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ARGUMENT IN FAVOUR OF PROTECTION OF BRAND EQUITY AND OTHER INTELLECTUAL PROPERTY AS A FUNDAMENTAL RIGHT

INTRODUCTION

1. In our submission of 31 May 1996 it was contended that the Constitutional Court cannot certify that the Constitution complies with the 34 Constitutional Principles because it does not provide for or protect by entrenched or justiciable provisions the fundamental right concerning intellectual property. It was contended that this fundamental right is not catered for in Section 25 dealing with property. This contention was based primarily on the point that Section 25 deals with the ownership of property whereas what is required is a provision which deals with the creation of intellectual property and thereafter with its regulation and ownership. Reliance was placed on Article 27(2) of the Universal Declaration of Human Rights in arguing that the right to intellectual property is a fundamental human right.
2. In this document we will supplement the earlier document with argument in favour of, and supporting, the aforementioned propositions

THE NATURAL-LAW PRINCIPLE UNDERLYING THE RECOGNITION OF INTELLECTUAL PROPERTY

3. In an article entitled "The Development of the Natural-Law Principle as one of the Principles Underlying the Recognition of Intellectual Property"*. Dr Frederick Mostert describes the natural law theory as follows:

"The theory is based on the fundamental principle that what an individual creates by his own effort and labour, belongs to him. This principle rests on the conviction that a person is entitled to the fruits of his own intellectual effort and that equity demands that he is entitled to reap what he has sown."**

* F Mostert: "The Development of the Natural-Law Principle as one of the Principles underlying the Recognition of Intellectual Property," (1978) 480 SALJ 1.

** Op cit at p 481.

4. In his article Dr Mostert traces how the natural law theory was implicit in Roman law in the creation and acquisition of certain forms of property and how this foundation was built upon and modified in the 17th century and later Roman law in Europe. He states that natural law in this era in general specified law that was universal, deduced from man's reason and purported to be perfect and ideal law.* Dr Mostert describes how the natural law principle of theory permeated the very notion of "property" during the 18th century and later. He quotes as follows from John Locke:

"Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person'. this nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with it and joined to it something that is his own, and thereby makes it his property."

* Op cit at p 486

5. Kohler is generally regarded as being the Father of Intellectual Property Law. His philosophical approach to intellectual property reflects the natural law theory as follows:

"The philosophical foundation of property and intellectual property is based on labor; or to be more precise, on the creation of an object; he who creates something new, has a natural right to it."*

* Josef Kohler: Lehrbuch der Rechtsphilosophie Note 72 at 98. Quotes by Mostert op cit p 495.

6. Mostert sums up his thesis on the natural-law principle underlying intellectual property as follows:

"The notion that a creative individual who expended intellectual effort and labour in producing a work of intellect is entitled to reap where he has sown formed the foundation for the recognition of intellectual property. The natural law principle not only initiated the recognition of intellectual property; it still plays a prominent role in the recognition and protection of traditional modern-day intellectual property rights as well as new forms of intellectual property."*

* Op cit at page 501.

7. The natural-law theory is clearly reflected in Article 27(2) of the Universal Declaration of Human Rights. Intellectual property law based on the natural law theory is thus inherently a fundamental right as well as having been declared to be so by the Universal Declaration of

Human Rights. It is not unprecedented for Article 27(2) of the Universal Declaration of Human Rights to be taken up into State Constitutions.

MORAL RIGHTS

8. As stipulated in Article 27(2) of the Universal Declaration of Human Rights intellectual property embraces both moral and material interests. To the extent that it creates material interests or economic rights it is analogous to the law of things. However, to the extent that it creates moral interests it is comparable to personality rights and more particularly the right of privacy and the right relating to defamation. By way of example Section 20 of the Copyright Act, 1978, provides for rights termed moral rights, as follows:

"Notwithstanding the transfer of the copyright in a literary, musical or artistic work, in a cinematograph film, or in a computer program, the author shall have the right to claim authorship of the work, subject to the provisions of this act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author ..."

9. These moral rights, given specific recognition by the Universal Declaration of Human Rights, clearly are not catered for in Section 25 of the Constitution or in any other section and require entrenched protection in the Constitution.

CONTRAST WITH PROPERTY

10. Apart from the fact that Section 25 of the Constitution does not deal with the moral interest component of intellectual property as discussed above, in addition to those differences mentioned in our submission of 21 May 1996 there is a further important distinction between intellectual property and other forms of property which render the section inadequate for protecting the fundamental right to intellectual property. Trade marks and other forms of intellectual property, require protection primarily against filching by others through, for instance, the use of confusingly similar trade marks, the reproduction of substantial parts of works, and against destruction or impairment through misuse by others which erodes their value. Corporeal property, in particular land, is not beset by these destructive forces and this form of property requires protection of an entirely different nature. As previously mentioned, Section 25 is concerned almost entirely with the issue of ownership of property and gives no comfort in respect of the foregoing issues.
11. Furthermore, the issues of expropriation of property and restoration of property previously dispossessed with which Section 25 is preoccupied not only have no relevance to intellectual property but would, if applied to intellectual property abrogate the very underlying principles and theory of intellectual property. None of the deprivations of the past which have existed in South Africa in respect of land have in any way been applicable

to intellectual property. In practical terms, Section 25 had no bearing whatsoever on intellectual property as a fundamental right or in regulating its content or ownership.

OTHER FUNDAMENTAL RIGHTS

12. The Universal Declaration of Human Rights has Articles dealing with other important fundamental rights such as the rights of privacy, academic freedom and freedom of speech. These fundamental rights have been given specific recognition in Chapter 2 of the Constitution. It is difficult to see on what rational basis certain of the fundamental rights recognised in the Universal Declaration are given specific recognition in Chapter 2 but the right to intellectual property is not. The right to intellectual property is no less deserving of protection in Chapter 2 than for instance the right of privacy, right of academic freedom or the right to freedom of speech.
13. 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, the enshrinement of protection of intellectual property in the Bill of 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 a truly democratic dispensation.
14. It could be argued that intellectual property rights run counter to some of the other fundamental rights granted protection in Chapter 2, for instance the right of freedom of expression, academic freedom and the right of economic activity. By its nature, intellectual property rights are monopolistic in that they grant exclusivity. Such exclusivity must inevitably to some extent impact detrimentally on the rights of others, more especially in the aforementioned areas. In the application of Section 35, it is submitted that if a conflict develops between an intellectual property right and one of the recognised fundamental rights the fact that intellectual property rights do not enjoy parity with any such rights within the Constitution could lead to intellectual property rights being considered to be subservient to such other rights. This could be avoided by giving intellectual property rights parity of treatment with the other fundamental rights.

ABROGATION OF INTELLECTUAL PROPERTY

15. As mentioned in our submission of 31 May 1996 intellectual property is almost entirely a creature of statute. The simple repeal of the relevant Statutes would destroy these rights which can have enormous economic value.
16. Chapter 2 espouses a market economy for South Africa. The Constitution should make provision for all the elements which will promote a healthy and vibrant economy in South Africa. Protection of intellectual property is such an element. The failure to give proper protection for intellectual property in South Africa would undoubtedly seriously inhibit South Africa's economic development both as generated from local resources and as

generated by foreign investment. It is therefore of paramount importance that the right to intellectual property should be entrenched in the Constitution.

17. When Mozambique achieved independence in the 1970's the legislature of that country summarily repealed all intellectual property statutes. The consequences for Mozambique were disastrous as this development contributed substantially to the drying up of all foreign investment and technology transfer into that country. This is the inevitable consequence for any country when it fails to grant proper protection for intellectual property. Mozambique is now attempting to repair the damage and resurrect its Intellectual Property laws. None of the present provisions of the South African Constitution would inhibit or prevent a South African Parliament from repealing South Africa's intellectual property legislation were it minded to do so. The termination of Intellectual property protection in South Africa would be disastrous for the country and its citizens. Recognition in Chapter 2 of the fundamental right to intellectual property would go a long way towards rectifying this situation.

INTERNATIONAL LAW

18. South Africa is a party to a number of international conventions which require it to give protection to intellectual property in conformity with the norms and standards adopted by the international community. In particular, reference is made to the Paris Convention of 1883 and the recently adopted agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) the conclusion of which forms a part of the Uruguay round of negotiations on the General Agreement on Trades and Tariffs (GATT). The failure to give proper protection to intellectual property in South Africa would bring the country into breach of its treaty obligations arising from the aforementioned conventions. This factor alone, in addition to inherent entitlement of a person to enjoy the fruits of his labours in the creation of incorporeal property, makes it necessary for the right to acquire, hold and protect intellectual property to be entrenched in the Constitution.
19. By virtue of these treaty obligations it could be argued that a measure of entrenchment of intellectual property is granted in Section 231 of the Constitution. However, none of these treaties have in themselves become part of domestic law and reliance on Section 231(5) for the entrenchment of intellectual property is insufficient. Even if it were to be sufficient this would be an extremely indirect manner of entrenching a universally accepted fundamental right. On the contrary, granting specific protection in Chapter 2 to intellectual property would demonstrate South Africa's adherence to the principles of these conventions, an issue which has been questioned in recent times by the United States of America. Reference is made here to the placing of South Africa on the Watch List maintained by the United States of America in terms of Section 301 of that country's Trade Act. In terms of that legislation the government of the United States of America is entitled to institute trade sanctions against countries whose law is considered not to comply with international norms and to afford adequate protection to America intellectual property owners. South Africa is faced with the possibility of such coercive measures.

CONCLUSION

20. South Africa presently grants a high level of protection to intellectual property. The level of protection compares very favourably with that granted anywhere else in the world. This is beneficial to the South African economy, technical progress in South Africa and to the attraction of foreign investment. Ultimately it is beneficial to the citizens of the country. It is in their interests that the level of protection should remain at this high level. The only way in which this can be properly safeguarded is for intellectual property to be entrenched as a fundamental right in the Constitution. In this way future governments can be inhibited from impairing or destroying the value of intellectual property and the level of protection enjoyed by it in South Africa. Entrenching intellectual property in the constitution would give effect to an important principle of natural law which has enjoyed due recognition.

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