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| **STUDYING INTELLECTUAL PROPERTY AT THE UNIVERSITY OF JOHANNESBURG**    “The future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the protection of intellectual property.” – Judge Richard Posner in *Rockwell Graphic Systems, Inc. v. DEV Industries*, 925 F.2d 174 (7th Cir. 1991)    In the last decade or two, the South African public has become intellectual property (IP)-wise or, rather, IP-sensitised. It started off with the conflict about the McDonald’s trademark, then followed the *Laugh It Off* case, the dispute relating to rights to the Springbok, the ANC/COPE dispute, the furore around FIFA and the World Cup. Also, the Frankie’s/Woolworths dispute. In the business sector, entrepreneurs became more and more aware of the role IP can play in securing the profitability of their businesses. Inevitably, law firms started to take IP (even) more seriously. News of prominent IP disputes in other countries reached our shores – the conflict over copyright in the book The *Da Vinci Code*, rights to Facebook, the Apple/Samsung disputes regarding the iPhone and iPad products, the non-stop Google battles, and so one can go on.  Intellectual property, one of the fastest-developing and most visible fields of law, can be studied at UJ on three levels.   * As part of capita selecta in Mercantile Law for final-year LLB students; * As a module in an LLM by coursework programme (and/or as the subject of a minor dissertation in a master's by coursework programme); or as the subject field of an LLM by research; * As the subject field of a doctoral thesis.   The subject is presented by Prof Wim Alberts. When appropriate, lawyers practising in the field of IP will be invited to take part in the programme.  Below is a general introduction to IP, followed by discussions on specific disciplines in more detail.  **AN INTRODUCTION TO INTELLECTUAL PROPERTY**  The nature of intellectual property is best understood through a comparison with other, tangible, forms of property. One example is immovable property, such as a piece of land. Other examples are things, such as a vehicle, a watch or a soccer ball. In these instances, one has rights to the object itself. In other words, one’s rights would be infringed if the object is destroyed. The position with intellectual property is different. An example may be a patent for a pair of night vision binoculars. The *intellectual property* rights of the patentee would not be infringed if the binoculars are destroyed. The reason for this is that it is the invention that is protected and not the binoculars. Intellectual property law is, accordingly, the body of law that regulates the creation and use of immaterial property and the enforcement of resultant rights. The objects of the various rights typically include patents, copyright, registered designs and trademarks. The rights concerned are discussed below.  Most intellectual property rights are created by statute. If the requirements of the legislation are met, protection for a limited period of time is granted. The basic approach is that the exclusive rights granted to the rights holder by the state are an incentive to innovation. While the rights holder will obtain a commercial advantage from the “monopoly” created by statute, society as a whole will also benefit from the exploitation of the particular intellectual property. The patenting of medicines for serious illnesses is a good example of this philosophy. Other forms of intellectual property, in particular trademarks, may subsist for an indeterminate period of time. This also applies to non-statutory forms of intellectual property, such as the right to goodwill.  The registration of patents is governed by the Patents Act No. 57 of 1978. The Act reserves the right to perform certain functions relating to the prosecution of patents for registered patent attorneys. A patent may be registered for a new invention that involves an inventive step. An invention must be capable of being used or applied in trade, industry or agriculture. A method of treatment of the human or animal body by surgery or diagnosis practised on the human or animal body is deemed not to be capable of being used in trade, industry or agriculture and is therefore not registrable. In addition, certain other matter is excluded from being registrable as a patent, including a scientific theory, a mathematical method, a scheme or method for doing business and a program for a computer. The exclusion of methods of doing business and computer programs is, however, controversial. The Act also prohibits the granting of a patent for any variety of animal or plant or any essentially biological process for the production of animals or plants, which is not a microbiological process.  A patent grants the exclusive right, among others, to make, use or import products embodying the invention. The term of a patent is 20 years, after which the public is free to use the invention. This implies, in the case of patents for medicines, that generic substitutes may be placed on the market. In terms of recent legislation, which has yet to be implemented, an applicant must indicate whether an invention is based on an indigenous biological or genetic resource, or traditional knowledge or use.  Registered design protection relates to the appearance of an article. The registration of a design is, in practice, usually attended to by patent attorneys, owing to the technical nature thereof. The Designs Act No. 195 of 1993 provides for the registration of aesthetic and functional designs, if they are reproduced by way of an industrial process. An aesthetic design is a design that is applied to an article, *inter alia*, for the pattern, shape or ornamentation thereof and which appeals to the eye. Indeed, beauty is, in the case of registered designs, in the eye of the beholder! Aesthetic designs typically include articles such as jewellery, an example of which may be a watch designed by someone such as Jenna Clifford. In order to be registrable, an aesthetic design must be new and original. To be “new”, such a design must not be part of the state of the art immediately prior to the date of application or release date, i.e. the date on which the design was first made available to the public.  A functional design, in contrast, may protect the functional features of an article, i.e. features that are necessitated by the function that the article to which they are applied must perform. Examples of functional designs include the sole of a shoe or a brick, although both of these may contain purely aesthetic features as well. A functional design must be new and not commonplace in the art in question. There is a specific exclusion insofar as spare parts “for a machine, vehicle or equipment” are concerned. Thus, for example, certain wear parts for a car may not be protected by a functional design.  The registration of a design gives the proprietor the right to prevent third parties from, *inter alia*, making or importing an article embodying the design concerned. The term of protection is 15 years in the case of an aesthetic design, and 10 years in the case of a functional design.  It is worth noting that a patent or registered design may not always relate to matter that is the product of years and years of research. Patents and designs may also be applied to protect relatively modest household items, for example, a novel coat hanger. It must be borne in mind that substantive examination for the registrability of a patent or design is not conducted in South Africa, in contrast with most other countries, and granted patent and registered designs may be attacked at any time on the grounds that they do not meet the requirements for registrability.  The Copyright Act No. 98 of 1978 protects certain categories of works that are original and that have been reduced to a material format. It is often stated, in relation to the latter, that there is no copyright in ideas: the idea must be concretised. The protected works include, among others, literary, musical and artistic works, cinematograph films, sound recordings and computer programs. Literary works could include stories, letters and sermons.  Protection is granted “irrespective of the literary quality” of the work. One does not therefore have to be the author of a Harry Potter bestseller. Examples of literary works protected by the courts include a spare parts catalogue and salary forms. Artistic works include items such as paintings, sculptures and photographs. Protection under this heading has been given to the wrapper of an audio cassette, but denied to the layout of the pages of a diary. With regard to the meaning of the term “original”, it was said in *Ladbroke (Football) v William Hill (Football) Ltd* [1964] 1 All ER 465 469, when copyright was held to exist in relation to fixed-odds football coupons, that originality is a matter of degree. As a minimum though, a work should not have been copied. Again, artistic quality is not decisive and a work does not have to be on the same artistic level as the Mona Lisa in order to be protected.  The Act contains specific definitions of the author of a work, and, insofar as ownership of copyright is concerned, the general rule is that the author is the first owner. There are, however, exceptions to this rule. The owner of copyright has certain exclusive rights: the most pertinent, of course, being the right to prevent the unlawful copying of the work in question. Infringement takes place if an unauthorised person performs any of the actions reserved for the copyright owner. Certain exemptions from infringement exist. For example, in the case of literary works, fair dealing with the work for purposes of research or private study is permitted. Another exemption relates to three-dimensional works with a primarily utilitarian purpose, which may, based on certain conditions, be copied. Accordingly, an article such as a spade may be copied by way of so-called reverse engineering. The duration of copyright, for instance in the case of a literary work, is 50 years from the date of death of the author and the same term applies to other works, as more closely defined by the Act.  For the sake of comprehensiveness, brief reference must be made to the Plant Breeders’ Rights Act No. 15 of 1976. This Act provides protection for certain varieties of plants if they are new, distinct, uniform and stable. Registration could be obtained, by way of example, for seedless grapes. Registration gives the registrant, among other things, the right to prevent the reproduction, sale, import or export of the plant concerned. The duration of protection is 25 years in the case of vines and trees, and 20 years in other cases.  The type of intellectual property that is probably most familiar to the public is trademarks. The registration of trademarks is governed by the Trade Marks Act No. 194 of 1993. A trademark most often consists of a word, such as Nokia, but it can also be a logo, such as the First National Bank “tree”, or a shape, such as that of the Toblerone chocolate bar. In other countries, even smells and sounds have been registered, but it is not clear whether this would be possible in South Africa. The Act requires a trademark to be distinctive in order to qualify for registration. A trademark can be inherently distinctive, for instance a mark such as Lamborghini, or it can become distinctive through use, such as is, perhaps, the case with Shatterprufe. Registration of a mark ordinarily provides the proprietor with the right to prevent the unauthorised use of a confusingly similar mark in relation to the same or similar goods. However, insofar as famous marks are concerned, there is a wider scope of protection available, subject to certain conditions. Famous marks could be a brand such as Coke. Exemptions from infringement exist, for example, as in the case of the *bona fide* descriptive use of a mark. An example may be an advertisement that states that a computer product is “compatible with Windows”. A trademark registration can be of indefinite duration, but can be cancelled if it has not been used for five years.  The common law relating to unlawful competition provides protection for certain intellectual property rights without, of course, requiring any form of registration. The right usually identified is the right to goodwill. This right is most often infringed by way of passing off. This term refers to the situation where the mark concerned has been used to such an extent that a reputation has been established and where the offending use is likely to cause confusion. Also protected by way of the law relating to unlawful competition are trade secrets and know-how. It goes without saying that all of the above rights may overlap and that, in certain instances, more than one right may be applicable. |

**WHAT IS INTELLECTUAL PROPERTY?**

The nature of intellectual property is best understood through a comparison with other, tangible, forms of property. One example is immovable property, such as a piece of land. Other examples are things, such as a vehicle, a watch or a soccer ball. In these instances, one has rights to the object itself. In other words, one’s rights would be infringed if the object is destroyed. The position with intellectual property is different. An example may be a patent for a pair of night vision binoculars. The intellectual property rights of the patentee would not be infringed if the binoculars are destroyed. The reason for this is that it is the invention that is protected and not the binoculars. Intellectual property law is, accordingly, the body of law that regulates the creation and use of immaterial property and the enforcement of resultant rights. The objects of the various rights typically include patents, copyright, registered designs and trade marks. The rights concerned are discussed below.

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