

**KURT BUCHMAN**

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## **OBJECTION AGAINST THE CERTIFICATION OF THE NEW CONSTITUTIONAL COURT, ON THE GROUNDS OF THE OMISSION OF AN INTELLECTUAL RIGHTS CLAUSE IN THE BILL OF RIGHTS**

### **1. INTRODUCTION**

This letter is written on behalf of the 34 organisations - as listed in the enclosure - which have submissions to the Constitutional Assembly - supposed by a petition with more than 4000 S] asking for a clause on the protection of Intellectual Rights to be included in Chapter 2, Bill of Rights of the new Constitution.

As such a provision was omitted in the new Constitution adopted by the Constitutional Assembly on the 8th May 1996, we hereby object to the certification of the new Constitution on the grounds that it does not comply with the Constitutional Principles as laid down in schedule 4 to the interim Constitution.

### **2. INTELLECTUAL RIGHTS, THE TERM AND THE CONCEPT**

“Intellectual Rights” is not a very familiar term. It has, however, been used in legal literature for seventy years as an expression which comprises both Intellectual Property Rights and Intellectual Personal Rights, eg, the moral rights of the author.

### **3. CONSTITUTIONAL PRINCIPLES**

As you know, the first part of Principle 11 reads as follows, with the two words most relevant in this context, with the two most relevant words in this context set in bold typeface by the writer of this letter.

Everyone shall enjoy all **universally accepted** fundamental rights, freedoms and civil liberties which shall be provided for and protected by entrenched and justiciable provisions in the constitution,...

### **4. INTELLECTUAL RIGHTS, UNIVERSALLY ACCEPTED?**

The following provision for the protection of Intellectual Rights was included as Article 27(2) in the UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS adopted and proclaimed on 10 December 1948.

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which, he is the author.

Almost identical, as shown below, is the Intellectual Rights wording, in Article 15 of the

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS which entered into force on 3 January 1976:

... the right of everyone: ...

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

By 30 June 1994, 139 countries had signed either one or both of these two international instruments. Considering that this list of countries include some with a very high population such as China, India, USA and the Russian Federation it can be assumed that these countries comprise about 90% of the world's total population.

If 139 countries with about 90% of the world's total population have accepted a clause on the protection of Intellectual Rights as one of the fundamental human rights, than such a clause must be considered **universally accepted**.

## 5. **INTELLECTUAL RIGHTS PROTECTED BY OTHER CLAUSES OF THE NEW CONSTITUTION?**

It has been suggested by members of the Constitutional Assembly, that the protection of Intellectual Rights might be covered by the Freedom of Expression clause. The principle of the Freedom of Expression clause in the new Constitution is appreciated. But in this context - clause 15.(1) (c) - it deals only with the "freedom of artistic creativity" and not with the protection of the moral and material interests of the creator.

It could be argued whether the Property clause can be applied also to intellectual property, but expressions such as "...property may be expropriated..." or "...for a public purpose or in the public interest..." are unthinkable in relation to intellectual property. But even if one believes that the Property clause does apply also to intellectual property, it would not provide the necessary protection as shown below:

A property clause:

- \* cannot protect the creator of intellectual property in cases where he is not the intellectual property
- \* cannot protect the "moral interests" of the creator, because these are non-assignable personal rights and not, assignable property rights
- \* cannot protect the creator against the state introducing legislation which deprives him of his authorship and/or of his right to be the initial owner of the intellectual property, which he has created. Both cases did happen in intellectual property legislation in South Africa and abroad.

This question was discussed with various legal experts e.g.:

**Dr OH Dean**, Attorney, Spoor and Fisher, Expert on Intellectual Property Law, Author of the Handbook of South Africa Copyright Law Member of the South African

Governments Advisory Committee on Copyright, Trade Marks, Patents and Designs.

**Chris Job**, Attorney, Adams & Adams, Expert on Intellectual Property Law, President of the South African Institute of Intellectual Property Law, Member of the South African Government's Advisory Committee on Copyright, Trade Marks, Patents and Designs

**Prof. BR Rutherford**, Professor for Mercantile Law, University of South Africa Member of the South African Government's Advisory Committee on Copyright, Trade Marks, Patents and Designs

**Prof. DH van Wyk**, Professor for Constitutional and Public International Law University of South Africa

who all agreed that a Property clause cannot provide sufficient protection of Intellectual Rights and all of whom did sign the above-mentioned petition asking for a separate clause on Intellectual Rights in the new Constitution.

The experts from various countries of the world who have formulated the UNITED NATIONS' UNIVERSAL DECLARATION OF HUMAN RIGHTS were also of the opinion that Freedom of Expression, Property and Intellectual Rights are three different issues and they have accordingly made three different clauses as follows:

- Article 19 = Freedom of Expression
- Article 17 = Property
- Article 27,2 = Intellectual Rights

## **6. SUGGESTED WORDING FOR AN INTELLECTUAL RIGHTS' CLAUSE**

We suggest and explain the following changes in text from the Universal Declaration of Human Rights:

- to include the terms "industrial" and "brand equity" to take care of industrial property
- to change "author" into "creator", because of the worldwide distortion and corruption of the term "author" in intellectual property legislations.
- to change "he is" into "they are" in adaptation of the language of the new Constitution in order to avoid gender discrimination.

Accordingly we suggest the following wording for a clause on the protection of Intellectual

## **INTELLECTUAL RIGHTS**

**Everyone has the right to the protection of the moral and material interests resulting from any industrial, scientific, literary or artistic production of which they are creators, or brand equity of which they are the proprietors.**

## **7. CONCLUSION**

As explained above the omission in the new Constitution of a clause on Intellectual Rights does not comply with the second Constitutional Principle because Intellectual Rights are “universally accepted fundamental rights”.

As was furthermore outlined, Intellectual Rights are not sufficiently - if at all - protected by any other clause in the new Constitution.

We therefore request the Constitutional Court not to certify this new Constitution unless a clause on Intellectual Rights is included.

Please do not hesitate to approach the writer of this letter, in case you require this objection to be amplified or written argument submitted.

**KURT BUCHMAN**

## **ORGANISATIONS WHICH SUPPORT A PROVISION ON INTELLECTUAL RIGHTS IN THE NEW CONSTITUTION**

AMERICAN CHAMBER OF COMMERCE IN SOUTH AFRICA  
ASSOCIATED FURNITURE  
ASSOCIATION OF ADVERTISING AGENCIES (AAA)  
ASSOCIATION OF MARKETERS (AOM)  
COPYRIGHT PROTECTION AGENCY (CPA)  
DA GAMA TEXTILE  
DESIGN WORLD  
D.M. KISCH INC.  
DURACELL - SOUTH AFRICA  
EDGARS STORES LIMITED  
HOLIDAY INN  
INSTITUTE OF INVENTORS AND INNOVATORS  
INTELLECTUAL PROPERTY OWNERS ASSOCIATION  
LION MATCH  
NATIONAL ASSOCIATION OF MODEL AGENCIES (NAMA)  
NATIONAL INSTITUTE OF DESIGNERS  
NATIONAL TELEVISION AND VIDEO ASSOCIATION (NTVA)  
OK BAZAARS  
PLATE GLASS  
PROFESSIONAL PHOTOGRAPHERS OF SOUTHERN AFRICA (PPSA)  
REMBRANDT GROUP LTD.  
SASOL OIL  
SOUTH AFRICAN ASSOCIATION OF ARTS

SOUTH AFRICAN BREWERIES LIMITED  
SOUTH AFRICAN RECORDING RIGHTS ASSOCIATION LTD. (SARRAL)  
SOUTHERN AFRICAN MUSIC RIGHTS ORGANISATION, LIMITED (SAMRO)  
SOUTHERN SUN  
SPOOR AND FISHER  
THE CAPE FILM AND VIDEO FOUNDATION  
THE LOERIE COMMITTEE  
THE SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY LAW (SAIPL)  
UNILEVER SA (PTY) LTD.  
UNITED TOBACCO COMPANY HOLDINGS LIMITED  
WORLD COUNCIL OF PROFESSIONAL PHOTOGRAPHERS (WCPP)