

A perspective of intellectual property



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This is a personal perspective of intellectual property, covering where it is today, how it got here, and where it is going in the future, with particular reference to its application in the field of brands and branding. The emphasis will be on trade marks and copyright law as these are the fields of intellectual property which primarily have application in brands and branding. Brands are in effect trade marks and artwork associated with labels and packaging is an example of pertinent material eligible for copyright.

Intellectual property is generally regarded as encompassing patents, designs, trade marks and copyright, as well as certain closely allied areas of the law. However, patents and designs play very little, if any, role in brands and branding and they will therefore not feature directly in the discussion.

The Nature and Purpose of Intellectual Property

The rationale of intellectual property has been recognised and protected for more than a century and its crystallisation into a coherent body of law and its rationale is evidenced in the embodiment of the concept in Article 1 S 8 of the Constitution of the United States of America, which empowers Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to the respective writings and discoveries". This simple clause sums up in a few words the philosophy and underlying principles of intellectual property. It seeks to create a system whereby a creator of an original work is afforded a qualified monopoly in the use or exploitation of that work in order, firstly to compensate and reward him for the effort, creativity

and talent expanded and utilised in the creation of the work and, secondly, to act as an incentive for him to use his talents and efforts to create more and better works or intellectual products in the future. The reward or incentive is constituted by affording the creator of the work the opportunity to gather all the commercial fruits of his works for a limited period.

Laws embodying this philosophy and principle have been put in place in virtually every country in the world and there are several international treaties regulating the worldwide protection of intellectual property. The United Nations has a special agency, the World Intellectual Property Organisation (WIPO) which seeks to coordinate and organise the international protection of intellectual property. There is thus, practically speaking, a worldwide order protecting intellectual property. Although there may be differences in detail in the manner in which intellectual property is protected from country to country, there is a large degree of commonality in the intellectual property regimes of all countries.

All intellectual property is characterised by conferring upon the creative person or his surrogate a monopoly in the use of the item of intellectual property which is limited in time. After the expiry of the term of protection, the work falls into the public domain and can be freely used and reproduced by others. A balance is struck between the interests of the individual and the public interest. But at the same time a profit incentive is provided for creators of intellectual property. Viewed from a different perspective, the purpose of intellectual property protection is to prevent one man from appropriating to himself what has been produced by the skill and labour of others.

Intellectual Property as a Fundamental Human Right

There is widespread recognition for the principle that the right to hold intellectual property is a fundamental human right. Article 27(2) of the Universal Declaration of Human Rights states that "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 the author". This declaration, which was a Resolution of the General Assembly of the United Nations passed in 1948, gave rise to an international covenant, namely the International Covenant on Economic, Social and Cultural Rights, 1966. The aforementioned Article of the Universal Declaration is echoed in Article 15 of the International Covenant. Given the wide acceptance of the Universal Declaration and the International Covenant as being the embodiment of fundamental human rights, it can be argued that the right to hold intellectual property rights is a universally accepted fundamental right.

Notwithstanding this, when called upon to adjudicate upon the validity of the South African Constitution in 1996 and in particular the question of whether it provided for all universally accepted fundamental rights, freedoms and civil liberties in the Bill of Rights, the Constitutional Court held that the right to hold intellectual property was not universally accepted as a fundamental right and therefore did not require to be recognised in the Bill of Rights. The soundness of this decision is open to serious question. However, this view expressed by the Constitutional Court was mitigated in a subsequent judgment handed down by it in a trade mark infringement case in which the Constitutional Court in effect



Laugh It Off CC used parodies of various well known trade marks, examples of which appear above. The use of the trade Black Labour gave rise to the Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae) 2006 (1) SA 144 (CC) in which the Constitutional Court held that Laugh It Off was exercising legitimate freedom of expression



gave equal status to a statutory trade mark right and the right of freedom of expression (a well established human right specifically protected in the Bill of Rights) in the context of the fundamental rights enjoying protection under the Constitution.

The Impact of Intellectual Property

The world has been termed a 'global village' for purposes of international business and trading. The internationalisation of brands has contributed to, and is in keeping with, this concept. Well known international brands like Coca-Cola, Microsoft, McDonald's, Sony, to mention a few, are household words throughout the world and they signify goods connected in the course of trade with a particular trading entity no matter in what part of the world they may be manufactured or sold. Within national boundaries, there are in addition invariably local brands which achieve an equivalent degree of local renown. One thinks of South African brands such as Castle for beer, Standard for banking services, Woolworths for clothing and food, Ster-Kinekor for cinemas and the like.

Both international and national famous brands have achieved their pre-eminence through extensive use resulting in a repute or renown. This

use generally takes the form of sales of products or the rendering of services, or the advertisement of such goods and services, by means of exposure in the media, sponsorships and so forth. Invariably well known and renowned trade marks are registered in order to consolidate the rights of property subsisting in them. These rights of property can be extremely valuable commercial assets and feature prominently on the balance sheets of their proprietors. Often these items of intellectual property can be the most valuable assets of a company or business, far surpassing corporeal goods owned by the entities in question.

What is good for trade marks applies equally to works enjoying copyright such as the designs of commercial commodities, computer software, movies and the like. A large proportion of the assets of a computer software company, a record company or a film company consists of the copyright subsisting in the works which they exploit.

Protection of Intellectual Property

All the foregoing considerations make it necessary for intellectual property to be properly protected and regulated by competent national laws which are capable of effective

enforcement. The effectiveness and realization of the philosophy of intellectual property is dependant upon the degree to which the creator of the intellectual property is able to maintain and enforce his qualified monopoly in order to serve the incentive

motive which gives impetus to its creation. If the law is not effective in enabling the creative intellectual property to maintain and enforce his monopoly then the efficiency of the operation of the incentive motive will be impaired. Consequently, the soundness and effectiveness of intellectual property laws are significant factors in the promotion of the creator of intellectual products and in enriching our culture, promoting our business and trade, and ultimately our wellbeing.

There are two facets, the one being the existence of competent, up to date and effective intellectual property laws, and the other being mechanisms for affective enforcement of those laws. The two go hand in hand and both requirements must be met if the objective is to be attained.

In South Africa, intellectual property laws have strong British roots. The first comprehensive intellectual property statute, dating from 1916, effectively re-enacted the then prevailing British laws, with certain local adaptations, in our statute law. The British laws of the time were world leading and South African intellectual property laws thus started from a good and sound base. Over the years the South African statutory intellectual property law has been amended and re-enacted

in the main using then current British precedents. In recent times this has been tempered by using the laws of the European Union as models but these laws have in turn also formed the basis of modern British legislation. The result is that South African intellectual property laws have retained close links with British intellectual property law.

By keeping pace with British and European legislation in the intellectual property field, our laws have by and large kept up to date with international standards. In so doing, they have made adaptations from time to time to keep pace with changing economic and technical circumstances which play significant factors in modern day commerce.

Specifically in the field of trade marks, our law has evolved favourably and currently allows for a liberal form of licensing of trade marks which is in keeping with modern commercial requirements, and for the protection of extended types or categories of trade marks, such as sounds, smells, shapes of articles, and containers for goods, in addition to the traditional forms of trade marks being words, or pictorial materials such as designs and logos, known as 'devices' in legal language. The law also recognises so-called "certification marks" such as the wool mark, and so-called "collective marks" such as the Stellenbosch Wine Route. An important innovation has been granting protection to so-called 'well known marks' of foreign origin, under the Trade Marks Act, without any form of registration. In the main South African trade mark law is in good shape.

The same cannot, however, be said of South African copyright law which has regrettably fallen behind in catering for technological and other developments since the beginning of



In the High Court case between Federation Internationale de Football Association and Eastwood Tavern, the Court granted an interdict restraining Eastwood's ambush marketing as exemplified above

the present century. Prior to that South African copyright law had been 'state of the art' and in some instances had been innovative and forward looking, such as in granting protection to computer programs as a sui generis species of work, rather than following the more generally adopted fiction that they are a form of literary work. In the field of the subject matter covered by copyright law, technical and other innovations are taking place at a fast and increasing pace (one need only think of the explosion of the internet) and it is essential that copyright law should be dynamic in keeping abreast of these changes. Regrettably this has not happened in South Africa with the result that our law is fast becoming increasingly obsolete.

If South Africa wants to be a serious contestant in the worldwide economic and commercial race it is imperative that our intellectual property laws, especially our copyright law, is regularly updated and adjusted to meet ever changing requirements.

Ambush Marketing

In one respect South African law

pertaining to brands and branding has been very pioneering and innovative and has set an international trend. This is in the field of so-called 'ambush marketing' in relation to significant sporting and other events. Ambush marketing takes place when someone who is not a sponsor of a prominent event seeks to adopt trading and marketing practices which will derive for him the benefits attaching to being a sponsor of that event, without paying any sponsorship money.

Ambush marketing takes two forms, namely 'association' and 'intrusion'. The first mentioned occurs when a brand owner misrepresents by the use of branding officially associated with an event, or very similar branding, that he is a sponsor or is somehow associated with the event. The latter takes place when a brand owner uses his own brand in such a manner so as, not to suggest that he is a sponsor or is associated with the event, but rather to enable him to attract the focus or limelight concentrated on the event to his own product, thus unfairly deriving the benefits of being a sponsor.

While most countries have laws which to some degree or another enable event organisers to combat ambush marketing by association, nothing had been done to provide special measures to combat ambush marketing by intrusion. In 2003, with the Cricket World Cup tournament imminently taking place in South Africa, legislation was adopted which prohibited ambush marketing by intrusion in relation to significant events which are declared as such by the Minister of Trade and Industry. This legislation has subsequently been emulated by the West Indies prior to the 2007 Cricket World Cup in those islands, and New Zealand in preparation for the 2011 Rugby World Cup.

Looking Ahead

Intellectual property faces challenges in the future with increasing emphasis and importance being attached to consumerism and competition. Both of these trends run counter to the notion of an intellectual property holder being granted a monopoly to enable him to exploit his property to maximum commercial advantage for his own benefit. Technological developments and mass communication of information is likely to make intellectual property all the more difficult to enforce. This is particularly true of the area covered by copyright law where the speed and ease of mass delivery and reproduction of works via the internet and other means could seriously erode the copyright owner's intended monopoly. Nevertheless, the underlying principles and tenants of intellectual property law and its *raison d'être* remain unchanged and sound, and should continue to prevail notwithstanding the fact that there

may be alterations in the balance between intellectual property owners, on the one hand, and users on the other hand. The pace of change is likely to quicken and legislators will have to be astute to continuously adapt their intellectual property laws.

In South Africa, a change of heart and attitude on the part of the Government towards intellectual property will have to come about if South Africa is to stay in the game. The indifference and apathy which has characterised the Government's attitude to intellectual property and updating the laws during the past decade is going to have to change and intellectual property must be given a higher national priority. Otherwise, intellectual property is not going to enjoy sufficient protection in South Africa in the long run and this will impact on the country's attractiveness for foreign investment and as a partner in foreign trade. It will also have an effect on local innovation, and all of these factors will be to the ultimate detriment of the country and its peoples.

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