THE CASE FOR THE RECOGNITION OF INTELLECTUAL PROPERTY IN THE BILL OF RIGHTS

Introduction

The term "intellectual property" encompasses the right to control the use of the fruits of intellectual endeavour, that is, the products of the mind. Intellectual property takes the form of inventions which are protected as patents, designs of articles which are registered as designs, literary, artistic and other works which are protected by copyright and product brands which are protected by registration as trade marks or under the common law remedy of passing-off. A brand is a distinguishing name, symbol or the like intended to distinguish the goods or services of a trader from those of competitors. Intellectual property is a form of incorporeal property and by its intangible nature has little in common with corporeal property.

When the Constitutional Assembly commenced the task of writing the final Constitution for the Republic of South Africa, it extended a general invitation to interested persons to make submissions to it regarding matters to be incorporated into the Constitution. Numerous individuals, bodies and organisations made representations to the Constitutional Assembly requesting that specific recognition and protection be granted to intellectual property in the Bill of Rights to be incorporated into the new Constitution. According to a submission made to the Constitutional Court by the Loerie Award Committee (see the record before the Constitutional Court vol 5 N715) a petition signed by 4 419 persons proposing the inclusion of an intellectual property clause was submitted. Numerous other bodies, including the Association of Marketers and the South African Institute of Intellectual Property Law, also made written submissions. These petitions did not find favour with the Constitutional Assembly and the Constitution adopted by that Assembly contained no clause in the Bill of Rights dealing specifically with intellectual property.

The Constitution came before the Constitutional Court in proceedings brought by the Constitutional Assembly seeking the certification of the Constitution as being in compliance with the Constitutional Principles set forth in Schedule 4 to the interim Constitution (*In re: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC)). Written submissions were made to the Constitutional Court on the subject of the recognition of intellectual property in the Bill of Rights by Spoor and Fisher, attorneys acting on behalf of the Association of Marketers, the Legal Committee of the Association of Marketers, the Loerie Awards Committee, the South African Institute of Intellectual Property Law, and Mr Kurt Buchmann. The Association of Marketers was granted the right to present oral submissions to the Constitutional Court during the hearings held by it in August 1996. The author appeared on behalf of the Association of Marketers, and with the endorsement of the South African Institute of Intellectual Property Law, before the Constitutional Court and made oral submissions to the court. The thrust of the submission made by the Association of Marketers was that the right to hold intellectual property is a universally accepted fundamental right, and, since Constitutional Principle II of the interim Constitution required all universally accepted fundamental rights to be provided

for in the new Constitution, this Constitution was defective in that respect and the court's certification should be withheld.

On 6 September 1996 the Constitutional Court handed down its judgment and held, *inter alia*, that the right to hold intellectual property law is not a universally accepted fundamental right and that the new Constitution was not defective as averred (par 75). The view is widely held in intellectual property circles that the court's judgment in this respect is unsatisfactory. The purpose of this note is to set out the case for recognition of intellectual property law as a universally accepted fundamental right, as it was presented to the court, and to comment on the findings of the court on this issue. Since there is no right of appeal against a decision of the Constitutional Court, it must be left to the reader, and perhaps to Parliament, to decide on the correctness of the court's decision.

General arguments in favour of the right to hold intellectual property being recognised in the Bill of Rights

The rationale behind a state granting protection to intellectual property ("IP") is to provide an incentive, in the nature of a reward, to inventors, designers, authors and other creative persons to employ their talents in the creation of works which will be beneficial to the public interest. The reward takes the form of a qualified monopoly of limited duration in the exploitation of the invention, work and the like brought about by the creative activity. The philosophy is that the state enters into a pact with the creative person in terms of which the latter is given a temporary monopoly in the exploitation of his product on condition that when the monopoly is ended, the product will fall into the public domain and be freely available for use by all. This principle has worked well for at least the past century and has played a significant role in the explosion of development of technology, culture and the like during that period.

The IP system has achieved universal recognition and it is internationally regulated by a number of international treaties, more particularly the Paris Convention on Intellectual Property dating from 1883, the Berne Convention on Copyright dating from 1886, and the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) dating from 1994. South Africa is a signatory to all of these treaties and has thus bound itself internationally to provide protection for IP in keeping with internationally accepted norms and standards and to make such protection available to the subjects of other contracting states.

The existence of adequate protection for IP in a country has been amply demonstrated in the past to be a *sine qua non* for foreign investment and the inflow of foreign technology in that country. In the light of the strong emphasis placed on foreign investment in the South African economy and the inflow of foreign technology and know-how by government and business in South Africa, it is essential that the correct signals are transmitted to the international community. The recognition of the right to hold IP in the Bill of Rights would achieve this. Furthermore, in the light of the high priority placed on economic development, it is essential that all possible encouragement be given to South African subjects to use their creative talents to develop new technology and other creative works. The entrenchment of the right to hold IP in the Bill of Rights would ensure that the incentive provided by the IP system would be perpetuated indefinitely. Furthermore, the individual has a natural entitlement to reap the products of the intellect where he has sown.

The model created by the Constitution of the United States of America, probably the most successful industrial country in history, should be followed. Article 1, section 8 of the United States Constitution provides that Congress is empowered "to promote the progress of science and useful arts, by securing for limited time to authors and investors, the exclusive right to the respective writing and discoveries". It was contended that the new South African Constitution, like the United States Constitution, should make provision for all the elements which would provide a healthy and vibrant economy in South Africa; protection of IP is such an element. The failure to give proper protection for IP in South Africa will undoubtedly seriously inhibit South Africa's economic development as generated from both local resources and foreign investment. It is therefore of paramount importance that the right to IP should be entrenched in the Constitution.

It became apparent that opinion makers in the Constitutional Assembly did not disagree with the aforegoing considerations, but felt that the question of protection of IP in the Bill of Rights would be adequately addressed by a property clause entrenching rights of ownership in property. It was reasoned that IP is a form of property and that if property in general is protected, the result would be that protection would be afforded to IP. The fallacy in this argument will be addressed below.

Constitutional principles

Principle II of the 34 Constitutional Principles embodied in Schedule 4 to the Interim Constitution reads as follows:

> "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, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution."

When the forum of debate for the Bill of Rights moved from the Constitutional Assembly to the Constitutional Court, this provision became the focus of the proponents of recognition of IP in the Bill of Rights.

In the application of Constitutional Principle II to the question of protection of the right to hold IP, it became necessary for the proponents of protection to establish the following:

(a) IP rights are fundamental rights or freedoms;

(b) IP rights are universally accepted as fundamental rights; and

(c) there are no provisions in the Bill of Rights, and more especially in the property clause, which are entrenched and justiciable provisions protecting IP rights.

At this stage the economic and policy arguments in favour of entrenchment of IP rights advanced to the Constitutional Assembly became irrelevant and the focus of the argument was of necessity confined to the parameters of Constitutional Principle II.

IP rights as fundamental rights or freedoms

The Association of Marketers, which became the standard bearer of the IP recognition crusade, founded its contention that IP rights are fundamental rights

on two bases, namely the natural law principle and the United Nations Bill of Rights.

(a) The natural law principle underlying the recognition of IP rights

In an article entitled "The development of the natural law principle as one of the principles underlying the recognition of intellectual property" 1987 *SALJ* 480, 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 where he has sown" (481).

Mostert shows that 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 (486). Mostert describes how the natural law principle or theory permeated the very notion of "property" during the 18th century and later. He quotes (494) 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" (*Two treatises of civil government* (1690) Second Treatise, 33 5 27).

Kohler is generally regarded as being the father of IP law. His philosophical approach to IP reflects the natural law theory as follows:

> "The philosophical foundation of property and intellectual property is based on labour; or to be more precise, on the creation of an object; he who creates something new, has a natural right to it" (*Lehrbuch der Rechtsphilosophie* n 72 98, quoted by Mostert 1987 *SALJ* 495).

Mostert 1987 *SALJ* 501 sums up his thesis on the natural law principle underlying IP 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."

IP law based on the natural law theory is thus *inherently* a fundamental right.

(b) IP rights under the United Nations Bill of Rights

The United Nations Bill of Rights comprises the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966, and the International Covenant on Economic, Social and Cultural rights, 1966. The aforementioned two Covenants are derived from the Universal Declaration of Human Rights. The Universal Declaration was a resolution of the General Assembly of the United Nations and thus had no binding force on

member countries in the sense that it did not create enforceable obligations on adherence to the Declaration. The Covenants, on the other hand, are international treaties having the objective of translating the provisions of the Universal Declaration of Human Rights into enforceable international obligations. In effect, the Universal Declaration of Human Rights is the "Ten Commandments" of modern human rights.

Article 27(2) of the Universal Declaration of Human Rights states:

> "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 is a clear enshrinement of the right of the individual to acquire and own IP. The Declaration purported to be, and is, a common standard of achievement for all peoples and all nations. It has the objective of securing the universal and effective recognition and observance, both among the peoples of member states themselves and among the peoples of territories under their jurisdiction, of the rights enunciated (see the preamble to the Declaration). The President of the General Assembly of the United Nations said at the time of the adoption of the Declaration:

> "It was the first occasion on which the organised community of Nations had made a declaration of *human rights and fundamental freedoms*. This document was backed by the authority of the body of opinion of the United Nations as a whole" (Yearbook of United Nations 1948–9, Social Humanitarian and Social Questions, 535; emphasis added).

Article 15 of the International Covenant on Economic, Social and Cultural Rights acknowledges

> "the right of everyone: . . .
>
> (c) to benefit from the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author".

This right is clearly derived from the Universal Declaration of Human Rights.

It was argued that the inclusion of the aforementioned provisions in the Declaration and Covenant was *per se* substantiation of the recognition of the right to hold IP as a fundamental right. The following authorities were quoted in support of this proposition:

(i) Yearbook of the United Nations 1948–9

Quotations from a summary of the discussion by the General Assembly in Plenary Meeting on the draft Universal Declaration of Human Rights:

> "Never before, he said, had so many nations joined together to agree on what they considered to be the fundamental rights of the individual" (the representative of the United Kingdom 530).
>
> "The representative of the United States considered it to be first and foremost a declaration of basic principles to serve as a common standard for all nations" (531).

(ii) "International enforcement of human rights": Rudolf Bernhardt and John Anthony Jolowicz:

> "If the jurisprudential character of the Declaration remains controversial, no one would doubt its significance as the principal articulation of the international human rights idea and the *authoritative enumeration of universally recognised human rights*" (6; emphasis added).

(iii) "The Universal Declaration of Human Rights: a commentary" edited by Asbjorn Eide, Gudmundur Alfredsson, Goran Melander, Lars Adam Rehof and Allan Rosas with the collaboration of Theresa Swinehart:

> "There is abundant literature . . . trying in fact to answer the question of what it did mean and what it does not mean now to be 'a common standard of achievement'. Whatever the situation at the time it was adopted, it would be difficult today to identify an article of the UDHR which States would not be bound to observe. Indirectly, of course, the numerous international human rights instruments, which the UDHR gave rise to, have made the Declaration's rights binding on the respective State Parties."

Universality of acceptance of IP rights as fundamental rights

It was argued by the Association of Marketers that the universality of the acceptance of IP rights as fundamental rights flowed from the support enjoyed by, and the universality of, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Declaration was adopted by 48 votes with only 3 abstentions, the abstentions including the Union of South Africa. There are presently 133 parties to the International Covenant on International Social and Cultural Rights and these include Canada, Germany, India, Italy, Japan, Kenya, Namibia, Netherlands, Philippines, Uganda, Zambia and Zimbabwe. South Africa signed the Covenant on 3 October 1994 but has not yet ratified it. The significance of the aforementioned countries is that it was argued by the Constitutional Assembly before the Constitutional Court that none of these countries had made provision for the protection of IP rights in their constitutions and that this demonstrated that IP rights were not universally accepted. However, these countries have bound themselves to implement the provisions of the Covenant and thus to grant protection to IP rights as fundamental rights.

The Association of Marketers relied on the following authorities in support of their contentions:

(i) Yearbook of the United Nations 1948–9

Quotation from a summary of the discussion by the General Assembly in Plenary Meeting on the draft Universal Declaration of Human Rights:

> "To the French representative, the chief novelty of the Declaration was its *universality*. Because it was *universal*, he said, the Declaration could have a broader scope than national Declarations" (531; emphasis added).

(ii) "International enforcement of human rights": Bernhardt and Jolowicz:

> "To students of the historic development of the idea of rights, to those acquainted with the United States Declaration of Independence and the US Bill of Rights, the French Declaration of the Rights of Man and the Citizen, and their English antecedents, most of the provisions of the Universal Declaration are familiar. Unlike the earlier instruments, however, the Universal Declaration, addressed to a *universal audience*, eschews building rights on any philosophical foundation and grounds them rather in general appeals to values of freedom, justice and peace, in faith in the dignity and worth of the human person, in commitment to social progress and better standards of life in larger freedom" (3; emphasis added).

(iii) "The Universal Declaration of Human Rights: a commentary" edited by Eide *et al*:

> "This realisation of the fundamentally supra-national or one could say pre-national nature of the Declaration led to the change of its title from 'International' to 'Universal' Declaration by the General Assembly. *Its universality has since been*

> *so clearly demonstrated* that we have come to admire the collective wisdom and sensitivities of its authors. In the more than 40 years since its adoption, the UDHR *has shown itself to be truly universal*, as the peoples of newly liberated independent countries have found in it a reflection of their deepest aspirations. The UDHR has inspired numerous other UN declarations and treaties as well as regional systems for the protection of human rights; it has served as the foundation for numerous constitutions and national laws; and it has been the standard applied by the UN human rights bodies when investigating allegations of violations of human rights" (20–21; emphasis added).

Reference is also made to "the universality and continuing relevance of the UDHR" (21).

(iv) "Economic, Social and Cultural Rights" edited by Eide, Krause and Rosas:

> "Internationally recognised human rights are those included in the International Bill of Human Rights or those elaborated on in subsequent instruments adopted by the UN General Assembly. The International Bill includes the Universal Declaration of Human Rights (UDHR) and the two Covenants adopted on the basis of that Declaration, that is, the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR). The International Bill of Human Rights has since been extensively elaborated through the adoption of numerous conventions and declarations, both at the universal level (by the United Nations and the specialised agencies) and at the regional level. The rights contained in these instruments form a wide-ranging, but interrelated, normative system" (21).

(v) "Human Rights: Thirty Years After the Universal Declaration" edited by Ramcharan:

> "The adoption of the Declaration was recognised as a great achievement and it immediately took on a moral and political authority not possessed by any other contemporary international instrument with the exception of the Charter itself . . . There can now in any event, thirty years after its adoption, be no doubt, that the Declaration does possess both moral and political authority. Not only has it become an international standard by which the conduct of governments is judged both within and outside the United Nations (it has been invoked so many times that it would require a major effort of research simply to list them); it has inspired a whole cluster of treaties – including the very important European Convention for the Protection of Human Rights and Fundamental Freedoms – it is reflected in many constitutions, some of which reproduce its provisions verbatim as well as in international legislation and in the decisions of both national and international courts" (28–29).

Apart from arguing that the countries mentioned above do not recognise IP rights in their Constitutions, counsel for the Constitutional Assembly stated that not all regional international instruments recognise this right. It was conceded that certain regional international human rights instruments do recognise IP rights, such as the American Declaration of Rights and Duties of Man and the Cairo Declaration of Human Rights in Islam. It was pointed out, however, that IP rights were not recognised by the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. It was said that it was significant that these leading international instruments do not recognise the rights in question.

This was countered by the Association of Marketers, which argued that it is erroneous to opine that a fundamental right has not been universally accepted simply because it is not dealt with specifically in certain national or international

human rights instruments. The pattern in the drafting of national and regional Bills of Rights has been to emphasise certain rights which have particular relevance or need of emphasis to the country or organisation concerned. The omission of a particular provision, namely an IP rights provision, does not mean that the country or organisation in question does not subscribe to the idea that that right is a fundamental right, where the country has acceded to the International Covenant on Economic, Social and Cultural Rights (eg Germany and Canada). It was emphasised that, by contrast to the present situation in South Africa where the Constitutional Assembly has been enjoined to ensure that the Bill of Rights includes all universally accepted fundamental rights, it is unlikely that the drafters of such other Constitutions and regional instruments had acted in terms of such a specific directive.

In any event, as will be demonstrated below, the argument presented by the Constitutional Assembly was misleading in the light of the facts.

With the exception of Mozambique, which repealed IP laws when it became independent, IP rights are in fact provided for in every country in the world. The Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS), which is intended to enjoy universal adherence, enjoins members to provide for IP rights in their national laws. In the premises, IP rights have *de facto* been universally accepted in practice.

Provisions in the Bill of Rights possibly protecting IP rights

As mentioned previously, it was the view of opinion-makers in the Constitutional Assembly that IP rights are protected by the property clause in the Bill of Rights. This view appeared to be shared by the Constitutional Court to the extent that the consideration by it of the IP rights issue was classified as an aspect of the overall debate about the property rights provision in the Bill of Rights. It was contended by the Association of Marketers that, leaving aside the question whether IP is a species of property in the context of the property rights clause, adequate protection is not granted to IP rights in any provision of the Bill, including the property clause.

Internationally, in a human rights context, IP rights are clearly distinguished from, and are not considered to be part of, property rights. This is borne out by the texts of all national Constitutions and international instruments granting protection to IP rights. More particularly, the Universal Declaration of Human Rights deals with property rights in article 17 and IP rights in article 27(2). Furthermore, for classification purposes, articles 1–21 of the Universal Declaration (including the property clause) are considered to deal with *political and civil rights*, while article 22 and the following (including the IP clause) relate to *economic, social and cultural rights*. IP rights are included in the International Covenant on Economic, Social and Cultural Rights, while property rights are included in the International Covenant on Civil and Political Rights.

Article 25 of the Constitution (the article dealing with property rights) is predicated on the assumption that property is something which is pre-existing and that the *ownership* of it is to be regulated. The emphasis falls entirely on the title to the property and not on the coming into being of that which is the subject of the ownership.

The law of IP is primarily concerned with the *creation* of property. The regulation of the ownership of that property is a secondary matter. Unless the

property comes into being no question of ownership can arise. An invention or a brand can become the subject of ownership only once it comes into existence. The fundamental right concerning IP is the right of the individual to have the fruits of his intellectual effort clothed in a form which can become the subject of property rights. Put differently, the fundamental right which relates to IP is the right to have the fruits of the individual's intellectual activity created into a thing (albeit an incorporeal thing) over which he can thereafter exert powers of ownership. The content of that ownership is entirely dependent upon the law which creates the intellectual thing and which specifies the powers which the creator or author can exercise in relation to it, for instance, the right to reproduce a mark or work, the right to make a product embodying an invention or a design, and so on. In essence, the intellectual thing is entirely a creation of the law and the law also defines what ownership of that thing entails.

Subject to the common law remedy of passing-off, all forms of IP are creations of statute. If the statutes in question were to be repealed, the property would cease to exist and would disappear. Without the entrenchment of the statutes creating IP in the Constitution, Parliament could at will summarily terminate the very *existence* of all IP.

By contrast to IP, corporeal property and in particular land, are things which do not owe their existence to statutes and cannot be destroyed by the repeal of any statute. Parliament cannot cause land or any corporeal object to cease to exist. It can go no further than regulate the ownership of such things.

It follows from the aforegoing that entirely different considerations apply to the entrenchment of the right of individuals to own property in the normal sense of the term, and to the creation of IP, the content of ownership of such property and the regulation of such ownership.

As stipulated in article 27(2) of the Universal Declaration of Human Rights, IP 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 . . ."

These moral rights, given specific recognition by the Universal Declaration of Human Rights, are clearly not catered for in section 25 of the Constitution.

The issues of expropriation of property and restoration of property previously dispossessed, with which section 25 is preoccupied, not only have no relevance to IP but would, if applied to IP, abrogate the very underlying principles and theory of IP. None of the deprivations of the past which have existed in South Africa in respect of land has in any way been applicable to IP. In practical terms, section 25 has no bearing whatsoever on IP as a fundamental right or in the regulation of its content or ownership.

The simple test of whether section 25 of the Bill of Rights properly entrenches IP rights is to ask whether that section would preclude Parliament from passing a statute discontinuing the ongoing creation or grant of IP rights. The answer to this question is clearly in the negative.

Proposed IP rights clause

The Association of Marketers proposed that, in regard to the requirement that IP rights should be recognised as universally accepted fundamental rights and should therefore be provided for in the Bill of Rights, the following independent clause should be inserted into the Bill of Rights:

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

This clause is based on the text of article 27(1) of the Universal Declaration of Human Rights. It expands the scope of the Declaration's provision to the extent that it adds the word "industrial" to the list of "productions" which should be protected and incorporates a further species of property, namely "brand equity". This species of IP right is conferred primarily by the registration of trade marks but also by the common law by means of an action for passing-off.

The genus of IP is divided into four species, namely copyright, patent, designs and trade marks. The general recognition of this situation dates from recent time. The World Intellectual Property Organisation (WIPO), as an agency of the United Nations with responsibilities for all four species of IP rights, dates from 1974.

At the time of the signing of the Universal Declaration of Human Rights in 1948, the model for the recognition of IP rights as a fundamental right was the Constitution of the United States of America. Although that Constitution gives recognition to all four species of IP rights, trade mark rights are encompassed in a different section of the Constitution (ie the article dealing with interstate trade). The concept of IP rights has evolved considerably since 1948 and in 1996 we are in a position to give due recognition to current thinking on the question. The ratio for protecting brand equity or goodwill signified by a trade mark is the same as that for protecting the other species of IP rights. It makes no sense in 1996 to protect three of the recognised species of IP rights and not the fourth.

Additional arguments

The Universal Declaration of Human Rights has articles dealing with other important fundamental rights such as the rights to privacy, academic freedom and freedom of speech. These fundamental rights have been given specific recognition in chapter 2 of the South African 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 IP is not. The right to IP is no less deserving of protection in chapter 2 than, for instance, the right to privacy, academic freedom or freedom of speech.

South Africa's record in the field of IP 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 IP 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 honour in the future, particularly in a truly democratic dispensation.

It could be argued that IP rights run counter to some of the other fundamental rights granted protection in chapter 2, for instance the right of freedom of expression and academic freedom. By their nature, IP 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 IP right and one of the recognised fundamental rights, the fact that IP rights do not enjoy parity with any such rights within the Constitution could lead to IP rights being considered to be subservient to such other rights. This could be avoided by giving IP rights parity of treatment with the other fundamental rights.

South Africa presently grants a high level of protection to IP. The level of protection compares very favourably with that granted anywhere else in the world. This is beneficial to the South African economy, to 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 standard level of protection should remain at this high level. The only way in which this can be properly safeguarded is for IP 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 IP and the level of protection enjoyed by it in South Africa. Entrenching IP in the Constitution would give effect to an important principle of natural law which has enjoyed due recognition for centuries.

Decision of the Constitutional Court

The Constitutional Court rejected the arguments advanced on behalf of the Association of Marketers in half a page of the typewritten judgment. The relevant portion of the court's judgment reads as follows (par 75):

> "A further objection lodged was that the NT fails to recognise a right to intellectual property. Once again the objection was based on the proposition that the right advocated is a 'universally accepted fundamental right, freedom and civil liberty'. Although it is true that many international conventions recognise a right to intellectual property,[66] it is much more rarely recognised in regional conventions protecting human rights[67] and in the constitutions of acknowledged democracies.[68] It is also true that some of the more recent constitutions, particularly in Eastern Europe,[69] do contain express provisions protecting intellectual property, but this is probably due to the particular history of those countries and cannot be characterised as a trend which is universally accepted. In the circumstances, the objection cannot be sustained.

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66 See, for example, article 27(2) of the UDHR and article 15(1) of the ICESCR.

67 There is no provision protecting intellectual property in, for example, the American Convention on Human Rights, the Banjul Charter on Human and People's Rights or the European Convention on Human Rights.

68 None of the following constitutions contain express protection for intellectual property: the Austrian Basic Law, the Belgian Constitution; the Botswana Constitution; the Canadian Charter of Rights and Freedoms; the German Basic Law; the Indian Constitution; the Japanese Constitution; the Constitution of the United States of America.

69 See, for example, article 51 of the Belarus Constitution; article 54(3) of the Bulgarian Constitution; article 39 of the Estonian Constitution and article 47 of the Macedonian Constitution."

The court acknowledged that the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights recognise IP rights, but felt that the non-recognition of such rights in certain regional conventions and in the constitutions of some countries outweighed this factor. With the greatest respect, given the nature of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and their wide international acceptance as codifications of accepted fundamental rights, it is difficult to understand why the situation in certain regional treaties and the constitutions of certain countries should carry the day. Unfortunately, the court did not give any insight into its reasoning in this regard. Given the emphasis placed on the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights by the Association of Marketers in their argument, it is surprising and regrettable that the court did not explain why it did not consider that recognition of IP rights in these two treaties *per se* constituted recognition of their acceptance as universally accepted fundamental rights. The court's reference (fn 68 of the judgment) to non-protection for IP rights in the Constitution of the United States of America is factually incorrect as mentioned above. Even counsel for the Constitutional Assembly made a specific acknowledgement in the written argument filed on behalf of that body that IP rights were given recognition in the United States Constitution (see the court record vol 3 328).

A further examination of the facts relating to express protection for IP in the constitutions of the countries of the world shows that the court based its decision on the wrong factual premise. Mr Kurt Buchmann conducted research into the constitutions of the countries of the world in order to test the soundness of the premise on which counsel for the Constitutional Assembly based his arguments on the IP issue and the Constitutional Court found its judgment. (Mr Buchmann is a professional photographer and is seized with the question of copyright for the Association of Photographers. He is also a director of the World Council of Professional Photographers with special responsibility for copyright. He submitted written representations to the Constitutional Court on behalf of 34 organisations and was supported by a petition with more than 4 000 signatures.) He concluded that if one leaves aside those countries which have no proper constitutions at all and which have no Bills of Rights in their constitutions, there are 166 countries which come into contention. Out of these 166 countries there are 90 countries which do afford some measure of protection to IP rights in their constitutions. This makes a majority of 54% of the countries in question granting such protection. The countries granting explicit protection to IP in their constitutions include Argentina, Brazil, Croatia, Czech Republic, Estonia, Korea, Latvia, Liechtenstein, Lithuania, Philippines, Poland, Portugal, Rumania, Russian Federation and the United States of America.

In broad terms, the 90 countries can be divided into the following three categories:

(a) Those which protect IP in direct terms (eg Costa Rica: "Every author, inventor, producer or merchant shall temporarily enjoy exclusive ownership of his work, invention, trade mark or commercial name, in accordance with the law");

(b) those which have incorporated the provisions of the Universal Declaration of Human Rights into their constitutions (eg Ivory Coast: "The people of Côte D'Ivoire declare their adherence to the principles of Democracy and the Rights of Man, as they have been defined . . . by the Universal Declaration of 1948 . . .");

(c) those which make statements of principle which guarantee the freedom of intellectual activities and provide support for their results (eg Egypt: "The State shall guarantee the freedom of scientific research and literary, artistic and cultural invention, and provide the necessary means for its realisation").

Of the 90 countries, 51 fall into category (a), 19 into category (b) and 20 into category (c). They include the following African countries: Algeria, Angola, Burkina-Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Ivory Coast, Egypt, Equatorial Guinea, Gabon, Libya, Madagascar, Mali, Mauritania, Mozambique, Rwanda, Senegal, Somalia, Tanzania and Togo.

It is of particular significance that during roughly the past decade (ie since 1985) some 80 countries have adopted new constitutions. Of these 57 (71%) protect IP rights. Despite being enjoined to protect all universally accepted fundamental rights in the Bill of Rights, the Constitutional Assembly and the Constitutional Court have sided with the minority of countries in not granting recognition to such rights in our Bill of Rights. Mr Buchmann has calculated that the countries which have accepted either the Universal Declaration or the International Covenant on Economic, Social and Cultural Rights comprise 89% of the world's total population. It is submitted that these facts make out a strong case for the universality of the protection of IP rights as fundamental rights.

It was said earlier that the written submissions made to the Constitutional Court on behalf of the Constitutional Assembly were misleading as regards the international acceptance of IP rights as fundamental rights. The Constitutional Assembly was supported by a team of researchers and their representatives purported to furnish the facts of the matter. They stated that countries such as the United States and Brazil are exceptions and that "the overwhelming majority of domestic Constitutions do not afford any special protection to intellectual property rights" (see the court record vol 33281). In terms of Mr Buchmann's research, this statement is clearly incorrect. Furthermore, the Philippines are mentioned as an example of a country which does not afford such protection. However, article XIV section 13 of the Philippines Constitution of 1986 reads as follows:

> "The State shall protect and secure the exclusive right of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law."

This is one of the most clear-cut constitutional provisions protecting IP rights available! It is submitted that this does not reflect well on the results of the research conducted on behalf of the Constitutional Assembly and the evidence presented to the court.

Germany is also mentioned by the court as a country which does not grant specific protection to IP rights. It must, however, be borne in mind that the Basic Law of Germany was adopted in 1947, only a few years after the end of the Second World War. At that time Germany was not accepted in the international

democratic community and was remote from the United Nations promotion of human rights. The German Basic Law also ante-dated the Universal Declaration of Human Rights. It took another 26 years before Germany was eventually admitted as a member of the United Nations in 1973.

The use of France as an example of a country which has made no provision for IP rights in its constitution is, with respect, not fair. Apart from a brief remark on human rights in the preamble to the French Constitution, it does not contain any chapter or section whatsoever dealing with fundamental rights.

In summing up his analysis of foreign constitutions, Mr Buchmann says, correctly with respect, that the Constitutional Assembly and the court placed too much emphasis on the contents of the constitutions of other countries. Their approach would have been correct if Constitutional Principle II had read: "All fundamental rights universally included in the Constitutions of the countries of the world." The actual wording is "all universally *accepted* fundamental rights" (emphasis added). It is submitted that the "acceptance" of IP as a fundamental right takes place either when such right is included in a Bill of Rights of a particular country or when that country accedes to the Universal Declaration of Human Rights and/or the International Covenant on Economic, Social and Cultural Rights which comprise this right.

Conclusion

It is difficult to understand the reluctance of the Constitutional Assembly and the Constitutional Court to provide for IP rights in the Bill of Rights. A substantial body of people clearly feel strongly that such rights should be included. IP rights are included in the constitutions of numerous other countries and they are given specific recognition in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. Requesting protection for such rights in the Bill of Rights is thus not a startling, far-fetched or unreasonable proposition. South Africa in fact gives good protection to IP rights and its IP regime compares favourably with any country in the world. IP rights are among the few fundamental rights that South Africa has respected over the years and in particular during the apartheid regime. We have nothing to be reticent or ashamed of regarding IP rights. One asks the question: what harm is done by following the example of 71% of the countries in the world that have adopted new constitutions in the past decade and giving specific protection to IP rights? The Bill of Rights contains virtually every fundamental right provided for the Universal Declaration of Human Rights besides IP. There is no justification or sound reason for making this exception and it is submitted that the position should be rectified. South Africa has bound itself internationally in several IP treaties to provide such rights. Why can this not be echoed in the Bill of Rights?

In the Yearbook of the United Nations for 1948 the following is said about the debate on the draft text of the Universal Declaration of Human Rights before the Third Committee of the General Assembly:

> "The representative of the Union of South Africa stated that the Declaration should refer only to those fundamental rights, the universal applicability of which was recognised all over the world. The Declaration, as it stood, went beyond those generally accepted rights" (48–49).

If one considers the essence and effect of the attitude of the Constitutional Assembly and the decision of the Constitutional Court, it is astonishing that,

after all the water that has flowed under the bridge in South Africa's turbulent and unhappy history of human rights issues and notwithstanding the dawning of a new era, these organs of the state should in effect be saying precisely the same thing about the Universal Declaration of Human Rights as the Union government representative said in 1948: Is it a case of "the more things change, the more they stay the same" (Karr *Les Guepes* (1849))?

OH DEAN
Spoor and Fisher, Sandton and Centurion

ARTIKEL 44 VAN DIE VERSEKERINGSWET ONGRONDWETLIK VERKLAAR – BESTAAN DAAR 'N LEEMTE IN ONS REG?

1 Inleiding

Artikel 44 van die Versekeringswet 27 van 1943 beperk die uitsluiting van sekere lewenspolisse of die opbrengs daarvan van die boedel van die eggenoot. Subartikel 1 bepaal soos volg:

> "As die boedel van 'n man wat 'n lewenspolis ooreenkomstig artikel twee-en-veertig of drie-en-veertig gesedeer of gesluit het, as insolvent gesekwestreer is, word die polisse en alle geld wat uit kragte daarvan betaal is of verskuldig geword het of enige ander bate waarin sodanige geld omgeset is, geag aan daardie boedel te behoort: Met dien verstande dat, indien die betrokke regshandeling te goeder trou aangegaan is en voltrek is nie minder as twee jaar voor die sekwestrasie nie – (a) deur middel van of ooreenkomstig behoorlik geregistreerde huweliksvoorwaardes, die voorgaande bepalings van hierdie subartikel nie van toepassing is nie in verband met die betrokke polis, geld of ander bate; (b) anders as deur middel van of ooreenkomstig behoorlik geregistreerde huweliksvoorwaardes, slegs soveel van die gesamentlike waarde van al sodanige polisse, geld en ander bate as wat dertigduisend rand te bowe gaan, geag word aan bedoelde boedel te behoort."

Subartikel (2) bepaal voorts:

> "As die boedel van 'n man wat so 'n lewenspolis as voormeld gesedeer of gesluit het, nie gesekwestreer is nie, word die polis en alle uit kragte daarvan betaalde of verskuldigde geld of alle ander bates waarin sodanige geld omgeset is, teenoor 'n skuldeiser van daardie man beskou as die eiendom van daardie man – (a) vir sover die waarde daarvan, met inbegrip van die waarde van alle ander lewenspolisse wat soos voormeld gesedeer of gesluit is en alle geld wat betaal is of verskuldig geword het ten opsigte van so 'n polis en die waarde van alle ander bates waarin sodanige geld omgeset is, die bedrag van dertigduisend rand te bowe gaan, as 'n tydperk van twee jaar of meer verloop het sedert die datum waarop bedoelde man die polis gesedeer of gesluit het; of (b) geheelenal, as 'n tydperk van minder as twee jaar verloop het tussen die datum waarop die polis gesedeer of gesluit is, soos voormeld, en die datum waarop die betrokke skuldeiser die betrokke goed laat in beslag neem ter voldoening aan 'n vonnis of bevel van 'n geregshof."

Die konstitusionele hof het egter onlangs beslis dat artikel 44(1) en (2) onversoenbaar is met artikel 8 van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 (vgl a 9 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996) en hierdie bepalings ongeldig verklaar. Die doel van hierdie aantekening