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INTELLECTUAL PROPERTY AND THE CRAFT INDUSTRY

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INTELLECTUAL PROPERTY AND THE CRAFT INDUSTRY

1 WHAT IS INTELLECTUAL PROPERTY?

1.1 Intellectual property is a product of the human intellect and may be:

1.1.1 an invention;

1.1.2 a concept;

1.1.3 a literary or artistic creation;

1.1.4 a computer program or process;

1.1.5 a design;

1.1.6 an industrial process or method;

1.1.7 information or know how, which is confidential;

1.1.8 a unique (distinctive) name or brand.

1.2 Over time a number of specific categories have developed into which the range of intellectual properties are classified and to which the law has developed rules with which the intellectual property concerned must comply before the law will afford it protection and its owner can exploit it.

1.3 Some of the recognised categories of intellectual property are dealt with below.

2 PATENTS

2.1 Patents are registered rights. If there is no registration there is no protection.



- 2.2 The registrations are territorial. A valid South African patent is enforceable in South Africa only. If patent protection in overseas territories is required a patent registration must be obtained in the territory concerned.
- 2.3 Patents are available in respect of any technological development capable of *industrial application* which is *new* and *inventive*.
- 2.3.1 "new" means that nobody (including the inventor) has revealed the invention to the public. It is not uncommon for inventors to approach us to register a patent on their behalf in respect of a successful invention which they have placed on the market because it works. In these unfortunate cases the invention is no longer new because it has been made public. Thus any other party can manufacture the product and sell it in competition with the original inventor;
- 2.3.2 if the inventor has however made application for his patent prior to destroying its novelty he obtains an exclusive right to exploit it to the exclusion of others for the patent term which is 20 years.
- 2.4 The patent monopoly works as follows –
- 2.4.1 where the invention is a product, the patent gives the Patentee a monopoly over the manufacture, use, keeping or disposal of any product falling within the invention claimed in his patent;
- 2.4.2 where in the invention is a process, the monopoly extends to the application of the process itself or the use, keeping or disposal of any product made directly from the process.
- 2.5 Examples of what could be patented are a new machinery or tool or even a new method or technique to be used in relation to pottery, for example.

3 DESIGNS

- 3.1 Design rights are registered rights.
- 3.2 Design rights are also territorial i.e. they are enforceable only in the territory of registration.
- 3.3 Designs differ from patents in that they do not represent technological developments.



- 3.4 There are two kinds of registrable designs, namely –
- 3.4.1 Aesthetic designs, which are granted exclusively for the appeal of the article to the eye. In relation to the craft industry for example this could be an attractive shape for a bottle, packaging, cutlery, or a wineglass;
- 3.4.2 Functional designs, the shape of which is dictated by the function it performs, for example a wine or book rack.
- 3.5 Like patents for inventions, registered designs must be new although the provisions in regard to design novelty are less stringent than those applicable to patents.
- 3.6 Design registrations for aesthetic designs endure for 15 years and for a functional designs 10 years.

4 COPYRIGHT

- 4.1 Copyright differs from most other categories of intellectual property in that protection is automatic under the Copyright Act - registration is therefore not required.
- 4.2 Because of the application of a number of International Conventions, copyright is not territorially limited either.
- 4.3 In order to obtain copyright protection the works concerned must be *original*.
- 4.4 The Copyright Act specifies which types of "*works*" are capable of being protected and if the type of work does not fall within one of the types of "*works*" it will not be protected.
- 4.5 The Act provides for literary works which would include books, essays and plays.
- 4.6 The Copyright Act also makes provision for the protection of artistic works which is defined as including paintings, sculptures, drawings, engravings and photographs **OR** works of craftsmanship which would include pottery, cutlery, needlework, stained glass.
- 4.7 The Copyright Act extends protection if a third party copies your work. If the third party has used his or her own skill without reference to your work there is no copying and no infringement.



4.8 However, the Copyright Act provides for an exception to infringement in relation to artistic works which is known as *reverse engineering*.

4.9 *Reverse Engineering* - copyright in artistic work will not be infringed if three dimensional reproductions of the work are made available to the public anywhere in the world with the consent of the copyright holder and a third party makes three dimensional reproductions thereof if the goods have *utilitarian purpose* and are made in an *industrial process*.

4.10 The test to determine whether the article has a *utilitarian purpose* is an objective one. Regard is had to the *purpose* of the article and not the article itself.

4.11 **CASE LAW**

4.11.1 Cavendish Textiles v Manmark (Pty) Limited

4.11.1.1 A party was the copyright holder of an artistic work used to print wall paper and curtaining ("A").

4.11.1.2 Another party ("B") had made curtaining material by considering a book containing A's copyrighted work.

4.11.1.3 Although B's work contained differences it was similar.

4.11.1.4 The court had to determine whether or not substantial features of the A's artistic work remained recognisable in order to find whether infringement had taken place.

4.11.1.5 The test is two-fold –

4.11.1.5.1 Firstly, one must determine whether there is a causal connection between the works; and

4.11.1.5.2 Secondly, whether there was sufficiently similarity between the two works.

4.11.2 Court found infringement had taken place.

4.12 Da Gama Textiles v Vision Creations CC



- 4.12.1 This case concerned the printing of an artistic work on fabric.
- 4.12.2 The court held there that the *reverse engineering* exception did not apply due to the fact that a design was printed with inks on textiles and did not exist in three dimensions.
- 4.12.3 It was found that copyright had been infringed where a textile design in the form of a painting was printed by the copyright owner on textiles and was reproduced without a licence.
- 4.13 The transfer of copyright from one party to another in any work must be *in writing* to be valid.

5 CONFIDENTIAL INFORMATION / KNOW HOW

- 5.1 The rights which arise in relation to confidential information and know how are not governed by statute but resort under the Common Law.
- 5.2 The protection is based upon the relationship of confidentiality which exists between two or more parties between whom information, often in the nature of know how, is passed on a confidential basis.
- 5.3 Such information may not be disclosed to outside parties who are not included in the circle of confidentiality.
- 5.4 A breach of the confidentiality arrangement is unlawful and legal action can be taken to prevent it or to recover financial loss occurring as a result of the breach.
- 5.5 Of course information which is generally available – in the public domain - cannot by its very nature be subject to a confidentiality arrangement.

6 TRADE MARKS (BRANDS)

- 6.1 Trade marks should be registered if they are to enjoy certainty of protection.
- 6.2 Trade mark rights are also territorial and must therefore be registered in every territory in which the owner thereof wishes to exclude others from using the same or a confusingly similar mark in relation to the goods or services of interest to the owner.



6.3 The purpose and function of a trade mark is to distinguish your goods or services from that of another person.

6.4 There is no limit upon the subject matter which can be utilised as trade marks provided they can be graphically represented i.e. reduced to a form which can be seen. Even containers, shapes, musical jingles and smells can comprise trade marks.

6.5 Trade marks are capable of being registered in one or more of 45 classes depending on the goods and or services for which protection is sought.

6.6 Fr example jewellery falls in class 14, leather goods in class 18, goods made of wood and plastics in class 20; glassware, porcelain and earthenware in class 21, fabrics in class 24 and clothing in class 25.

6.7 Choosing a mark

6.7.1 When choosing your mark you should avoid adopting a descriptive mark for goods or services.

6.7.2 Generally, descriptive marks are not registrable as it will not be able to distinguish your goods from the next person.

6.7.3 Non-verbal marks could also be protected for example the **NIKE swoosh**, the **COCA COLA bottle** and the **TOBLERONE chocolate bar**.

6.8 What can be trade marked?

Anything that can be graphically represented such as –

6.8.1 words (**SHELL** for petrol)

6.8.2 a logo (the **SHELL logo**)

6.8.3 a name (**CAROL BOYES**)

6.8.4 a container for goods for example distinctive bottle or glass

6.8.5 a shape (a distinctive shape for a soap, cutlery or crockery)



6.8.6 colours (for example the combination of purple and green used by **OUTSURANCE** which we have come to associate with them in relation to their services – being short term insurers).

6.9 A brand is merely a trade mark which exerts a particularly strong attractive force over consumers in the marketplace e.g **COCA COLA** .

7 EMPLOYEES / CONSULTANTS

7.1 The general rule is that intellectual property created by employees in the course and scope of their employment belongs to the employer.

7.2 Intellectual property created by consultants however belongs to the consultant as general rule.

7.3 To avoid any uncertainty it is recommended that ownership of intellectual property is provided for in writing, in such situations. A simple understandable agreement clearly defining the intellectual properties concerned and the rights of the parties to the agreement will be sufficient

8 CONCLUSION

8.1 Although there are a number of complex rules which apply in relation to intellectual property matters the general principles are easily accessible.

8.2 Becoming IP aware will reveal assets of substance which add substantial value and which could provide additional income streams by means of licensing or sale thereof.

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