

D.M. KISCH INC.

Sandton

20 February, 1996

PROPOSAL FOR INCLUSION IN THE NEW CONSTITUTION - PROTECTION OF INTELLECTUAL PROPERTY OF PERSONS AND THE INTELLECTUAL PROPERTY LAW SYSTEM

I refer to my submission to you dated 5 June 1 995 and your confirmation thereof, regarding the above.

I have noted from the Draft Constitution that Intellectual Property and the legal/administrative system therefor has not been included. I also make mention that neither the South African Institute of Intellectual Property Law nor I was afforded an opportunity to address the relevant Theme Committee on this matter.

For your information I am telefaxing hereafter a copy of my submission, together with the following comments, for reconsideration by the relevant Theme Committee:

- a) Intellectual property should not be considered to be part of property per se and hence it deserves special treatment in the Constitution.
- b) Intellectual property has international rights attached thereto, and is indeed dealt with in several International Conventions of which South Africa is a signatory country such as the Paris Convention of 1883 and the Berne Convention of 1886.
- c) Because South Africa is a signatory country of the aforementioned Conventions, South Africa is presently obliged to protect the intellectual property of citizens of other countries, as well as the Intellectual Property of its own citizens.
- d) Intellectual property and the protection thereof enables a country to develop industrially/commercially and economically.
- e) It attracts foreign investment and enables industry and commerce to expand and hence provides labour i.e. jobs.
- f) South Africa presently has a well developed legal / administrative system to protect intellectual property. This system has been and is still evolving continuously.
- g) Our system enjoys international respect and we can be proud of our system at present but we need to ensure that the system is protected and entrenched in a special manner. This can be achieved by entrenching the system in the Constitution as is the case in the USA for example.

The above is a non-exhaustive listing of considerations that should be taken into account in considering this matter. I therefore request the relevant Theme Committee to reconsider this matter and to consider including the protection of intellectual property (i.e. inventions, trade marks, designs, copyright works, etc) and the provision of an adequate legal/administrative system for the protection of intellectual property. I refer in this regard to the broad proposals listed as paragraphs 1 and 2 in my aforementioned letter.

I look forward to hearing from you in this matter at your early convenience.

A. K. VAN DER MERWE
JOHANNESBURG

PS. Should you require further information or an oral presentation, please do not hesitate to let me know.

4 March 1996

**PROPOSAL FOR INCLUSION IN THE NEW CONSTITUTION - PROTECTION
INTELLECTUAL PROPERTY OF PERSONS AND THE INTELLECTUAL PROPER
LAW SYSTEM**

I refer to previous correspondence herein, terminating with my letter to you dated 20 February 1996. 1

In support of my submissions made herein, I wish to draw your attention to the following justification for inclusion of protection of Intellectual Property and Intellectual Property rights in the final constitution, namely as set out hereunder.

The United Nations Universal Declaration of Human Rights which has been adopted in 1948 reads as follows:

"Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which they are the creator."

The aforementioned provision clearly envisages that persons (including legal persons) are entitled to protection of their inventions (by way of patents), trade marks (by way of trade mark registration and the common law), designs (by way of design registration and the common law), and works such as literary, musical artistic, dramatic works and also computer programmes (by way of copyright protection).

I therefore look forward to hearing from you regarding the above submission well as my earlier substantive submission, at your early convenience.

A. K. VAN DER MERWE
JOHANNESBURG

D.M. KISCH INC.
5 June 1995

PROPOSAL FOR INCLUSION IN THE NEW CONSTITUTION - PROTECTION OF INTELLECTUAL PROPERTY OF PERSONS AND THE INTELLECTUAL PROPERTY LAW SYSTEM

Upon acceptance of the principles set out herein, the writer hereof suggests the following as a proposal (made on his own behalf), or at least a starting point, for, consideration of the particular form in which protection should be granted in the constitution for intellectual property / law.

The submission is that one clause is needed to grant protection as a fundamental human right of the intellectual property of individuals; and that as a second aspect, the State should be enjoined to provide a system of laws and/or administration to protect intellectual property. The following is submitted as a broad proposal or guideline:

1. Every person (including associations of persons and legal persons) shall be entitled to protection of intellectual property developed and/or owned by such person.
2. In order to promote the development of technology, commerce, and the arts, and any allied activities, and [caving regard to the existing legal and administrative system, the State shall provide a legal system, and when necessary/applicable an administrative system, for protection of intellectual property, in accordance with any international conventions or treaties to which South Africa is a member country or signatory.

Although the Interim Constitution does, and also I assume the Final Constitution will, grant rights of protection to property of the individual, it is submitted that intellectual property can be distinguished from other forms of property, and hence should be protected as a separate genus or species of property and hence should be given special protection in the New Constitution.

Intellectual property, as the name suggests, includes the products of the intellect of persons such as inventions, designs, trade marks, literary, musical, dramatic, artistic, cinematography, works, broadcasts, computer programmes, and know-how etc. Intellectual property law comprises that part of the law relating to patents, aesthetic and functional designs, trade marks (both under statutory law and under common law), copyright, etc.

Our system of intellectual property law is based largely on the corresponding English or British system which in turn corresponds with that in many other countries. Most if not all countries of the world protect the intellectual property of individuals and organisations. In line with this legal philosophy, various international conventions and treaties have been concluded over the years for example the Paris Convention of 1883 in respect of patents, designs and trade marks, and the Berne Convention in respect of copyright. South Africa is a full member nation and signatory of the aforementioned two conventions and operates fully in accordance with the provisions of these conventions.

The United Nations also recognises the particular importance of the protection of intellectual property and has a particular agency namely WIPO (World Intellectual Property Organisation)

which is located in Geneva, striving to harmonise intellectual property laws world-wide and for example to provide model laws for developing countries.

Although it may not appear necessary to explain the rationale behind the protection of intellectual property, a short motivation is set out hereunder.

The right to a person's intellectual property, for example a person's invention, trade mark or literary work can be considered in one sense to be akin to a fundamental right such as a right to the protection of one's corporeal property, the difference of course being that intellectual property is an abstract and a very different form of property. However, it is property none the less and hence deserving of protection.

From another point of view, it should be noted that all industrial nations in the world, including the former USSR for example, have considered an intellectual property law system to be essential for the development of industry and commerce. In fact it is rightly believed that, without such a system, persons and companies would either not invest money and effort in research and development, and the consequent industrialisation thereof, but would merely try to copy their competitors' products. Alternatively they would try to keep secret any technological developments.

However, an intellectual property law system provides the incentive for a company to develop new products, to manufacture and market any new products, and to protect its works and its identity. For example pharmaceutical companies spend millions of dollars and years of painstaking research to develop new life-saving drugs. They should be afforded an opportunity to recoup their investment and to make a profit proportionate to their efforts. Such profit also serves to finance further development.

One could also consider trade marks and the identities that trade marks and company names provide for their owners, for example Coca-Cola, Rank Xerox, Volkswagen to mention a few international examples, and locally names and trade marks such as Sasol, Simba, Iscor, Sanlam.

In support of the above, one could look at countries such as Japan, the USA and Germany to realise that companies in such countries invest considerable effort and money in research and development, and jealously protect the results of their work. For the past few years, Japan is the single country which files more patent applications annually at the USA Patent Office than any other single country including the USA itself. The development, industrial power and export might of Japan or Taiwan over the past two decades are certainly to be admired and emulated, but are based on research and development and the ability to protect the fruits thereof.

It has been part of the legal tradition of South Africa to recognise and grant protection for works of intellectual property. This field of law has for approximately a century followed British law, both as far as statutory and common law is concerned. Consequently, our legal system has for a long time given recognition to both statutory and common law rights in this regard. Our statutory and intellectual property laws have been administered by the Registrar of Patents, Designs, Trade Marks and Copyright, and by his administrative offices (and officials). This is fully in line with

international practice and administration. Our judicial system has also developed a fairly extensive system of case law in regard to intellectual property and intellectual property law and unlawful competition, and our Courts give full recognition to, and uphold, such rights.

Although neither our constitution nor the British constitution has seen fit to entrench such rights, the writer hereof feels that in the new South Africa, its constitution should protect and enshrine such rights. Although other precedents can be cited, the most notable precedent is that of the United States of America which had seen fit to adopt a patent and copyright system as far back as the writing of its original constitution in 1776. The relevant part of the USA constitution in this regard reads as follows:

ARTICLE 1, SECTION 8: POWERS GRANTED TO CONGRESS

"The congress shall have power:

(1)

(8) To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."

Besides the historical import of the above example, the USA patent and copyright systems are entrenched in their constitution by the bill of rights which protects the fundamental rights of their citizens. Because of the aforementioned, it would be very difficult, and the writer hereof suggests virtually impossible to abolish the patent system in the USA and any act by Congress in this regard would be unconstitutional and could be challenged in the Supreme Court of the United States.

Although the writer hereof does not necessarily wish to propose the precise wording for inclusion in the Constitution, what is being raised is the important principle that a New Constitution should make provision for the inalienable right of individuals and organisations such as companies to obtain protection for their intellectual property, both under the statute and common law, as applicable.

It is submitted that the present system of law should be acknowledged and accepted, without stultifying the system which is continually evolving and developing, for example in line with international trends and developments in this field of law.

The writer hereof therefore looks forward to hearing from you in this matter at your early convenience, and as a final thought, I would like to share with you a quotation which I understand has been credited to Mark Twain namely :

"A country without a good patent office, like the crab, can only move side-ways".

ANDRE K. VAN DER MERWE

JOHANNESBURG

**THE SOUTH AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY
LAW**

Pretoria

31 May 1996

**FINAL CONSTITUTION BILL - SUBMISSIONS MADE ON BEHALF OF THE SOUTH
AFRICAN INSTITUTE OF INTELLECTUAL PROPERTY LAW FOR THE
PROTECTION OF INTELLECTUAL PROPERTY OF PERSONS AND THE
INTELLECTUAL PROPERTY LAW SYSTEM**

The Institute and I have made submissions in the above regard to the Constitution Drafting Committee of the Constitutional Assembly, and I enclose a copy of my submissions for your information.

Unfortunately the Constitution Drafting Committee has seen fit not to include provision for protection for intellectual property and the legal / administrative system therefor in the Constitution Bill. I also make mention that neither the South African Institute of Intellectual Property Law nor I was afforded an opportunity to address the relevant Theme Committee on this matter.

Together with the enclosed submissions, I make the following comments, for your consideration:

- a) Intellectual property is a special form of (abstract) property and should not be considered to be part of property in the ordinary sense of the word. Hence it deserves special treatment, more particularly in the Constitution. See in this regard the inclusion of protection by way of patents and copyrights provided in the first Constitution of the United States of America drafted in 1776.
- b) Intellectual property has international rights attached thereto, and is indeed dealt with in several International Conventions of which South Africa is a signatory country such as the Paris Convention of 1883 (patents, trade marks and designs) and the Berne Convention of 1886 (copyright).
- c) Because South Africa is a signatory country of the aforementioned Conventions, South Africa is obliged to protect the intellectual property of citizens of other countries, as well as the intellectual property of its own citizens.
- d) Intellectual property and the protection thereof enables a country to develop industrially / commercially and economically.
- e) It attracts investment including foreign investment and enables industry and commerce to expand and hence provides labour i.e. jobs.

- f) South Africa presently has a well developed legal/administrative system to protect intellectual property. This system has been and is still evolving continuously under both statute and common law.

- g) In spite of criticism by certain bodies in the United States of America in recent times, our system enjoys international respect and we can be proud of our system at present. However, we need to ensure that the system is protected and entrenched in a special manner. This can be achieved by entrenching the system in the Constitution as is the case in the USA for example.

The above is a non-exhaustive listing of considerations that should be taken into account in considering this matter. I therefore request the Constitutional Court to reconsider this matter and to consider expressly including in the final Constitution provision for the protection of intellectual property (i.e. inventions, trade marks, designs, copyright works, etc) and the provision of an adequate legal/administrative system for the protection of intellectual property.

I look forward to hearing from you in this matter at your early convenience.

A. K. VAN DER MERWE
CONVENOR : PUBLIC AFFAIRS COMMITTEE
