

# **ASSOCIATION OF MARKETERS**

## **CERTIFICATION OF THE NEW CONSTITUTION BY THE CONSTITUTIONAL COURT**

- 1 . We act on behalf of the Association of Marketers, a voluntary association of companies other entities engaged in the distribution and promotion of consumer products in the South African market. Its membership includes the major South African industrial companies account for a very high proportion of industrial, commercial and business activity in South Africa. They are thus amongst the key role players in the South African economy.
2. We are enclosing herewith a submission made on behalf of the Association of Marketers objecting to the certification of the new Constitution on the grounds that it does not comply with the Constitutional Principles set out in Schedule 4 to the Interim Constitution. Our clients would be grateful if the Constitutional Court would give careful consideration their objection.

SPOOR AND FISHER  
Attorneys and Patent Attorneys

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## **PROTECTION OF BRAND EQUITY AND OTHER INTELLECTUAL PROPERTY AS A FUNDAMENTAL RIGHT**

- 1 . It is submitted by the Association of Marketers that the new Constitution does not comply with the 34 Constitutional Principles set out in Schedule 4 to the Interim Constitution in the respect discussed below and that the Constitutional Court should not certify the Constitution until this issue has been adequately addressed.
2. Article 2 of Schedule 4 to the Interim Constitution provides that everyone shall enjoy all universally acceptable fundamental rights and that these shall be provided for and protected by entrenched and justiciable provisions in the Constitution. The right to enjoy the benefit of the fruits of intellectual effort and activity is, as we shall demonstrate, a universally accepted fundamental right which has not been provided for in the new Constitution.
3. The term "intellectual property" encompasses the right to control the use of the fruits of intellectual endeavour, i.e. 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 seller from those of competitors.

4. Intellectual property is a form of incorporeal property and by its intangible nature has little in common with corporeal property. Measures which are designed to protect corporeal property, especially land, have little or no application to intellectual property.
5. The Universal Declaration of Human Rights was proclaimed by the General Assembly of the United Nations in 1948. It is submitted that it sets the international norm and foundation for the protection of human rights. Article 27(2) of this instrument states the following: *"Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author."* This is a clear enshrinement of the right of the individual to acquire and own intellectual property. On the strength of the foregoing, it is submitted that the right of the individual to intellectual property is a universally accepted fundamental right.
6. The fundamental nature of intellectual property rights and their universal acceptance is illustrated and underlined by the fact that the Constitution of the United States of America, in Article 1, Section 8, provides that Congress is empowered *"to promote the progress of science and useful arts, by securing for limited times to authors and inventors, the exclusive right to their respective writing and discoveries."*
7. The provisions of the new Constitution protecting the right to property do not, it is submitted, accord the protection to intellectual property envisaged by Article 27(2) of the Universal Declaration of Human Rights.
8. Article 24 of the Constitution is predicated on the assumption that property is something which is pre-existing and the ownership of it is to be regulated. The emphasis falls entirely on the ownership of the property and not on the coming into being of that which is the subject of the ownership.
9. The law of intellectual property is primarily concerned with the creation of property. The regulation of the ownership of that property is a secondary matter. Without the property coming into being no question of ownership can arise. An invention or a brand can only become the subject of ownership once it comes into existence. The fundamental right concerning intellectual property 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 intellectual property is the right to have the fruits of the individual's intellectual activity created into a thing (albeit an incorporeal thing) in relation to which he can thereafter exert ownership. The content of that ownership is dependant entirely 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, etc. In essence, the intellectual thing is entirely a creation of the law and the law also defines what ownership of that thing entails.
10. Subject to the common law remedy of passing-off, all forms of intellectual property are creations of statute. If the statutes in question were to be repealed the property would

cease to exist and disappear. Without the entrenchment of the statutes creating intellectual property in the Constitution, Parliament could at its will summarily terminate the existence of all intellectual property.

11. By contrast to intellectual property, corporeal property and in particular land, are things which do not owe their existence to statutes and they 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.
12. It is submitted that it follows from the foregoing that entirely different considerations apply to entrenching the right of individuals to own property in the normal sense of the term compared to the creation of intellectual property, the content of ownership of such property and the regulation of such ownership. This fundamental distinction is recognised and taken into account in the Universal Declaration of Human Rights. Despite the fact that property is dealt with in Article 17 of that Declaration, separate treatment is given to intellectual property in Article 27(2) of the Declaration.
13. In the premises, it is submitted that the fundamental right concerning intellectual property is currently not provided for and protected by entrenched and justiciable provisions in the new Constitution, despite the fact that such Constitution has a clause dealing with "property". It is thus contended that the Constitutional Court cannot certify that the Constitution complies with the 34 Constitutional Principles unless and until it embodies a specific clause dealing with intellectual property. The following is a suggested provision for insertion into the Constitution:

*"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".*

The formulation of this suggested provision can be further motivated or justified if so required.

ASSOCIATION OF MARKETERS

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### **OBJECTION TO CERTIFICATION OF THE NEW CONSTITUTION BY THE CONSTITUTIONAL COURT**

Objection is hereby lodged by the Association of Marketers

**Objector**

The Association of Marketers (hereinafter referred to as ASOM) is a voluntary association of major marketers in South Africa engaged in the manufacture, distribution, advertising, promotion and selling of major branded goods and services.

### **Objection**

1. ASOM objects to Section 25 of the constitution which deals with property rights.
2. The ground for ASOM's objection is that by omitting reference to intellectual property, Section 25 does not comply with Constitutional Principle II which reads "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..."

Property is a universally accepted fundamental right and intellectual property is a form of property.

The provision "property is not limited to land" is too vague, does not unambiguously protect intellectual property rights and is open to interpretation and legal uncertainty.

In this regard, it is significant that the Universal Declaration of Human Rights specifically enshrines intellectual property rights.

3. It is our contention that the universally accepted fundamental right of intellectual property should be entrenched in the constitution, for example, by a clause such as:

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

### **Further argument**

ASOM asks for the opportunity to submit further argument, either written or oral, to the Constitutional Court in amplification of this objection.

31 MAY 1996