such knowledge because, by their very nature, the types of work (or knowledge) which are sought to be protected already exist” (Karijker, 2015). This also means that the scope of an IK/ TCE protection should not extend into the future, and should only pertain to existing material, knowledge, traditions and thought systems. Another potential effect of the 2015 IKS draft is that South African citizens would be potentially limited from utilising certain forms of registered IK in ways that the international community is not. Karijker provides the following example to illustrate this point: “there is already a concern among publishers about producing works concerning South African folklore, which may be considered to be indigenous knowledge. If there are not sufficient exemptions, this may lead to an unfortunate decline in such material in educational material due to the costs which would now have to be incurred in gaining the necessary permissions for the inclusion of such material. It may thus be the case that in the future foreigners have more access to,

and knowledge, about our folklore than our children, as they are not affected by any legislation which we seek to introduce, in absence of international consensus”²⁶.

Professor Owen Dean, Professor of Law at Stellenbosch University, clarified some important points about how indigenous knowledge and intellectual property, particularly copyright connect. He explained that “protecting information or knowledge was to keep it secret or confidential, but once it was in the public domain, it became free for use by all and there was an inherent right to copy. The only means of protecting information or knowledge was by legal measures, as the law created mechanisms by which information could be protected. This had been achieved in the case of intellectual properties by various statutes, such as the Copyright Act and Designs Act, among others. The statutes created private ownership of items of intellectual property and by creating private ownership, a facility was created for the property to be used in commerce for the purpose of revenue generation (...) that traditional information and IK was currently unprotected. The Bill was to create a mechanism for protection and was a voluntary system, as no one was forced to register their property or what was claimed to be their property. Owners of IK were expected to register their knowledge only if they intended to benefit from the dividends of the Bill, and NIKSO was only a facilitator of the registration process and not a beneficiary of the commercial use of the material. He added that before any of the knowledge or information registered could be used by a third party, a licence must be obtained from the community, and a benefit sharing agreement must be entered into with the community. The policy of the Act was that all IK, regardless of when it came into existence, was protected and the only formal step that could be taken was registration, which could be done at any time before the owner wished to exercise their rights” (PMG, 3rd IKS Public Hearing, 2017).

However, despite this process that would appear to protect the abuse and theft of IK by exploitative commercial forces, the DST’s draft Bill was met with impassioned responses from various stakeholders and indigenous communities articulating this fear. The Public Hearings studied for this analysis were marked by some heated interactions stemming from different reactions from indigenous communities around the rights of ownership of indigenous knowledge and the profit-sharing agreement. According to the hearing summary, “the definition of “indigenous community” in

²⁶ <http://blogs.sun.ac.za/iplaw/2015/04/08/a-better-second-attempt-protection-of-indigenous-knowledge/>

chapter 1 of the Act remained a major concern for indigenous communities, as it was perceived to exclude certain groups of persons“ (PMG Public Hearing 3, 2017). The perspective of one indigenous group was that the IKS Bill as drafted, if enacted, “would empower the DST to sell indigenous rights of Kei Korana to the highest bidder and once sold, the ancestral wisdom of the community would no longer be theirs to use. The knowledge would be withdrawn, and the people would face a jail sentence for utilising their own priceless heritage handed down to them from generation to generation” (PMG Public Hearing 3, 2017). Mr Anthony Rees, National Chairman: Traditional and National Health Alliance, expressed concern that the Bill would “catalyse a second wave of exploitation, theft, and the expropriation of IK and traditional healing systems by the State and its research academia under the thinly veiled guise of promoting and protecting indigenous and cultural rights which had been practised for decades by the traditional African healing systems. He claimed the “myopic Bill” was intentionally creating excessively onerous requirements that would alienate the real owners of the healing systems from any future participation in their own cultures and knowledge, while directly benefiting the transnational pharmaceutical drug companies who had the financial depth for meeting the requirements of this misguided and deceptive IKS Bill” (PMG, 3rd IKS Public Hearing, 2017).

A final argument to consider is the politics around who defines IK/ TCE. It stands to reason that if the role of defining and articulating what and whose cultural practices may be deemed indigenous and thus worthy of protection, in the absence of agreed parameters for these terms, value judgments would be involved. Karijker explains that “(w)hat the protection of indigenous knowledge seeks to achieve is the perceived immoral, or unethical, misappropriation of such information. This perception necessarily involves a value judgment, which invariably involves political considerations“ (2015). The question of which government entity (if any) is the legitimate custodian of precious cultural and social assets was raised by a number of stakeholders: “(s)cience and technology was the antithesis of the understanding that underpins the indigenous culture and healing arts, and for the Department of Science and Technology (DST) to have been chosen to govern the intellectual property that was the community’s indigenous culture and all its nuances, raised suspicion as to its true intent” (PMG Public Hearing 3, 2017). In international debates around the protection of ICH, it has been argued that while traditionally international treatise or legal instruments have been the responsibility of national governments to enact and realise, this might not be the best way forward when it comes to ICH or indeed IK/

TCE. Kurin makes the point that “(i)mportant parts of the ICH - such as songs of protest, epics of struggle, knowledge of traditional territorial occupation - may be seen as opposing government positions and practices. Human rights charters, particularly the International Declaration of Human Rights, seek to protect individual and communal forms of expression from onerous government control and regulation” (Kurin, 2007:12). In this case, Kurin argues that the onus of safeguarding the ICH should be on the cultural community itself (2007:12). This of course becomes a politicised question of self-representative, authority and power – as evidenced in some of the contentions raised by indigenous community members in the Public Hearings reflected on in this chapter.

Chapter 5: Policy Implications and Recommendations

In light of the history of developing countries and their relationship with WIPO, it is important to maintain a view of South Africa both in terms of its relatively advanced economic and institutional capabilities, as well as its position as part of the developing world with a large cohort of citizens that struggle to assert their basic human rights. The following policy recommendations are offered as tentative, and deriving from the discussion paper. As there is much more discussion, debate and research required to further shed light on this complex and intersectional field of IP and the CCIs, the conclusion points to a few areas of future research. The most recent presentations and hearings in Parliament about the progress being made on the Draft Copyright Amendment Bill, the Draft Indigenous Knowledge Bill and the Intellectual Property Amendment Act (recorded by the PMG) suggest that there is active and robust debate around the topics and that various stakeholders are able to make their voices heard around the fundamental role and direction that IP should be playing in society. Within this context, there is a need for more reflective, open-ended research and discussion, that seeks to synthesis, analyse and respond to the presentations of ideas by vested interests in order to deepen the discussion and generate an ever more accurate picture of where we are and what we want as a country. The (ongoing) role of a project like SACO in commissioning independent research like this report seems crucial to add to the literature of thinking through the specificity of the South African context in order to contribute to more nuanced visions of the country and its needs.

5.1 CCI Policy in SA

- There was a concern in the previous drafting of the ACH Policy in 2015 that tensions might emerge in balancing the need to grow the economy and the view of arts and culture as a *human right* that the state has a responsibility to make accessible to its citizens. In the 2017 ACH Policy Draft there seems to be a greater appreciation of the need to maintain state support for a variety of forms and expressions of the arts, and not only focus on the arts related industries that are commercially successful.
- In terms of the relationship between the CCIs and IPR, the 2017 ACH Policy presents significant progress by recognizing the importance of the digital era and its' meaning for cultural production and consumption. Additional to its commitment to protect the IPRs of online content creators, the policy also commits to addressing technology gaps in the country. These are welcome

recommendations and speak to the need outlined in chapter 1 for developing countries to address technological gaps, infrastructural inequality and unequal access in their plans for their CCIs rather than only focus on the implementation of IPRs for those who already have digital access.

5.2 IP Policy in SA

- An analysis of the draft policy suggests a primary occupation with Public Health and IPRs, as such it is concerned with patents and licences and related aspects of pharmaceutical production and dissemination. It does not deal in depth with IPRs that relate to innovations and CCI related production and consumption, neither does it address the advent of the digital era on knowledge sharing, access to information and IPRs. This might be presumed to be emerging in the following phases, but the importance of addressing these issues should not be underestimated. The CCI's should be seen to include some aspects relating to Industrial Property – in particular industrial designs, patents, trademarks, service marks and geographical indications – and this should be made explicit in the IP Framework.
- Considering the Film and Publications Board (FPB) presented a Draft Online Regulation Policy (which is still under consideration in parliament), it would seem wise to reconsider this division of departmental duties in terms of future thinking about the management of cultural production and digital rights management, as these will become even more important areas of policy development in the future.

5.3 Copyright in the CCIs (*Policy Recommendations*):

- As suggested in the UNESCO/ CISAC report, in attempting to maximise public benefit (through access and the promotion of artists/ creators), it would remain crucial to try to “persuade consumers to pay for something they may have been accessing for free”. Second, by harmonising the different governmental departments that deal with the online sphere, there could be a more realistic attempt to “extracting a fair share of the value generated by cultural content, which has been largely captured by online intermediaries” (UNESCO/ CISAC, 2015:9).
- The UNESCO/ CISAC report goes on to propose two useful tools that South African policy makers would do well to observe: 1) “Private copy exceptions”

which refers to when “creators waive their right to authorize/forbid the use of their works, in exchange for a fair compensation (a fee taken on each copying device), thus allowing the public to legally copy their works for their own use” (2015: 20); 2) As a way to get around direct licensing which is near impossible in a digital era, “Collective Management Organisations” (CMOs) which are often run by creators themselves, “manage economic rights and collect and distribute remuneration to creators for the use of their work (...) CMOs are particularly well-adapted to the negotiating of rights in the digital era as they provide a onestop-shop to get licenses for the Digital Sound Programmes (DSPs) for a large number of works” (2015: 21).

CREATOR/ USER/ COMMISSIONER RELATIONS:

- Greater flexibility for creators to fashion contracts that do not assume “(t)he automatic usurpation of copyright where composers and authors are commissioned or funded to create musical or literary works”.
- If the new proposal that state funded works are vested in the state is put into effect it would contradict the Publicly Financed IP Act and would create a situation in which there would be “two regimes dealing with the same matter, with the one regime permitting private ownership of the intellectual property developed through State funding, and the other prohibiting it” (Copyright Alliance Submission to DTI, 2017). This is clearly an inconsistency that would need to be rectified.

FAIR USE:

- Clearer indications of what ‘underserved populations’ and the plan of ‘expanding access’ might mean in practice. This could serve to restore the faith of creators who fear the commitment to greater educational access could create a “very broad exception is open to being exploited at the expense of authors” (PEN, 2017).
- In addition, clearer indication of how scholarship, teaching and education will be recognized as circumstances under which ‘fair use’ could be guaranteed.

LOCAL CONTENT:

- As an amelioration, it has been suggested that “(i)f the SABC is serious about having 90% local content, [they] need to provide resources for the artists.

Recording a single track and booking a studio can set an artist back almost R50 000⁶. Therefore, supply-side initiatives should be put in place by government organisations to create a platform accommodating local artists, meeting the demand at an acceptable quality²⁷.

- The need to demand of the various State instruments greater transparency and integrity.

5.4 IKS/ TCE and IP:

- It should be recognised first that the 2015 IKS Bill's argument for sui generis law, that would create a special form of protection for IK/ TK that does not rely on making use of existing copyright laws – is an approach that presents a much more promising path for the protection of IK/ TCE in the country.
- Given the propensity in South Africa for the polarization of debate around race, ethnicity and identity politics, addressing complex questions of how to protect IKS and TCE requires a totally transparent process. South Africa's culture of public debate and respect for freedom of expression is crucial in protecting these necessary processes. The emerging importance of defining IKS and TCE for educational purposes could present a welcome opportunity to further deepen the debate through engagements both between those involved in higher education and research and communities, as well as between African thinkers and researchers across the continent.

5.5 Conclusion

This discussion paper has argued that it is important to maintain a view of South Africa as having both Global North and Global South conditions, that is both highly developed world and highly undeveloped paradigms. This context requires more nuanced – rather than one-size-fits-all – policy interventions. In addition, the unequal playing ground between developed and developing countries, as well as the enormous social and economic disparities within developing countries, have presented tensions that have run through this paper. In terms of copyright an example would be access to knowledge versus creators rights, in the case of IKS the imperative to protect indigenous culture versus commercializing and monetizing cultural expressions. It seems clear that a core question is how policy might address the formal, legal and infrastructural development of the CCIs while supporting access

²⁷ <https://www.newsclip.co.za/Research-And-Analysis/Entertainment/19/the-impact-of-local-content>

to culture for all? A key consideration here is the balance between the formal and informal sectors, and finding ways to develop and support the informal sectors (which so many in the country rely on) rather than only focus on the formal sectors, which may advantage large local corporations and pander to foreign business interests at the expense of guaranteeing access to the production and consumption of arts and culture for the masses.

Based on the analysis in this paper, it seems that the DAC, the DTI and the DS&T are aware of the need to strike a balance of rights between creators and consumers and should be recognized for maintaining a commitment to this balance. However, the concurrent policy focus on the CCIs as an economic driver suggests that emphasis on formalizing IP laws in ways that *primarily* benefit large corporations, and indeed attempt to attract FDI by acquiescing to international demands of international bodies like WIPO who do not necessarily hold dear the status of social justice in the countries they do business with. South Africa would do well to learn from the analyses and critiques emerging from the Global North around the impact of CCI focused arts policies (which are emerging two decades after the initial ‘buzz’ around CCIs) and work to mitigate against the socially detrimental effects of gentrification and deepening socio-economic divisions that such policies may engender or at least leave unquestioned. While IP laws and copyright remain important ways to protect cultural expressions from exploitation and to formalize the creative sectors, as a country that remains faced with such deep levels of social justice redress, South Africa would do well to maintain an equal emphasis on the human, social and economic dimensions of development. If South African can pioneer a more nuanced policy, one that locates it between the Global North and Africa for example, taking both into account and not imposing one regime on circumstances that militate against this, this might become a model for the world. It might help to respond to the question of what might be “realistic” IP regimes in Global South/African conditions, where there may be room for ambivalence/ambiguity as for example in Nigeria where a deal has been struck between film producers and the piracy industry allowing the producers two weeks to recoup their costs before the pirates go into action.

In closing, avenues for further research could include: i) ‘rethinking copyright’ within a hybrid context and considering what imperatives related to copyright that might need to be considered to for a country that requires social, human and economic development as well as social justice redress; ii) South Africa’s potential cultural imperialism within in Africa, given its propensity as one of the dominant economic forces on the continent to exercise soft power and contribute to cultural hegemony

and iii) possibilities for counter narratives to Global North cultural dominance through the strengthening of relations between BRICS countries and through the networks of socio-cultural and cultural/ economic exchange and relations between African countries (here one could consider not only how might we learn from each-other on a policy front, but how might a shared vision of an empowered Africa and Global South be articulated through art and culture).

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APPROVALS FOR THE SOUTH AFRICAN CULTURAL OBSERVATORY PUBLICATION REPORT – Intellectual Property in the Cultural and Creative Industries

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