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STELLENBOSCH  
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## Commercial Exploitation of Intellectual Property

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SU Policies are available at [www.sun.ac.za/policies](http://www.sun.ac.za/policies)

<sup>1</sup> Policy Owner: Head(s) of Responsibility Centre(s) in which the policy functions.

<sup>2</sup> Policy Curator: Administrative head of the division responsible for the implementation and maintenance of the policy



# POLICY

in respect of  
exploitation of  
intellectual property



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# **Stellenbosch University**

## **POLICY IN RESPECT OF THE COMMERCIAL EXPLOITATION OF INTELLECTUAL PROPERTY**

**Effective Date: 1 December 2010**

December 2004, as conditionally approved by SU Council, December 4, 2004.  
Amended February 2010 to accommodate the IP Rights from the Publicly Financed R&D Act, of 22 December 2008 and the Regulations promulgated under the 2008 Act

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## **PART 1: SU POLICY IN RESPECT OF THE COMMERCIAL EXPLOITATION OF INTELLECTUAL PROPERTY**

### **1.1 INTRODUCTION TO THE POLICY**

Stellenbosch University (“**SU**”) has developed this Intellectual Property Policy (“**IPP**”), as inspired by its mission to create and sustain, in commitment to the academic ideal of excellent scholarly and scientific practice, an environment within which knowledge can be discovered, can be shared, and can be applied to the benefit of the community. SU is committed to research and development (“**R&D**”) which may lead to new knowledge, inventions and products, and to unlock the value of its knowledge base to the benefit of SU, inventors, and the broader community. The commercialisation of the knowledge base and technology transfer are regarded as an integral part of SU’s obligation to use knowledge for the common good.

At SU all interested parties are encouraged to familiarise themselves with this IPP and to ensure that all research and related activities that may give rise to IP are in compliance with this policy. This IPP is applicable to all campuses of SU, to all temporary and permanent employees on its payroll, to contract workers, to all registered students, to postdoctoral fellows, and to visiting lecturers of SU. Employees and contract workers of SU are referred to collectively as the “**staff**” of SU herein. This policy also has implications for the research clients and research partners of SU.

In the compilation of this policy due cognisance was taken of the Intellectual Property Rights from Publicly Financed Research and Development Act, no 51 (2008) (“**the 2008 Act**”), and the regulations promulgated under the 2008 Act (“**the Regulations**”). The object of the 2008 Act is to make provision that intellectual property emanating from publicly financed research and development is identified, protected, utilized and commercialized for the benefit of the people of the Republic, whether it is for a social, economic, military or any other benefit. According to the 2008 Act “intellectual property” means “any creation of the mind that is capable of being protected by law from use by any other person, whether in terms of South African law or foreign intellectual property law, and includes any rights in such creation, but excludes copyrighted works such as a thesis, dissertation, article, handbook or any other publication which, in the ordinary course or business, is associated with conventional academic work”.

The 2008 Act makes provision for the creation of National Intellectual Property Management Office (“**NIPMO**”). NIPMO must promote the objects of the 2008 Act, which include the statutory protection, management and commercialization of intellectual property. Tertiary institutions are required within 12 months of the coming into effect of this Act to establish and maintain an Office of Technology Transfer (“**OTT**”). InnovUS shall fulfill the role of the OTT at SU. InnovUS is charged with the responsibility to protect the rightful IP interests of SU, its staff, students, visiting lecturers, post-doctoral fellows and partners, and to make the results of R&D available to the community by means of technology transfer. InnovUS has been duly empowered by SU to perform this function. Therefore, the primary goal of InnovUS is to implement this IPP in a mutually beneficial partnership with the academic community of SU and to function in compliance with the applicable regulatory framework.

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## **1.2 APPLICATION OF THE POLICY**

### **1.2.1 GENERAL**

This IPP is not intended to be comprehensive in all respects, but forms part of SU's integrated management model and should be read in conjunction with the University's other policies including the SU Policy on Research, the SU Policy on Full Cost and the SU Policy on Short Courses. Specifically, this IPP is intended to stipulate the way in which IP that originates in the SU environment shall be dealt with, and specifically:

- (a) deals with ownership of IP and the exploitation thereof in Parts 2, 3 and 4 of this IPP; and
- (b) sets out in Part 5 of this IPP the way in which SU endeavours to ensure that inventors and authors who are staff, students, postdoctoral fellows and visiting lecturers of SU obtain a fair share of the income derived from the commercialisation of such IP.

### **1.2.2 INVENTIONS**

SU will establish procedures, in accordance with Part 3 of its IPP, regarding inventions made by staff, students, postdoctoral fellows and visiting lecturers of SU, which would help to ensure that:

- (a) it can be factually established in whom the IP rights concerning such inventions should be vested and, if applicable, in whose name any inventions should therefore be registered;
- (b) due care is taken that the necessary assistance and advice be given to inventors in order to ensure that the rights of all the relevant parties in respect of their inventions are protected at the time of disclosure of the results of their R&D work;
- (c) due care is taken during the process of registering an invention, and that the academic aim to publish scholarly findings is given thorough consideration;
- (d) in each case a fair division of royalties and of any other income from the invention is made between SU and the inventor(s), taking into account costs incurred by the relevant parties in connection with the making of the invention and the practical application and refinement thereof, and, if applicable, during the registration process of such invention; and
- (e) the viability and business potential of such inventions can be properly evaluated.

### **1.2.3 CONCEPTS WITH BUSINESS POTENTIAL**

SU will establish procedures, in accordance with Part 3 of this Policy, regarding concepts, plans and ideas with business potential that may be brought to the attention of SU by staff, students, postdoctoral fellows and visiting lecturers which would help to ensure that:

- (a) the viability and commercial potential of such ideas can be properly evaluated;
- (b) due care is taken to keep the contents of such concepts, plans and/or ideas confidential in so far as it is necessary;
- (c) due care is taken that the promotor of an idea is given support, which, among other things, may take the form of training, assistance, advice, mentoring and incubation space, in order to ensure that the knowledge and space exist to develop the enterprise successfully; and
- (d) in each case a fair division of equity, royalties and/or other income from the enterprise is made between SU and the promotor of an idea, taking into account any costs incurred by the relevant parties in respect of the establishment of the enterprise, including a loan account.

### **1.2.4 RESEARCH AND CONTRACT RESEARCH**

In the case of R&D undertaken in collaboration with other organisations, SU requires:

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- (a) that the IP interests of SU and its staff, students, postdoctoral fellows and visiting lecturers are fully protected when contracts are concluded with such other organisations; and
- (b) that, in consideration of the above, a written agreement is concluded prior to the commencement of the contract research with such other organisations concerning:
- the rights and obligations of all the parties involved in respect of IP that may emanate from the R&D,
  - the utilisation of such IP, including the granting of licences and commercialisation rights, and
  - claims to and payment of royalties, as well as any other income derived from such IP.

### **1.2.5 SHORT COURSES**

The SU Policy on Short Courses deals with management of, and the distribution of revenue generated in connection with such short courses. The use of SU's trade mark in the presentation of short courses is also dealt with in the SU Policy on Short Courses. However, it should be noted that in terms of Paragraph 2.1.2 of this Policy, SU lays claim to the copyright of the course material of short courses.

### **1.2.6 TRADE MARKS**

A trade mark of SU is a mark (including logos) that has been registered with the aim of distinguishing, in the course of trade, the services or products of SU from the services or products of its competitors. A trade mark gives SU the right to exclude competitors' use of the mark with reference to identical or even similar products or services. See also 2.5 Trade marks.

## **1.3 DISPUTE RESOLUTION**

Any dispute regarding the interpretation or application of this policy shall be dealt with in accordance with the Grievance Procedure of SU.

## **1.4 CONCLUSION**

In establishing this IPP, SU, in striving to be a knowledge partner for government, the private sector and society, recognizes that its staff must be free to choose and pursue areas of study and research, to share the results of their intellectual efforts with colleagues and peers and to retain the traditional freedoms for the conduct of scholarly and scientific work. In addition, it is intended that application of this IPP will take into consideration the principles of open and full disclosure, fairness to the inventors and creators of IP and to SU, and the need for understanding and goodwill among the parties who have an interest in IP.

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## PART 2: OWNERSHIP OF INTELLECTUAL PROPERTY

### 2.1 STAFF

#### 2.1.1 GENERAL

All staff should note that ownership of IP created by them in the normal course and scope of their duties and obligations vests in SU. Parts 3, 4 and 5 of this Policy describe how SU tries to ensure that its staff members obtain a fair share of the proceeds derived from the utilisation of such IP.

#### 2.1.2 PROVISIONS IN RESPECT OF COPYRIGHT.

The ownership of all copyright of employees of SU in respect of works created by them in the normal course and scope of their duties vests in SU in terms of Section 21(1) (d) of the Copyright Act. In accordance with paragraph 2.1.8, contract workers are obliged to assign to SU their copyright in all works that may originate during the execution of their contractual obligations.

- **Identification of copyright works**

To the extent practically possible, all course material, cinematograph films, sound recordings, published editions and computer programs (software)) created by staff of SU in the execution of their duties must be identified as follows:

Copyright © [insert year], Stellenbosch University  
**All rights reserved**

or

Kopiereg © [vul jaartal in], Universiteit Stellenbosch  
**Alle regte voorbehou**

The year included in the declaration is the year in which copies of the work are made available to students or members of the public, or the work is otherwise published, for the first time.

- **Course material**

All course-related materials created by staff of SU in the normal course and scope of their duties, including their tuition, research and community-interaction functions, shall, unless otherwise agreed, be deemed to be works originating within the scope of the staff members' employment obligations. These include works that are created in the performance of a staff member's normal duties, or in the execution of specific tuition, research or community-interaction projects assigned to the staff member. Such works shall include, *inter alia*, the following: all course material, including WebCT or similar web-based modules, class notes, transparencies, test and examination papers, short course materials and all other material for use in contact and distance (including telematic) education and informal and non-formal tuition functions, e.g. community education, as well as software, databases, and video and multimedia material developed by the staff member for tuition purposes.

A staff member who leaves the employ of SU must, prior to his or her departure, provide a copy of all tuition material developed by him/her in the course of his/her employment to his/her Departmental Chairperson or other designated person. Provided that all references to SU are removed, a former staff member shall not be prevented by SU from using tuition material created by him/her for normal tuition purposes at other institutions.

Staff members may also include course material prepared by themselves into other works they may create such as text books. However, if a staff member wants to prescribe such



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works (e.g. text books) to SU students for purchase in respect of courses provided at SU, such staff member must obtain the prior approval thereto from his/her Dean.

- **Software and Multimedia**

Copyright in computer programs, databases, films and videos, sound recordings, broadcasts and multimedia material developed by staff members in the performance of their duties will in principle vest in SU, but SU may agree to alternative arrangements in appropriate circumstances. A staff member who leaves the employ of SU must, prior to his or her departure, provide a copy of all such material developed by him/her in the performance of his duties to his/her Departmental Chairperson.

Personnel are also encouraged to retain copies of all design and reference materials pertaining to the development of software. Copyright in such materials will in principle vest in SU, but SU may agree to alternative arrangements in appropriate circumstances. Personnel should treat such materials as well as the code of the programs that may arise in the course of their research as confidential, and should make such materials and code available only to duly authorised personnel of SU upon request. Reference materials and program code that are developed solely for the purposes of demonstration to students in the course of conventional academic teaching activities may, however, be made available freely to such students. Such material and code will form part of course material which is dealt with above.

Applications for alternative arrangements regarding the copyright works mentioned hereunder must be made in writing to InnovUS.

Personnel should also be aware that although computer programs are protected by copyright and are usually not patentable, this does not necessarily apply if the computer program has a novel technical application, in which case a computer program may also be patentable.

- **Open Source Software**

Notwithstanding the SU's claim to ownership of software that is created by its staff, SU supports and promotes the creation and participation in the creation of open-source software.

SU usually permits publication of open-source software on open source systems, provided the staff member complies with the process described herein, unless exempted by way of written notice. It is required that staff members disclose their intention to create or to participate in the development of open-source software prior to doing so. Since InnovUS may require NIPMO approval for the publication of such open-source software, staff members will be obliged to provide InnovUS with such information regarding the development as InnovUS may require. InnovUS shall evaluate the disclosure and undertakes to endeavour to discuss within four weeks after the disclosure with the staff member whether or not alternative means of utilisation of the envisaged software exists and whether and on what terms the software may be made available on an open-source basis. In the event where such staff member fails to disclose his/her intention, InnovUS may take any such steps as it may deem necessary to protect the IP in the software. Personnel developing open source code solely for the purposes of demonstration to students in the course of conventional academic teaching activities will not be required to notify InnovUS of such development and will be exempted from the aforesaid process for as long as the code is used only for such purposes. Such material and code will form part of course material which is dealt with above.

Staff members must familiarise themselves with the licence conditions applicable to the use of the relevant open-source software and disclose them in a timely manner to InnovUS and

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shall comply with such licence conditions and such terms that InnovUS may prescribe in connection with the particular development.

- **Scholarly Works and Artworks**

Income from the categories of work listed below is usually not claimed by SU, even if the creation of the work in question falls within the scope of a staff member's duties.

- Artistic works of a purely aesthetic nature (e.g. paintings) but excluding artistic works of a functional nature such as design materials (e.g. flow charts, circuit diagrams and design drawings)
- Literary works (e.g. volumes of poetry, articles or books), but excluding course material and literary works of a predominantly functional nature such as databases and design material
- Musical works (compositions), performances of musical works and recordings thereof

Such works (e.g. text books) may, however, only be prescribed to SU students for purchase in respect of courses provided at SU by a staff member if approved by his/her Dean.

Copyright in academic text books and academic articles written by SU staff will remain vested in such staff, provided that SU is suitably acknowledged in the publication thereof. However, for the other works described above, staff members should contact InnovUS and make sure that their intended publications would be dealt with in this way before they proceed with the publishing of any such work. Provided that it is legally capable thereto, and unless otherwise notified by SU, staff members will be granted the copyright ownership or usage rights of and be entitled to the income from these types of works (except for the excluded works described above in respect of which SU does claim the copyright). In this regard, staff members should note that only copyright works associated with conventional academic work are excluded from the provisions of the 2008 Act, which requires that NIPMO be given first option to acquire the IP in works emanating from publicly funded research and/or development if such IP is not claimed by SU. All transactions by staff members in respect of copyright works owned by them (e.g. with publishers) must be concluded in their own name and will be for the account and responsibility of such staff members only.

### **2.1.3 PROVISIONS IN RESPECT OF INVENTIONS, DESIGNS, PLANT BREEDER'S RIGHTS AND KNOWLEDGE**

The staff of SU (including employees and contract workers) should note that all rights, interest and title in any invention, plant breeder's right, design, trade secret or knowledge, whether registerable or not, created by such staff members of SU in the normal scope and course of their duties and obligations to SU, vest in SU, and in so far as these do not vest by law, staff members assign and shall assign such rights and interests to SU. Unless otherwise agreed, this shall include all inventions and knowledge developed by the staff members in the field of specialisation in which the said staff members have been appointed at SU.

The above assignments shall include all rights, title and interest in any inventions developed by the staff member during the fulfilment of his/her duties and obligations notwithstanding that an application for registration of a patent, design or plant breeder's right is only filed after termination of the staff member's relationship with SU.

All inventions, plant breeder's rights, designs, knowledge and trade secrets developed by a staff member during the period that he/she renders services for SU and that relate to the field of specialisation in which the staff member has been appointed at SU, shall be deemed to have emanated from SU's publicly financed research and to have been developed in the course and

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scope of his/her duties for SU, unless the staff member can prove the contrary on the basis of an agreement, logbook or suchlike evidential material. Any such invention, plant breeder's right, design, trade secret or knowledge that is disclosed within 12 months of his/her leaving SU's employ shall also be deemed to have emanated from SU's publicly financed research and to have been developed in the course and scope of his/her duties for SU, unless the staff member can prove the contrary on the basis of an agreement, logbook or suchlike evidential material.

#### **2.1.4 RESEARCH AND CONTRACT RESEARCH**

Research is highly valued as one of the key functions of the academic staff members of SU. The nature of the research may be either very fundamental or else of a more applied nature. In case of fundamental research, the potential commercial value may not be evident at the early stages of the investigations. Therefore, all researchers need to be mindful of the potential value of their IP in interaction with fellow researchers or business associates. The intention is not to inhibit scholarly academic contact and collaboration or participation in conferences and meetings, but to sensitise researchers to the fact that premature and unprotected disclosures of research results may lead to the loss of recognition, IP protection and the exploitation of opportunities.

Staff of SU who visit other educational institutions or other organisations with a view to discussing research ideas with them that may lead to the creation of IP, or who conduct research elsewhere during research leave, must ensure that appropriate agreements regarding IP rights are concluded prior to the visit. Staff should contact the Division of Research and Development to assist in this regard.

In a similar manner, staff members who are approached by outside organisations to conduct contract research or consultation work for such bodies, regardless of the place where the contract research is done, must ensure that appropriate contracts are in place. Such agreements must be approved by SU in advance, and in accordance with the procedures prescribed by the Contract Research Policy and this IPP. The Division for Research Development: Research Contracts will assist staff members in this process. InnovUS, in conjunction with the Division for Research Development, is available to assist staff negotiating the intellectual property and commercialisation clauses of such contracts. Contract research shall be deemed to be part of SU's publicly financed research and to fall within the normal execution of the staff member's duties for SU, and the IP that may be created as a result of such contract research shall therefore vest in SU, except to the extent otherwise agreed with the outside organisations, subject to the applicable law.

##### **IP rights – Full Cost**

SU shall give reasonable consideration to any requests from the outside organisation regarding ownership of IP rights emanating from such research or consultation, provided that the research or consultation is conducted on a Full Cost basis as prescribed by the Full Cost Policy of SU. The extent of the contributions of the outside organisation to the research will be determinative, including its financing of the research, its provision of facilities or equipment, its contribution of background IP, its participation in the actual research efforts and in the commercialisation thereof.

##### **IP rights – not Full Cost**

When research contracts are not concluded on a Full Cost basis, SU must take into account the applicable regulatory framework, including as it may pertain to SU's publicly funded R&D. Any assignment to, or sharing with, the outside organisation of IP rights that may emanate from such contract research that are not concluded on a Full Cost basis or jointly developed, will have to be approved by NIPMO beforehand and signed by the designated person from SU and must comply with the applicable regulatory framework.

##### **Pre-existing IP**

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Where a staff member of SU is requested by an outside organisation to conduct a study in which Pre-Existing IP (as defined in Annexure A), which does not belong to SU, has to be further developed or where a problem relating to it has to be solved, SU's ownership rights shall be limited to the IP in the improvements, enhancements and alterations to the Pre-Existing IP arising during the investigation or research and any patents, plant breeder's rights, designs and copyrights that may arise regarding such improvements, enhancements and alterations. In all such cases, the relevant staff member is required to notify InnovUS promptly of the use of and dependency on the relevant Pre-Existing IP in order to ensure the parties' respective rights in and to the IP arising from the research can be clarified in the applicable written contract.

### **2.1.5 GOVERNMENT RIGHTS**

Staff should also note the rights of the South African government in respect of IP emanating from all publicly funded research that is contained in the 2008 Act and related regulations. SU must comply with such regulatory framework. This regulatory framework does not apply to copyright works associated with conventional academic work or IP emanating from research if the Full Cost (as defined in the SU Full Cost Policy) of the research is funded by an outside person or entity. InnovUS will assist staff in determining whether or not the regulatory framework is applicable to research, but staff members should generally assume that it will be until the research project has been certified by the designated person from SU to be in compliance with the Full Cost Policy.

SU must regularly report to NIPMO in respect of IP created from publicly funded research by SU and staff members. Failing this NIPMO may demand the transfer of undisclosed IP to it. Staff members and outside organizations involved in research contracts will be required to consent to such disclosures. NIPMO is under statutory obligation to hold such disclosed information in confidence.

Generally, NIPMO also has the first option to step in and acquire ownership of IP emanating from publicly funded research if SU declines to retain such ownership or to seek statutory protection in respect thereof. It is only if NIPMO declines to acquire ownership of such IP that SU will be able to offer, firstly, any relevant outside organization and, secondly, the relevant staff member the opportunity to acquire the IP. Again, this does not apply to research in respect of which the outside organization carried the Full Cost or to copyright works associated with conventional academic work.

### **2.1.6 CONSULTATION WORK**

In order to interpret paragraphs 2.1.4, 2.1.5, and 2.1.6 correctly, a distinction is made between *consultation* and *contract research*, as defined in the list of definitions in Annexure A. Paragraph 2.1.5 and 2.1.6 must also be read with SU's *General Procedure for Private Work* of November 2006.

The product of consultation work, whether a report, an opinion, or any other form of product or service, may be delivered by a staff member of SU to an outside organisation inclusive of the copyright on the product, subject thereto that no confidential information of SU may be disclosed without SU's prior written consent. SU's confidential information would include the research results obtained by staff during the normal execution of their duties for SU. The reason for this requirement is that SU would like to prevent the rights to academic publication of SU and its staff from being prejudiced. SU consequently reserves the right to take all reasonable steps to prevent such prejudice. SU, however, retains the copyright on the raw data created during research for such consultation work in order to, *inter alia*, encourage further research. Staff members of SU therefore assign to SU the copyright and any other rights that may vest in such raw data, unless otherwise agreed with SU.

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Moreover, since knowledge/know-how is applied in consultation work, new knowledge and inventions are not normally created in this case and SU therefore does not lay claim to the products of consultation work, except in the case of serendipitous knowledge (see definition in Annexure A). Accordingly, contracts for consultation services concluded directly between staff members and outside organisations must always exclude serendipitous knowledge from the deliverable product. Serendipitous knowledge shall be deemed to have emanated from SU's publicly financed research, and within the normal execution of the staff member's duties for SU.

SU understands that certain forms of consultation work cannot be performed meaningfully without the use of SU's infrastructure (e.g. for clinical trials in the Faculty of Health Sciences and sophisticated research equipment of SU's Central Analytical Facilities), with attendant costs for SU. In such a case, the relevant outside organisation must conclude an agreement with SU, including the manner in which SU is to be compensated for such use and the vesting of the IP arising there from. Failing such an agreement or the payment of the agreed compensation, all IP arising from such consultation work will be deemed to have emanated from SU's publicly financed research and will thus vest in SU. SU's standard levy on contracts, as determined from time to time, applies to contracts of this type. Contracts of this type must be approved by SU in advance, and in accordance with the procedures prescribed by the Contract Research Policy.

Other forms of private work that do not fall within the definition of consultation shall be deemed to be contract research, unless otherwise agreed beforehand, and shall be dealt with in terms of paragraph 2.1.4.

#### **2.1.7 IP THAT VESTS IN EMPLOYED STAFF OF SU**

If a staff member claims that ownership of IP vests in him- or herself, and can reasonably prove to SU that such IP has not emanated in any way from publicly financed R&D and has been created outside the normal course and scope of his or her duties, SU will probably accept that the staff member is entitled to the ownership thereof. SU shall take into account whether or not the IP originated in the course of consultation work, whether or not use was made of SU's infrastructure, the staff member's academic title or rank, and/or his or her employment relationship with SU. If staff members wish to utilise commercially the IP that vests in them, InnovUS will assist them in this regard, at a market-related rate.

#### **2.1.8 CONTRACT WORKERS**

Persons who are appointed on a contract basis by SU are included under the terms staff and staff members as used above, and are therefore subject to the same conditions regarding IP rights that apply to the employees of SU, unless the contrary has been explicitly agreed. To the extent that IP created by them in the execution of their duties for SU does not vest in SU by law, such contract worker will assign and transfer his/her full rights, title and interest in respect of such IP, including inventions, designs, plant breeder's rights, knowledge and the copyright to SU. For the avoidance of doubt, a provision to this effect will be included in all written contracts concluded with contract workers.

The relationship between SU and such contract workers shall be governed by a written contract that shall provide for, amongst others, the following:

- Assignment to SU of IP rights that do not by law vest in SU;
- Indemnity against third party IP infringement; and
- Moral rights waiver in the case of copyright.

Each contract worker must complete a disclosure form in respect of any such IP developed in the course of his or her contract work.

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SU shall compensate contract workers in respect of revenue earned from IP rights on the same basis as applicable to employees of SU, in accordance with Part 5 of this Policy.

#### **2.1.9 JOINT STAFF ESTABLISHMENT**

The ownership of IP of staff who are on a joint staff establishment of SU and an outside organisation shall be determined in accordance with the agreement between SU and that outside organization, subject to applicable laws, including as they may apply to publicly financed R&D work. Unless otherwise stipulated in such agreement, all IP created by a staff member in the course of the performance of its duties for SU will vest in SU.

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## 2.2 STUDENTS

### 2.2.1 GENERAL

Students of SU make use of its infrastructure, do their work in the course of their studies to obtain a qualification, and their work is supported and guided by staff of SU. All IP that may emanate from work conducted by students in the course of their studies, irrespective of whether it is submitted to SU or not, will thus be deemed to arise in the context of SU's publicly financed research and as such will vest in SU. This will include copyright, patent rights, plant breeder's rights, design rights and all related know how. To the extent that such IP does not vest in SU by law, students assign such IP to SU. Such assignment takes place pursuant to and as part of the registration process. The aforesaid allocation of IP may in certain circumstances be changed by written agreement between the student and SU. Such agreement will be subject to all applicable laws, including as they may apply to SU's publicly financed research. Students may approach InnovUS to discuss such alternative terms.

### 2.2.2 PROVISIONS IN RESPECT OF COPYRIGHT

- **Study Related Materials**

Students assign to SU their copyrights in all works that may be created in the course of the execution of their study obligations (including all research conducted as part of such studies). These include, *inter alia*, all presentations, assignments, test and examination scripts, papers, dissertations, theses, sound recordings, video recordings, software, databases, designs and models developed by students in the course of their studies. In this regard, the requirements of the SU yearbook regarding the insertion of copyright notices and authorship declarations into academic materials, such as dissertations and theses, must be complied with. SU may decide in certain cases to assign ownership of the whole or part of the copyright to the student, or may authorise him or her otherwise to utilise the work commercially or otherwise.

- **Artworks**

Income from the categories of work listed below is usually not claimed by SU, even if the creation of the work in question is created pursuant to a student's studies.

- Artistic works of a purely aesthetic nature (e.g. paintings) but excluding artistic works of a predominantly functional nature such as design materials (e.g. flow charts, circuit diagrams and design drawings)
- Literary works (e.g. volumes of poetry, articles or books), but excluding course material and literary works of a predominantly functional nature such as databases and design material
- Musical works (compositions), performances of musical works and recordings thereof

Students should contact InnovUS and make sure that their intended publications would be dealt with in this way before they proceed with the publishing of any such work. Provided that it is legally capable thereto, and unless otherwise notified by SU, students will be granted the copyright ownership or usage rights of and be entitled to the income from these types of works (except for the excluded works described above in respect of which SU does claim the copyright). In this regard, students should note that only copyright works associated with conventional academic work are excluded from the provisions of the 2008 Act, which requires that NIPMO be given first option to acquire the IP in works emanating from publicly funded research and/or development if such IP is not claimed by SU. All transactions by students in respect of copyright works owned by them (e.g. with publishers)

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must be concluded in their own name and will be for the account and responsibility of such students only.

- **Software**

Students are encouraged to retain copies of all design and reference materials pertaining to the development of software that may arise in the course of their studies at SU. Students should treat such materials as well as the code of the program as confidential, and should make such materials available only to duly authorised personnel of SU upon request. Reference materials and program code that are developed by such students during their participation in conventional academic teaching activities may, however, also be made available freely to their lecturers and other participating students.

Students should also be aware that although computer programs are protected by copyright and are usually not patentable, this does not necessarily apply if the computer program has a novel technical application, in which case a computer program may also be patentable. If the student is unsure hereof, he/she is encouraged to contact InnovUS in this regard.

Notwithstanding SU's claim to ownership of software that is created by its students, SU supports and promotes the creation and participation in the creation of open-source software.

SU usually permits publication of open-source software on open source systems, provided the student complies with the process described herein, unless exempted by way of written notice. It is required from students to disclose their intention to create or to participate in the development of open-source software and to provide InnovUS with such information regarding such development as InnovUS may require since InnovUS may require NIPMO approval prior to the publication of such open-source software. InnovUS shall evaluate the disclosure and undertakes to endeavour to discuss within four weeks after the disclosure with the student whether or not alternative means of utilisation of the envisaged software exists and whether and on what terms the software may be made available on an open-source basis. In the event where a student fails to disclose his/her intention, InnovUS may take any such steps as it may deem necessary to protect the IP in the software. Students developing open source code for the purposes of participating in conventional academic teaching activities will not be required to notify InnovUS of such development and will be exempted from the aforesaid process for as long as the code is used only for such activities.

Students must familiarise themselves with the licence conditions applicable to the use of the relevant open-source software and disclose them to InnovUS and shall comply with such licence conditions and such terms that InnovUS may prescribe in connection with the particular development.

### **2.2.3 PROVISIONS IN RESPECT OF INVENTIONS, DESIGNS, PLANT BREEDER'S RIGHTS AND KNOWLEDGE**

It is brought to the notice of students of SU that all rights, interest and title in any invention, plant breeder's right, design, trade secret and knowledge, whether registerable or not, created by such student in the course of his/her studies and/or research at or for SU, vest by law in SU and in so far as these do not vest by law, students assign such rights and interests to SU. Unless otherwise agreed, this shall include all inventions and knowledge developed by the student in the field of specialisation in which the said student has been studying at SU during the term of such studies.



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The above assignments shall include all rights, title and interest in any inventions developed by the student during his/her studies and for which an application for registration of a patent, design or plant breeder's right is filed after termination of his/her relationship with SU.

All inventions, knowledge and trade secrets developed by a student during the period that he/she studies at SU and that relate to the field of specialisation in which the student studies at SU, shall be deemed to have emanated from SU's publicly financed research and to have been developed in the execution of his/her duties for SU, unless the student can prove the contrary on the basis of an agreement, logbook or suchlike evidential material.

#### **2.2.4 OUTSIDE ORGANISATIONS THAT PROVIDE BURSARIES**

Where outside organisations provide scholarships or bursaries to students to attend SU, and require rights in respect of the IP emanating from the studies or research undertaken by the relevant students, such organisation must approach InnovUS to discuss the granting of such rights. Students may not grant such rights directly to any outside organisation. The outside organisation will be required to agree contractually in advance with SU about the ownership and exploitation of IP that may emanate from the student's studies or research at or for SU. Such agreements will be subject to any applicable regulatory framework, including as it may pertain to SU's publicly funded research. It is the student's responsibility to assist in establishing such an agreement.

In particular, it should be noted by students and sponsoring organisations that a scholarship or bursary paid to a student or to SU on behalf of a student to cover the student's fees to attend SU (such as accommodation and tuition fees) does not cover the Full Cost of the student's studies or research. Such studies and research will also be subsidised from public funds and, consequently, the IP emanating in the context of such studies and research will vest in SU by law. Any independent transfer or grant of IP rights by the student in respect of such IP will thus be invalid and unenforceable.

Students shall share in the financial rewards resulting from the commercial application of IP created by them in the same way as staff of SU, as set out in Part 5 of this Policy.

#### **2.2.5 IP THAT VESTS IN STUDENTS**

If a student claims that ownership of IP vests in him- or herself, and can reasonably prove to the Director: InnovUS that such IP has not been created in the normal course and scope of his or her studies or pursuant to research conducted at or for SU, SU shall accept that he/she is entitled to the ownership thereof. Should students wish to commercially utilise the IP vested in them, InnovUS will assist them in this regard, at a market-related rate.

#### **2.2.6 PROVISION FOR PRE-EXISTING IP**

In the event where a student intends to submit an assignment or thesis (e.g. for an honour's or master's degree) or a dissertation (for a doctorate) that contains any Pre-Existing IP (as defined in Annexure A) in respect of which an outside entity holds rights (notwithstanding that it may have been developed by him/ her), such as IP previously developed by him/her under contract with an outside organisation (including as an employee or consultant), such student must disclose this to SU prior to registration or as soon as possible after he/she has become aware thereof. SU will not be obliged in any way to accept such inclusion. In this regard, see also paragraph 2.2.1 above.

The student will be required to disclose the extent of the rights of the outside organisation in the Pre-Existing IP and will be required to obtain such consent as may be required by SU to include such Pre-Existing IP into the materials being submitted to SU. SU may elect to negotiate an agreement pertaining to the Pre-Existing IP disclosed in or related to the student's

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assignment/thesis/dissertation with the relevant outside organisation. In this regard it must be noted that SU will be the sole owner of the copyright in the assignment/thesis/dissertation that is submitted to it notwithstanding the inclusion of Pre-Existing IP therein. Furthermore, SU will be the sole owner of the IP in any improvement, enhancement or alteration to the Pre-Existing IP emanating from the student's work.

Furthermore, SU will require the right to publish the content of the submitted materials as soon as reasonably possible. SU may in exceptional circumstances agree to delay such publication, but it is University policy not to keep any assignment/thesis/dissertation confidential for a period of longer than three years. Unless otherwise agreed in writing, SU thus reserves the right to publish any assignment/thesis/dissertation submitted to it in any way it deems fit.

### **2.2.7 ASSIGNMENTS, DISSERTATIONS AND THESES**

According to paragraph 2.2.2, SU holds the copyright of the assignment/thesis/dissertation and may publish the assignment/thesis/dissertation as it deems fit, including in paper or electronic format. The student may also publish the assignment/thesis/ dissertation or a derivative version thereof on his/her own or have it published, including in a journal or as part of a book, provided he/she complies with the remainder of the terms of this policy prior to making such publication, including in particular paragraph 3.3 hereof, as it applies to the disclosures of novel inventions, designs and plant breeders' rights.

In conformance with the SU Yearbook, it should be noted that students may not publish their assignment/thesis/dissertation or a derivative version thereof in any form other than as an article in an accredited academic journal without the prior written approval of the Dean of the relevant faculty (or his delegate) unless they first publish the relevant research in one or more articles in accredited academic journals recognised for this purpose by SU and they acknowledge in such articles that the research contained therein was performed at SU.

SU may, in accordance with Sections 3 and 4 of this Policy, commercially exploit patents, plant breeders' rights and designs and related know how emanating from a student's assignment/thesis/dissertation.

### **2.2.8 GOVERNMENT RIGHTS**

Students should also note the rights of the South African government in respect of IP emanating from all publicly funded research that is contained in the 2008 Act and related regulations. This regulatory framework does not apply to copyright works associated with conventional academic work or IP emanating from research if the Full Cost (as defined in Annexure A) of the research is funded by an outside person or entity. InnovUS will assist students in determining whether or not the regulatory framework is applicable to the specific research, but a student should generally assume that it will be until InnovUS notifies him/her to the contrary.

SU must regularly report to NIPMO in respect of IP created by SU staff members and students, failing which NIPMO may demand the transfer of undisclosed IP to it. Students and outside organizations involved in research contracts are required to consent to such disclosures. NIPMO is under statutory obligation to hold such disclosed information in confidence.

Generally, NIPMO also has the first option to step in and acquire ownership of IP emanating from publicly funded research if SU declines to retain such ownership or to seek statutory protection in respect thereof. It is only if NIPMO declines to acquire ownership of such IP that SU will be able to offer, firstly, any relevant outside organization and, secondly, the relevant student the opportunity to acquire the IP. Again, this does not apply to research in respect of which the outside organization carried the Full Cost.

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### 2.3 VISITING LECTURERS AND POST-DOCTORAL FELLOWS

The terms of Section 2.2 of this Policy pertaining to University students will apply *mutatis mutandis* to post-doctoral fellows and visiting lecturers who visit SU regarding the IP created during the term of their stay at SU. Post-doctoral fellows and visiting lecturers must, prior to their visit, sign a confidentiality agreement in terms of which they undertake to keep confidential all confidential information which may come to their attention during their visit to SU, and not to use it otherwise than as may be permitted by SU. Post-doctoral fellows and visiting lecturers will also be required to comply with the terms of this policy. They acknowledge that, should they, during their stay at SU, become involved in any research project of SU that may result in the creation of IP, such IP will vest in SU should the IP have emanated from SU's publicly financed R&D. To the extent that such IP does not vest in SU by law, the post-doctoral fellows and visiting lecturers assign such IP to SU.

SU only claims IP of post-doctoral fellows and visiting lecturers that originated or was created during their visit to SU or that was derived at a later stage from such IP or from IP made available to them by SU during such visit. SU shall compensate post-doctoral fellows and visiting lecturers in respect of income earned from IP rights on the same basis as applicable to staff of SU, in accordance with Part 5 of this Policy.

### 2.4 OUTSIDE ORGANISATIONS

The granting of a scholarship or bursary to students or the provision of financial support for research by an outside organisation does not imply that the relevant organisation has any claim to the IP rights that may emanate from such funding. The IP rights emanating from all SU's publicly funded R&D, as well as research that is partly funded by outside organisations will vest in SU, save in the event where the IP is jointly developed with an outside organisation's researchers, in which event the IP will typically be co-owned with such outside organisation.

If an outside organisation wishes to acquire rights in or share in the commercial exploitation of IP created at or for SU, it should enter into a research contract with SU and shall be dealt with in accordance with paragraph 2.1.4. All contracts pertaining to such IP, including research contracts, must be concluded in writing between the relevant outside organisation and SU, and must be officially approved by the designated authorised persons according to the policies of SU. In such an agreement the allocation of ownership and the rights to exploitation of the relevant IP and the division of revenue generated thereby will typically be addressed. All such agreements will be subject to the applicable regulatory framework, including as may apply to publicly funded R&D conducted at SU such as the provisions of the 2008 Act and the Regulations. The extent of the contributions of the outside organization to the research will largely determine the ability of SU to grant rights to such outside organisation in respect of the resultant IP. Such contributions may include its financing of the research, its provision of facilities or equipment, its contribution of background IP, its participation in the actual research efforts and in the commercialization thereof. Outside organisations should note the rights of the South African government in respect of IP emanating from all publicly funded research that is contained in the IP Rights from Publicly Funded R&D Act and related regulations. SU must comply with such regulatory framework. This regulatory framework does not apply to copyright works that emanate from conventional academic work or IP emanating from research if the Full Cost (as defined in Annexure A) of the research is funded by an outside person or entity. InnovUS will assist an outside organisation in determining whether or not the regulatory framework is applicable to research, but they should generally assume that it will be, until the research project has been certified by the designated person from SU to be in compliance with the Full Cost Policy.

In terms of the aforesaid regulatory framework, SU must regularly report to NIPMO in respect of IP created from publicly funded research by its staff and students. Failing this NIPMO may demand the transfer of undisclosed IP to it. Outside organizations involved in research contracts will be required to consent to such disclosures. NIPMO is under statutory obligation to hold such disclosed information in confidence.

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Generally, NIPMO also has the first option to step in and acquire ownership of IP emanating from publicly funded research if SU declines to retain such ownership or to seek statutory protection in respect thereof. It is only if NIPMO declines to acquire ownership of such IP that SU will be able to offer, the relevant outside organization the opportunity to acquire the IP. Again, this does not apply to research in respect of which the outside organization carried the Full Cost.

## **2.5 TRADE MARKS**

SU is the owner of various registered and unregistered trade marks and reserves all its rights in respect of any such trade marks (including any logos) such as trade marks that include its name, coat of arms, abbreviation or similar indications, or that otherwise suggest an association with SU. These include, *inter alia*, the names Matie, Matieland and Coetzenburg, corporate colours, names and logos that have been or will be developed by Departments, Institutes, Bureaux or Units and SU's respective internet domain names. The use of such trade marks by staff, or students, post-doctoral researchers and/or visiting lecturers in the course of their duties or studies must comply with the applicable regulations (e.g. in respect of letterheads) as laid down by InnovUS. The use of SU's trade marks for private purposes or gain by staff, students, post-doctoral researchers and/or visiting lecturers or members of the public is strictly prohibited.

The slogan "Jou kennisvenoot – Your knowledge partner" is also a registered trade mark of SU in respect of which all rights are reserved. SU reserves the right to license its name or registered trade marks to commercial partners. This includes the licensing of SU's name to short courses in terms of the Policy in respect of the Presentation of Short Courses at SU.

If a staff member, student, visiting lecturer and/or post-doctoral fellow should wish to use SU's trade marks outside of the provisions of a recognised policy of SU, an application should be directed to InnovUS to request authorisation. Use thereof by the person concerned shall be subject to any conditions that SU may attach to such authorisation.

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## **PART 3: PROCEDURES FOR THE PROTECTION AND COMMERCIAL EXPLOITATION OF INTELLECTUAL PROPERTY**

### **3.1 IDENTIFICATION OF IP**

The protection of the IP of SU is the responsibility of InnovUS. To enable InnovUS to perform this function, all relevant managers, in conjunction with staff and students, are required to work with and assist InnovUS in identifying and protecting the IP created within the SU environment. The exploitation thereof through InnovUS occurs in partnership with the inventor(s) to the benefit of SU, its staff and its students. This identification is done by means of regular surveys and annual reports or through disclosures by staff and students *via* their academic head to InnovUS. InnovUS offers the staff and students the following services in respect of the utilisation of inventions, plant varieties, designs, business concepts and other IP developed by staff and students:

- a technological investigation to establish whether the IP is registerable
- estimating its commercial potential
- investigating the commercial and licensing possibilities
- undertaking the preliminary patenting of an invention
- a preliminary market analysis, assisting with the establishment of a business plan, investigation of exploitation routes (whether through licensing, sale of rights, or the establishment of spin-off companies)
- investigating sources of financing, the formation of partnerships and the finding of buyers
- negotiating business contracts with commercial partners
- protection, monitoring and providing ongoing support for IP after contract conclusion with a partner.
- managing relationships with commercial partners and the flow of revenue arising from commercial exploitation
- liaising with and reporting to the NIPMO and obtaining NIPMO approvals where required.

In certain cases InnovUS, in consultation with the inventor(s), may need to make use of third parties to provide the abovementioned services. The costs attached to this shall mostly be recovered from proceeds generated from the exploitation of the IP or, possibly, from the Intellectual Property Fund to the extent approved by NIPMO. If SU does not share in the said proceeds, the relevant staff member and/or student shall be solely responsible for such costs.

It is normally expected of the staff members and/or students concerned to be involved in the commercialisation process. Staff members and students agree to such involvement and will reasonably cooperate with SU and InnovUS in this regard, including travel to and onsite visits at third party premises in order to resolve issues arising in respect of the IP and/or the further development thereof for commercialisation purposes.

If a staff member or student approaches InnovUS with a proposal for the commercial exploitation of a business concept or IP that has been developed by him/her and that vests in him/her, InnovUS shall investigate the possibilities for such exploitation in partnership with the person. If SU acting through InnovUS should decide not to become involved in the proposed commercial exploitation thereof, the relevant person is naturally at liberty to proceed with such exploitation of the concept or IP for his or her own account (profit and loss). InnovUS may, however, assist such person with this at a market-related rate.

If a staff member or student approaches InnovUS with a proposal for the exploitation of IP that has been developed by him or her or otherwise discloses to InnovUS IP of which the ownership vests in SU, InnovUS shall likewise, and in consultation with the relevant staff member or student, investigate the possibilities for the proposed commercial exploitation thereof. Such investigation, which shall not exceed a period of six months, will take place in ongoing consultation with the staff member or student,

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after which SU shall inform the relevant staff member or student in writing whether or not it will continue with the proposed exploitation thereof.

Decisions to exploit IP vesting in SU shall be taken in accordance with the applicable regulatory framework, including any relevant guidelines published by NIPMO from time to time, and shall be communicated to the relevant person. Should SU decide not to pursue the commercial exploitation of publicly financed IP it will be required to inform NIPMO of such decision and NIPMO may then take assignment of such IP. SU and the relevant creator(s) will in such event be entitled to use the IP for further research and teaching purposes.

In the event of SU failing to inform the relevant staff member or student of a decision within the agreed period, the relevant student or staff member is at liberty to apply to SU for authorisation to continue with the proposed exploitation him- or herself. InnovUS may assist such person with this at a market-related rate. Staff and students should note that SU will be obliged to follow the applicable regulatory framework in deciding whether or not to grant such authorisation and, specifically, may be required to offer such IP for assignment to NIPMO and/or any entity involved in the funding of the research giving rise to the relevant IP before offering the IP to the relevant staff member or student. If such authorisation is given, it will be subject to the government's rights in respect of the IP emanating from publicly funded research, including its rights to use such IP for health, security and emergency needs of South Africa and to terminate exclusivity and/or procure the granting of compulsory licences pertaining to such IP that is not properly commercialised as may be granted to NIPMO in terms of applicable law.

### **3.2 REGISTERABLE INVENTIONS**

A registerable invention is any product, process, method, appliance, composition of matter, or an improvement on an existing product, process, method or appliance, that can reasonably be deemed to be new and inventive, and that can be applied in industry, agriculture or trade.

The novelty requirement is of particular importance for patents, designs and plant breeders' rights and any inventor with an idea must first test it against the current state of the art. The current state of the art includes all publications on and uses of similar products, processes and methods, and especially in the relevant field of application. A recommendation by the Departmental Chairperson and/or Dean concerned regarding the merits of an idea is required at the time of disclosure to InnovUS. The inventor is obliged to ensure at all times that the invention is kept confidential, as early publication or public use can destroy the possibilities for a patent, design registration or protection for a plant breeder's right – the novelty requirement is vitiated if this happens. This includes disclosure to any member of the public without obtaining his or her agreement in writing to keep the invention confidential. If anyone should become aware of such an untimely disclosure, InnovUS must be informed immediately.

Both patenting and copyright protection may be applicable to certain inventions. A typical and important example is software. Such cases are governed by special provisions (see paragraph 3.5).

### **3.3 DISCLOSURE OF IP**

In order to ensure maximum utilisation of new IP, identification and disclosure thereof must be made to InnovUS as soon as possible (and in any event within 90 days) that a new and potentially useful product, process, method or design has been conceptualised, or a new plant variety or software is being or has been developed, or when an unusual, unexpected or non-obvious research result, or a business concept which has the potential of being commercially or otherwise applied, is obtained. It should also be noted that IP created using public funds and that is not disclosed to NIPMO may be claimed by NIPMO pursuant to the terms of the 2008 Act. It is thus imperative that early disclosure of all new IP be made to InnovUS so as to enable InnovUS to report such new IP to NIPMO. Early disclosure to InnovUS normally forms part of each new contract in terms of which externally funded research is conducted. At SU, research contracts are managed by its Division of Research and Development, who will liaise with InnovUS in respect of these matters. After disclosure, the services as

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set out in paragraph 3.1 are rendered. The disclosure to InnovUS should be in a written format, or as agreed upon between InnovUS and the inventor or creator of the IP.

All researchers must keep a complete and accurate laboratory logbook and apply a proper system of laboratory management in order to assist SU in claiming the rights in new IP and to keep all data relating thereto secure to assist SU in protecting such IP including pending the application for registration of the relevant IP rights. Materials to be kept securely would include all research materials and results, design materials and the source code of any newly developed software. Researchers in partnership with InnovUS should take all reasonable steps to prevent unauthorised disclosures of the data and materials pertaining to any new IP (including in particular any new invention, design and/or plant variety).

Since public disclosure vitiates the possibilities of patenting, design registration and protection of plant breeders' rights, publication of research results (*inter alia* in scientific periodicals and journals or by way of public presentation, and at conferences) must be held back until such time as SU authorises such publication. SU shall endeavour to ensure that the period of non-disclosure is as short as possible. In this regard it should be noted that SU may be required by law to obtain approval from NIPMO prior to authorising the public disclosure of IP. Researchers in partnership with InnovUS should take all reasonable steps to prevent unauthorised disclosures of the data pertaining to any novel invention, design and/or plant variety pending application for the registration of the relevant IP right.

#### **3.4 REGISTRATION OF PATENTS, DESIGNS AND PLANT BREEDERS' RIGHTS**

InnovUS has the final say in the decision to register, or not to register, a patent, plant breeder's right or design for a particular invention, plant variety or model of which the ownership vests in SU, and shall endeavour to take a decision regarding the seeking of provisional protection within three months of disclosure thereof. In this regard, SU will also seek to comply with any relevant guidelines issued by NIPMO. Should SU decide to proceed with the patenting or registration of an invention, plant variety or model of which it is the owner, the costs of registration of the patent, design or plant breeder's right shall be borne by SU, save to the extent otherwise agreed.

In cases where the InnovUS decides not to register a patent, design or plant breeder's right for publicly funded IP in respect of which it owns the rights, SU is required by law to notify NIPMO of such decision and provide reasons for the decision at which point NIPMO may elect to acquire ownership of the IP. Should NIPMO elect not to acquire ownership of the IP, SU will where a private organisation contributed funding towards the development of the IP, give such an organisation the option to acquire the IP and to obtain statutory protection for such rights. Should there be no such private organisation, or if such organisation elects not to acquire the IP rights, the relevant inventor(s) will be given an option to acquire ownership of the IP and to proceed with registration of a patent, plant breeder's right or design and utilisation in respect of the invention, plant variety or model in question, for his/her own account (profit and loss).

Without authorisation from SU, acting through InnovUS, no staff member or student may proceed, on their own initiative or *via* a patent attorney, with the preliminary or final registration of a patent, plant breeder's right or design arising in the normal course and scope of his/her employment or studies, as ownership thereof vest in SU.

If SU bears the costs of the registration of a patent, plant breeder's right or design, SU is also entitled to decide on the geographical area in which the patent, plant breeder's right or design is to be registered. If the inventor is of the opinion that the patent, plant breeder's right or design should also be registered in other countries, this shall only be done after consultation with InnovUS.

It is understood that some or all of the costs associated with such further registrations may be for the inventor's account unless SU agrees to assume such costs. If the inventor(s) assumes the whole of such costs for such further registrations, the proceeds from the relevant additional geographical areas will usually accrue to the inventor(s).

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### 3.5 SOFTWARE

Copyright protection applies to software, but patenting is also applicable if such software complies with certain conditions. This type of invention is dealt with as a separate section in this IPP.

The vesting of IP rights in software is explained in Part 2, paragraphs 2.1.2 and 2.2.2. Contract workers in particular have to exercise caution in respect of software developed in the course of their work. Employees and contract workers, on the expiry or termination of their contract or employment at SU, are prohibited from using, distributing, reproducing, removing or otherwise taking a copy, of any software developed by them in the normal course and scope of their duties at SU, including all accompanying development material, whether written, electronic or in any other format, unless such use has been explicitly authorised by SU and will provide a copy of such software and accompanying development material to such person at SU as he/she may report to prior to his/her departure. Furthermore, the staff member must keep the contents, structure and methodology of the software confidential at all times while in the employ of SU and thereafter, unless disclosure thereof has explicitly been authorised by SU.

Unless exempted by written notice, staff members and students must disclose software that they are developing (other than for the sole purposes of participation or demonstration in conventional academic teaching activities) to SU, since it is important to identify timeously all the possible IP rights that may emanate from such software, in order to protect these rights effectively. The said disclosure must be made to InnovUS. Software developed for the sole purposes of participation or demonstration in conventional academic teaching activities does not have to be disclosed to InnovUS unless such software can also potentially be used for other purposes. Note that ownership of IP in such software will remain vested in SU irrespective of such non-disclosure.

The source code of software must be delivered to the designated person at SU on completion of the development of the software, and in the event of ongoing development, on completion of each version thereof. In all cases, all development material and all existing versions of the source code must on conclusion of the duties or termination of employment of a staff member or of studies by a student be delivered to InnovUS or such other person as may be designated for such receipt by InnovUS.

### 3.6 ASSIGNMENT AND LICENSING OF IP

SU, through InnovUS or otherwise, may conclude agreements with business partners in order to commercially exploit the IP developed by its staff and students. Such agreements may include the assignment or licensing of such IP to business partners. Such agreements will be required to comply with the regulatory regime applicable to IP emanating from publicly funded research, unless the relevant research has been fully funded by an outside organisation or the IP involves a copyright work associated with conventional academic work only. The regulatory regime applicable to IP emanating from publicly funded research includes the 2008 Act and the Regulations issued pursuant thereto. The regulatory regime requires that transactions pertaining to such IP take the following into account:

- preference must be given to non-exclusive licensing;
- preference must be given to BBEE entities and small enterprises;
- preference must be given to parties that seek to use the IP in ways that provide optimal benefits to the economy and quality of life of the people of South Africa;
- preference must be given to parties that made material contribution to the R&D giving rise to the IP;
- each IP transaction must provide the South African government with an irrevocable and royalty-free licence to use the IP throughout the world for the health, security and emergency needs of South Africa;



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- each IP transaction must contain a condition to the effect that, should a party fail to commercialise the IP to the benefit of the people of South Africa, the State is entitled to procure the granting of compulsory licences after following the legislated procedure;
  - a private entity or organisation may become an exclusive licensee of IP emanating from publicly financed R&D if it has the capacity to manage and commercialise the IP in a manner that benefits South Africa;
  - exclusive licence holders must undertake, where feasible, to manufacture, process and otherwise commercialise within South Africa;
  - if a holder of an exclusive licence is unable to continue with the commercialisation of the IP within South Africa during the term of the licence, SU is required to provide NIPMO with full reasons for retaining any exclusivity within 30 days of becoming aware of such inability, and failing the provision of adequate reasons NIPMO may terminate the exclusive rights of the licensee;
  - each assignment of IP by SU to a small enterprise in return for shareholding as a consideration must contain a condition providing that in the event of the liquidation of that small enterprise, the IP shall revert to SU.
  - IP transactions involving assignment of IP by SU require NIPMO approval;
  - all offshore IP transactions must be notified to NIPMO in advance and must comply with all applicable regulations and guidelines issued by NIPMO or otherwise be approved by NIPMO;
  - In the event of an offshore IP transaction in the form of an assignment or exclusive licence NIPMO must be satisfied that there is insufficient capacity in South Africa to develop or commercialise the IP locally and that South Africans will benefit from such offshore transaction;
  - NIPMO approval must be obtained for all royalty free licences and licences in respect of which the consideration is not on an arms-length basis
  - SU is obliged by law to establish in advance that any prospective exclusive licensee is capable of developing and commercialising the relevant IP in the licensed territories

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## **PART 4: PROCEDURES FOR THE COMMERCIAL EXPLOITATION OF INTELLECTUAL PROPERTY THROUGH SPIN-OFF COMPANIES**

Staff members and students of SU may not have an interest or be involved in private companies, close corporations or other separate entities or enterprises that exploit IP created at or for SU without the prior written authorisation from the Director of Innovus. However, in its commitment to the commercialization of its IP, SU supports the establishment of spin-off companies where appropriate and commercially feasible in which staff members and students may be involved. InnovUS also offers several services to enable the establishment and functioning of such spin-off enterprises.

### **4.1 COMPANY STRUCTURES**

In cases where SU should decide, in consultation with the inventor or the promotor of an idea, to exploit IP by means of the establishment of a spin-off enterprise, it shall be done by establishing a separate enterprise that shall normally be a subsidiary or associate company of "InnovUS Technology Transfer" (hereafter "ITT"), and in which SU, the inventor or the promotor of an idea, and other possible partners shall own shares or members' interests according to a division that is agreed upon beforehand.

The employees of SU shall not be involved in any other private companies, close corporations or other separate entities or enterprises that compete with SU including with respect to tuition, research or other primary functions of SU. In this regard, it should be noted that all staff members are expected to ensure that research funding obtained by them for research to be conducted at SU is paid directly to SU. Staff members will not be permitted to have an interest in any private entity that procures research funding for research to be conducted at SU without prior written authorisation from the Director of Innovus.

No staff member who is involved in a spin-off enterprise or other enterprise in partnership with SU shall compete with such enterprise or be involved in any other entity that competes with such enterprise by providing similar goods or services, without prior written authorisation from the Director of Innovus.

SU may establish wholly owned subsidiary enterprises in cases where SU for strategic reasons want to retain full control and shareholding in the enterprise via InnovUS. Such enterprises shall mostly be exclusively intended to promote the strategic interests of SU, and SU may refuse to establish more than one spin-off enterprise in the same sector. Private enterprises or spin-off enterprises that conduct business in competition with these enterprises can therefore not be allowed and all employees are thus prohibited from being involved in such competitive enterprises save with the prior written authorisation from the Director of Innovus. Staff who provide services to this category of enterprises may be entitled to "payment for services rendered" and/or to profit-sharing. The articles of association and/or shareholders agreement of the enterprise shall in each case stipulate the particulars in this regard. This provision must, where applicable, be interpreted in the context of the SU Policy on Short Courses.

SU reserves the right to develop and to implement an exit strategy for spin-off companies with the understanding that each and every IP transaction involving an assignment of IP to an enterprise as contemplated in this section, is required by law to contain a condition providing that in the event of the liquidation of the enterprise, the IP shall revert to SU.

### **4.2 SERVICES OFFERED BY INNOVUS TO SPIN-OFF COMPANIES**

The commercial viability of spin-off enterprises shall be investigated by InnovUS after the prescribed Business Disclosure form has been completed. Thereafter, a process, as determined by InnovUS, shall be followed where the following services and support, but not limited to these and not necessarily including all, may be rendered in partnership with the inventor or the promotor of an idea:

- Identifying a suitable promotor of an idea;
- Training of the promotor of an idea in business;
- Development of a business plan;

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- Finding of strategic partners;
  - Making limited start-up capital available on a loan basis;
  - Procuring incubation space and access to facilities;
  - Making a mentor available;
  - Making legal and financial services available;
  - Making available the use of SU's financial system (cost centres);
  - Making available the use of SU's human resource services;. and
  - Making available the use of SU's IT network and services.

SU may render the services and support as described herein to the new enterprise in exchange for either equity or payment for services rendered. SU may require that a written agreement be concluded in this regard.

In the case of SU office space or laboratory equipment being utilised, a lease agreement must first be concluded with the spin-off enterprise in respect thereof. Such lease agreement shall at all times put the academic interests of SU first. The Division Facility Management is responsible for such lease agreement.

### **4.3 CONFLICT OF INTEREST**

Where SU transfers any IP to the spin-off company, grants exclusive rights or is of the opinion that the activities of a spin-off enterprise may possibly have a direct influence on its public image, it may insist on certain veto rights in the shareholder's agreement of such spin-off company. In such a case, SU shall be entitled to also appoint at least one director in the enterprise. No spin-off enterprise shall be allowed to conduct its main business on SU's premises for longer than two years, unless it has been so agreed by all interested parties.

Where an academic promotor of an idea prefers to become involved in the new spin-off enterprise on a full-time basis or in an executive capacity, the promotor of an idea's academic duties and remuneration should be reduced accordingly. In the event where the promotor of an idea is due to become the managing director of the spin-off enterprise, he or she shall be required to leave the employ of SU.

Staff members are obliged to disclose, on a yearly basis, to their Departmental Chairperson and/or Dean their interests in private enterprises and entities, regardless of whether it is an SU enterprise or not. This applies to directorships, shareholding, members' interests and part-time appointments.

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## **PART 5: DIVISION OF INCOME DERIVED FROM THE COMMERCIALISATION OF INTELLECTUAL PROPERTY**

InnovUS shall keep a separate account for each IP product. Unless otherwise agreed, earnings derived from the commercialisation of IP shall be divided in accordance with paragraph 5.1. These allocation formulae shall apply only as from the Effective Date of this Policy as stipulated at the head hereof. It should be noted that although the allocation formulae specified hereunder apply to earnings derived by SU from IP arising from research conducted at SU, they do not apply to research grants or other monetary and non-monetary contributions which are provided to support such research. Furthermore, the allocation formulae also do not apply to income from IP that is agreed pursuant to this policy to accrue solely to SU's staff and/or students.

### **5.1 ALLOCATION OF INCOME DERIVED FROM COMMERCIAL EXPLOITATION OF IP**

Unless otherwise agreed and subject to 5.2, income derived from the commercial exploitation of IP that has been created by a staff member or student, but the ownership of which vests in SU, shall be allocated as set out in this paragraph. The income to be so divided includes all forms of revenue or benefits derived from the exploitation of such IP as defined in the 2008 Act, including in the form of non-refundable royalties, equity (including shareholding), dividends, fees and commissions and other payments received and the value of non-monetary rights and benefits received, but excluding donations. If the staff member or student receives his/her pro rata share of the equity in any entity hereunder (e.g. shareholding), he/she will have no further entitlement to any dividends or other income of SU based solely on the corresponding share of equity held by SU in the same entity, unless otherwise agreed in writing.

If a non-monetary right or benefit is received as part of the consideration for the exploitation of IP, SU will procure the valuation of such rights and benefits using internationally accepted valuation principles.

Save to the extent that it may not be legally permitted, the direct costs to be deducted for the purposes of distribution of revenue ("**Direct Costs**") will include all out-of-pocket costs, fees and expenses that SU incurs and pays to independent third parties in connection with any of the following activities:

- (i) filing, prosecution, development and maintenance of any statutory protection for intellectual property, excluding any amounts recovered by SU from any third party in this regard.
- (ii) auditing, recovery or collection of revenues, including bank fees, charges and other expenses of any kind paid by SU in order to collect, receive or account for amounts payable to it for the commercialization of the IP;
- (iii) defence, validation and enforcement of IP in any IP office, court or tribunal;
- (iv) legal advice and services in respect of the above activities or issuance or conveyance of any securities or other consideration constituting revenues, or in respect of any proposed, threatened or actual litigation involving the IP; and
- (v) costs directly incurred in respect of market research, business development, marketing, advertising, promotion or sales activities or services, and administrative expenses, irrespective of whether such costs was paid to a third party or incurred internally by SU.

The funds allocated to the inventor's/creator's environment must be applied in the interest of research and may not be allocated to any individual for personal gain. SU manages these allocations strictly in accordance with the 2008 Act and the requirements of the SA Revenue Service regarding such income, and SU reserves the right to implement the necessary systems and structures in this regard.

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**A: Gross income up to R1,000,000 (one million Rand):**

**Step 1:**

25% of the gross income is allocated to the inventor(s)/creator(s)/author(s) or their heirs in their personal capacity. Such allocation will be shared equally between inventor(s)/creator(s)/author(s) unless otherwise agreed in writing.

**Step 2:**

All Direct Costs relating to the process of protection and the process of commercialisation and other costs agreed to be recoverable may be recovered by the parties who incurred such Direct Costs from the gross income on a pro rata basis to the amount of the costs incurred by each, before any allocation of the balance of the income can take place.

**Step 3:**

The balance of the income (if any), after the execution of steps 1 and 2 above (hereinafter, referred to as "the First Tier Net Income"), shall be allocated as follows:

- 50% of the First Tier Net Income is allocated to SU's internal innovation fund.
- 50% of the First Tier Net Income is allocated as follows:
  - 30% of the First Tier Net Income is allocated in equal proportions to the SU research account(s) of the inventor(s)/creator(s)/author(s) for use in their research work, until termination of their employment with SU, following which it will be allocated to the department(s)/institute(s)/unit(s)/ centre(s) where the inventor(s)/creator(s)/author(s) resided;
  - 10% of the First Tier Net Income is allocated to the department(s)/institute(s)/unit(s)/centre(s) where the inventor(s)/creator(s)/author(s) reside pro rata to the number of inventor(s)/creator(s)/author(s) of each department/institute/unit/centre;
  - 10% of the First Tier Net Income is allocated to the Faculties where the inventor(s)/creator(s)/author(s) reside, pro rata to the number of inventor(s)/creator(s)/author(s) of each Faculty, to be administered by the Dean in consultation with the Head of Department.

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## **B: Gross income in excess of R1,000,000 (one million Rand)**

### **Step 1:**

All Direct Costs relating to the process of protection and the process of commercialisation and other costs agreed to be recoverable may be recovered by the parties who incurred such Direct Costs from the gross income on a pro rata basis to the amount of the costs incurred by each, before any allocation of the balance of the income can take place.

### **Step 2:**

The balance of the income (if any), after the execution of step 1 above (hereinafter, referred to as "the Second Tier Net Income"), shall be allocated as follows:

- 35% of the Second Tier Net Income is allocated to the inventor(s)/creator(s)/author(s) or their heirs in their personal capacity. Such allocation will be shared equally between inventors/creators/authors, unless otherwise agreed in writing.
- 35% of the Second Tier Net Income is allocated to SU's internal innovation fund.
- 30% of the Second Tier Net Income is allocated as follows:
  - 10% of the Second Tier Net Income is allocated in equal proportions to the SU research account(s) of the inventor(s)/creator(s)/author(s) for use in their research work until termination of their employment with SU, following which it will be allocated to the department(s)/institute(s)/unit(s)/ centre(s) where the inventor(s)/creator(s)/author(s) resided;
  - 10% of the Second Tier Net Income is allocated to the department(s)/institute(s)/unit(s)/centre(s) where the inventor(s)/creator(s)/author(s) reside, pro rata to the number of inventor(s)/creator(s)/author(s) of each department/institute/unit/centre;
  - 10% of the Second Tier Net Income is allocated to the Faculties where the inventor(s)/creator(s)/author(s) reside, pro rata to the number of inventor(s)/creator(s)/author(s) of each Faculty, to be administered by the Dean in consultation with the Head of Department.

## **5.2 ALLOCATION OF INCOME DERIVED FROM COMMERCIAL EXPLOITATION OF IP WHERE SHARED OWNERSHIP APPLIES**

Where the IP is co-owned by SU and an outside organisation, the division of revenue between SU and such co-owner from such IP shall first occur according to a formula that has been agreed on with the co-owner beforehand. Thereafter, SU's share shall be allocated in accordance with paragraph 5.1. In cases where the IP is vested in the staff member or student who approaches SU to assist in exploiting it, the division of income shall also be agreed on beforehand between the parties. Likewise, the division of income shall also be agreed on beforehand in cases where SU authorises the staff member or student to exploit IP commercially otherwise than in partnership with SU.

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### **5.3 MONETARY AND NON-MONETARY BENEFITS**

SU's policy with respect to the commercial exploitation of IP is to obtain monetary benefits whenever possible. Benefits are usually in the form of royalties and/or shareholding, which will be divided in accordance with the terms of this Part 5 unless otherwise agreed.

If a benefit is in the form of an asset that SU determines cannot reasonably be divided (e.g. equipment), SU will be entitled to elect to hold such asset in co-ownership with the inventor(s)/creator(s)/author(s), or, at SU's option and at any time, purchase the undivided share(s) of the inventor(s)/creator(s)/author(s) in the asset.

SU will be solely entitled to determine possession, use and commercial exploitation of all such co-owned assets. In the event that a co-owned asset is sold, rented out or otherwise commercially exploited by SU, the earnings arising in respect thereof will be divided pursuant to the allocation formulae specified herein.

If SU elects to purchase the undivided share(s) of the inventor(s)/creator(s)/author(s) in a co-owned asset, SU will seek to agree the purchase price of the undivided share with the inventor(s)/creator(s)/author(s), but failing such agreement within 30 (thirty) days of request therefore, SU may have the undivided share valued by independent auditors, whose valuation will be final and binding on the inventor(s)/creator(s)/author(s). The auditors will value the undivided share by determining the monetary value of the asset and by then applying the allocation formulae specified herein thereto. SU may purchase the undivided shares within 60 (sixty) days of receipt of the value of the undivided shares being agreed or notified to SU by the auditors. In event of such purchase of an undivided share, no money will be paid into the research account of the relevant inventor(s)/creator(s)/author(s) or to the departments, institutes or Faculties of the relevant inventor(s)/creator(s)/author(s).

If other clearly identified non-monetary benefits are to form part of the consideration for IP exploitation, SU will seek to agree fair and equitable compensation for inventor(s)/creator(s)/author(s) prior to accepting such benefits, and failing such agreement SU may have the benefits valued by independent auditors, whose valuation will be final and binding on the inventor(s)/creator(s)/author(s) and may then be used by SU as basis on which to compensate inventor(s)/creator(s)/author(s) hereunder using the allocation formulae specified herein.

### **5.4 PAYMENTS TO INVENTORS, CREATORS AND AUTHORS**

SU wants to pay its inventor(s)/creator(s)/author(s) promptly after receiving IP related earnings and by law is required to do so within 12 (twelve) months of receipt. It is the responsibility of inventor(s)/creator(s)/author(s) to ensure that SU is in possession of up to date and accurate banking details so as to facilitate such payments. All payments will be made by way of electronic transfer in South African Rand and to South African bank accounts unless otherwise agreed in advance. The costs of affecting payment to inventor(s)/creator(s)/author(s) will be for the account of such inventor(s)/creator(s)/author(s), including any costs incurred in tracing them. If SU is unable to affect payment because of incorrect or inadequate banking details, SU will keep the relevant amounts in trust for a maximum period of 3 (three) years after which all rights of inventor(s)/creator(s)/author(s) to receive such payments will be forfeited and the money will be taken out of trust. If SU pays an amount into an incorrect account as a result of information supplied to it being outdated or incorrect, SU will not have any further obligation or liability in respect of such payment, which will be deemed to have been duly and properly made.

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## **PART 6: ANNEXURES**

### **ANNEXURE A**

#### **DEFINITIONS**

For the purposes of this Policy, the concepts listed below have the following meanings:

#### **LETTER OF INTENT**

A Letter of Intent is a written undertaking that is given by InnovUS to the promotor of an idea before a project is to be officially supported by InnovUS. The document contains proposals which set out all the rights, obligations and fair expectations of all parties in respect of equity, profit-sharing and other forms of compensation in the new enterprise. The promotor of an idea has to indicate to what extent the proposals are acceptable to him/her. No party to the Letter of Intent shall be bound by its terms before agreement has been reached about such terms. Such agreement shall be indicated by the signing of the Letter of Intent by all relevant parties thereto.

#### **PRIVATE WORK**

Private work is defined according to SU's *General Procedure for Private Work* as "... work of a specialised nature which bears a relationship with the applicant's subject area and which is performed on a continuous or repetitive basis on a limited scale for payment, including directorships".

#### **PROMOTOR OF AN IDEA**

A promotor of an idea is a staff member or student with a business idea who wants to make use of SU structures to start an enterprise.

#### **INTELLECTUAL PROPERTY OR IP**

IP encompasses registerable and non-registerable inventions, expertise, trade marks, trade secrets, copyrights, designs and plant breeders' rights which have come about through the mental efforts, insight, imagination, knowledge and creativity of humans.

#### **INTELLECTUAL PROPERTY RIGHTS**

This refers to IP as defined above, of which the exclusive right of ownership, with the attendant rights and obligations, belongs by law to a natural or a legal person (company, trust, institution).

#### **INTELLECTUAL CAPITAL**

Intellectual capital comprises the sum total of IP and other forms of tangible and intangible assets that normally exist within a company context. These other intangible assets include, but are not limited to, the following: capital, reputation, operating systems, knowledge, experience, trade secrets, access to markets, access to distribution channels, and quality assurance.

#### **CONSULTATION VS. CONTRACT RESEARCH**

##### **Consultation**

Consultation takes place when a staff member who has obtained permission from SU to do private work makes his/her knowledge available to a third party on commission, in exchange for compensation without any substantial use being made of SU's facilities, infrastructure, other staff or students. During consultation, knowledge is applied creatively and problem solving may take place. New knowledge is usually not created during consultation, but existing knowledge is merely applied.



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### Contract research

In contrast to the above, new knowledge is likely to be created during contract research. Contract research is commissioned by an outside organisation and SU's infrastructure is normally used. Other staff and/or students of SU are usually also actively involved in contract research. Contract research at or for an outside organisation must take place in accordance with paragraph 2.1.4.

### **SERENDIPITOUS KNOWLEDGE**

Serendipitous knowledge refers to all inventions, designs and knowledge, whether registrable as IP rights or not, which could not reasonably have been foreseen by the principal or the staff member involved in the commissioned work, be it consultation or research. A typical example is where a staff member is commissioned to conduct clinical trials on a new compound, and then discovers accidentally and outside the scope of the commission that the active compound can also cure another disease.

### **INVENTION**

A registrable invention is any product, process, method, appliance or composition which is new and involves an inventive step, and which is capable of being used or applied in trade or industry or agriculture. The term "invention" also includes all inventions to the extent where they have not been patented or registered, but rather acquire protection as confidential knowledge. A discovery is not an invention.

### **INVENTOR**

An inventor is a person involved in the conception of intellectual property (i.e. who invents the invention), and includes an "intellectual property creator" as defined by the "the 2008 Act". All references in this policy document to "Inventor" must be taken to include or be in the alternative to "Creator".

### **SOFTWARE**

Software includes all computer programs together with all documents (in any format) created during the development, maintenance and updates of developed software or any part thereof;

### **OPEN SOURCE SOFTWARE**

Open source refers to a program in which the source code is available to the general public for use and/or modification free of charge. Open source code is typically created as a collaborative effort in which programmers improve upon the code and share the changes within the community.

### **PRE-EXISTING IP**

Pre-Existing IP refers to IP that is used by a staff member or student for the purposes of his/her research or work and that is owned by an entity other than SU. Consent from the owner of such IP is likely to be required to use such IP, particularly if the research or work results emanating from the research or work incorporates or depends upon the pre-existing IP.

### **FULL COST**

The precise method for determination of Full Costs will be determined by SU from time to time in its Full Cost Policy.

The determination of the share of the indirect costs attributable to the relevant research and/or development work will be as determined in accordance with the SU Full Cost Policy from time to time.

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## ANNEXURE B

### ACTS REFERRED TO IN THIS POLICY

Plant Breeders' Rights Act, 15 of 1976

Patents Act, 57 of 1978

Copyright Act, 98 of 1978

Trade Marks Act, 194 of 1993

Designs Act, 195 of 1993

Counterfeit Goods Act, 37 of 1997

Competition Act, 89 of 1998

Biodiversity Act, 10 of 2004

Intellectual Property Rights from Publicly Financed Research and Development Act, 2008

#### **Explanatory Note regarding 2008 Act:**

The Intellectual Property Rights from Publicly Financed Research and Development Act, 2008 ("**the 2008 Act**") does not replace any of the other IP legislation but builds on such legislation to create a very specific regime for IP emanating from publicly financed research which sometimes differs from the default positions established by the other legislation. The other IP legislation should thus be read in conjunction with the 2008 Act to establish the complete legal environment within which SU operates with respect to IP. If and to the extent that the 2008 Act does conflict with the other legislation, the 2008 Act will prevail.