

LOERIE AWARDS ASSOCIATION OF MARKETERS

Bryanston

PROTECTION OF INTELLECTUAL PROPERTY, BRANDS AND BRAND EQUITY AS A FUNDAMENTAL RIGHT

The Loerie Award Committee, represents the interests of the advertising/marketing industry in South Africa, we welcome the opportunity to lodge an objection under Schedule 4 - Trade, and with reference to the Property Clause Section 25.

Our initial submission was incorporated in the refined working draft of 18 March 1996. There were 4,419 petitions proposing the inclusion of an intellectual property clause. This important factor was omitted from the constitution. It is almost inconceivable that this request, coming from major business in this country, could be ignored. The reason for our submission was that there was no clear delineation between fixed property and intellectual property, we are deeply concerned that the highly interpretable sentence - Chapter 2 Section 25 4(b) Property "is not limited to land" does not address the issue.

Intellectual Property

Brands as a species of property are protected by, and embodied in intellectual property laws in South Africa, as in all other free market countries. More particularly they are protected by registration as trademarks, as literary and/or artistic works under the law of copyright and under the common law of passing-off. Affording constitutional protection to brands in effect involves affording such protection to intellectual property.

Intellectual property is a form of incorporeal property which does not have a material form in contrast with other forms of property such as land (immovable property), motor vehicles, furniture etc (movable property). Incorporeal property, and measures which are designed to protect corporeal property, especially land, have no application or relevance to intellectual property. The provisions of Chapter 2 Section 25 of the Bill of Rights are clearly aimed at granting protection to mainly land and are entirely inapposite to intellectual property. It is accordingly submitted that, it is accepted that brands and brand equity, as a species of intellectual property, ought to be protected under the constitution. It was contended that a special clause was required, dealing with brands, brand equity and other forms of intellectual property in the constitution.

We therefore earnestly request that this omission be corrected and that the following paragraph be considered :

"Everyone has the right to the protection of the moral and material interest resulting from any artistic, industrial, scientific or literary production of which they are the creator, or trademark, brand or brand equity of which they are the proprietor".

Difference between products and brands

Brands are a much broader concept than a mere trademark which is merely that part of a brand that is given legal protection because it is capable of exclusive appropriation.

A product is something that is made in a factory, a Brand is something that is bought by a customer. A product can be copied by a competitor, a Brand is unique. A product can be quickly outdated, a successful Brand is timeless.

Advertisers invest millions of Rand in developing a product, they then need to Brand these products, which is usually done through marketing communications (advertising and sales promotion). Physical and psychological differentiation of the products is needed to set them aside from competitors. This is done by product innovation and by positioning the product in the minds of consumers by means of advertising. To accomplish this they create a Brand personality which is a highly intangible thing. This positioning and personality is reinforced with slogans and devices which become the marketers' 'property'.

Brands are the major equity of most marketing companies. Brand equity is based on Brand benefits and value as perceived by consumers. Uniqueness is at the root of Brand value.

The importance of brands is demonstrated by the fact that they are now presented on companies' balance sheets like any other company asset. Kraft Foods for example was purchased for nearly US \$13 Billion, more than 60% above the company's book value - this premium is attributable to the brand equity which subsisted in the company's brands.

This position is based on the recognition that Brand names and trademarks are amongst the greatest assets - if not the greatest - of companies. Hence the principle that it is essential to protect Brand names and trademarks, and bestow on them similar rights that an individual experiences under the Constitution.

Protection of Intellectual Property rights in a Bill of Rights

Intellectual property has contributed substantially to the economic success and power of the United States of America, and its economy.

The Universal Declaration of Human Rights was proclaimed by the General Assembly of the United Nations in 1948. This Declaration was intended to proclaim a common standard of achievement to be striven for by the community of nations. it sets the

international norm for the protection of human rights. Article 27(2) of this instrument states the following:

"Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is author. This is clear enshrinement of the right of the individual to acquire, own and have protection for his intellectual property."

It is significant that the Universal Declaration of Human Rights deals with property separately from intellectual property.

In Chapter 2 of the Constitution, South Africa espouses a market economy. The Constitution should make provision for all the elements which will promote a healthy and vibrant economy in South Africa. Protection of brand equity and other intellectual property is such an element. The failure to give proper protection to intellectual property in South Africa would undoubtedly, seriously inhibit South Africa's economic development. It is therefore of paramount importance that the right to intellectual property should be enshrined in the Bill of Rights.

South Africa's record in the field of intellectual property rights is a proud one and there is no reason or justification whatsoever why this universally accepted fundamental right should be omitted from South Africa's Bill of Rights. On the contrary, enshrinement of protection of intellectual property rights, will give formal recognition to one of the few fundamental rights which South Africa has honoured in the past, and should continue to do so in the future, particularly in truly democratic dispensation.

Our request that the enshrinement in the Bill of Rights of protection for brand equity and other intellectual property rights, in keeping with the Universal Declaration of Human Rights, is viewed very seriously by us, and a high priority is placed on achieving our objective. The Loerie Committee cannot accept a situation where brand equity, which is every bit as important as rights, such as privacy, freedom of expression and economic activity, (all of which are also embodied in the Universal Declaration of Human Rights) is not given the due protection in the Constitution.

LOERIE COMMITTEE

31 MAY 1996