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THE SOUTH AFRICAN INSTITUTE
OF INTELLECTUAL PROPERTY LAW

P.O. Box 4685, Pretoria 0001

DIE SUID-AFRIKAANSE INSTITUUT
VIR INTELLEKTUELE GOEDERE REG

Posbus 4685, Pretoria 0001

Your ref.
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Our Ref.
Ons verw. Mr A K van der Merwe

Telephone
Telefoon (011) 337 8420

COPY

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TELEFAX NO. 397 2211
FOUR PAGES

CODESA
Working Group 2
World Trade Centre
Kempton Park
P O Box 307
ISANDO
1600

Attention : Mr S S van der Merwe / Mr Mac Maharaj
Codesa Secretariat

Dear Sirs

RE : PROPOSAL TO PROTECT INTELLECTUAL PROPERTY LAW SYSTEM IN THE PROPOSED NEW CONSTITUTION

I am writing this letter to you on behalf of the South African Institute of Intellectual Property Law (formerly known as the South African Institute of Patent Agents) which is the professional and official body representing patent attorneys, patent agents and other attorneys who specialise in Intellectual Property Law. The Institute is recognised statutarily in the Patents Act of 1978, and fulfills, in addition to the normal functions of a professional representative body, an educational role, a disciplinary role, and liaises with the Standing Commitee on Intellectual Property Law (established under the Copyright Act of 1978), with the Registrar of Patents, Trademarks Copyright etc., and various Governmental Departments.

Fellows of the Institute are also members of various International Intellectual Property organisations.

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The Institute, at its Annual General Meeting in 1990, resolved that it would strive towards the protection of the Intellectual Property Law system in a proposed new constitution for South Africa and that it would approach all relevant bodies and organisations in this regard. This programme has commenced, and relevant interest bodies have been approached, in line with this approach to CODESA.

Intellectual property law includes that part of the law relating to patents (for inventions), industrial designs, trade marks, copyright, (protection of) know-how, etc.

The South African Intellectual Property legal system is based largely on the corresponding system in Britain, and, as you may know, most, if not all, countries in the world protect the intellectual property of individuals and organisations, both in their own countries and in other countries. Subsequent to this legal philosophy, various international treaties and conventions have been concluded over the years e.g. the PARIS Convention of 1883 in respect of patents, designs, and trademarks, and the BERNE Convention protecting copyright. South Africa is a full member nation / signatory of the aforementioned two conventions and operates fully in accordance with the provisions of these conventions.

The United Nations also recognises the importance of the protection of intellectual property, and has a particular agency, namely WIPO (World Intellectual Property Organisation) located in Genéva striving to harmonize Intellectual Property laws worldwide and to provide model laws for developing countries.

Although it may not seem necessary to explain the rationale behind the protection of intellectual property, a short motivation is set out hereunder.

The right to a person's intellectual property for example a person's inventions, trademarks, copyrighted works, designs etc. can be considered in one sense to be, akin to fundamental rights i.e. one has the right to protection of ones property, the sole difference being that this property is intellectual or incorporeal property. However, it is property none the less.

From another point of view, it should be noted that all industrial nations of the world, including Russia, have considered an intellectual property law system to be essential for the development of industry and commerce. In fact it is rightly believed that, without such a system, persons and companies would either not invest money and effort in research and development, or would merely try to copy their competitors' products. However, such a system provides the incentive for a company to develop new products and to protect its works and its identity. For example, pharmaceutical companies spend millions of dollars and years of painstaking research to develop new life-saving drugs. They should be afforded an opportunity to recoup their investment and to make a profit proportionate to their efforts. Think also of trademarks and the identities that trademarks and company names can provide for their owners for example Coca Cola and the Coca Cola Company, Simba Chips and the Simba Group Limited, in respect of soft drinks and snack foods respectively.

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In support of the above, one can look at countries such as Japan, U.S.A. and Germany to realise that such countries invest considerable effort in research and development, and jealously protect the results thereof. For the past few years, Japan is the single country which files more patent applications in a year at the U.S.A. Patent Office than any other single country including the U.S.A. itself. The development, industrial power and export might of Japan over the past two decades are to be admired and emulated.

It has been part of the legal tradition of South Africa and its former Republics and colonies, to recognise and grant protection for works of intellectual property. This field of law has for approximately a century followed British law, both as far as statutory and common law is concerned.

The law relating to unlawful competition which is an important adjunct to our intellectual property law, is of course based on Roman Dutch law principles but has been influenced by English Law. Consequently our legal system has for a long time given recognition to both statutory and common law rights in this regard. Our statutory Intellectual Property laws have been administered by the Registrar of Patents, Designs, Trademarks, and Copyright and by his administrative office(r)s. This is fully in line with international practice and administration. Our legal system also has a well developed system of case law in regard to intellectual property law and unlawful competition, and our courts give full recognition to, and uphold, such rights.

Although neither our constitution nor the British constitution has seen fit to recognise such rights, our Institute feels that in the new South Africa, its constitution should protect and enshrine such rights. Although the constitutions of various countries can be cited as precedents in this regard, the most notable precedent is that of the United States of America which had seen fit to adopt a patent and copyright system as far back as 1776. The relevant part of the U.S.A. constitution in this regard reads as follows:

> ARTICLE 1, SECTION 8 : POWERS GRANTED TO CONGRESS :
>
> The Congress shall have power:
>
> (1) .....
>
> .
>
> .
>
> .
>
> (8) To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings anddiscoveries"

Besides the historical import of the above example, the USA patent and copyright systems are entrenched in their constitution by the bill of rights which protects the fundamental rights of their citizens. In other words, if there was any suggestion by their congress that the patent and copyright system should be abolished, such an act by congress would be unconstitutional and could be challenged in the supreme court of the United States.

I am not at this stage proposing the precise wording for one or more suitable clauses in the constitution but I am rather raising the important principle that a new constitution should make provision for the inalienable right of individuals and organisations to obtain protection for their intellectual property. I and the institute would gladly liaise with you concerning the precise wording of such clause or clauses, but, however worded, such provision should protect the intellectual property of individuals and organisations, and should provide for protection under statutory and/or common law, as applicable. The body of statutory law and legal precedents provided by decisions of our various courts should also be recognised. The principles of the present system should be acknowledged, without stultifying the present system since the system is continually evolving and developing, for example in line with international legal developments in this field.

Upon acceptance of the principle that intellectual property and intellectual property law should be protected and enshrined in the proposed new constitution, I shall gladly liaise with you as to further details or information and on specific wording for the provision(s) in the proposed new constitution.

I therefore look forward to hearing from you at your early convenience herein.

Yours sincerely

André K van der Merwe
Constitution Committee

PS : "A country without a good Patent Office, like the crab, can only move sideways."

ex Mark Twain